

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.

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,

before the said confirmation, were not given up in testament; which neither being given up, nor eiked since, discovered a fraud upon her part, and so the action was sustained against her *hoc nomine*; and found it not necessary to put the pursuer to take a dative *ad omisssa*; also they found, that the said intromission being proven against her, it should import decret against her as universal intromissatrix, and for payment of the whole debt; and not to that effect alle- narily, to make the goods intromited with furthcoming to the pursuer *pro tanto*, for payment so far as the said goods would amount to; but that, albeit the same could not satisfy the whole debt, yet that she should pay the same as universal intromissatrix, in respect of her foresaid fraudulent omission to give up the same.

No 167.

Act. ———.

Alt. Sandilands.

Clerk, Gibson.

Fol. Dic. v. 2. p. 42. Durie, p. 272.

* * Spottiswood reports this case :

A RELICT being convened as intromissatrix with her husband's goods and gear, *alleged*, No process against her, because she offered to prove that there were executors confirmed before the intenting of the cause. *Replied*, That he ought to have process against her notwithstanding, because he offered him to prove she had intromitted with sundry particulars given in ticket, besides what was given up in testament. *Duplied*, Let him take a dative *ad omisssa*; for, as for her intromission, she was countable to the executors.—THE LORDS found process against the relict as universal intromissatrix, *in odium fraudis et perjurii*, in giving up of the inventory.

Spottiswood, (EXECUTORS.) p. 112.

1629. June 20.

DOUGLAS against TOURES.

No 168.

WHEN one is pursued as universal intromitter with any defunct's goods, it is a good exception, that there was an executor confirmed to the defunct before the intenting of the cause; because the executor being a party representing the defunct, all the defunct's creditors have good action against him; but if one confirm himself executor to a defunct as a creditor of his, for payment of his own debts, he is not such a party as action can be had against him for any of the defunct's debts; and therefore such confirmation cannot free an universal intromitter. Yet, in the like case, between Jean Toures and N. Douglas, the LORDS would not sustain action against the defender as universal intromitter, but found that the pursuer should take a dative *ad omisssa* by the first executor, who had confirmed himself executor creditor, or yet that he might pursue the intromitter for giving up that wherewith he had intromitted.

Spottiswood, (UNIVERSAL INTROMITTER.) p. 352.