

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 anti-date 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

on the 7th of January, 1711; but the officer having signed the execution blank, it was afterwards, by Wiseman's orders, filled up, as of the date the last of December; so that it being called the 11th of January, the Lady was decerned on the 16th, and confirmed on the 25th; and Kinminity's defences (who was then arrived,) not so much as admitted, nor marked on the decret; but he thereafter obtains reduction of this decret before the Commissaries of Edinburgh, and now insists before the Lords for damages, &c. against the Lady and Mr. Wiseman; which damage he alleged they had occasioned by ante-dating and using their said execution.

Answered for Wiseman the defender: *1mo*, That the pursuer was not lesed by the wrong date of the execution; for the preference was not given on account of priority of diligence, nor did the Commissaries reduce the decret upon that account; but the pursuer's aunt was preferred upon the Commissary of Murray's mistake, that the sister excluded the grandchild, as being a degree nearer the defunct; which wrong notion is the *ratio decidendi* of the Commissaries of Edinburgh in their reduction; so that, at whatever time the pursuer had claimed the office, the Commissary of Murray would have preferred the sister as nearer; and the mistake in the execution occasioned not prejudice to the pursuer. *2do*, That, however the pursuer was cited, yet he was sufficiently certiorated, appears by his compearing by his procurator, proponing defences, &c. which were over-ruled.

Replied for the pursuer: That, though the question was not anent priority of diligence, yet the gaining of nine days by such an illegal practice was the occasion of the pursuer's being debarred from his right by a confirmation which would never have taken place, if the edict had not been called within the lawful days, after the true execution thereof had elapsed: To the *2d*, answered, That the very allegiance was an argument against the defender, in so far as the pursuer's compearing by his procurator to stop the confirmation, was an evidence that he would have come time enough to propone his defences, if the defender, by his unwarrantable conduct, had not prevented him.

Duplied for the defender: That, in the reduction before the Commissaries of Edinburgh, there were no expenses craved, and it was against both justice and form to raise a process for the expense and damage of another; for so a pursuer may go on *in infinitum*, seeing every process requires expenses; and such a process as this was expressly refused to be sustained by the Lords, 26th January, 1709, Menzies against Gordon, No. 88. p. 6535. *voce* IMPLIED DISCHARGE AND RENUNCIATION. Nevertheless,

“The Lords found the defenders liable, conjunctly and severally, in the pursuer's damages.”

At advising of the above process, it occurred to the Lords, that the above James Wiseman, one of the defenders, had unwarrantably acted in the name of the Commissary without a commission, who alleged, that what he did was by commission; and a term being assigned to him for proving thereof, the term was circumduced or not proving: Wherefore,

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both liable to the party injured in his damages, conjunctly and severally.

No. 110. "The Lords granted warrant to cite him before them, to answer for his said unwarrantable procedure; and recommended to the Solicitor to execute this order, and to the Lord Advocate to prosecute the same."

Act. Dun. Forbes.

Alt. Horn.

Gibson, Clerk.

Fol. Dic. v. 2. p. 385. Bruce, v. 2. No. 1. p. 1.

SECT. XVIII.

Magistrates who allow a Prisoner to Escape.

1609. December 7.

CRAIG against SHEARER.

No. 111.

Found, that a prisoner having escaped, one of the Bailies could not be convened, except the whole Magistrates and Council were called; but found, that the part of the libel was relevant, which bore, that the prisoner was set at liberty by this particular Bailie, who therefore ought to be convened *ob propriam culpam.*

THE Laird of Craig Achindorie having pursued John Shearer, sometime one of the Bailies of Dundee, to pay to him a certain great sum of money owing to the pursuer by the Laird of Bandovie, whom he had taken and warded in the tolbooth of Dundee, and the Bailies had thereafter suffered him to escape, this defender being one of the number;—it was alleged by the defender, that if any way he was suffered to escape, it was by occasion of the pest which raged so vehemently at that time in Dundee, as the hail magistrates were forced to retire themselves and their families forth of the town, and so could not be answerable for keeping the tolbooth and warders therein. It was replied by the pursuer, that he offered to prove, that the Bailies had of set purpose freed Bandovie, and taken a bond of my Lord Balmerino for their warrant and relief. The Lords found, that the pursuer not insisting against the rest of the Bailies, could not have action against this one man for any thing wherewith he was challenged to have transgressed his office, except he had libelled that he himself particularly had demitted, or caused Bandovie to be demitted forth of ward, or that he had been present and consented to his liberty, or to the taking of the bond for the relief of the Bailies.

Fol. Dic. v. 2. p. 386. Haddington MS. No. 1682.

* * A similar decision was pronounced 12th January, 1615, Gray against Mellis, No. 6. p. 11689. *voce PRISONER.*