

No. 106.

taining only the right of the superiority, with the said feu-duties, which was a consequent of that sort of holding belonging to him as superior, the same could no more pertain to her as Lady-tercer than the third of the superiority, whereof she could have no right in law by virtue of her terce; and this was so found, because she being provided to a sufficient conjunct fee, by and attour her terce, the Lords found therefore no terce could belong to her, but that which has been clearly by preceding practiques given before to other Lady-tercers; and seeing it could not be shown, that services of terces at any time preceding were deduced, or allowed for the third of feu-duties, therefore, in this instance, they would not begin to introduce a new consuetude, where the Lady was besides sufficiently provided of a conjunct fee, there being nothing shown where the like was granted at any time preceding; but here it is to be marked, that the Lady was served to the third of the lands, so that her title differed from the desire of her summons, wherein she craved the third of the feu-duties, and retrenched her title thereto; whereas in her title she was not served nor kened to the third of the feu-duties, and so there was a disconformity. This cause being thereafter reasoned again, the Lords abode by this interlocutor, and decerned according thereto, 25th March, 1628; at the which time the Lords sustained the pursuit, both against the Earl and his tutors and curators, who were convened for payment of the terce uplifted by them, and against the tenants, who were convened for payment of the same duties, and the summons was sustained *in solidum* against them both, but declared, that once payment by either of them should liberate both the parties. In this process the Lords found, that the Lady ought to have the terce of the whole teinds, wherein her husband died heritably infest; albeit it was found that she could not have right to seek a liferent thereof as a conquest, conform to her contract of marriage, as is marked 12th March, 1628, in that action betwixt them there mentioned, No. 2. p. 3048. *voce* CONQUEST. (See TERCE.)

Fol. Dic. v. 2. p. 385. Durie, p. 344.

1668. January 17. CAPTAIN STRACHAN *against* GEORGE MORISON.

No. 107.

In wrongous intromission, each intromitter is not liable *in solidum*, but a joint intromission proved against many, infers against each of them an equal share, unless it be proved that they intro-

CAPTAIN STRACHAN having obtained decret before the Admiral against George Morison for wrongous intromission of a loading of wine belonging to the pursuer, *in anno* 1638, which was brought home by him in the ship called Stulla, whereof he had an eighth part, and the defenders the rest; and the pursuer being skipper, did upon his own credit buy the wine, and having brought it home, the ship was broken at Newburgh, and loading was meddled with by the defenders, wherupon they are decerned to pay conjunctly and severally. George Morison raises reduction on two grounds, 1st, That the decret was unjust, in so far as the defenders were decerned *in solidum*, each for the whole; 2^{dly}, That there was no probation of any of their intromissions, but upon the testimony of one witness, and

Captain Strachan's own oath taken in supplement. It was answered to the first reason, that the whole intrmitters were justly decerned *in solidum*; 1st, Because this was in itself a spuilzie, and albeit the defender did not insist within three years, yet he ought not to be excluded, because he was in the King's service all the time of the trouble, and fled the country at the time of this intromission; 2dly, Because the prescription of the privilege of spuilzie is only in relation to violent profits, and the oath *in litem*, and these are only lost, if pursuit be not within three years; but the parties being all liable *in solidum* is not lost, for the intromission remains still a wrongous intromission, and is not in the same case as a vindication and restitution of goods in the defender's hands, without violence or vice, and in many cases *correi* are liable *in solidum* as tutors, or where the intromission is joint or promiscuous; for it were against reason, if there were many vitious intrmitters, that the particular intromission of each of them behoved to be proved, which oftentimes is impossible, as in the same case, and likewise *socii* are liable *in solidum*, and here was a copartnery betwixt these parties. It was answered for Morison, that there were three years elapsed since the King's restoration before any pursuit, and though that had not been, there is nothing that can stop that short prescription, and therefore infancy or minority hinders not the course thereof, and in this case the decret in question restricts to wrongous intromission. As to the second, all the privileges of spuilzie are lost by the prescription; and it was never found at any time, that in wrongous intromissions, the parties were all liable *in solidum*, especially where the thing intromitted with was divisible, as wines, and as to the alleged copartnership there was nothing libelled thereon.

The Lords did not consider the point of copartnership, but found, that in wrongous intromission, each intrmitter was not liable *in solidum*, but a joint intromission proved against many, did infer against each of them an equal share, unless the pursuer proved that they intromitted with a greater share, and found not a necessity to prove against each of them the particular quantity of their intromission.

Fol. Dic. v. 2. p. 385. Stair, v. 1. p. 508.

* * * Dirleton reports this case :

A pursuit for spuilzie being restricted to wrongous intromission, it was alleged, that the defenders are only liable for their intromission *respective*, in so far as it should be proved that each of them had intromitted at least *pro virili* and conjunctly. It was replied, that the defenders being convened *ex delicto*, they are liable *in solidum* as *correi*, being all accessory to the wrong, and the pursuit, as it is restricted, is not for intromission simply, but wrongous intromission; and though the pursuer, by restricting the pursuit, as said is, has precluded himself as to violent profits, and *juramentum in litem*, and other consequences of spuilzie; he has not prejudged himself as to that benefit, that all who are accessory to the wrong should be liable *in solidum*, which the law has introduced upon just ground, seeing it is

No. 107.
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missions.

No. 107. impossible in such cases where divers persons do intromit, to distinguish and prove their intromissions.

The Lords found the defenders liable conjunctly.

Dirleton, No. 137. p. 57.

No. 108.

1687. *January.* CAPTAIN STRACHAN *against* MORISON.

THOUGH spuilziers pursued in three years are liable *in solidum*, yet, after three years, being restricted to intromission, and a promiscuous intromission of many being proved, they are all decerned equally *pro rata*, unless the defender or pursuer prove that such a one's intromission was less or more than others.

Fol. Dic. v. 2. p. 386. Harcarse, (SPUILZIE.) No. 863. p. 245.

No. 109.

1704. *November 18.* LORD SALTON *against* CLUB.

IN a question whether those accomplices who had assisted a tenant to carry his goods and corns off the ground to the prejudice of the master's hypothec, should be liable *in solidum*, or only *pro rata* for the damage, where no violence was used in the away taking; the Lords considering the intromission to be unwarrantable, and that, though they were not sharers in the benefit, yet that it was a delinquency *in suo genere mali exempli*, and, if allowed, would encourage tenants to help their neighbours in defrauding their masters, by clandestinely conveying their goods and corns off the ground; therefore, in this circumstantiate case, their Lordships found all the assistants liable *in solidum*.

Fol. Dic. v. 2. p. 386.

* * This case is No. 13. p. 1821. *voce BREVI MANU.*

No. 110.

An agent for a lady having caused antedate an execution of an edict for confirming her executrix, and she having made use of it, the Lords

1716. *June 13.* SUTHERLAND of Kinminity, *against* WISEMAN and Others.

THE late Sutherland of Kinminity, the pursuer's grandfather, having deceased while the pursuer was abroad, the Lady Artamfoord, the defunct's sister, intending to raise an edict before the Commissary of Murray for confirming her executrix to her brother, Wiseman the defender, in the interim, acting as commissary-depute, inventories the goods and papers, seals up the cabinets, &c. and delivers fifty guineas to Crimond the lady's son, and takes his bond for the same, payable to whomsoever should be found to have best right to the executry. But the pursuer being on the road homeward to Scotland, the edict is raised and executed only