No 156.

Pleaded for the defenders; Vitious intromission is penal and odious; it may not be intended against those who acted *bona fide* and openly; and the defenders did not secretly take possession of their debtor's goods, but took payment from the relict of their just debt, being prevailed upon by her to save to her and her family the expense of confirmation, &c. as there would be a reversion. The whole transaction with her were openly and fairly carried on; neither she nor they imagining there was any other creditors, and the roup was public. Although Hart applied for sequestration; and obtained it for the behoof of all concerned, yet there was no obligation upon him to go further; he might honestly stop here, and take payment of his debt when offered; and the relict is the intromitter, not the defenders.

Answered for the pursuers; The whole was a fraudulent contrivance to hinder a confirmation, and prevent all the creditors from coming in *pari passu*. The defunct's bankruptcy was notorious, as is evident from the words of Hart's application to the Commissaries. If the effects had been fairly divided, there would have been a great deficiency. To prevent this, the name of the relict is used, as she had nothing to lose; but the defenders, and their doer Watson, were the conductors of the whole. They, by the transaction with her, authorised her intromission, and by false representations, obtained the possession of the goods from Smith, thereby taking the goods out of the custody of the Court; a step highly irregular, as done both in contempt of the Court, and to defraud the pursuers.

The Court seemed to be of opinion, that there was no place for a passive title in this case; at the same time that the intromitting with the goods *sine titulo*, after they were in the hands of the Commissaries, and thereby defeating the legal sequestration, was highly irregular; as was likewise the taking such obligation from the relict, and receiving payment from her, all within the six months; that they ought therefore to be subjected *in valorem*.

"THE LORDS found the defenders liable to the pursuers for the debts pursued for, being within the value of their intromissions."

Act. *Lockhart.* Alt. *Advocatus, A. Pringle.* Clerk, *Kirkpatrick.*

W. S. *Fol. Dic. v.* 4. *p.* 47. *Fac. Col. No* 200. *p.* 298.

1772. *June* 19.

JAMES WILSON *against* JANET SMITH, and ROBERT ARMOUR her Husband.

No 157.
Intromission with a defunct's effects, where there was no fraud, and the articles inconsiderable, found not to subject farther than *in valorem*.

WILSON sued the defenders, as representing his debtor Patrick Smith, father of Janet, insisting chiefly on the ground of vitious intromission with the defunct's moveables. In defence, it was stated, that, upon the death of Patrick Smith, Armour, his son-in-law, having engaged for his funeral charges, he, in virtue of a warrant obtained from the Bailies of Kilmarnock to that effect, sold, by roup, as much of the household furniture as defrayed the expense of the fu-

No 157. neral, with a small balance over, which he intended to have lodged in the hands of the clerk of Court; but that a process having been raised against his wife and him, at the instance of another creditor of the defunct's, they were decerned in payment of the balance of the said rouped effects: And the said warrant, issued on the defender's application, the inventory of the defunct's moveables, account of his funeral charges, and the process before mentioned, were produced.

The pursuer *alleged* there was private super-intromission in this case, and exhibited a condescendence of the effects which belonged to Patrick Smith, and were intromitted with by Armour, over and above those in the roup-roll produced. Armour admitted, that certain articles had come into his hands; but which, excepting one trifling article of chairs, were some mean body clothes, and some old blankets, &c. he had received from the widow of Patrick Smith, and understood to be at her disposal; and a proof, which the pursuer insisted for in support of his condescendence, being taken, this interlocutor was pronounced by the Lord Ordinary; " Finds the intromission with the defunct's body-clothes and chest proved is too inconsiderable to subject the defender *passive* in payment of the defunct's debts; and, therefore, assoilzies the defender from the penal passive titles insisted on by the pursuer; and finds he can only be subjected *in valorem* of his intromissions."

Pleaded by the pursuer, in a reclaiming petition; The doctrine of the passive title of vitious intromission is explained by Stair, B. 3. Tit. 9. § 1. 2. and 3.; Bankton, B. 3. tit. 9. § 1.; M'Kenzie, B. 3. Tit. 9. § 23.; Craig, lib. 2. dieg. 17. § 3. and 16.

These texts make no mention of a greater or lesser degree of vitious intromission, but are conceived in the most general terms. General principles, when good, must be strictly maintained. The passive title inferred from vitious intromission, which is to be considered as a penal sanction, to preserve the effects of a defunct debtor from being embezzled by those having access to his house and repositories, must not be relaxed, otherwise intromitters would flatter themselves that they might go so artfully to work as to have a chance that only intromissions of a small value would be detected, and so they would escape; nor ought it to avail such, that they have only taken, or been discovered to have taken, things of small value.

