

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.

Akt. 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 valore* 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

from thence, she had had an universal intromission with her husband's effects, who was the debtor in the bond sued on; but this being in a question with her heir, who, it was urged, could not be made liable universally, on account of the predecessor's delict;

"THE LORDS found the defender liable *in valorem* of Katharine Penman's intromissions only."

Alt. *Geo. Fergusson.*

Act. *Geo. Clerk,*

Clerk, *Tait.*

*Fol. Dic. v. 4. p. 48. Fac. Col. No 206. p. 152.*

No 158.

1783. July 10.

GEORGE TAWSE *against* WILLIAM FINDLATER and WILLIAM MURRAY.

FINDLATER and Murray appointed Alexander Cheyne their supercargo in a voyage from Peterhead to Bergen, he being to receive, as his reward, a certain share of the profits of the adventure.

Cheyne happened to die on his return, when he had almost reached the land; and on his body's being carried ashore, Findlater and Murray, apprehensive, as it should seem, of suffering loss through his conduct in the business, besides laying hold of the cargo homeward bound, intromitted with his personal effects, particularly the money in his pockets, without having taken any legal step for authorising them so to do.

Afterwards, Tawse, a creditor of Cheyne's, but who had not expedited confirmation, pursued them as vitious intromitters.

*Pleaded* for the defenders, The *bona fides* with which they acted must not only exempt them from the character and penal consequences of vitious intromission, but entitles them to retention of the sums in their hands for payment of the debts due to them by the defunct. On the other hand, the pursuer, not having made up a title by confirmation, has no right at all to insist in the action.

*Answered,* By their intromission, the defenders have subjected themselves to an universal passive representation of the deceased, and are therefore sued as personally liable for his debts: So that it is not the object of the pursuer to attach the moveables of the deceased as *in bonis defuncti*, in which case alone confirmation could have been of any use.

The general opinion of the Court was, That though there was no ground for subjecting the defenders universally as vitious intromitters, yet that they so far stood in that light as to authorise the present action to the amount of the effects intromitted with.

Accordingly, the LORDS found the defenders liable to that extent.

Lord Ordinary, *Brasfield.*

Act. *Rolland.*

Alt. *Maconochie.*

Clerk, *Orme.*

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*Fac. Col. No 103. p. 176.*

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A supercargo having died on his voyage home, the owners took possession of what money he had about him, without any legal authority. They were not found liable universally, but were not allowed to retain an account of their own claims.