

before the said confirmation, were not given up in testament; which neither being given up, nor eiked since, discovered a fraud upon her part, and so the action was sustained against her *hoc nomine*; and found it not necessary to put the pursuer to take a dative *ad omisssa*; also they found, that the said intromission being proven against her, it should import decret against her as universal intromissatrix, and for payment of the whole debt; and not to that effect alternarily, to make the goods intromited with furthcoming to the pursuer *pro tanto*, for payment so far as the said goods would amount to; but that, albeit the same could not satisfy the whole debt, yet that she should pay the same as universal intromissatrix, in respect of her foresaid fraudulent omission to give up the same.

No 167.

Act. ———.

Alt. Sandilands.

Clerk, Gibson.

Fol. Dic. v. 2. p. 42. Durie, p. 272.

* * Spottiswood reports this case :

A RELICT being convened as intromissatrix with her husband's goods and gear, *alleged*, No process against her, because she offered to prove that there were executors confirmed before the intenting of the cause. *Replied*, That he ought to have process against her notwithstanding, because he offered him to prove she had intromitted with sundry particulars given in ticket, besides what was given up in testament. *Duplied*, Let him take a dative *ad omisssa*; for, as for her intromission, she was countable to the executors.—THE LORDS found process against the relict as universal intromissatrix, *in odium fraudis et perjurii*, in giving up of the inventory.

Spottiswood, (EXECUTORS.) p. 112.

1629. June 20.

DOUGLAS against TOURES.

No 168.

WHEN one is pursued as universal intromitter with any defunct's goods, it is a good exception, that there was an executor confirmed to the defunct before the intenting of the cause; because the executor being a party representing the defunct, all the defunct's creditors have good action against him; but if one confirm himself executor to a defunct as a creditor of his, for payment of his own debts, he is not such a party as action can be had against him for any of the defunct's debts; and therefore such confirmation cannot free an universal intromitter. Yet, in the like case, between Jean Toures and N. Douglas, the LORDS would not sustain action against the defender as universal intromitter, but found that the pursuer should take a dative *ad omisssa* by the first executor, who had confirmed himself executor creditor, or yet that he might pursue the intromitter for giving up that wherewith he had intromitted.

Spottiswood, (UNIVERSAL INTROMITTER.) p. 352.

No 168.

*** Durie reports this case :

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

1662. February 7. MARJORY GRAY against DALGARDNO.

No 169.

It is no defence against vicious 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 vicious 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 disposed 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,