

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.