

prejudice of the nearest of kin and others interested; his discharging and assigning import no property; seeing these be acts which may be done by factors, tutors, or any administrator of other men's affairs. If a factor uplift a sum or recover sentence for it, yet it ceases not to be the constituent's, neither will they fall under the factor's escheat. If one were infest for his own behoof, and the interest of several other persons *per expressum*, this trustee's rebellion or treason would not forfault the whole in prejudice of those to whom by the quality of the infestment he is countable. So neither can the executor's rebellion prejudge those to whom by the express quality of the confirmation (which is his only title for intromission,) they must be made forthcoming. As for the axiom *tantum luendo quantum agendo*, it is only true where *delinquens est vere et proprie dominus*, which is not here. The finding of caution gives not the executor the right of dominion in the goods; *Imo*, Because that is only an accessorian security, and the executor stands first and primarily liable. *2do*, No stress can be laid on thir cautioners, since no care is had in receiving responsal persons;—a footman will be received for a very great inventory. And, by the common law, legatars had so great interest *in hæreditate defuncti*, that if they were *legatarii certæ speciei* they had *rei vindicationem*, which was only conceded *rerum dominis*; in other legacies *licet de manu hæredis capiebant*, yet they had not only their *actio personalis ex testamento, quasi tacite contractum fuisset cum hærede*, but also *actionem hypothecariam*: *Parag. 3. Institut. de Legatis*. Now *fideicommissa*\* (of the which kind the office of executry is,) being *per omnia exæquat cum legatis*, what actions were allowed to the legatars the same are consequentially due to him *cui ex fideicommisso hæreditas vel ulla ejus pars restitui debet*, and consequently to the nearest of kin and others against the executor. And where any thing was legat *veteribus formulis per vindicationem et per præceptionem, dabatur legatariis actio in rem*.

This point was reasoned from thir and many other excellent mids, whereof see some in the informations.

The Lords found no such dominion to be in the person of the executor, as, he being rebel, to make the executary goods fall under his escheat, except as to his own share, the third of the dead's part.

*Vide infra, No. 377, December 1672, Lord Lyon against Feuars of Balveny. Advocates' MS. No. 288, folio 121.*

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1671. December 8. The COUNTESS of BRAMFORD, LORD and LADY FORRESTER *against* The EARL of CALLENDER.

THE Earl of Bramford being forefaulted in 1645 for his loyalty to his Majesty, and having L.40,000 upon infestment, out of my Lord Erroll's lands, the same was assigned by the then States to my Lord Callender, and he accordingly uplifted the same. This forefaulture, as horribly unjust, being *funditus* rescinded in 1661, *per modum justitiæ*, and the Earl and his heirs reponed against the same; as

\* This was excellently well decided, though to the prejudice of the fisk, *contra quem qui in dubiis respondet, non erat*; l. 10. *D. de jure fisci*; and as Plinius says of Trajan *in Panegyrico* page 110, *Quæ præcipua tua gloria est, sæpe vincitur fiscus, cujus causa mala, &c.*

also, by an act in 1670, the intromitters being declared liable : upon thir grounds Callender is now pursued by the Countess of Bramford, and her daughter, the Lady Forrester, and my Lord, her husband, for his interest, (who have right from the deceased Earl of Forth,) to repay the foresaid sum intromitted with by him, and the annualrents thereof since that time.

