

Elleis's pursuit;—this was found relevant, and the payment made by her allowed, and the Laird of Dalmahoy preferred; albeit Patrick Elleis *replied*, That he ought to be preferred, or at least should come in with other creditors to be equally answered, seeing he was anterior in diligence, and during his dependence by favour of the relict, she had given way to her good-son's process, who had intented this action since he had cited her, and had kept his process in her procurator's hands, while the other had passed through his decret by collusion betwixt them; which fraud ought not to be sustained. This reply was repelled, and the creditor, posterior in diligence as said is, was preferred.

Act. *Learmonth.*Alt. *Belshes.**Fol. Dic. v. 2. p. 45. Durie, p. 365.*

No 194.

1629. March 5. ARCHIBALD THOMSON *against* The LAIRD OF RENTON.

ARCHIBALD THOMSON convened the Laird of Renton, as universal intromitter with the goods and gear of William Douglas of Ively, to hear and see a bond granted by William to the pursuer, registrated against him as intromitter fore-said. *Alleged* by him, He could not be convened as intromitter, because there was one decerned executor ~~dativ~~ *to* William, which executor disponded the said goods to him. *Replied*, Not relevant, unless he would say, there was an executor confirmed before the intending of this cause, who disponded the same to him; for there is no right that any man can have to intromit with the goods of a defunct, except by a confirmed testament. *Duplied*, No necessity, because the executor being decerned, he behoved to take a time before he confirmed, till he knew what goods and gear were to be confirmed; and being now confirmed, albeit after the intending of the pursuer's cause, it must liberate the defender of his intromission, which was by the executor's warrant.—THE LORDS found the exception and duply relevant; for it is lawful to an executor decerned to confirm at any time before year and day expire, and to purge his former intromission thereby, although there were never so many pursuits intented against him before his confirmation.

*Fol. Dic. v. 2. p. 45. Spottiswood, (EXECUTOR.) p. 120.*

No 195.

Found in conformity with  
No 193. P.  
9866.1630. November 25. MINIMAN *against* RAMSAY.

WILLIAM MINIMAN pursuing David Tindale and Elizabeth Ramsay, as executors or intromitters with the goods of John Fullerton, burges of Dundee, his debtor, to pay him his debt, Tindale *alleging*, That he could not be pursued as intromitter, because Ramsay, the other defender called, was executor.

No 196.

Found in conformity with  
No 194. P.  
9868.

No 196. confirmed to the defunct, in respect whereof, albeit the said testament was confirmed *post captam litem*, and after expiring of a year, and much more after the defunct's decease, yet seeing it was a testament *testamentar*, made by the defunct's own nomination, of Ramsay his relict, to be his executrix, and that she was also called in this same process, whereby the pursuer's action would proceed against her; therefore, the LORDS found no process against the other party, who was called as intromitter, seeing he was liable to the executor, and the executor to the creditor.

Act. Russl.

Alt. \_\_\_\_\_.

Fol. Dic. v. 2. p. 45. Durie, p. 541.

\* \* \* In this case a conjunct intromitter, called in the process, was assoilzied from vitious intromission, and found ~~only~~ accountable to the executor testamentary; but, in other cases, where such indulgence is not given, a confirmation after year and day will be no defence against a process already commenced; and this was, in the case of Cochran against Sturgeon, 20th March 1624, No 146. p. 9825. so strictly taken, that a confirmation, after year and day, was not sustained, being posterior to the execution of the summons, though before the day of compareance.

1630. November 26. FULLERTON against KENNEDY.

No 197.  
Declarator upon a defunct's escheat, obtained before any suit at the instance of any creditor against a vitious intromitter, is sufficient to purge the intromission with the defunct's moveables.

ONE Kennedy, relict of Dalrymple of Stairs, being convened as intromissatrix with her husband's goods, to hear her husband's obligation granted to the pursuer, upon a certain sum registrated *hoc nomine* against her; the LORDS found, that she, as intromissatrix, was not holden to pay the same, in respect that her husband died rebel, and his escheat was gifted and declared at the instance of Kennedy donatar thereto, to whom she was countable for her intromission; which exception was found relevant, albeit it was *replied*, That her intromission going along before the granting of the gift of escheat and declarator, that preceding vitious intromission could not be purged by the subsequent taking of the gift of escheat, specially seeing her own brother is donatar thereto, and that she has ever kept the possession since her husband's decease, and was never unquieted by the donatar; which reply was not respected, for the LORDS found, that the donatar would be preferred to the creditor, and that the relict would be countable to the donatar; and respected not the conjunction of the relict with the donatar, seeing the relict might have taken the escheat to herself *proprio nomine*, her husband being dead; seeing a stranger might have done it, and so might she to her own use; and as there could not a testament be confirmed valuably of the rebel's, whereby his gear might be claimed, either