

The Lords will not allow the probation of this progress, or to prove, after a man's decease, that he intromitted without a title; because if he had been convened in his own lifetime, and questioned, he might have purged the intromission, and ascribed it to some title, which none else now knows; besides this passive title of vitious intromission *sapit naturam delicti*, it is penal; *morte extinguitur, nec transit in hæredes, nisi ejus dolo lucrum ad eum perventum sit, vel lis cum defuncto contesta fuerit*; by which *perpetuatur actio*. And this the Lords decided justly in the case of *Willieson*, in 1666. See it in Stair's System, tit. 31, Of Vitious Intromission, *num. ult.* and my Annotations on it there.

*Advocates' MS. No. 574, § 8, folio 286.*

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1677. *June.* ———— *against WILLIAM BRODIE.*

ONE pursuing as heir served and retoured, and no retour being produced, Mr William Bailie alleged, no process, because the active title not produced. Halton repelled it. Mr William huffed at the novity, and offered a dollar for the Lords' answer. The Lords, to save Halton's credit, in June, 1677, permitted a pursuer to produce a retour as his *active* title, *cum processu*. Which was to evert all form. And yet Halton was pleased with the report, to give Mr Bailie a rebuke. *Vide supra*, No. 441, [*Duke of Hamilton against Loudon, February, 1674*;] and 490, [*Hay against Earl of Twedale, July, 1676*;] *infra*, 579, § 4, [*June, 1677.*] Yea, a sea-sine alone was not found a sufficient title in a reduction of heritable rights without the charter, but the Lords will allow it whiles to be produced *cum processu*.

*Advocates' MS. No. 574, § 9, folio 286.*

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1677. *June.* ANENT LYING OUT UNENTERED.

A MAN is married on a woman that is apparent heir to lands, either burgage or without burgh. She, to defraud her husband either of the *jus mariti* or the courtesy, lies out and will not enter. *Quæritur, quid juris*, Is there no remedy in law to force a malicious woman to do what is just? Sir George Lockhart thought, the husband by his marriage, had a rational and well founded interest whereon to compel her to enter; only the law had not provided for that case, not being frequent nor *casus cogitatus*. Yet it had supplied the ordinary case where apparent heirs lay out to prejudice creditors, by charging them to enter heir within 40 days, conform to the 104th act Parliament 1540. See my marginal notes on it. That the husband was *quodammodo* a creditor, and *ex æquitate prætoria* the method of that act might be extended to him, and the defect made up, that the wife *ex suo dolo non lucretur*,—neither prejudice his *jus maritale* nor *curiale*.

*Advocates' MS. No. 574, § 10, folio 286.*