The former practice of the Court is also consonant to the pursuer's plea; March 20th 1624, Cochrane, No 146. p. 9825.; July 14th 1626, Johnston, No 16. p. 9659.; January 17th 1627, Fraser, No 18. p. 9661.; July 12th 1628, L. Morrieston, No 173. p. 9853.; February 14th 1629, Steven, No 19. p. 9663.; January 15th 1630, Cleghorn, No 21. p. 9664.; January 25th 1632, Scarlet*; January 12th 1633, ——— *contra* Bruce, No 148. p. 9827.; February 5th 1636, Mowat, No 149. p. 9827.; June 15th 1675, Abercairney, No 151. p. 9828.; November 29th 1679, Irving, *voce* Qualified Oath; February 17th 1697, Marquis of Tweeddale, No 172. p. 9852.; June 29th 1705, Archi-

* Scarlet against Paterson, Durie, p. 614. in the Appendix to this Title.

bald, No 152. p. 9829.; June 24th 1699, Duff, (see APPENDIX.); and decisions of the English Judges, 1658, Hay, see APPENDIX. No 157.

But, *separatim*, supposing this novel idea were to be adopted, that intromission with things of small value ought not to infer the passive title of vitious intromission, a due consideration ought to be had to the station and circumstances of parties; for there is no doubt, that what may be considered things of small value, in the case of people of high rank, ought not to be looked upon in that light in the case of mechanics, and others in such circumstances as the deceased Patrick Smith; at the same time, it would appear, that here the defenders, besides what is mentioned in the interlocutor, had laid hold of every thing they could; and a recent instance will be remembered in the case of Telfer *contra* Milmyne, December 2d 1769, see APPENDIX.

Answered; The authorities cited do clearly show, 1*mo*, That, from the earliest mention of the passive titles in our law, and even during the period when they were most in vogue, that it was a question *in arbitrio judicis*, whether the penal passive titles were incurred or not? and that, in discussing this question, the *animus*, or intention, and extent the of the intromission, were the governing rule; and, indeed, this is founded in the nature of the thing, as, in order to constitute a delict of any kind, an *animus delinquendi* must concur; and this, again, must be judged of from the circumstances of the case. 2*do*, These authorities do further prove, that the Court has gradually departed from the severity of our ancient practice with regard to questions of this nature, and the reason, as well as the progress of it, is traced in a masterly manner in Hist. Law Tracts, v. 1. p. 73.

Passive titles, in general, and that of vitious intromission, in particular, being introduced as a check to fraud, and the penalty of vitious intromission being so great, every equitable and favourable circumstance tending to exclude the presumption of fraud, is pleadable by the party, and will enter into the consideration of the Judge. Where, indeed, there is ground to presume fraudulent intention of the intromitter, *e. g.* from the universality of his intromission, or other unfavourable circumstances attending it, there the sanction of the law will be applied; and, on the other hand, where the presumption of fraud is taken off by any favourable circumstances, for intance, the smallness of the intromission, and, where the intromission itself cannot be ascribed to any tortious or fraudulent design, then it will not fall within the rule, nor the reason of introducing this penal passive title; and so the doctrine is laid down by Erskine, B. 3. tit. 9. § 53. who mentions, in particular, a decision 22d January 1713, Stark, No 153. p. 9831. where vitious intromission was excluded by the small value of the thing intromitted with.

It does not appear that any attempt had been made to stretch or extend the penal passive title of vitious intromission beyond its just limits, from the date of the last quoted decision, till the case Black *contra* Wallace and Kings, January 26th 1739, cited in Dictionary, No 155. p. 9831. and the judgment there giv-

No 157. en tends, in the strongest manner, to support the defender's general proposition. "It was found, that John and Mary Kings, their intromissions with 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."

Had the defender, upon Patrick Smith's death, entered, *per aversionem*, into the possession of the defunct's moveables, there might have been some more ground for the pursuer's plea of subjecting him, as a vitious intromitter, whether the amount of them were considerable or not, as, in that case, a *malus animus* may be presumeable. But his conduct was the reverse. He acted by legal authority previously obtained. The trifling body-clothes, &c. he understood as given him in a gift by the widow; and he is ready to account for the value of another trifling moveable, mentioned in the proof, which he took into his possession *custodiæ causa*. And, if the defenders are not misinformed with regard to the case of Telfer *contra* Milnmyne, it was materially different from the present. There were there not only an intromission *per universitatem*, a failure of proving the defence that the intromission was by the approbation and consent of the pursuers, but, moreover, various strong circumstances militating against the defender. On the other hand, the defenders must look upon the decision in the case of Black, as exceedingly favourable to their side of the question. The smallness of the intromission, joined to there being no appearance of fraud, seem to have been the capital grounds of that decision, as they do likewise concur to support that which hath been given in the present case.

"The Lords adhered; and afterwards refused a reclaiming petition, without answers."

Act. *J. Boswell.* Alt. *W. Wallace.* Clerk, *Pringle.*

Fol. Dic. v. 4. *p.* 46. *Fac. Col. No* 16. *p.* 41.

1775. *December* 15.

George Penman and Janet Brown *against* James Penman.

No 158. Action transmits against heirs *in valorem* only.

The present action was brought against James Penman for payment of a bond for 800 merks, granted by the deceased William Mitchell and Katharine Penman, to which the pursuers have right by assignation.

The defender admitted, that he represents Katharine Penman, in so far as, about five years ago, he made up a title to her, as heir to her at law, by a precept of *clare constat*, in a trifling heritable subject belonging to her.

In the course of this process, a proof was, before answer, allowed, that Katharine Penman represented her husband William Mitchell. A proof was accordingly led; and the Judges were generally of opinion, that it appeared