

found thereon, neither the Lord Oliphant himself, till he were distressed, and had paid, which cannot be, there being none to represent the Lord Oliphant.— It was *replied*, That the arrester being now insisting in a declaratory right, justly craving it to be declared, That so soon as he had got sentence against the apparent heir of Oliphant, as charged to enter heir, he might thereupon adjudge the infestment of relief :

THE LORDS sustained that part of the declarator, and ordained Sir Laurence and Blair to compt for what profits they had made by the infestment of relief and liferent escheat, over and above the 2300 merks, the arrester always adjudging the infestment of relief from the apparent heirs of Oliphant, who was cautioner in the arrester's debt.

Fol. Dic. v. 1. p. 111. Stair, v. 2. p. 580.

No 38.

1712. February 20. MONCRIEF *against* MONYPENNY.

AN executor-nominate being appointed by testament to lay out a sum upon a tomb to the defunct; and having begun the work, was found not to be put *in mala fide*, to complete it, by a process of reduction of the testament. Therefore the expence was allowed out of the first end of his intromissions, though the testament was afterwards reduced upon this plain ground, that the testator was *in extremis*, and insensible when made to subscribe it.

Fol. Dic. v. 1. p. 111. Fountainball, v. 2. p. 587. & 727.

* * See The particulars, *voce* TESTAMENT.

No 39.
An executor was allowed the expence of a tomb, carried on during a reduction of the testament upon which he acted, which was reduced.

1715. July 19. MILN of Hatton *against* The LADY GALRAW. (FALCONER.)

MILN of Hatton having right by progress to an adjudication led against John Falconer, apparent heir to the deceased Sir John Falconer of Galraw, adjudging from him, as lawfully charged to enter heir to his father, the whole lands that belonged to him, particularly the lands of the Bank of Ballochrie: He did insist in an action against the Lady Galraw, for repetition of the rents of the said Bank, intromitted with by her, from 1690 to 1702.

And it being *answered* for the Lady, That she having intromitted with the rents of the said lands by her son's right of apparency, and applied them to his aliment, (which she instructed) she was *bonæ fidei* possessor, and not obliged to repeat.

THE LORDS found the Lady's intromissions with the said rents were *bona fide*, and ascribable to the aliment and education of the apparent heir, ay and while she was interpellated by the citation in the mails and duties against the tenants.

Act. Archibald Ogilvie. Alt. Horn. Clerk, Robertson.

Bruce, No 120. p. 156.

No 40.
Lands were adjudged from an apparent heir. His mother intromitting with the rents on her son's right of apparency, was as a *bona fide* possessor, found not obliged to repeat, till citation in an action of mails and duties against the tenants.