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.

No 199. there was litiscontestation. This was found relevant to purge vitious intromission in a process at the instance of the creditors against him, he being *in cursu diligentiæ*.

Act. *Stuart.* Alt. *Nicolson.* Clerk, *Scot.*

Fol. Dic. v. 2. p. 46. Durie, p. 771.

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. Vitious intromission purged by the intromitter's confirming within year and day after the defunct's death.

MARGARET STEVENSON pursues Margaret Ker, as vitious 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 creditrix. It was *answered* by the pursuer,

No 201. *Non relevat*, unless before intenting of the cause. The defender *answered*, It was sufficient, being within year and day after the defunct's death;

Which the Lords found relevant.

Fol. Dic. v. 2. p. 45. Stair, v. 1. p. 164.

1665. *July 4.* Mr Walter Innes *against* George Wilson.

No 202.
Vitious intromission elided, because the intromitter had warrant from the donatar of the defunct's escheat.

Innes of Auchbuncart being pursued as heir to his father, upon all the passive titles, *alleged*, That his father was denounced rebel, and his escheat gifted, and the defender had right or warrant from the donatar before intenting of this cause. The pursuer *answered*, *Non relevat*, except the gift had been declared, and that the defender's intromission had been after declarator and the warrant, but the intromission being anterior cannot be purged *ex post facto*. The defender *answered*, That, as the confirmation of an executor excludes vitious intromission had before the confirmation *ante motam litem*; so the gift and warrant, though without declarator, purge anterior intromission *ante motam litem*;

Which the Lords found relevant.

Fol. Dic. v. 2. p. 46. Stair, v. 1. p. 294.

*** Newbyth reports this case:

George Wilson pursues Mr Walter Innes for payment of 2000 merks, upon this passive title, that he had intromitted with his father's moveable heirship, which father was his debtor. It was *answered* by the defender, That his father died rebel, and at the horn, and his escheat gifted after his decease, and declared, so that the donatar had the only right to his moveables; and that any intromission he had, if he any had, could not infer *gestionem pro hærede*; because the defunct was denuded by the rebellion and gift, and the intromitters behoved to be countable to the donatar. It was *replied*, That the defender did intromit with the moveable heirship before the gift was declared. To which it was *duplied*, That albeit he had intromitted before the declarator, yet his intromission being after the gift, it can never infer *gestionem*; because, by the gift, *jus est quæsitum* to the donatar; so that, albeit the heir were entered, he could have no right to the moveable heirship, and so his intromitting therewith could not infer a gestion no more than in the case of an expired apprising, where the apparent heir intromits with his mails and duties of the lands apprised. This defender having right by assignation to his father's gift of escheat,—the Lords found the assignation to the subsequent gift of escheat sufficient to purge the defender's preceding intromission with his father's moveables.

Newbyth, MS. p. 32.