

No. 46.

defunct, which was fraudulently done by her, ought not to be profitable to her, nor prejudicial to the creditors, and found in respect of her fraudulent omission, that there was no necessity to seek a dative *ad omissa*.

Act. Mowat.

Alt. Hamilton.

Clerk, Gibson.

Fol. Dic. v. 2. p. 369. Durie, p. 44.

* * Haddington reports this case :

In an action pursued against Pitoddie and some other vassals, as intromitters with the goods of defunct, the defenders excepted no process, because there was a testament confirmed before the intenting of this cause. It was replied, That the confirmation could not relieve the mother, who, giving up the goods and debts for her bairns, minors, had omitted above the worth of a thousand pounds of goods, wherewith she had intromitted, and so her intromission was not purged *sua culpa* : In respect of which reply, the Lords sustained the action.

Haddington MS. No. 2745.

1624. March 18. CANT against CHEISLY, and TOURIS against DOUGLAS.

No. 47.

Found in conformity with the above.

BARBARA CANT being convened as intromissatrix with the goods and gear of William Muirhead, her umquhile husband, to pay to Mr. Robert Cheisly the sum of 300 merks, addebted to him by her said husband ; and she alleging that there were executors confirmation before the intenting of this pursuit, to whom she was only answerable for her intromission, and not to any creditor, who ought to pursue the executor, and not her : This exception was repelled, in respect of this reply, bearing, that the defender had intromitted with as many of the moveables and utensils of the house, as would pay this pursuer of his debt, by and attour the quantity of the utensils confirmed in testament, and which intromission of the said further quantity, was referred to the relict's own oath, and which was found relevant by the Lords, to the effect, that the particulars so intromitted with by her, and not confirmed, might be made forthcoming to the pursuer *pro tanto*, to satisfy his debt : And the Lords sustained this, and found no necessity to seek a dative *ad omissa*, as the defender alleged ought to have been, seeing this sentence was sufficient to her, to liberate her *pro tanto*, at all hands : See Shaw *contra* Auchinleck, *supra*, from the which this differs, because in that, the testament was given up by the relict's self, and her bairns confirmed executors, so that her fraudulent omission ought not to be profitable to her ; and in this cause, strangers, viz. two of the defunct's creditors, were confirmed executors, who gave up the inventory, and not the relict.

The like case was agitated upon the last of March 1626, betwixt Touris and Douglas, wherein the daughter being called as intromittor with her father's goods, to pay his debt to the pursuer, the defender alleging, that there were executors

confirmed to him, and at the term assigned to prove, producing a testament where another creditor was confirmed for his own debt, which being quarrelled by the pursuer, as not sufficient, to exclude his action against the intromissatrix, where there was only so much confirmed, as would pay that one creditor confirmed executor; the Lords reponed the parties to prove, or to elide and purge the intromission, notwithstanding of that confirmation, which was not respected, and it was not found necessary that the party pursuer should be compelled to take a dative *ad omnia*, but sustained the action against the intromissatrix, except she purged her intromission.

No. 47.

Act. *Monat.*Alt. *Nicholson.**Fol. Dic. v. 2. p. 369. Durie, p. 121.*

* * Haddington reports this case :

If the relict pursued, as universal intromissatrix, allege that the defunct's testament is confirmed by other executors, it will be repelled if the defender offer to prove, by his own oath, that besides the goods confirmed in testament, she has intromitted with more than may pay his debt, and he will not be forced to take a dative *ad omnia*.

Haddington MS. No. 3085.

* * See Douglas *against* Tours, No. 168. p. 9849. *voce* PASSIVE TITLE. Maxwell *against* Stanly, No. 198. p. 9871. IBIDEM; and Anderson *against* Anderson, No. 170. p. 9851. IBIDEM.

1626. December 9. LORD BLANTYRE *against* FORSYTH.

No. 48.

Process was sustained at a creditor's instance against an intromitter with the defunct's effects, and that even without calling the representatives of the defunct.

*Fol. Dic. v. 2. p. 369. Durie.** * This case is No. 24, p. 4813. *voce* FORUM COMPETENS.

1628. December 6. CRANSTON *against* ADIESON.

In an action, a wife pursuing her good-son, married on her daughter, as intromitter with divers goods and bestial, and other gear pertaining to her, and being in her possession divers years before, for rendering the same to her; this action was sustained at the pursuer's instance for the same, albeit it was alleged, that she could have no interest to pursue therefore, seeing the same pertained to her hus-

No. 49.
Process sustained at a relict's instance for goods belonging to her husband at his death,