

1626. July 28.

TENANT *against* TENANT.

No 192.

The defence of confirmation was sustained, where the intromitter obtained one beggar to be confirmed, and another to be cautioner.

IN an action of registration of a bond pursued by one called Tenant, against another so called, who was convened as intromitter with the defunct's goods and gear, debtor to the pursuer; it being *alleged* for the defender, That he could not be convened as intromitter, because, before the intending of the cause, there was an executor confirmed to the defunct; and it being *replied*, That the pursuer's action ought to be sustained against him, as intromitter, notwithstanding of the confirmation of executors, because if any testament was confirmed, the same was most fraudulently done by this same defender, who having first intromitted with the defunct's whole goods, he thereafter, to the effect that the creditors' just actions therethrough competent against him might cease, moved a poor beggar to lend his name to the said executry; and caused another beggar to become cautioner for him; likeas not only he bestowed the whole expense upon the said confirmation, and paid the quot of the testament, and also promised to warrant the executor of all action and danger, which he might incur, by his being executor; but the said executor concurred with the pursuer at the bar, in this pursuit; and so in effect the said excipient is both executor and intromitter, in respect of the which exemplary fraud, the defender ought to be only found his just debtor, and the pursuer ought not to be excluded by this indirect dealing, from his just debt, which is in effect all that he has, but the defender's exception ought to be repelled. This exception was admitted by the LORDS, notwithstanding of the reply, for the LORDS found, That executors being confirmed, the process behoved to cease against the intromitters; and if any fraud were done by the excipient, the same in this place could not exclude this action; and if the excipient made any promises to relieve the executor, the pursuer had his action competent against him thereupon, after that the executor was found his debtor.

Act. Miller.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. 2. p. 45. Duriz, p. 230.

1628. January 24.

JOHN ADIE *against* JOHN GRAY.

No 193.

JOHN ADIE pursued John Gray as universal intromitter with his father's goods and gear. *Alleged*, He could not be convened as intromitter, because he is executor confirmed to his father, and so has *beneficium inventarii*, and should be comptable only for the free gear in the testament. *Replied*, That he has confirmed himself executor after the intending of the pursuer's cause. *Duplied*, That he did confirm within year and day, which he might do lawfully, notwithstanding of the pursuer's action intended. THE LORDS found the exception