SECT. II.

Where Possession commenced lawfully, the continuing in Possession will not be Vitious Intromission.

No 162.

1628. *January* 16. ALLAN'S EXECUTORS *against* LANDER.

A HUSBAND after his wife's decease, cannot be convened as vitious intromitter with her goods to pay her debt, being *dominus omnium ejus bonorum*, and continuing only in that possession after her decease which he once as husband had lawfully acquired.

Fol. Dic. v. 2. *p.* 42. *Durie. Spottiswood.*

*** This case is No 135. p. 5931. *voce* HUSBAND and WIFE.

*** A similar decision was pronounced 7th February 1629, Brown against Dalmahoy, No 136. p. 5932. *voce* HUSBAND and WIFE.

No 163.

1674. *June* 10. LADY SPENCERFIELD *against* HAMILTON.

WHEN a person enters to the possession of the defunct's house by a warrant of the Lords, his possession of the goods in the house does not infer vitious intromission, unless he make use of goods, which *usu consumuntur*, or dispose of goods that are not of that nature, such as beds, tables, &c.

Fol. Dic. v. 2. *p.* 42. *Dirleton. Stairs.*

*** This case is No 97. p. 9762.

No 164.
Vitious intromission found excluded and that there was no claim beyond the value, the intromission being that of a husband continuing to possess his

1676. *December* 13. FAIRHOLM *against* MONTGOMERY.

MR JOHN FAIRHOLM pursues Mr Francis Montgomery for 20,000 merks, due to him by the Earl of Leven, as being vitious intromitter with his Lady's half of the moveables, which he possesseth, and hath not confirmed now by the space of a year and more after her death, which Lady was heir to the Earl of Leven, his debitor. The defender *answered*, That a husband continuing to possess his own moveables, can never be vitious intromitter for his wife's share, though he confirm not within the year. 2*do*, The defender hath a disposition from his

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wife's share of moveables unconfirmed for year and day, he having a disposition to the moveables *in lecto*.

Lady. It was *replied*, That the disposition was *in lecto*, and imports but a legacy, and cannot exclude creditors.

THE LORDS found the defence relevant to exclude the general passive title of vitious intromission, he confirming before extract, but prejudice to the creditors to insist *quoad valorem*.

The pursuer further insisted upon this title, that the defender is liable for his Lady's debt *jure mariti*, especially seeing it was established by a decreet against him in her life. The defender *alleged*, 1*mo*, That though the marriage were standing, he was not liable for any heritable debt of his wife's *jure mariti*, that being a consequence of the communion of goods betwixt man and wife, which is only in moveables. 2*do*, Though this debt were moveable, yet it hath no effect against the husband after dissolution of the marriage, though decreet was obtained before, as hath been oft-times decided. The pursuer *answered*, That though this debt was heritable by infeftment, yet it contains a personal clause for payment; and therefore, according to the common custom, a charge of horning would make it moveable upon this account, that the creditor betakes himself to his personal right: But here there is more, for the creditor could not charge the debitor being dead, but he hath pursued an action for payment, and obtained decreet, and never possessed after. 2*do*, Albeit the dissolution of the marriage frees the husband from that indefinite obligement, to be liable for all his wife's debts, yet he remains still liable *in quantum est lucratus*; for the marriage being a legal assignation to the wife's moveable estate, must import the burden of her debt so far as the moveable estate can reach, and remains unconsumed *per onera matrimonii*, as was found James Cunninghame *contra* Thomas Dalmahoy, No 82. p. 5870. It was *replied*, That though that hath been sometimes sustained, yet it hath never been cleared upon what ground, and how far it is to be extended: But the only just ground can be, that if a wife have debts anterior to the marriage, her posterior marriage cannot defraud her creditors, if she have nothing *aliunde* to pay, if her moveables exceed the just interest of the husband, *ad sustinenda onera matrimonii*; but otherways marriage is always interpreted a cause onerous, and in this case the Countess hath a plenteous real estate befalling to her heir.

This point the LORDS decided not, but resolved to hear it in their own presence, for clearing the extent of that title.

Stair, *v.* 2. *p.* 477.

*** Gosford reports this case:

THE Lord Melville assignee, constitute by John Fairholm of Craigshall, in and to a bond granted by the deceast Countess of Leven, for the sum of 20,000 merks, whereupon he was infeft in an annualrent out of her estate, and whereupon he had obtained a decreet against the Countess and Mr Francis Montgomery, then her husband *pro interesse*, and thereupon had denounced them to the horn;

