1802. *December* 9.

GARDENER and Others *against* DAVIDSON and Others.

No 161.
Circumstances in which intromission did not infer a passive title.

JAMES PEARSON, merchant in Dumblain, died upon the 20th March 1796, leaving a widow and four daughters, the eldest of whom only had attained majority. John Drummond, Pearson's nephew, and John Davidson, writer in Auchterarder, his wife's brother, sealed up his repositories, and were present along with his family when they were afterwards examined. Various bills were found, some of which were discounted during the month of April 1796.

Upon the 26th of May following, Jean Pearson, the eldest daughter, was decerned executrix as nearest of kin; and soon after, a factory was granted by the widow and children to Drummond.

Pearson had been generally understood to have been in opulent circumstances. Besides possessing some heritable subjects, upon which his wife was secured for a jointure, he was proprietor of four shares of the stock of the Perth Banking Company, and of the same number of shares in the Bank at Stirling. His executrix obtained confirmation of the shares of the stock of the Perth Bank, but the shares of the stock of the Stirling Bank were drawn out without any confirmation, and the discharge was granted by the widow and children, together with Davidson and Drummond the factor.

During the course of the year 1796, various payments were made out of the funds of the deceased, while the affairs were entirely managed by Davidson and Drummond, with the approbation of the family. In the course of the spring of 1797, a state of accounts was made out, by which, for the first time, it was discovered that there was a deficiency for payment of the debts. Upon this, a general meeting of the creditors was called, to determine what measures should be adopted, when Davidson offered, upon the part of the family, to submit the whole of Pearson's funds to the direction of his creditors.

The proposal, however, was not accepted, and an action was raised, in which the widow, the children, Davidson and Drummond, were summoned as defenders. It concluded, *first*, That the defenders, conjunctly and severally, should be found liable, as vitious intromitters with Pearson's effects, for payment of his whole debts; or, 2*dly*, That they should at least be found liable for such a share of the debts as the creditors would have drawn from the effects of Pearson, as they stood at the time of his death: And afterwards a supplementary conclusion was introduced, by an amendment of the libel, for subjecting the children of Pearson on the passive title of *gestio pro hærede*.

The Lord Ordinary (2d February 1802) found, "That there were no sufficient grounds for subjecting the defenders as vitious intromitters, or for subjecting them in the passive title of *gestio pro hærede:* But, before further answer, appoints parties procurators to be ready to debate upon the question, How far the defenders, although not liable universally upon the foresaid passive

titles, are not bound, in consequence of their incautious proceedings, to repair the loss thereby occasioned to the creditors, and to replace matters in the same situation in which they stood at the death of the late James Pearson?" His Lordship afterwards superseded the consideration of the question reserved in his interlocutor, until the pursuers obtained a decision of the Court upon the general ground of the passive titles. No 161.

The pursuers accordingly reclaimed; and

Pleaded; 1*st*, That the defenders, who had intromitted with the effects of Pearson, were liable, as vitious intromitters; and, 2*dly*, That the heirs-portioners, more especially the eldest daughter, were liable in the passive title of *gestio pro hærede*.

The general object of our law, in instituting the passive title of vitious intromission, is, to prevent the moveable effects of a debtor from being abstracted from his creditors after his decease; and this security is obtained by subjecting those who intermeddle with the moveables of a defunct, without inventory or confirmation, in payment of the whole of his debts.

Vitious intromission may be considered as applying either to the nearest of kin, or to persons who have no right to the succession. If the former take possession of the effects, they commit no crime, because they are perfectly entitled to do so; but then they become liable for all the debts of the deceased, and are bound to pay them whatever may be their amount. This is the natural course of law, which considers the heir as *eadem persona cum defuncto*. At the same time, certain legal proceedings are provided, which an heir may adopt, who wishes to avoid this responsibility. He may have himself decerned executor; and after giving up an inventory of the effects to be confirmed by the Commissaries, upon finding caution, he may make use of these effects with perfect security, as he is not liable beyond this inventory; and at the same time, every person who has a claim upon the inheritance, is secure that no part of the succession shall be secreted or squandered. An heir who is not liable for his ancestor's debts, must be considered as an exception from the general rule, and he can only have the benefit of that exception, by faithfully following out the course marked by law, for the security of creditors.

The case of intromitters, who have no right to the succession, is less favourable than that of heirs. They have no title to interfere with the effects of the deceased at all; and if they open his repositories without legal authority, and carry off his papers, they assume a character which does not belong to them; they place themselves in a situation where they may commit fraud with impunity; and therefore the law provides, that they shall be equally responsible to creditors who have an onerous claim on the succession as the heir himself, who has a legal title. In applying the law on this subject, the question is not, Whether the person acted with bad intentions. It is enough, that he knowingly took possession of the effects of the deceased, without adopting those steps

No 161. which are pointed out for the security of all concerned; Craig, L. ii. t. 17. § 5.; Ritchie against Bowes, March 7. 1795, No 161. p. 9840.

