It was *pleaded* in defence, That for so small an intromission he could not be overtaken on this passive title, especially when it appeared from the application of the sum received, that he had no intention to defraud his father's creditors. In support of this defence, the decision, Reoch against Cowan, No 150. p. 9828, and Stark and Tam against Jolly, *supra*, were adduced.

No 154. father's death, sold one of the stacks for 28l. 4s. Scots, and and applied the same to the payment of the funeral charges. The Lords found the intromission not relevant to subject the defender to the passive title of vitious intromission.

It was *answered* for the creditors, That (as my Lord Stair observes) although intromission by strangers, who have not so easy access to embezzle defunct's moveables, must be *per quasi universitatem*, yet a very small intromission should be sustained against an apparent heir, who may huddle up his intromissions, and in time ascribe them to singular titles, &c. B. 3. T. 6. § 3. That there was no necessity of instructing fraud in such an intromission, but the bare contraction of moveables by the heir was sufficient; and if intromission to the value of L. 28 should not subject him as well as a thousand, then no rule could be fixed. As to the decisions it was *answered*, That they were with respect to the uplifting of small sums due to a defunct, where the danger was not near so great, because the debt would remain due if uplifted without a title, and likewise a legal evidence might be had against the intromitter, viz. his discharge to the debtor; whereas the *ipsa corpora* of moveables may be easily embezzled, and no vestige remain.

Replied, That as this passive title was not designed for a snare, the intention and *animus* of the party was to be observed, rather than the fact; and it could not be supposed, that in the present case the heir, by selling of a stack of corn, designed either to defraud the creditors or enrich himself; and as my Lord Stair says, B. 3. T. 9. § 7. 'Intromission with one thing, or a small thing, will 'not infer this passive title.'

"THE LORDS found the intromission being with one particular of small value, not relevant to subject the defender to the passive title of vitious intromission."

Reporter, *Lord Newhall.* Act. *And. Macdowl et H. Dalrymple jun.*
Alt. *Pat. Leith.* Clerk, *Dalrymple.*

Fol. Dic. v. 4. *p.* 46. *Edgar, p.* 75.

1739. *January* 26. BLACK *against* WALLACE and KINGS.

No 155.

MARY WALLACE being due the sum of 1000 merks by bond, a process for payment was brought after her decease against Elizabeth Wallace her sister, and John and Mary Kings, her children, concluding upon the passive title vitious intromission. The LORDS found it only proved against Elizabeth Wallace, That she had some small moveables in her custody for the behoof of John and Mary Kings, which had been in the possession of Mary Wallace preceding her decease, and that she delivered these moveables to John and Mary Kings upon their receipt; and found such custody and delivery not relevant to infer the

No 155. passive title of vitious intromission against the said Elizabeth Wallace; and found it proved, That the defenders John and Mary Kings did receive from the said Elizabeth Wallace some of their mother's body clothes, a five guinea piece of gold, and four small pieces, in value 23 shillings, and some houshold furniture, that had been in the possession of their mother before her decease, for which they granted receipts in process to the said Elizabeth Wallace; but in respect of the small value of these particulars, and that special receipts were granted for them, and of the uncertainty whether the articles of houshold-plenishing did truly belong to Mary Wallace the mother, or to Mr John King her husband, and had only remained in her custody after the husband's death without title; and that by the proof it appeared, that the bulk of the effects of Mary Wallace had been rouped by John Wallace her brother; found, That John and Mary Kings their intromission with the small particulars contained in the receipts, could not, in law, be construed an intromission *per universitatem*, and therefore not relevant to infer the penal passive title of vitious intromission against them.

Fol. Dic. v. 2. *p.* 41.

1756. *March* 9.

No 156. Creditors who consented to the relict's intromission with the goods of a defunct, after they had been sequestrated by the Commissary court, and received payment of their debts from the relict, were found liable to the other creditors *in valorem* of their intromissions.

William Cumming, and Others, *against* Archibald Hart, and Others.

Alexander Law died suddenly and insolvent. Hart, a creditor, immediately upon his death, preferred a petition to the Commissaries of Edinburgh, setting forth, 'That Law had died suddenly; that he owed considerable sums to 'Hart the petitioner; that there was reason to suspect that his effects might be 'embezzled, in defraud of him and the other creditors; therefore praying 'warrant to sequestrate and seal up the defunct's effects for the behoof of all 'concerned.'

The Commissaries granted the desire of this petition. The goods were inspected, and the warehouse locked up by Smith, an officer of court. Next day Smith inventoried and valued the goods, and took custody of the key.

A few days after, the defunct's relict granted her obligation, with two cautioners, to Hart and the other defenders, that she should roup the effects which had been sequestrated, and apply the price towards their payment; and this obligation, with an inventory, of the goods, was delivered to John Watson doer for the defenders. Watson informed Smith, that the creditors had come to an agreement with the relict, and thereupon got the keys of the warehouse from him and delivered them to the relict. She rouped the goods, and with the price paid off the defenders.

Cumming and other creditors, not parties to this transaction, pursued Hart and others for payment of their debts, upon the passive title of vitious intromission.