

by the relict's bairns or executors, in respect of the said rebellion, no more can the intromissatrix be liable for the gear to any but to the donatar.

No 197.

Fol. Dic. v. 2. p. 46. Durie, p. 542.

* * Spottiswood reports this case:

N. being addebted to Mr. David Fullerton in a certain sum, Mr. David intented an action of registration of the same sum against Kennedy, relict of the said N. his debtor, as intromissatrix with her husband's goods. *Alleged*, She could not be convened as intromissatrix, because her husband died at the horn, and his escheat was gifted and declared before the intending of the pursuer's cause, and the donatar had given her permission to intromit, and had discharged her of her intromission, so that she was countable to no other. *Replied*, That she had intromitted before the gift, which intromission of hers being once vitious, could not be purged by the subsequent gift and discharge; likeas the gift was taken by the defender's brother, and so in effect to herself.—The LORDS found the exception relevant, and that the donatar's discharge purged her intromission, although prior; likeas, they regarded not that the gift was given to the defender's brother, for they thought she might have taken it herself, and that it would have wrought a liberation to her as well as if a stranger had got it.

The same found betwixt William Mudie and James Hay of Tourland, 29th November 1633.

Spottiswood, (ESCHEAT and LIFERENT.) p. 104.

* * Similar decisions were pronounced, 27th January 1636, Straiton against Chirnside, No 17. p. 5395.; 16th June 1674, Lady Spencerfield against Hamilton, No 97. p. 9762.; 16th December 1674, Drummond against Menzies, No 182. p. 9859.

1632. March 28. MAXWELL against LA. STANLIE.

THE relict of L. Stanlie being convened by Margaret Maxwell, one of his daughters, as intromissatrix with her husband's goods, to pay some debt to her; and the relict *alleging*, That one of the defunct's sons was executor confirmed, and who ought to be answerable to the creditors, and who had found responsal caution at the confirmation of the testament; and the pursuer *replying* upon the defender's fraud, in confirming of a minor, especially seeing herself was nominated executrix by the defunct's self; likeas she intromitted with her husband's goods before she confirmed the minor; as also, she hath intromitted with many other particulars (whereon the pursuer condescended) beside and attour the goods confirmed, whereby she was *in dolo*, and so ought to

No 198.

A relict being sued for vitious intromission, the defence was sustained, that there was an executor confirmed, altho some particulars she had intromitted with were omitted in the invent.

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 allenary, 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-