Partial confirmation is no defence against the passive title, when the vitious intromission greatly exceeds the value of the subjects confirmed. The duty of an executor is to give up a full inventory of the effects, so far as is consistent with his knowledge; and if he has intromitted with effects without confirming them, he incurs the same responsibility as any other vitious intromitter; Hope, Min. Pract. tit. 3. § 5.; Craig, L. 2. t. 17. § 3.; Stair, b. 3. tit. 9. § 11.; Kneeland against Baillie, February 13. 1627, No 167. p. 9848.; Steven against Paterson, February 14. 1629, No 19. p. 9663.; Irving against Forbes, June 8. 1676, No 5. p. 7722.; Anderson against Anderson, January 28. 1678, No 170. p. 9851.; Marquis of Tweeddale against Dempster, Feb. 17. 1697, No 172. p. 9852.; Drummond against Campbell, Dec. 13. 1709, *voce* Service and Confirmation; Lawrie against Gordon, July 27. 1779, No 94. p. 3918.; Fraser against Gibb, 10th Feb. 1784, No 95. p. 3921. The doctrine established by these decisions applies in the strongest manner to the present case, where the intromission wasuniversal, while the inventory and confirmation were trifling, and such as not to afford the smallest security to the creditors of Pearson.

2dly, With respect to the passive title of *gestio pro hærede*, the pursuers *pleaded*, That the daughters of Pearson had taken possession of his heritable subjects, without being served heirs-portioners to their father; that they had levied the rents, and granted a factory to Drummond, giving him a commission to intromit with the heritable subjects. Such a conduct is exactly that which the law has described as sufficient to incur a passive title; Erskine, 8vo, b. 3. tit. 8. § 38.

Answered; The argument maintained by the pursuers, resolves itself into an attempt to revive doctrines with respect to passive titles which have been long obsolete. In early times, when the utmost strictness was requisite to prevent individuals from plundering the property of their neighbours, he who interfered irregularly with the moveables of a person deceased, was held liable for all his debts without limitation. But this regulation has been gradually mitigated, and is not now enforced, unless there be some appearance of fraud; Bankton, v. 2. p. 421.

It does not appear, even in the most rigid period of our practice, that the defenders, Davidson and Drummond, could have been found liable. The former merely gave advice and assistance to his sister with respect to the affairs of her family, without ever obtaining possession of any of the funds, or intromitting in any way with the estate; and Drummond acted in all his intromissions under an express authority from the executrix of the deceased, whom he was entitled to regard as having a right to the property. He cannot therefore be found liable upon a passive title; Stair, b. 1. tit. 9. § 8.; Tennant against Tennant, July 28. 1626, Durie, No 192. p. 9866.

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The mere fact of super-intromission, was never understood to make an executor universally liable. The original practice with respect to the *aditio in mobilibus*, was for the executor decerned, upon obtaining confirmation, to give up an inventory of the whole moveable estate of the deceased on oath, in so far as it consisted with his knowledge; Craig, b. 2. t. 17. § 2. If there were any defect in this inventory, it was incumbent upon the executor to show that the omission was innocent; and it was only when this could not be shown, that, even in the earliest periods, the super-intromission subjected him in an universal passive title; Scot against Livingston, December 5. 1623, Durie, No 145. p. 9824.; Reoch against Cowan, February 26. 1668, Stair, No 150. p. 9828.; Douglas against Tours, June 20. 1629, No 168. p. 9849.

But a material change came to be introduced with respect to the confirmation of executors, and the form of exhibiting an inventory was by degrees laid aside; Ersk. b. 3. t. 9. § 33. A partial confirmation became the general practice; and the strict doctrine, which held an executor who did not give a full statement of the whole effects guilty of perjury, was consequently abandoned. Unless fraud be positively established in the conduct of the executor, a partial confirmation has for a long period been understood to protect him from incurring the passive titles; Bank. v. 2. p. 424.; Ersk. b. 3. t. 9. § 53.

2dly, With regard to the passive title of *gestio pro hærede*, it was *answered*, that the widow was entitled, by her marriage-contract, to an annuity out of the rents of the heritable subjects; and that the fee of this property being provided by the contract of marriage to the children of the marriage, the eldest daughter, as heir portioner of provision, was not liable beyond her intromissions.

But it was, above all, strongly urged upon the part of the defenders, that their conduct was perfectly free from any fraudulent intention; that they believed Pearson's property greatly to exceed the amount of his debts; and that whenever they discovered their mistake, they made over the whole of the effects to the creditors.

The Court, upon advising the petition, with answers, adhered to the interlocutor of the Lord Ordinary.

But great doubts were expressed by some of the Judges in the minority, with respect to the propriety of this decision; and it was even stated from the Bench, in the strongest manner, that if this case were to be followed as a precedent, the doctrine of passive titles might be expunged altogether from our law books.

Lord Ordinary, *Cullen*. Act. *Campbell* junior. Agent, *Ja. Gentle*.
Alt. *W. Erskine*. Agent, *R. Hill, W. S.* Clerk, *Gordon*.

J. *Fac. Col. No 69. p. 156.*