No 164. did intent action against Mr Francis after dissolution of the marriage for payment of the said debt upon these grounds; *1mo*, That he was liable, because he was *locupletior factus* by the marriage, having intromitted with the rent of the estate during the marriage; *2do*, That he was liable *jure mariti* to his Lady's debt; upon which ground they cited a practick, The Laird of Cunninghamhead against Thomas Dalmahoy, No 82. p. 5870.; whereupon he was found liable to the Duchess of Hamilton's debt *jure mariti*, as being *locupletior factus* after dissolution of the marriage. It was *answered*, That the Lord Melville could not pursue as assignee, because the time of the assignation he was tutor to the deceased Countess, and having meddled with her estate before and since the dissolution, albeit the tutory was now ceased, yet *ante redditas rationes*, the law presumes, that any assignation he purchased to his pupils bond was acquired by her means and not by his own; and until the end of the count and reckoning, this title of assignation could not be sustained, the pupil being only debtor; and that he could not be liable as *locupletior factus* by the marriage, because any provision he had by the contract was but a just and competent remuneration, he having married the heritrix, and having renounced the right of the courtesy of Scotland, whereby the rents of the whole lands would have fallen to him in case there had been an heir of the marriage: Likeas, he did advance of his own means, the sum of 50,000 merks, which was applied for the payment of the debts of the family, and whereof he hath no repetition, albeit there be no heirs of the marriage, and in consideration thereof, all that he gets is but a naked liferent of a part of the lands, the rest being burdened with the creditors' debt; so that by our law, the provision for so just and onerous a cause cannot be reduced by creditors upon the act of Parliament 1621, albeit they were insisting for a reduction upon that head. Likeas by a practick, The Earl of Northesk against the Lady Craig, for additional jointure besides what was provided by the contract of marriage, being offered to be reduced upon the said act by a lawful creditor, she was assoilzied upon this ground, that there was more than a sufficient estate to pay creditors of all their debts, and that therefore, she should enjoy her liferent until the rest of the estate was discust; and provisions made by husbands and wives could not be quarrelled but by subsidiary actions, in case the heir or executor were not found, after discussing, to have heritage or moveable estate sufficient to pay creditors. Likeas, that any intromission with the moveables could not make the husband liable because he had right thereto *jure mariti*, which was an assignation in law; neither could the pursuer's title be sustained, unless he were executor creditor confirmed, which title is not yet settled in his person; and if it were needful, the defender could instruct that he hath paid as much debt as the moveables could amount to. THE LORDS having seriously considered this case, and the whole titles whereupon the pursuit was founded, with the answers made thereto, as to the *first*, They found that the assignation being *stante tutela ante redditas rationes*, the tutor could not pursue till it might appear whether the assignation

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was purchased by the pupils means or his own; neither did they find, that after dissolution of the marriage, the decreet and horning executed against him *pro interesse*, only could make him liable, seeing in a former process Craigshall when the right was in his person, had executed the horning in his name, but had judicially declared that it was against his knowledge and warrant that it was executed against the husband, so that the marriage being now dissolved, the Countess's heirs were only liable; and for that title that he was *locupletior factus*, there being no reduction upon that head, they did assoilzie in this process, but reserved it as accords, as likewise how far he might be liable as intromitter with the moveables of the pursuer, or had a title as executor creditor.

Gosford, MS. No 915. *p.* 592.

1680. *June* 9. BROWN *against* The EARL of LOTHIAN.

No 165.
It being pleaded, that the fiar of a coal-work did, after the liferenter's death, continue to work by his servants, with the instruments of the coal-work which belonged to the liferenter; this was repelled, it not being properly an intromission, but only a continuation of possession.

WILLIAM BROWN pursues the Earl of Lothian as vitious intromitter with his father's moveables, for payment of a debt of his father's, contracted after the disposition of the estate of Lothian to him, and condescends that the Earl intromitted with the instruments of the coal-work, and with the tiends of the feuers of Newbottle.—The defender *answered* to the first, That his father having disponed to him the estate, with coal and coal-heughs, with reservation of his own liferent, the property of the coal-heughs carries therewith the necessary instruments of the coals, though not expressed; and his father having disponed his liferent right to Sir Patrick Murray, he possessed till his father's death; after which the defender continued to uplift the profit of the coal, the servants of the coal remaining the same, and retaining the instruments of the coal-work; and denies any other intromission; so that though the instruments of the coal-work could be questioned, as not carried by the disposition of the coal-heugh, yet the servants continuing to work with the same instruments, could never infer a vitious passive title against the Earl, albeit executors might have recovered the instruments from the work-men; and as to the tiends, the Earl uplifted a part of the feuers' teinds by virtue of a tolerance from Sir Patrick Murray, to whom the late Earl disponed the feu-duties and tiends of his liferent lands.—The pursuer *replied*, to the first, That instruments of a coal-work, not being fixed to the ground, were certainly moveables, and so could not be carried by the disposition of the land and coal-heugh, unless they were expressed, but would belong to executors, and fall in escheat in the same way as steelbow-goods, or the plough and plough-goods upon the mains, which being continued to be made use of by servants, by their master's knowledge and approbation, would infer his vitious intromission; and the Earl could not be ignorant that the servants continued to make use of the instruments which were his father's; and as for the feuers' tiends, they are not disponed by his father to Sir Patrick.