

1626. July 28.

TENANT *against* TENANT.

No 192.

The defence of confirmation was sustained, where the intromitter obtained one beggar to be confirmed, and another to be cautioner.

IN an action of registration of a bond pursued by one called Tenant, against another so called, who was convened as intromitter with the defunct's goods and gear, debtor to the pursuer; it being *alleged* for the defender, That he could not be convened as intromitter, because, before the intending of the cause, there was an executor confirmed to the defunct; and it being *replied*, That the pursuer's action ought to be sustained against him, as intromitter, notwithstanding of the confirmation of executors, because if any testament was confirmed, the same was most fraudulently done by this same defender, who having first intromitted with the defunct's whole goods, he thereafter, to the effect that the creditors' just actions therethrough competent against him might cease, moved a poor beggar to lend his name to the said executry; and caused another beggar to become cautioner for him; likeas not only he bestowed the whole expense upon the said confirmation, and paid the quot of the testament, and also promised to warrant the executor of all action and danger, which he might incur, by his being executor; but the said executor concurred with the pursuer at the bar, in this pursuit; and so in effect the said excipient is both executor and intromitter, in respect of the which exemplary fraud, the defender ought to be only found his just debtor, and the pursuer ought not to be excluded by this indirect dealing, from his just debt, which is in effect all that he has, but the defender's exception ought to be repelled. This exception was admitted by the LORDS, notwithstanding of the reply, for the LORDS found, That executors being confirmed, the process behoved to cease against the intromitters; and if any fraud were done by the excipient, the same in this place could not exclude this action; and if the excipient made any promises to relieve the executor, the pursuer had his action competent against him thereupon, after that the executor was found his debtor.

Act. Miller.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. 2. p. 45. Duriz, p. 230.

1628. January 24.

JOHN ADIE *against* JOHN GRAY.

No 193.

JOHN ADIE pursued John Gray as universal intromitter with his father's goods and gear. *Alleged*, He could not be convened as intromitter, because he is executor confirmed to his father, and so has *beneficium inventarii*, and should be comptable only for the free gear in the testament. *Replied*, That he has confirmed himself executor after the intending of the pursuer's cause. *Duplied*, That he did confirm within year and day, which he might do lawfully, notwithstanding of the pursuer's action intended. THE LORDS found the exception

and duply relevant, and sustained the action against the defender only as executor.

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*Fol. Dic. v. 2. p. 45. Spottiswood, (EXECUTORS.) p. 114.*

\* \* Durie reports this case :

1628.—*January 24.* JOHN ADIE pursues John Gray in Leith, for payment of a debt owing to him by the defender's father, for which payment he was convened as intromitter with his father's goods, &c. The defender *alleged*, that he could not be pursued as intromitter, seeing he was confirmed executor to his father, which allegiance was sustained; in respect whereof the LORDS found no process against him *hoc nomine*, as intromitter, and nevertheless that the defender was confirmed executor *post hanc litem captam*; yet the said allegiance was sustained, seeing he was confirmed within year and day after the defunct his father's decease; but the LORDS in the same action sustained process against the defender as executor, seeing he himself was executor, who was convened as intromitter, and so there was no reason to put the party to any new process against him, seeing he had once deduced his process legally, in a lawful manner, against him who then was only intromitter; and his being executor *ex post facto*, by that deed done by him since, could not impede the course of his proceeding against him in this same procedure, as executor; albeit if any other but the defender's self had been executor, the party behoved to pursue that executor by a new process, and the process against the intromitter would have ceased; and so the defender being executor, had *beneficium inventarii*, which he as intromitter could not have.

Act. Primrose.

Alt. Mowat.

Clerk, Hay.

1628. *January 26.*—IN the cause betwixt Adie and Gray, mentioned *supra*, January 24th 1628, the pursuit being sustained against the defender as executor, albeit confirmed *post litem captam*; and therefore the defender, who by the confirmation had *beneficium inventarii*, *alleging*, That the goods confirmed were exhausted by payment made by him to creditors of the defunct, to whom this defender was cautioner for his father the defunct, who had registrate their bonds against this excipient, the terms of payment being all by-past, and the bonds registrate before the intending of this pursuit, and payment also made before the same; this exception was sustained, albeit the pursuer *replied*, that this defender being obliged as cautioner for his father, his paying of the creditors, could not make defalcation of the defunct's goods to the defender, seeing the defender behoved here to be considered as another creditor of the defunct's; and so seeing the pursuer had intented his action against him for his debt, before he was confirmed executor, he cannot be debarred, but must have the defunct's goods made forth-coming to him, being first in his diligence, there be-

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ing no pursuit moved against the excipient by any other of the defunct's creditors; for albeit he was cautioner for the defunct, and had paid for him, yet that behoved to be respected, as done for liberation of his own debt, he being bound himself, and cannot have respect to the defunct's debt, no pursuit being moved against him as executor to the defunct, but as a cautioner who was personally obliged; neither can the relief seeking upon the defunct's gear by the defender, which makes him a creditor to the defunct, be respected to be more valuable to him, but from that time when he was confirmed executor, and that is after the pursuer's diligence; so that his being full-handed with his father's goods, they cannot be retained by him for satisfying of his own debt totally, and to prejudge the pursuer of his, but ought to be made forth-coming proportionally to them all *pro rata*. This reply was repelled, for the Lords found the defender might defalk and exhaust the goods in the testament, for relief of the sums paid by him before the intenting of the pursuer's cause, wherein he was preferred to the pursuer, albeit he intented this cause before the confirmation, but if the payment had been made since the intenting of this cause, it would have been more questionable, if it should have been allowed to the pursuer's prejudice; likeas the 2d February 1628, in this cause, the defence being reformed and restricted, that he was only cautioner for the father for sums, whereof the terms of payment were past before the intenting of this cause, albeit neither sentence nor payment was before this cause, yet he had reason to retain for his relief of the debts confirmed, whereof the term was past, as said is, for he was an inevitable debtor;—this allegiance was repelled, seeing no payment made before the confirmation, and so he ought only to come in *pro rata* with the other creditors.

Act. ———

Alt. *Mowat*.Clerk, *Hay*.*Durie*, p. 330. & 332.1628. *March 21.*

LINDSAY'S Relict against ELLEIS.

No 194.  
Where one  
intromitted,  
who was nam-  
ed executor  
by the de-  
funct, vitiosi-  
ty was purged  
by a confirma-  
tion *post litem  
motam*, altho'  
after year and  
day.

IN a double pointing by the Relict of Bernard Lindsay, against Patrick Elleis and Sir John Dalmahoy, and certain other creditors of her umquhile husband, Patrick Elleis having pursued the relict for payment of his debt, as intromissatrix with her husband's gear; after the intenting of the which cause, she having confirmed herself executrix to him, albeit it was two years after her husband's decease, yet the action was only sustained against her as executrix, that she might have *beneficium inventarii*; and sicklike during this dependence, after Patrick Elleis's citation, the Laird of Dalmahoy her son-in-law, being also a creditor, intented action, and obtained decret against her, conform whereto she made payment to him, and which exhausted the goods contained in the testament; in respect whereof she *alleged* she should be assoilzied from Patrick