ALLEGED for Callender, *1mo*, He is secure by the act of indemnity declaring intromitters with public monies not liable. *2do*, A restitution against a fore-faulture restores to lands, but not to monies where the same is consumed ; it being *res fungibilis et quæ usu quasi consumitur*, and must be considered not as the money of the Earl of Bramford, but as the money of the States, who acted conform to the power then standing, and ordered their General Commissary to receive the same. And though Callender got it immediately from the debtors, and not from the General Commissary, by which it would seem not to have been redacted *in fiscum*, yet this being only to spare a telling *et per fictionem brevis manus*, it was all one as if he had got it from the public ; with whose money being once confounded, he was not obliged to take notice whose it was, unless he had been accessory to the forefaulture, which he was not : neither is he obliged to debate the public right whether it was good or not, seeing they had so much of a present right and title by reason of the forefaulture, that was more than sufficient to purge the possession of the money and the simple act of numeration (the same being uplifted by warrant, and without any violence,) from all vitiosity. And he is no more obliged to debate the public's right, than he who has paid to an heir, but whose service is afterwards reduced ; or to a man having a decret which is afterwards annulled : in neither of which cases will the payer be found farther liable. And if intromitters, by virtue of a coloured title, were put to restore, it would stop all commerce amongst men. *3tio*, By an act in 1647, Bramford was restored again to his honours, lands, and dignities, but with this quality, that he should never seek these sums which were meddled with either by the public or others having their order. Which restitution he homologated, and so neither he nor his heirs can recur. *4to*, The pursuers can have no action, because by the act in 1661, Callender is exonerated, at least it is only declared he shall be obliged to relieve Errol in case he be distressed, which case can now never exist, Errol being discharged by act of Parliament in 1670 ; and so *sublata principali, tollitur accessorium*.

See the replies to thir allegeances in the informations beside me.

The Lords after a long and full debate, found Callender ought to restore the principal sum, as he who intromitted therewith.

Then Bramford insisted for the annual-rents. ALLEGED, no annualrents can be paid, because *usuræ debentur tantum ex pacto*, and there was none here. *2do*, *Bonæ fidei possessor fructus consumptos facit suos, nec restituere cogitur*, in which case Callender is.

REPLIED,—The sum lifted by him out of Errol's hand was upon annual-rent, and so *omne turpe lucrum* which Callender had upon that account *ei est extorquendum*, and Bramford's posterity must be redintegrat *cum omni causa*.

The Lords were unwilling to determine upon the annualrents, but recommended to the parties to see if they could settle betwixt themselves, between and which if it should take no effect, then they should likewise advise the dispute anent the annualrents. At last, when they could not agree among themselves,

the Lords decerned for all annuals of that sum owing by the debtors, the time of the forefaulture, and for the annuals thereof since the restitution *per modum justitiæ* in 1661, and assoilyed from the rest. This will make about the half of the annualrents.

Then Bramford insisted against the Laird of Carse for repayment of L.20,000 received by him out of Bramford's forefaulture. ALLEGED,—*1mo*, He was an infant when it was paid. *2do*, It was given for most onerous causes, viz. either for fees and other public service done by his father as Justice-General, or was real lent money to the States, which also they instructed. The Lords found whatever was given upon the account of service must be restored, and therefore decerned for that; but what was given for payment of borrowed money they demurred longer on it, yet at last they found no causes, how just and onerous soever, of sufficient strength to stand against the rescission of that unjust forefaulture, and therefore they involved Carse's principal under that same very fate with Callender's; and sic like, for the annualrents recommended them to agree.

Kinghorne, who got 15,000 merks of that forefaulture as the price of meal, forecasting the horoscope of his affair, and fearing the speit wherein he saw things running, he submitted the difference betwixt him and them to my Lord Chancellor.

*Advocates' MS. No. 289, folio 122.*

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1672. *January 3.*

A WOMAN pursuing for a sum provided by bond to her husband and her, the longest liver of them two, his heirs, executors, and assignees; and it being ALLEGED she could not uplift the sum, the fee terminating on her husband's heirs, my Lord Advocate found she might lift the sum, she confirming before sentence, because it was moveable.

In such cases the Lords will ordain the sums to be given up to her, she discharging with absolute warrandice, or finding caution for the right employment of the sum, or confirming.

*Advocates' MS. No. 290, folio 122.*

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1672. *January 3.*

ANENT INFERIOR JUDGES.

THE King's Advocate also refused to advocate a cause from the bailies of Edinburgh, upon this reason, that the question dipped upon double rights and infetments, and their competition, whereto inferior judges were incompetent; yea, with indignation, he remitted the cause, and declared when he was assessor to the town he had advised twenty such rights, and they were competent enough to them.

*Advocates' MS. No. 291, folio 122.*