

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 comparance.

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

by the relict's bairns or executors, in respect of the said rebellion, no more can the intromissatrix be liable for the gear to any but to the donatar.

No 197.

Fol. Dic. v. 2. p. 46. Durie, p. 542.

* * Spottiswood reports this case:

N. being addebted to Mr. David Fullerton in a certain sum, Mr. David intented an action of registration of the same sum against Kennedy, relict of the said N. his debtor, as intromissatrix with her husband's goods. *Alleged*, She could not be convened as intromissatrix, because her husband died at the horn, and his escheat was gifted and declared before the intending of the pursuer's cause, and the donatar had given her permission to intromit, and had discharged her of her intromission, so that she was countable to no other. *Replied*, That she had intromitted before the gift, which intromission of hers being once vitious, could not be purged by the subsequent gift and discharge; likeas the gift was taken by the defender's brother, and so in effect to herself.—The LORDS found the exception relevant, and that the donatar's discharge purged her intromission, although prior; likeas, they regarded not that the gift was given to the defender's brother, for they thought she might have taken it herself, and that it would have wrought a liberation to her as well as if a stranger had got it.

The same found betwixt William Mudie and James Hay of Tourland, 29th November 1633.

Spottiswood, (ESCHEAT and LIFERENT.) p. 104.

* * Similar decisions were pronounced, 27th January 1636, Straiton against Chirnside, No 17. p. 5395.; 16th June 1674, Lady Spencerfield against Hamilton, No 97. p. 9762.; 16th December 1674, Drummond against Menzies, No 182. p. 9859.

1632. March 28. MAXWELL against LA. STANLIE.

THE relict of L. Stanlie being convened by Margaret Maxwell, one of his daughters, as intromissatrix with her husband's goods, to pay some debt to her; and the relict *alleging*, That one of the defunct's sons was executor confirmed, and who ought to be answerable to the creditors, and who had found responsal caution at the confirmation of the testament; and the pursuer *replying* upon the defender's fraud, in confirming of a minor, especially seeing herself was nominated executrix by the defunct's self; likeas she intromitted with her husband's goods before she confirmed the minor; as also, she hath intromitted with many other particulars (whereon the pursuer condescended) beside and attour the goods confirmed, whereby she was *in dolo*, and so ought to

No 198.

A relict being sued for vitious intromission, the defence was sustained, that there was an executor confirmed, altho some particulars she had intromitted with were omitted in the invent.