

No 198.
 tory, but she was required to account for her intromissions, so far as not contained in the confirmed testament, without necessity upon the creditor to take a dative *ad omissa*.

be liable to the pursuer as universal intromissatrix; and the defender *duply-ing*, That it was lawful to her to accept or renounce to be executrix, albeit she had been nominated by the defunct, seeing the confirming of another, where there is also sufficient caution, is no more prejudicial to the creditors than if she had been confirmed, for the confirmed goods will be made furthcoming to the creditors; and her alleged further intromission with goods omitted, unconfirmed, cannot make her universal intromissatrix, to make her so liable for debts of her husband's, amounting to greater sums than either she is worth, or all her husband's own estate might pay; but the most that thereby can result on her alleged omission, is to take a dative *ad omissa*.—THE LORDS, notwithstanding that there were executors confirmed, and not-theless of the allegiance foresaid, sustained the action against the defender as intromissatrix, without necessity to take a dative *ad omissa ad hunc effectum*, only to infer sentence against her to make the particulars, wherewith she shall be proven to have intromitted, besides the goods confirmed, furthcoming to the pursuer for her debt allenarly, and not to make her liable as universal intromissatrix thereby, either to his creditor, or to any other of the defunct's creditors, if the intromission to be proven shall not be found to be so much as will pay the debt; and respected not the reply to make her further liable.

Fol. Dic. v. 2. p. 45. Durie, p. 634.

* * Spottiswood reports this case :

IN an action pursued by Margaret Maxwell against the Lady Stanly, as universal intromissatrix with her husband's gear, notwithstanding that the defender had given up inventory, and made faith thereon in name of her son, whom she had confirmed executor, and that further intromission was offered to be proved upon her than was given up; yet the LORDS did sustain action against her as universal intromissatrix, only to infer payment for as much more as should be proved against her.

Spottiswood, (EXECUTORS.) p. 112.

1635. July 17.

LO. JOHNSTON *against* JOHNSTON.

No 199.

A natural son, after intromitting with the defunct's moveables, obtained a gift of his escheat, and commenced declarator, upon which

LO. JOHNSTON pursuing James Johnston, as universal intromitter with the goods and gear of umquhile Captain James Johnston, to pay to him a debt owing by the said Captain, who was the defender's natural father; and he excepting, that he was donatar to the escheat of the said Captain, whereupon he had action of general declarator depending, wherein litiscontestation is made, by virtue of which gift of escheat he had right to the defunct's goods and moveables, so that this intromission would not make him liable to any of the de-

funct's creditors; and the pursuer *replying*, That the defender, immediately after the defunct's decease, intromitted with all his whole goods, both within and without the houses, and used the same at his pleasure; which intromission cannot be purged by any subsequent right of his escheat, purchased by the defender *ex post facto*, and a long space after his intromission; for, by his preceding vitious meddling with the defunct's goods, he became liable to his creditors; and that deed cannot be purged, by purchasing of the gift of the escheat thereafter, which was not purchased while the space of after his said intromission, specially also seeing there is no declarator obtained upon the said gift hitherto; and the case of the creditors is most favourably to be considered against a donatar;—this exception upon the gift, albeit purchased after the intromission, and declarator depending thereon, wherein litiscontestation is made, albeit not yet decerned, was found relevant, and sustained to purge the preceding intromission, and to elide the action pursued against the defender, as universal intromitter.

Act. *Stuart.*Alt. *Nicolson.*Clerk, *Scot.**Fol. Dic. v. 2. p. 46. Durie, p. 771.*

No 199.
there was
litiscontes-
tation.
This was
found rele-
vant to purge
vicious intro-
mission in a
process at the
instance of
the creditors
against him,
he being *in
cursu diligen-
tia.*

1662. February 7.

GRAY *against* DALGARDNO.

No 200.

A GIFT of escheat to the intromitter himself, *ante litem motam*, is sustained to purge vitiosity, though there be no diligence on it. The reason given is, that the gift to the intromitter himself is effectual without declarator;—but of this there is some doubt. A special declarator indeed is not necessary, but a general declarator, which is not a process for payment, but a step of diligence, in order to complete the conveyance, like the intimation of an assignation, ought to be requisite in all cases.

Fol. Dic. v. 2. p. 46. Stair.

* * This case is No 169. p. 9850.—A similar decision was pronounced 22d January 1675, Chalmers *against* Farquharson and Gordon, No 45. p. 9683.

1663. January 28.

MARGARET STEVENSON and her SON *against* KER and Others.

No 201.
Vicious in-
tromission
purged by
the intromit-
ter's confirm-
ing within
year and day
after the de-
funct's death.

MARGARET STEVENSON pursues Margaret Ker, as vicious intromissatrix with the goods of her husband, for payment of a debt, wherein he was cautioner. She *alleged*, Absolvitor, because her intromission was purged, in so far as she had confirmed herself executrix-creditrrix. It was *answered* by the pursuer,