*** Durie reports this case:

No 168.

ONE being convened, as universal intromissatrix with her father's goods, to pay a debt owing to the pursuer by her father; and the defender *alleging*, That there was another of the defunct's creditors confirmed executor to him, so that thereby she could not be convened as universal intromissatrix; and the pursuer *replying*, That a creditor confirming himself executor *in aliquo individuo*, only to the effect his own debt might be paid, that could not take away the action competent to another creditor, against the intromitter with other goods, by and attour that which was confirmed, and that he could not have action against the executor:—THE LORDS found, that there being an executor confirmed *ante captam litem*, albeit he was only a creditor, against whom no other creditor could have action in law, yet that thereby no other could be convened as universal intromitter; but that the pursuer might either seek a dative *ad omissa*, or else insist against the defender, as intromitter, to make the particulars, which should be proven to be intromitted with by her, furthcoming to the pursuer, or the prices thereof; for which particulars sentence should only follow against the defender, and for the which the action was sustained; but not to make her liable to the debts as universal intromissatrix, for the which the action was not sustained; and election was given to the pursuer, either to insist against the defender in this same process as intromitter to the effect foresaid, or else to seek a dative *ad omissa*. See SERVICE and CONFIRMATION.

Act. ——. Alt. *Mowat.*

*Dic. Fol. v. 2. p. 42. Durie, p. 448.*

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1662. *February* 7. MARJORY GRAY *against* DALGARDNO.

No 169.
It is no defence against vitious intromission, that the intromitter died at the horn, because his moveables are still liable to the diligence of his creditors, unless there be a general declarator on the gift.

MARJORY GRAY pursues Dalgardno, as vitious intromitter with the goods of a defunct, to pay his debt, who *alleged*, Absolvitor, because the defunct died rebel, and at the horn, and so *nihil fuit in bonis defuncti*; seeing, by the rebellion, all his moveables belonged to the fisk, *ipso jure*, without necessity of tradition, for the King, *jure coronæ*, hath the right of lands without infeftment, and the right of moveables forfeited, or fallen in escheat, without tradition or possession. The pursuer *answered*, *Non relevat*, because the defender intromitting without any warrant from the fisk, is *quasi prædo*, and moveables are not *ipso facto* in the property of the fisk by the rebellion; but, if they be disponed by the rebel for an onerous cause, the disposition before rebellion will be valid; or, if they be arrested for the defunct's debts, and recovered by sentence, making furthcoming; or, if a creditor confirm himself executor-creditor to the defunct rebel, he will be preferred to the fisk; by all which it appears,

that the rebellion transmits not the property. The defender *answered*, That these instances do only show that the King prefereth creditors, and takes but the benefit of what the rebel had *deductis debitis*, or what was contracted with him *bona fide*, but doth not say, that the property of the goods was not in the fisk, but in the rebel. No 169.

THE LORDS repelled the defence. The defender further *alleged*, That not only was the defunct rebel, but that he had a gift of his escheat. The pursuer *answered*, *Non relevat*, unless it had been before the vitious intromission, or at least *ante motam litem*.

THE LORDS repelled the defence, unless the defender would allege that the gift was *ante motam litem*; for they thought, that the taking of the gift was like the confirmation of an executor, which purged vitious intromission, being *ante motam litem*.

1662. *February* 27.—Marjory Chalmers pursues William Dalgardno, as vitious intromitter with a defunct's goods, to pay his debt, who *alleged*, Absolvitor, because the rebel died at the horn, and so had no goods; 2*dly*, The defender hath the gift of his escheat, and also is executor-creditor confirmed to him; 3*dly*, The defender had a disposition of all the defunct's goods, albeit he possessed not thereby during his life, yet he might enter in possession after his death, and not be vitious intromitter.

THE LORDS found this defence relevant to elide the passive title, but prejudice to either party to dispute their right as to the simple avail of the goods; and they repelled the first defence, and found the second and third defences relevant only if the gift was before the intenting of this cause.

*Fol. Dic. v.* 2. *p.* 42. *Stair, v.* 1. *p.* 92. & 109.

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1678. *January* 23. ANDERSON *against* ANDERSON. No 170.

IF he, as executor to his brother, could deduce a third of the legacies for his pains in executing the office, conform to the act in 1617? *Alleged*, 1*mo*, The act speaks of strangers, which he is not; 2*do*, It allows deduction from off legitims, but not off legacies, as is clear by Durie.

1678. *January* 28.—THE LORDS found the defenders having omitted to confirm some moveable sums lying in Holland, which he knew of by the count books, and intromitted therewith, they found it *dolose* omit, and they made him liable for that super-intromission, without putting the pursuer to take a dative *ad omissa*; so that the LORDS inclines to find such super-intromission no less a passive title than vitious intromission.

*Fol. Dic. v.* 2. *p.* 43. *Fountainhall, MS.*