

No. 49. although alleged, that she could have action only for her own part; this because she had had possession before the intromission of the nearest in kin not confirmed.

band, and was in his possession when he died, so that the same pertained to his bairns and executors, of whom the defender's wife was one, and his relict could have no right but to her own part thereof; which allegiance was repelled, and the action sustained at the relict's instance for the whole, in respect of the libel, bearing her own possession divers years before the defender's intromission, and since her husband's decease, and that she offered to find caution to warrant the defender at all hands, who might claim right thereto by her husband's decease; which the Lords found relevant, seeing the defender was not decerned nor confirmed executor to the defunct.

Act. Craig.

Alt. Hart.

Gibson, Clerk.

Fol. Dic. v. 2. p. 370. Durie, p. 407.

1639. January 24.

INGLIS against BELL.

No. 50.

A defunct's creditor is not obliged to confirm *ad omnia*, if he can prove by the oath of the executor confirmed, that he the executor intromitted with goods not confirmed sufficient to pay the debt, for in such a case the executor will be directly decerned to pay.

Fol. Dic. v. 2. p. 369. Durie.

* * This case is No. 73. p. 2737. *voce* COMPETENT.

1671. June 16.

BOWERS against LADY LINDORES.

No. 51.

A relict having intromitted with moveables, to which she had a gratuitous right from her husband, *retenta possessione*, it was found that the creditors had a direct action against her, without necessity of confirming executors-creditors.

Fol. Dic. v. 2. p. 369. Gosford.

* * This case is No. 180. p. 9859. *voce* PASSIVE TITLE.

1709. December 13.

DRUMMOND against CAMPBELL of Burnbank.

No. 52.

An executor's confirmation within year and day of the defunct's death sustained, to purge the vitiosity

GEORGE DRUMMOND, accomptant-general to the excise-office, having married the late Burnbank's daughter, pursues James Campbell, now of Burnbank, her brother, for payment of 3000 merks yet resting of her tocher; and, first insists on the passive title of vitious intromitter. Alleged, executor confirmed. Answered, *Non relevat* to purge vitiosity, because you never offered to confirm till

I had cited you in my process of payment. Replied, That law has fixed and established year and day, as the period within which confirmations are to be expedite, and pursuits before that are looked upon as too hasty and preposterous; and so it is, he confirmed within the year which has ever been sustained, as my Lord Stair remarks, B. 3. Tit. 9. and backs it with two decisions, one from Spottiswood, 24th January, 1628, Aldie *contra* Gray, No. 193. p. 9866.; and the other, 28th Jan. 1663, Stevenson and Ker, No. 201. p. 9873.; where a confirmation within the year, purged and elided the universal passive title, even against a creditor who had used citation before. Duplied, That this doctrine opened a door to encourage people to intromit short-hand immediately after party's deaths, if they think the confirming any time within the year will secure them, by which moveables may be exceedingly embezzled; and the former decisions are not now observed, but, on the contrary, six months is only now allowed by act of sederunt to bring in all creditors then appearing into one testament *pari passu*. The Lords found the confirmation within the year purged the vitiosity, but found him liable for the inventory of the testament as executor. The next passive title insisted on, was his superintromission posterior to the confirmation, with effects not confirmed; for prior superintromission above what was confirmed, was an undoubted passive title. Answered, This would indeed make him liable *in valorem*, but no farther, as appears by the 20th act 1696, and was so found in Ormistoun *contra* Bangour, No. 118. p. 5909.; and the particulars may be so small, that they cannot bear the charges of a new confirmation; and if you think otherwise, you have the remedy of confirming *ad omissa*. Replied, There could not be but fraud in this omission, being a son confirming executor to his father, who could not be ignorant of his effects, and therefore must be liable *ex dolo*, whatever might be pleaded if a stranger had been executor. The Lords, by plurality, found him (being the nearest of kin) universally liable on this superintromission, and not singly *in valorem*, as he pleaded it.

The Lords afterwards, on a bill, turned the relevancy to an act before answer, to see the extent of the super-intromission, if small, or considerable.

Fountainhall, v. 2. p. 545.

* * This case is reported by Forbes :

GEORGE DRUMMOND having pursued Burnbank, as representing his father, upon the passive title of vitious intromission, for payment of 4000 merks contained in his father's bond; and the defender having alleged, that he was executor confirmed, the pursuer, to take off that allegiance, offered to prove, 1st, That the defender both intromitted, and was cited at the pursuer's instance before confirmation, 2^{do}, That he had super-intromission after the confirmation, with goods not confirmed.

Answered for the defender: 1st, He being confirmed executor to his father within year and day after his death, that confirmation doth purge the vitiosity of all

No. 52.
of his anterior intromission, notwithstanding he was cited at a creditor's instance before confirmation, but super-intromission with goods not given up in the inventory after the citation, sustained relevant to make the intromitter universally liable.

No. 52. prior intromission, Stair Instit. B. 3. Tit. 9. §. 10. where decisions are cited to confirm this assertion; which seems reasonable, since confirmation cannot be expedite immediately upon the party's death; and the creditors are in no danger, because, if any subject intromitted with should not be confirmed, it would be esteemed a fraudulent omission, and make the intromitter universally liable; or they may confirm *ad omnia*. *2do*, Super intromission after confirmation by the executor confirmed, makes him liable only *in valorem*. Because, before the 20 Act. Par. 1696, it was always sustained as a relevant exception against vitious intromission, that there was an executor confirmed; and that law makes only this alteration, that confirmation of a third party as executor creditor in a particular subject, should not purge the vitiosity of intromitters with any other subject.

Now the defender being executor creditor himself, is not in the case of that statute 1696, but liable only *in valorem*; which is consonant to the analogy of law, whereby any colourable title, as a general disposition, excuseth from such a passive title: And a person decerned and confirmed executor is *in titulo* to intromit, at least is as favourable as one clothed with a general disposition: For super-intromission after confirmation, is not so unfavourable as anterior super-intromission, which argues both a fraudulent omission and perjury; inventories being given up upon oath, and every person supposed to know his own deed. Again, by the civil law, an heir entering by inventory, though guilty of omissions therein, was not liable universally, L. 1. §. 10. *in fine C. De Jure deliberandi*.

Replied for the pursuer: Law, to prevent embezzling of men's moveables after their death, to the prejudice of creditors or others interested, having introduced this passive title of vitious intromission, and fixed the method of transmission by confirmation and caution; the not observers thereof must be universally liable from the very moment of their unwarrantable intromission. And law having only *ex gratia* allowed the unwarrantable intromitters, to purge the vitiosity by confirming before citation at the instance of any creditor, that is not to be extended in favours of a subsequent confirmation. *2do*, Confirmation was never sustained to protect a posterior superintromission by the executor confirmed, but only super-intromission by a third party, or by an executor creditor confirming partially who is not bound to eik.

The Lords sustained the defence founded on confirmation within year and day, to purge the vitiosity of the defender's intromission, notwithstanding of a prior citation given to him by the pursuer before confirmation; but sustained the super-intromission with goods not given up in the inventory after the pursuer's citation, relevant to make the defender universally liable.

Forbes, p. 366.