

must abate the Defuncts Debts and Legacies. But where Executors have right to the overplus of the execution after payment of Debts and Legacies, and thereby have it in their power to purchase for the Remainder or Part; the expense of purchase for Recovering such Beneficial Intention they Incumb, must lay upon the Executors themselves to whom they beneficial arising from it would have belong and cannot burden Beneficial the Legacies, which might have been satisfied out of the free Gear without affecting the event of such purchase. 6 June 1674 Law contra Executors of Last Wills. If the executor had got any Estates from some Beneficial Debts arising by the Decedent, he is bound to communicate Beneficial thereof to the Rest. 16 Decemb. 1710 Elyling Non contra Paton. Because he is a fiduciary, or Trustee for all concerns in the execution.

The Executors defence, that the Jurors torgett Cautely by Lawfull payments, or his plea of *Quere Annon* Noth in Arrear or No thing behind as the English Law Thraup it, is taken off by the jur Jurors Reply, of the executor having super intromitted: that is, Intromitted with as much more of the Effects of the Decedent, than Rest. Contained in the Inventory as would pay the pursuers. Which was sustained to Make the executor Liable, without obliging the pursuers to take a Dative ad Missa 29 January 1639 Inghit contra Bell. The Will taken by the executor at his Confirmation, being understood only as an Oath of Fidelity, doth not exact proof of super intromission.

If after all just Allowances made to the executor he be found Chargeable with No thing have debts Unrecovered for which he hath done Competent Diligence, he will be answerd, upon assigning Order these Debts to the Executors according to their preference. And albeit Executors are Liable to the Creditors of the Decedent for the price of goods as Valued in the Inventory given up by them; yet they are not always so Accountable to the Children of the decedent. For if the furnished goods were Valued at a price in the Inventory and could not be got for, the Children are bound to take their share of these in specie 30 June 1668 Steven contra Borden.

The satisfaction found for the executor in the Confirmation cannot be pursued till the executor be Discharged. Hope Min. Pral. 4th of Testaments § 86.

Having

Having ~~having~~ had the Succession to the Moveables of one Decedent that is, authorized by Law and Justifiably, proceed to that which is legal and Unwarrantable, called Vitious Intromission.

Chap. 2
Of illegal and Unwarrantable Succession to the Moveables of persons Decedent, called Vitious Intromission.

Vitious Intromission, is any persons taking into his hands and using the goods of one dying testator, without any title thereto. Which passive title subjecting the Heir to, called Vitious Intromission, differs from the French, Entre Mettir an Intermedler and termed in the Law of England Executor Pleasor or executor of his own Wrong) to all the Debts of the Decedent. Vitious Intromission is the largest passive title in our Law for those of behaviour as heir and Successive Succession in heritage reach only Apparent heirs who in that manner are principal candidates. Where up this passive title may be fixed not only upon the nearest of kin, or those related to the Decedent, but upon any stranger meddling at his own hands with the goods of the Decedent; which is peculiarly to Scotland. It was introduced to prevent fraudulency and clandestinity of trading of the most base of the Decedent to the prejudice of Creditors, which may be easily done by any persons. Political Land or the profits thereof could be with drawn without a title, at least an Apparent one.

In the case of Vitious Intromission is presumed, Vitious persons related to a Man dying in his own house, present at his death; or the Master or Mistress of his other house where he dies; do not, after he comes in possibly, load up the prices where he's goods, Evidents, Money and other precious Moveables are contained; seal and deliver the keys to the next Judge Ordinary to be kept till opened at his sight by those having best right; they will be tied and Deputed out Embassadors or abstractors of his wittes Evidents Money or precious Moveables, Dec. of Eden 23 Feb. 1692. But in case of necessity, the Heir or Children of the Decedent may at the sight of the Judge Ordinary, or two Justices of peace, take out so much of the Money lying by the Decedent upon their receipts, as may Defray the expenses of the Buriall. In other cases Vitious Intromission must be proved.

As to the cases where this passive title wants to be proved it is not Inferred from necessary Intromission for preserving the goods. Viz. when a husband surviving his wife, or a wife her husband, continues possessor of the goods of the Decedent for preservation of them when there is no other person to look after them, because it is for the advantage of