

was purchased by the pupils means or his own; neither did they find, that after dissolution of the marriage, the decret and horning executed against him *pro interesse*, only could make him liable, seeing in a former process Craigshall when the right was in his person, had executed the horning in his name, but had judicially declared that it was against his knowledge and warrant that it was executed against the husband, so that the marriage being now dissolved, the Countess's heirs were only liable; and for that title that he was *locupletior factus*, there being no reduction upon that head, they did assoilzie in this process, but reserved it as accords, as likewise how far he might be liable as intromitter with the moveables of the pursuer, or had a title as executor creditor.

No 164.

Gosford, MS. No 915. p. 592.

1680. June 9. BROWN against The EARL of Lothian.

WILLIAM BROWN pursues the Earl of Lothian as vitious intromitter with his father's moveables, for payment of a debt of his father's, contracted after the disposition of the estate of Lothian to him, and condescends that the Earl intromitted with the instruments of the coal-work, and with the tiends of the feuers of Newbottle.—The defender *answered* to the first, That his father having disposed to him the estate, with coal and coal-heughs, with reservation of his own liferent, the property of the coal-heughs carries therewith the necessary instruments of the coals, though not expressed; and his father having disposed his liferent right to Sir Patrick Murray, he possessed till his father's death; after which the defender continued to uplift the profit of the coal, the servants of the coal remaining the same, and retaining the instruments of the coal-work; and denies any other intromission; so that though the instruments of the coal-work could be questioned, as not carried by the disposition of the coal-heugh, yet the servants continuing to work with the same instruments, could never infer a vitious passive title against the Earl, albeit executors might have recovered the instruments from the work-men; and as to the tiends, the Earl uplifted a part of the feuers' tiends by virtue of a tolerance from Sir Patrick Murray, to whom the late Earl disposed the feu-duties and tiends of his liferent lands.—The pursuer *replied* to the first, That instruments of a coal-work, not being fixed to the ground, were certainly moveables, and so could not be carried by the disposition of the land and coal-heugh, unless they were expressed, but would belong to executors, and fall in escheat in the same way as steelbow-goods, or the plough and plough-goods upon the mains, which being continued to be made use of by servants, by their master's knowledge and approbation, would infer his vitious intromission; and the Earl could not be ignorant that the servants continued to make use of the instruments which were his father's; and as for the feuers' tiends, they are not disposed by his father to Sir Patrick.

No 165.

It being pleaded, that the fiar of a coal-work did, after the liferenter's death, continue to work by his servants, with the instruments of the coal-work which belonged to the liferenter; this was repelled, it not being properly an intromission, but only a continuation of possession.

No 165.

THE LORDS found, That though the servants in the coal-work continued to make use of the instruments of the coal-work, either fixed or unfixed, this did not infer vitious intromission against the Earl; but did not determine to whom the property of the unfixed instruments did belong, such as picks, buckets, and mattocks, &c.; and found the tolerance from Sir Patrick Murray relevant to liberate from the universal passive title, albeit the disposition had a general clause, dubious whether it would extend to the feuers' teinds or not; seeing a colourable title was sufficient to exclude this universal passive title.

*Fol. Dic. v. 2. p. 42. Stair, v. 2. p. 768.*

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S E C T. III.

Where the executor has been confirmed.—Where the party died at the horn:

No 166.

Super-intromission, subsequent to confirmation, infers only restitution; but, if it is prior, the fraudulent concealment makes the executor liable universally.

1616. February 1.

JOHNSTON *against* KER.

IN an action pursued by Johnston against Margaret Ker, the LORDS sustained an exception of executors confirmed against the libel of universal intromissatrix; but thereafter, it being *replied*, that the relict was nominate, and had intromitted with certain goods, which were not confirmed *ab initio*, the LORDS repelled the exception, in respect of the reply, notwithstanding it was duplied, that the goods and sums omitted were confirmed in the dative *ad omisssa*, and decret of exoneration given in favours of the executor; and that because the LORDS found, that the relict had intromitted before the confirmation, *dolo fecit* that she did not confirm.

*Fol. Dic. v. 2. p. 42. Kerse, MS. fol. 141.*

No 167.

Found in conformity with Johnston *against* Ker, *supra*.

1627. February 13.

KNEELAND *against* BAILLIE'S Relict.

IN an action for registration of a bond, by one Kneeland against the Relict of Baillie, who was maker of the bond, she being convened as intromissatrix with the defunct's goods, the LORDS sustained the action against her as intromissatrix, notwithstanding that she *alleged*, That there was executors confirmed to the defunct long before the intending of this cause; seeing the bairn was confirmed executor, and the testament was given up by herself, and that she made faith, and caused find caution in the testament; and that the particulars which were condescended on to have been intromitted with by the defender,