

1676. December 14. WALLACE against MURRAY.

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THERE being a pursuit at the instance of a Creditor against the Representatives of an intromitter with the debtor's goods, the LORDS found, that the passive title of intromitter could not be sustained, after the intromitter's decease, to make him liable as universal intromitter; and yet sustained the same *in quantum* he was *locupletatus*; the pursuer, for the defender's farther security, confirming, before the extracting of the sentence, a testament as executor creditor to his debtor.

Reporter, *Treasurer-depute.*

Clerk, *Gibson.*

Fal. Dic. v. 2. p. 74. Dirleton, No 404. p. 198.

* * * Gosford reports this case :

In a pursuit at Wallace's instance, as executor-creditor to Patrick Murray, against Margaret Murray his daughter, as representing him, which Patrick Murray, as vitious intromitter with the goods and gear of William Murray his brother, who was debtor to the pursuer; it was *alleged* for the defender, That *esto* she was representing her father, yet she could not in law be liable to the pursuer; *1st*, because he being Commissary of Orkney, and dying there, his testament should have been confirmed in Orkney, the Commissaries of Edinburgh having no right to discern him executor-creditor, but the testament should have been confirmed by the Commissaries of Orkney within which diocess he died; *2do*, Albeit the testament had been confirmed, yet there being no sentence recovered at the pursuer's instance against their father, as vitious intromitter with his brother's goods who was debtor, who might have defended himself, and cleared his intromission, that passive title being odious can never be transmitted against her as representing her father, who being but a minor, it is impossible that she can clear his intromission; and, therefore, it being the pursuer's own fault, who did not constitute the debt by a decreet, it were against all law and reason to make her liable passive to all her uncle's debts, whom she did not represent. It was *replied* to the *1st*, That the pursuer did offer to confirm at Orkney, but the defunct, Patrick Murray, being the commissary himself, did obstruct the same, so that he was necessitated to apply himself to the Commissaries of Edinburgh, as the supreme commissariot, and, to take off the Commissaries of Orkney's prejudice, he was content to confirm there before sentence. It was *replied* to the *2d*, That the defunct Commissary hindering the pursuer to confirm, and so to pursue himself as vitious intromitter, he dying in the mean time, there is no reason but that he should have that same action competent to him against his daughter, as his representative otherwise thereon the default of her father, who hindered the pursuit, he should

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be frustrate of his just debt, which were of a dangerous consequence, and yet his daughter should *lucrari ejus dolo*, and possess his whole estate.—THE LORDS, as to the *first*, sustained the testament confirmed by the Commissaries of Edinburgh, having no jurisdiction to confirm but in their own diocess; as to the *second*, they found it of a general concern, and did well consider the same, before interlocutor, seeing it was of great and universal concernment to make the representatives of any person liable passive for all debts contracted by another than the person whom they represent, which had no warrant by our law nor practise; but considering this case as singular, and that the defender's father did obstruct any legal procedure against himself, and died *medio tempore*, they found that the defender should only be liable *in valorem* with the father's actual and vitious intromission with the brother's goods, effecting to the pursuer's debt, and *in quantum* the defunct was *locupletior factus*, and that his intromission could not be purged; but found, that there could be no ground to make her liable to all her uncle's creditors, as being a passive title transmissible, there being no diligence done by any other creditors to constitute the father debtor by decret, upon that ground, whereby the general succession of all representatives and minors was salv'd, and yet, upon good reason, the pursuer's interest, who was not *in culpa*, preserved by the foresaid decret.

Gosford, MS. No 921. & 922 p. 597.

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1682. November 28. MR JOHN PAIP against LAIRD of NEWTON.

THE heir or executor of a vitious intromitter found liable only *in quantum* the intromitter was *lucratus* by the intromission, unless he had been pursued as vitious intromitter in his own life, which would have made his heir universally liable.

Fol. Dic. v. 2. p. 74. *Harcarse*, (AIRES GESTIO, &c.) No 37. p. 8.

No 24.

1686. March. DUFF of Bracco against INNES of Auchluncart.

THE heir of one who was successor *titulo lucrativo*, was found as universally liable for the first defunct's debt, as his immediate predecessor would have been; although an heir to a vitious intromitter is only liable *in quantum lucratus*; because vitious intromission being penal, is not so rigorously extended against the intromitter's representatives, as the passive title of universal successor, which is not a vitious title, but *præceptio hæreditatis*.

Fol. Dic. v. 2. p. 73. *Harcarse*, (AIRES GESTIO, &c.) No 65. p. 12.