

No 186.

debt, albeit he had intromitted (which is not granted) with a small quantity, which could not satisfy the half of his debt;—the LORDS found this allegeance of intromission relevant, only for such quantity as the excipient would condescend upon, and prove was intromitted with by the creditor, to compensate the debt acclaimed *pro tanto*, and no further; and found, that it could not be received thereby, to make him as a vitious intromitter liable for the whole, if the intromission would not extend to so much, albeit he might be pursued that way by another creditor of the defuncts *in solidum* for the whole, by way of action, which was found ought not to be received by way of exception. See July 21. 1630, Fairly *contra* Fairly, No 3. p. 3560.

Act. Gibson.

Alt. Dunlop.

Clerk, Hay.

\* \* \* Under the above case Durie has the following note :

Upon the 17th January 1632, Stuart *contra* Stuart, one of two daughters, only bairns to their father, of two sundry wives, having pursued her elder sister, as charged to enter heir to her father, and upon her renunciation having intended adjudication against her, the process of adjudication and the said decret were sustained, albeit the eldest sister was only called, seeing the other sister pursuer could not pursue herself, and she renounced to be heir also; which was found upon both their renunciations; this being proponed by another creditor of their father, who was seeking adjudication also against them, in which process the said creditor compeared; and it was found, that her process should go on with this creditor's *pari passu*.

Fol. Dic. v. 2. p. 44. Durie, p. 540.

No 187.

1671. January 21. CAPTAIN RAMSAY *against* WILLIAM HENDERSON.

CAPTAIN RAMSAY, as assignee constituted by Eupham Scot, to a sum of 2000 merks, addebted by umquhile Mr Charles Henderson, pursues his heir for payment, who *alleged*, *Absolvitor*, because this debt being due originally by Mr Charles Henderson, and by the said Eupham Scot, who being vitious intromissatrix with his goods and gear, and having been assigned to this sum herself, she became creditrix as assignee, and debitrix as vitious intromitter, *et confusione tollitur obligatio*, and this pursuer having right from her, can be in no better case than she. It was *answered*, That vitious intromission was not competent by way of defence.

THE LORDS found that whatever might be said, if the vitious intromitter had been pursuing, whether the defence might have been competent, yet found it not competent against the assignee, seeing the cedent was not *in campo*, and probation behoved to be used against her.

Fol. Dic. v. 2. p. 44. Stair, v. 1. p. 705.