

No 160.

A party had intromitted with a watch, a gun, and some other inconsiderable articles, along with a few pounds of arrears of salary, belonging to his deceased brother, and on that account was found liable on the passive title of vitious intromission.

1795. March 7.

RITCHIE *against* BOWES.

IN 1788, Margaret Ritchie obtained a decree against Thomas Bowes, excise-officer, for payment of L. 4 Sterling yearly, as the aliment of a bastard which she had to him in 1787, until the child should be twelve years of age.

Thomas Bowes having died, she brought an action against his brother, Alexander Bowes, supervisor of excise, concluding for L. 10 Sterling, as arrears of aliment due to her on the 7th March 1793, and for payment of it in future.

Alexander Bowes stated in defence, that he did not represent his brother; and the pursuer was allowed a proof of his having incurred a passive title, by vitiously intromitting with his effects.

Thomas Bowes (it appeared from the proof,) about six years before his death, was stationed at Torbolton, where he furnished a small house, for which he paid L. 2 : 17 : 5 yearly. From Torbolton, he went to Glasgow, where he hired a furnished room; and having consequently no use for furniture, he sent to his father's house in Kilmarnock the following articles, viz. seven chairs, a tent-bed, and a table, the value of the whole amounting to L. 5 : 15 : 6. From Glasgow he was sent to Paisley, where also he had a furnished room. He died there in February 1799; at his death, his property consisted of some clothes, a chest, a silver watch, a gun, a pair of pistols, and a fiddle, together with arrears of salary, amounting to L. 5 : 13s, which the defender afterwards received, upon his receipt, from the collector of the district. A sister of the deceased, who attended him in his illness, brought his corps to Kilmarnock in a coach, at the desire, (as there was reason to believe) of the defender, and also, at her own hand, carried along with her some of the effects above enumerated. A few days after the funeral she returned to Paisley along with the defender, when they packed up the remainder of them. What became of them afterwards the witnesses did not know. The defender, before he left Paisley, paid the medical people who attended his brother, what he owed for his lodgings, and some other small debts, which in all, including the hire of the coach, and other funeral expenses, amounted to L. 18 : 18 : 4. At Whitsunday 1793, the father left Kilmarnock, and came to reside in family with the defender at Dunfermline, and brought along with him the furniture which had belonged to his deceased son.

Such being the amount of the evidence, the defender *contended*, That he had not incurred a passive title: That it was the constant custom of the Excise to pay the arrears of salary due to their deceased officers to their nearest relation, without requiring any title in him, merely upon his shewing evidence that he had paid the funeral charges: That it was his sister, not he, who got possession of, and carried to her father's house, the trifling effects which belonged to his brother at his death; and that although he was present when part of them were packed up, yet having immediately after set out for Edinburgh, he never enquired more after them, but took it for granted that his sister carried them to her father's house, as she had done the former parcel:

That with his brother's furniture he never had any concern; it had been sent by him to his father *custodiæ causa*, who could therefore be liable for it only *in valorem*. And, lastly, that although he had taken possession of all his brother's effects, he would not have incurred a passive title, as he had never heard of the present claim against his brother till called in this action: That in the whole of his conduct, there was not the smallest appearance of fraud: That the effects themselves were of little value; and that he had already paid debts of his brother, which would have more than exhausted their price, if they had been exposed to sale.

The general arguments used on both sides, respecting the nature of vitious intromission, were in substance the same with those stated in the case of Wilson and Smith against Armour, No 157. p. 9833. where also the whole authorities referred to will be found.

The LORD ORDINARY assolized the defender.

On advising a reclaiming petition and answers, several of the Judges were for adhering to the interlocutor, partly because they thought there was no evidence of the defender having intromitted with any part of his brother's effects, except his arrears of salary, in doing which he was justified by the practice of the Excise, and partly because it was clear that he had already *bona fide* paid debts to a larger amount than the whole value of the property left by his brother.

A majority of the Court, however, were for altering the interlocutor. If the passive title of vitious intromission still exist in our law, (it was observed,) the defender has incurred it. The practice of the Excise, to pay, without a title, cannot affect the general rules of law. Independently of this, however, all his brother's effects have ultimately landed in the defender's house, as his father and sister now reside with him; and they acted under his eye, and with his permission, in taking away what they received. It appears also, that he had interfered with a part at least of these effects, before they were carried away, yet he did not so much as cause an inventory of them to be made. His brother must also, at his death, have had some ready money, though probably not much; of this, however, no account has been given. The defender, besides, took the whole charge of settling his affairs. He also ordered a coach burial, which was improper, unless he meant to give out of his own pocket what money should be necessary to pay his brother's debts, in so far as his own funds were insufficient for that purpose. In short, he had a general intromission and management, without the ceremony of a title, and therefore must be presumed to have had an *animus* of representing.

The Court, (28th January 1795,) "found the defender, as intromitter with the effects of his deceased brother, liable in the debt due to the pursuer, with the expense of process."

And on advising a reclaiming petition, with answers, the LORDS "adhered."

Lord Ordinary, *Dunsinnan*. Act. *Honyman*. Alt. *Fletcher*. Clerk, *Gordon*.  
*R. D.* *Fol. Dic. v. 4. p. 47.* *Fac. Col. No 166. p. 392.*