No 96. regard that the defender was apparent heir to his father, and so his intromission being once vitious, could not be purged thereafter.

Fol. Dic. v. 2. p. 34. Spottiswood, (Heirs.) *p.* 142.

1674. *June* 10. Lady Spencerfield *against* Hamilton.

No 97.
It was afterwards found, that if the declarator of escheat was obtained before the heir was attacked upon his intromission, this was relevant to purge the intromission.

The Lady Spencerfield pursues Hamilton of Kilbrackmount for payment of a debt of his predecessors, and insists against him as behaving as heir by intromission with the heirship moveables, viz. the plenishing of the house, and as lucrative successor by a disposition. The defender *alleged*, 1*mo*, that the defunct could have no moveables, because he was rebel at the horn when he died, whereby the property of his goods were devolved to the King. 2*do*, It was offered to be proved, that the defunct's escheat was gifted before the defender's intromission. 3*tio*, His intromission was by warrant of the Lords, allowing him to possess the house, so that any plenishing that was therein being yet extant, can import no passive title. It was *answered*, That it was not relevant that the defunct died rebel, or his escheat was gifted, unless it had been also declared before the intromission, for the declarator is equivalent to the confirmation of a testament, which only purges vicious intromission; and the Lords' warrant imports no power to dispose, or make use of any of the moveables of the house.

The Lords found it not relevant, that the defunct was rebel, or his escheat gifted, unless it were declared before intenting of the cause, or that the gift were in favours of the defender, or that he had intromitted by warrant from a donatar.

Fol. Dic. v. 2. p. 34. Stair. v. 2. p. 270.

*** Gosford reports this case:

In a pursuit at the Lady's instance against Kilbrackmount, as vicious intromitter with the moveable heirship which belonged to his uncle, who was debtor to the Lady; it was *alleged absolvitor* because it was offered to be proved, that the defender's uncle died rebel at the horn, and his escheat gifted in favours of a donatar, to whom he could only be liable, and that before any intromission had by the defender. It was *replied*, that the defence ought to be repelled, unless it were farther alleged, that the gift was declared before the defender would intromit, or that the defender himself was donatar; and if neither of these can be alleged, he ought to be liable as vicious intromitter, just as in the case where it is alleged, that there is an executor to whom the intromitters with moveables can only be liable, which is never sustained, unless the testament be confirmed. The Lords did repel the defence in respect of the reply, and found, that an intromitter with moveables, cannot purge his *vice*, unless he allege that he had

a gift himself before his intromission, or that he had a warrant from the donatar to whom the gift was granted; otherwise he must allege, that the donatar's gift was declared; there being a *par ratio* in alleging against vicious intromission, that there was an executor or a donatar; which cannot defend a third party which had no right from them, unless they can allege that the executor was confirmed before the intenting of the cause, or the donatar's gift declared. No 97.

Gosford, MS. p. 413. *No* 693.

*** This case is also reported by Dirleton:

IN the case of the Lady Spencerfield *contra* Robert Hamilton of Kilbrackmount, the LORDS found, that the allegeance, viz. That the defender could not be liable as intromitter, because there was a gift given of the defunct's escheat being rebel, is not relevant, unless the gift were either declared, or were to the defender himself, or that he had right from the donatar; for in the first case, he is in condition parallel with an intromitter, in the case of executor confirmed; and cannot be said to be intromitter with the goods of a defunct, and *bona vacantia*, the right of the same being in a living person *per additionem*, and by confirmation; and a third person intromitting where there is no declarator, who has not the gift himself, nor a right from the donatar, is not in a better case than an executor decerned; and in the case of a donatar intromitting, or the intromission of any other having right from him, there is the pretence and colour of a right in the person of the intromitter, which is sufficient to purge vitious intromission.

They found in the same case, that a person entering to the possession of the defunct's house by warrant of the LORDS, their possession of the goods in the house doth not infer intromission, unless they make use of such goods as *usu consumuntur*, or dispose of such goods as are not of that nature, as beds, tables, and such like.

Clerk, *Hamilton*.

Dirleton, No 187. *p.* 75.

1676. *February* 10. GRANT *against* GRANT.

No 90.
The apparent heir's intromission with the heirship moveables was found purged, he having obtained, before intenting of the cause, a gift of his father's escheat, altho' not declared.

GRANT pursuing Grant, as behaving as heir to his father, by intromission with his heirship moveables, he *alleged* absolvitor, because his father died at the horn, and the defender obtained a gift of his escheat before intenting of this cause, which as by the ordinary practice, would liberate him from vicious intromission, so for the like reason it must liberate him from intromission with heirship moveables. The pursuer *answered, non relevat*, unless the gift had been before the intromission; 2*do*, Unless the gift had been declared before intenting of this cause, It was *replied*, That albeit the gift was after the intromission,