

No 193.

ing no pursuit moved against the excipient by any other of the defunct's creditors; for albeit he was cautioner for the defunct, and had paid for him, yet that behoved to be respected, as done for liberation of his own debt, he being bound himself, and cannot have respect to the defunct's debt, no pursuit being moved against him as executor to the defunct, but as a cautioner who was personally obliged; neither can the relief seeking upon the defunct's gear by the defender, which makes him a creditor to the defunct, be respected to be more valuable to him, but from that time when he was confirmed executor, and that is after the pursuer's diligence; so that his being full-handed with his father's goods, they cannot be retained by him for satisfying of his own debt totally, and to prejudge the pursuer of his, but ought to be made forth-coming proportionally to them all *pro rata*. This reply was repelled, for the Lords found the defender might defalk and exhaust the goods in the testament, for relief of the sums paid by him before the intending of the pursuer's cause, wherein he was preferred to the pursuer, albeit he intented this cause before the confirmation, but if the payment had been made since the intending of this cause, it would have been more questionable, if it should have been allowed to the pursuer's prejudice; likeas the 2d February 1628, in this cause, the defence being reformed and restricted, that he was only cautioner for the father for sums, whereof the terms of payment were past before the intending of this cause, albeit neither sentence nor payment was before this cause, yet he had reason to retain for his relief of the debts confirmed, whereof the term was past, as said is, for he was an inevitable debtor;—this allegiance was repelled, seeing no payment made before the confirmation, and so he ought only to come in *pro rata* with the other creditors.

Act. ———

Alt. *Mowat*.Clerk, *Hay*.*Durie*, p. 330. & 332.1628. *March 21.*

LINDSAY'S Relict against ELLEIS.

No 194.
Where one
intromitted,
who was nam-
ed executor
by the de-
funct, vitiosi-
ty was purged
by a confirma-
tion *post litem
motam*, altho'
after year and
day.

IN a double pointing by the Relict of Bernard Lindsay, against Patrick Elleis and Sir John Dalmahoy, and certain other creditors of her umquhile husband, Patrick Elleis having pursued the relict for payment of his debt, as intromissatrix with her husband's gear; after the intending of the which cause, she having confirmed herself executrix to him, albeit it was two years after her husband's decease, yet the action was only sustained against her as executrix, that she might have *beneficium inventarii*; and sicklike during this dependence, after Patrick Elleis's citation, the Laird of Dalmahoy her son-in-law, being also a creditor, intented action, and obtained decret against her, conform whereto she made payment to him, and which exhausted the goods contained in the testament; in respect whereof she *alleged* she should be assoilzied from Patrick

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, registered 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.