

No 188. heritable estate ; and vitious intromission being oft-times by persons who have access to meddle without witnesses, and being always without authority, inventory, or record, it is seldom possible to prove either quantities or value ; and therefore the law has most justly introduced a presumption *juris et de jure*, that the moveable were sufficient to pay the debts, and consequently the same became extinct *ipso facto*. 2do, There is not any law or precedent to distinguish heritable from moveable debts in this case, which cannot but have happened frequently.

“ THE LORDS found, That a vitious intromitter was entitled to pursue the heir for relief of heritable debts ; but sustained the allegiance of vitious intromission to extinguish moveable debts in the person of the vitious intromitter.”

Fol. Dic. v. 2. p. 43. Dalrymple, No 133. p. 185.

No 189. 1729. December 5. LOCH against MENZIES.

Sir WILLIAM MENZIES granted a bond of aliment to his daughter, upon death-bed, for payment of which process was raised against Sir William's representative, upon the passive title of vitious intromission. The defence was, That though this obligation was conceived *per modum actus inter vivos*, yet being granted upon death-bed, and not declared till after death, it was *donatio mortis causa*, which the granter did not design to be binding upon him if he reconvalesced ; and therefore, she had not the benefit of the passive title of vitious intromission, which was introduced in favour only of proper creditors of the defunct, such who could have compelled him by way of process to implement ; and it was added, that a *donatio mortis causa*, in whatever terms conceived, is more properly a legacy than an obligation. THE LORDS found this bond to be a debt relevant to subject the defender as vitious intromitter. See APPENDIX.

Fol. Dic. v. 2. p. 44.

S E C T. VI.

Vitious Intromission Purged by Confirmation, or by declarator of escheat.

THOMSON against THOMSON'S EXECUTORS.

No 190.

CONFIRMATION of the defunct's moveables, before process is commenced at the creditor's instance for vitious intromission, purges the vitiosity whoever be the executor. The administration of moveables, after the death of the pro-

prietor, belongs to the church; and when one is decerned executor by the Commissary, it is the same as naming him trustee for the in-gathering the defunct's moveables, which of consequence he has right to claim from every person upon using the form of a confirmation; the vitious intromitter then becomes accountable to him, and regularly to him only, which of course must purge the vitious intromission, because, from the nature of his office, he can insist no further than for compt and reckoning. And though, even after confirmation, action is sometimes sustained to creditors against those who intromit with subjects left out of the inventory of the confirmed testament, which in strict law is competent to the executor only; yet that is no more but a favourable extension for the ease of creditors who have once commenced a process upon vitious intromission, not knowing that there has been an executor appointed, to save the circuit of a new process against the executor, or a confirmation *ad omnia*; and by the common rules of law an extraordinary remedy can go no farther than the ordinary remedy, in place of which it is substituted. Thus, in a pursuit upon the passive title vitious intromission, it was sustained as a defence, That decret was already recovered by the executor against the defender for her intromissions.

No 190.

Fol. Dic. v. 2. p. 44.

* * Kerse reports the case alluded to.

In an action pursued by John Thomson in Leith *contra* The Executors of James Thomson there, it was *alleged* for Bessie Bell, relict, That she could not be convened as universal intromissatrix, because there was an executor decerned, who, by virtue thereof, had obtained sentence against the relict for one half, and for the other half she has found caution to make the same forthcoming. THE LORDS found the exception relevant.

Kerse, MS. fol. 141.

1622. January 12.

BAD against HAMILTON.

FOUND, That an executor confirmed *lite pendente*, cannot be farther obliged than *secundum vires inventarii*; and albeit the pursuer reply upon farther intromission and fraudulent omission, yet the executor shall not be obliged *in solidum*, but according to the quantity of the omission.

No 191.

Fol. Dic. v. 2. p. 45. Kerse, MS. fol. 133.

* * A similar decision was pronounced 14th July 1626, Smith against Gray,
No 17. p. 9660.