

APPENDIX.

PART I.

EXECUTOR.

1777. March 11. JAMES CRAIG against ANNE RATTRAY.

ANNE RATTRAY, relict of Alexander Steven, baker in Edinburgh, was, upon an edict at her instance, decerned by the Commissaries executrix *qua* relict to her deceased husband, after having applied by petition for having his goods inventoried and valued, which was done accordingly. James Craig, baker in Edinburgh, objected to the inventory, that the goods were estimated at too low a price, the whole being only valued at £133. 5s. whereas he was willing to give £200. for them. He contended, therefore, that either the goods ought to be delivered up to him at that value, or charged upon the relict according to the same value, or instantly exposed to public roup. The Commissaries, 5th November 1776, “Repelled the objection in respect of the answers, re-
“serving to the objector Mr. Craig to procure himself decerned and con-
“firmed executor *ad omnia vel male apprehensata* to the defunct, if he shall be
“so advised.” Of this judgment Mr. Craig presented a bill of advocation, and Lord Monboddo Ordinary took it to report.

Pleaded for Mr. Craig: The purpose of confirmations by executors was to ascertain the amount of the succession of the defunct before the executor was allowed to intromit with the moveable subjects pertaining to that succession, and by this means to give security to the creditors of the defunct that his effects should not be embezzled, nor withdrawn from their claims, till such time as his debts were paid. Hence the necessity of giving up specially in inventory the effects that were confirmed; Hence the use of an appropriation of these effects; and hence the use of the caution found in the confirmation.

No. 1.

An executor found liable for a greater sum than the amount of a valuation put upon the defunct's goods in a judicial inventory, a creditor having offered that higher value.

See No. 32.
p. 3851.

No. 1. The service of an edict when an executor was to be confirmed, seems to have arisen from the same source, that all might have notice to appear and object to any irregularity or fraud attempted to be practised; for no intromissions could be more prejudicial to creditors than fraudulent intromissions under colour of law, by procuring false and defective appretiations.

The Commissaries, accordingly, were particularly instructed upon their first institution, to be exceedingly careful to put a just estimation upon the effects that should be confirmed. Sir James Balfour, who was himself one of the Commissaries of Edinburgh at their first institution, has in his Practics preserved to us the instructions laid down for their conduct in office; and among these, in page 667, there is the following: “Ze ar to advert, that the prices of
“ the guids given up in testament, be valued conform to the commoun rate,
“ as thay ar sauld in the countrey, nather to heich nor to low, in prejudice of
“ the quottis and bairnis of the defunct.”

The *quotts* here are particularly mentioned, as this was an instruction proceeding from the Bishops, to whom the *quotts* properly belonged. But the same ideas of equality that apply to *quotts* will also apply to creditors, who, now that *quotts* are abolished, have the sole interest in objecting to too low an appretiation. Had the rule indeed proceeded from the Legislature in place of the Bishop, creditors no doubt would have been mentioned as well as *quotts*. Now if the Commissaries are to advert as above-mentioned, how can they do it otherwise than by hearing objections to an erroneous appretiation? The meaning of the instruction therefore clearly is, that when an edict was served, the Commissaries were to receive all objections to the valuation.

The remedy of confirmation *ad male appretiatam*, appears indeed to be nothing more than a supplementary one, when, through inadvertency, the confirmation has been carried through, before the mal-appretiation has been observed. And the judgment of the Commissaries in the present instance does in fact invert one of the most general maxims of law,—*Melius est intacta jura servare, quam post vulneratam causam remedium querere*. It is much the same as if, in the ordinary course of law proceedings, a Judge should repel a relevant defence, reserving it to be pleaded in the way of suspension or reduction, as accords. The impropriety of such mode of proceeding appears strongly in the present case. An improper and *ex parte* valuation of the goods is obtained; they are immediately intromitted with; and when the valuation is objected to, it is answered, that they have been already valued by order of the Court,—after they were valued I consumed and disposed of them, and they cannot be valued again. The remedy of a confirmation *ad male appretiatam* may thus be rendered absolutely ineffectual.

Virious intromission is well known as a passive title in our law. It has now indeed lost much of its rigour; yet where a fraudulent intention appears, the Court still continues to give it effect. But a fraudulent intromission under colour of a legal title is far more dangerous. The confirmation excludes the

quality of the vitiosity in the intromitting; and creditors thus have no hold of the intromitters by a passive title, while they are at the same time equally defrauded, as if the intromission had been without title at all.

For the Relict it was argued, That the office of executor to a defunct belongs in a certain order; first, to the executor nominate; secondly, to the defunct's nearest in kin; thirdly, to his relict; and lastly, to his creditors. Any person interested may appear for his interest, and take care that the defunct's goods be properly valued; but it has never yet been attempted to wrest the office of executor out of the hands of the person entitled thereto by law, on pretence that the goods are undervalued. The remedy pointed out by the law is a confirmation *ad male appretiatam*, or perhaps even without such confirmation action may be sustained at the instance of a creditor to account for the full value of the goods. But to demand that the executor should charge himself with what value the creditor thinks fit to put upon the goods, or otherwise to expose the same to public roup, or deliver them up at that value, is in effect compelling him to surrender the office.

Persons now entitled to the office of executors have the same right, excepting so far as statutes have intervened, which the Church had in former times. But churchmen formerly were not obliged to charge themselves with the value, or otherwise to yield up the administration. They were only accountable for a just value. And accordingly all the relict contends for here is, that she is entitled to the administration of her husband's effects, upon finding caution to account for the valuation made thereof, reserving action against her, if it shall appear that the valuation is not just.

A great part of the goods contained in the inventory are already disposed of. Some of these are valued at the highest current price, though of a mean quality. The pursuer's demand, therefore, simply comes to this, that without any option left to the defender, she must charge herself with whatever imaginary value he pleases to put upon them.

It had been objected by the pursuer, that the goods had been inventoried and valued before the day of compearance in the edict. But this practice is coeval with the Court, and found to be attended with the most salutary effects to those in the pursuer's situation, who are not in possession of the defunct's goods, by preventing the possibility of either embezzlement or dilapidation.

It was observed from the Bench, That it is not now necessary to confirm *ad male appretiatam*. The creditor may indeed, but need not, as he has a direct action against the intromitter. Every thing is worth what it will bring, and as the pursuer offers £200. the defender must account for this sum. If action would be competent afterwards to prove the real value, much more must this hold where the creditor interposes at the time.

The following interlocutor was pronounced: "The Lord Ordinary, after advising with the Lords, refuses this bill, but remits the cause to the Com-

- No. 1. “missaries with this instruction, that they find the relict must be accountable
“to the creditors of her husband for the sum of £200. as the value of the
“goods given up in the inventory, in respect that that sum was offered for
“these goods by the complainer James Craig, and that the relict had disposed
“of part of the same, which she had no power to do before confirmation.”
A reclaiming petition against this interlocutor was refused without answers.

Lord Reporter, *Monbardo.*

Act. *Crosbie.*

Alt. *D. Greme.*

J. W.