

LITIGIOUS.

DIVISION I.

Litigious by Process.

SECT. I.

What understood to make a *lis pendens*.—Assignment granted *pendente lite*.—Marriage *pendente lite*.—Encroachments *pendente lite*.—Titles made up *pendente lite*.

1608. December 30.

LADY MONCUR *against* The LADY MANER and her HUSBAND.

No 1.

IN an action pursued by a woman against the Lady Maner and Mr Alexander Monteith, now her spouse, for a debt of 100 merks, lent to her during her widowhood, and offering to refer it to her oath of verity, the LORDS would not sustain that probation in prejudice of her husband, but ordained the pursuer to refer it to the husband and wife's oath conjunctly; and they likewise decided at that same time betwixt the Laird of Lesmoren and a woman called Duncan and her spouse.

Fol. Dic. v. 1. p. 552. Haddington, MS. No 1520.

1630. November 23.

SMITH *against* GRAY.

No 2.

ONE Gray being pursued as intromitter with his father's goods, to pay a debt owing by his father to the pursuer; after the which pursuit, the de-

One was pursued as intromitter with his fa-

No 2.
 ther's goods.
 After the suit
 had commen-
 ced, he con-
 firmed execu-
 tor-creditor
 within year
 and day.
 He obtained
 thereby no
 preference.

fender confirms himself executor to his father, as a creditor, to the effect he might be satisfied of debts, wherein he was cautioner for his father; which confirmation was expedited within year and day after his father's decease; and in respect thereof, alleging, that he ought to have retention of the goods confirmed, for his own relief of these debts, wherein he was cautioner for his father, and which would exhaust the testament confirmed; and so he alleged, that he ought to be liberated of this pursuit; and the pursuer opposing the priority of his diligence, by intending of this cause before the confirmation, after which diligence he could do no deed in his prejudice, to prefer either himself as a creditor, or any other creditor, so that every creditor ought to be respected according as they have done diligence; and he not being pursued nor distressed by his father's creditors, as cautioner, or otherways by any legal manner, his own voluntary act of confirmation cannot give him preference to the pursuer, *qui prius provocavit*. THE LORDS found, That albeit this confirmation was expedited within the year after the defunct's decease, yet being done after the intending of the pursuer's cause, it could not give him preference before the pursuer for those debts wherein he was cautioner for his father, he not being pursued therefore, for relief whereof he could not intromit at his own hand, to pay himself totally, and thereby to exclude any other creditor's more timeous pursuit; and so found, that the goods should proportionally receive division betwixt him and the pursuer, conform to the quantity of their debts.

December 8.—IN the action before mentioned, November 23. 1630, of Smith *contra* Gray, the defender, who was confirmed executor as a creditor, *alleging*, that he had retention of the goods intromitted with by him since he was confirmed executor, for the which he ought not to be accountable to the pursuer, notwithstanding of this pursuit before the confirmation, because he was cautioner for his father to diverse of his creditors who had decreets of registration of these bonds before he was decerned executor and confirmed, and whose terms of payment of their debts were also come before he was confirmed, and before which confirmation also he had paid them their said debts, and reported their discharges; and some other of the defunct's creditors to whom also he was cautioner had registered their bonds, the terms of payment whereof, and the time of the registration, preceded also his confirmation, which albeit the same were not paid, yet he was debtor, and decret given against him, and whereby he behoved to pay, so that he ought to be preferred to this pursuer for these debts, seeing he had no intromission before he was decerned and confirmed executor, as said is;—in respect whereof, albeit this pursuer had intended his action against him before these sentences, and before any payment made by him to his father's creditors, yet the same being done, as said is, before he was executor confirmed, he might lawfully confirm for his relief, which should give him preference to any other creditors, *quia sibi vigi-*

Javit: THE LORDS found this allegiance relevant for liberation of the defender for so many debts as were decerned against him, and paid by him after decret, and whereof the terms of payment were then past, being all done before he was executor decerned, albeit the decreets were obtained, and payment made by the defender, after intenting of this pursuer's cause, against him as intromitter, seeing he denied any intromission before the time of his being decerned executor; after which, the LORDS found, notwithstanding of the prior pursuit of this party, he then having no intromission, he might provide for his own relief by the said confirmation of himself as a creditor, and then lawfully intromit, which subsequent intromission could not be a ground to produce this action. But the LORDS found, if the pursuer would astrict himself to prove, that the defender intromitted before the confirmation, they would prefer him, and that being proved, that he behoved to pay the pursuer's debt, as vicious intromitter, which was not purged by the subsequent confirmation; and this was so found, albeit it was or might have been alleged, that after this pursuer's intenting of the pursuit, the party defender could do nothing in his prejudice to make his action worse to him, and better to himself, specially by a deed voluntary of his own, (as this confirmation was) except this pursuer had been lawfully cited thereto, *cum lite pendente nihil sit innovandum*, which was not respected; and as for the other debts obtained, registered against the defender as said is, albeit the terms of payment were past, and decret of registration obtained before his confirmation, yet seeing they were not paid by the defender also, before the confirmation, the LORDS would not sustain the allegiance for these debts, in respect of the pursuer's action intended before, as said is; but I conceive not the reason of this difference betwixt the debts paid and unpaid, decreets being given, and the terms being past, which makes all in a like case, for the cautioner seeking relief. See July 14. 1626. Smith *contra* Gray, *voce* PASSIVE TITLE.

A&t. Primrose.

Alt. Morat.

Clerk, Hay.

Durie, p. 541. & 546.

1663. January 29. MARGARET EDGAR *against* JOHN MURRAY.

MARGARET EDGAR having charged John Murray, as cautioner for the umquhile Viscount of Stormont, he suspends and offers him to prove by her oath, that she transacted with him to accept a decret against the principal to free him. The charger *answered*, that she being a wife clad with a husband, could not swear in his prejudice. The suspender *replied*, that before her marriage, he had raised a pursuit, and cited her to see it found and declared, he was free of cautionry, in respect of the said transaction, and so the matter being litigi-