

SECT. XVII.

Wrongous Intromitters.—Delinquents.

1609. *December 2.* ———— *against* LD. COWGRANE.

A MAN in the Lenox pursued Demerstoun of Cowgrane, and certain others, for the spoliation, or way-taking, resetting, withholding, and detaining certain of his nolt. Litiscontestation being made, he proved the away-taking furth of his byre of four nolt by Cowgrane, and that they were taken to the house of another Demerstoun that night, and kept all that night; which the Lords found to be a probation of the spuilzie against the said persons, in respect of their reset. Thereafter, it being alleged, That Cowgrane was dead since the act of litiscontestation, the Lords found, That no sentence could be given against him, because the depositions of the witnesses contained probation against Cowgrane. The Lords found, That the act of litiscontestation made the quantity to divide in equal portions against all the defenders against whom any thing was proved; and therefore they decerned that part which answered to Cowgrane's part, and decerned for the rest against the remanent defenders.

Fal. Dic. v. 2. p. 385. Haddington MS. No. 1672.

1628. *February 13.* LADY DUMFERMLINE *against* The EARL, her SON.

IN a pursuit by the Lady Dumfermline, against the Earl her son, for payment of the terce of the feu-duties of the lands disposed in feu to the feuers thereof, and which feu-duties, by the feuers' infestments, were due to her umquhile husband, by his right of the same lands, he being superior to them, and they being his feuers, and proprietors of the lands; to the third of the which feu-duty she acclaimed right by her service, as Lady-tercer, served to the third of all the lands where-in her husband died infest; and he being infest in these lands, albeit the property pertained to the feuers, yet her husband's infestment, although it extended not to the property of the lands, it was valid for the feu-mails, and consequently, albeit she had no right to the terce of the lands, whereof her husband was not proprietor, yet she acclaimed right to the third, and terce of the said feu-duties, to the which she restricted her service and pursuit. The Lords found, that the Lady-tercer had no right to claim any right of terce out of any feu-duties, whereof her husband had right the time of his decease, seeing he being denuded of the property, and re-

No. 105.

Litiscontestation being made against several persons in a spuilzie, and the intromission of all of them being proved, the quantity was found to divide among them, and to have execution against each *prorata*; but one of them having died after litiscontestation, the rest were found liable also for his proportion.

No. 106.

The Lords sustained process both against the heir who was convened for the terce uplifted by him, and also against the tenants who were convened for payment of it, and that *in solidum*.

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