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,

No 98. it is sufficient to purge the preceding unwarrantable intromission, being before intenting of this cause, as is ordinary in vicious intromission with other moveables; neither is there any need of declarator where the intromitter himself is donatar and apparent heir, and cannot declare against himself.

The Lords found the defence upon the gift granted to the intromitter himself, before intenting of the cause, relevant, albeit not declared, and though posterior to the intromission.

Fol. Dic. v. 2. p. 34. Stair, v. 2. p. 413.

*** Dirleton reports this case:

In a pursuit upon a passive title of behaving, it was *alleged*, That before intenting of the cause the defender had gotten a gift of the defunct's escheat.

The Lords upon debate amongst themselves, found, that albeit the gift was not declared, yet it purged the defender's vicious intromission, being before the intenting of the cause, and that the defender having the goods in his hands, needed not a declarator.

This seemed hard to some of the Lords, in respect by our custom there being two ways *adeundi hæreditatem*, viz. either by a service or by intromission with the defunct goods, that were in his possession; the apparent heir, meddling with the goods, *gerit se pro hærede*, and so by his intromission, having declared his intention also fully, as if he were served heir, *semel hæres* cannot cease to be heir, there being *jus quæsitum* to the creditors as to a passive title against him. 2*do*, The pretence that the defender is in the same case, as if there were an executor confirmed before the intenting of the cause, is of no weight, seeing the defence upon the confirmation is sustained, because there is a person against whom the creditors may have action, which is not in the case of a donatar. 3*tio*, A donatar has no right without a general declarator, and though when the donatar has the goods in his hand, there needs not a special declarator, yet for declaring his right, there must be a general one. 4*to*, As to that pretence, that the defender cannot be liable as intromitter with the defunct's goods, because they belong to the fisk and not to him; it is *answered*, That the goods being in the possession of the defunct, the apparent heir thereafter meddling with the same *eo ipso adit*, and the creditors ought not to be put to debate, seeing he is in possession; and if a person should be served special heir to the defunct, though the defunnt's right were reduced and the *hæreditas* could be *inanis* as to the benefit, yet the heir would be still liable.

Dirleton, No 331. p. 158.

*** This case is reported also by Gosford:

Grant being pursued for payment of his father's debt, upon that passive title, that he was vicious intromitter with his goods and gear, it was *alleged* absolvitor, because his father died at the horn, and his escheat was gifted, so that the

donatar only had right to the moveables, and they not being the defunct's goods, the defender could not be liable as vicious intromitter, which can never be sustained but where the defunct was undoubted proprietor of the goods. It was *replied*, That albeit the escheat was gifted, yet it was never declared before, which the donatar could have no right to pursue. THE LORDS did sustain the defence notwithstanding of the reply, and found, that the defunct being denounced to the horn, and his escheat gifted either to the apparent heir, or to one from whom he had right, did free him from that passive title of behaviour and vicious intromitter with the defunct's goods; but if he had intromitted before any gift, the case would have been of more difficulty. No 98.

Gosford, MS. p. 539. *No.* 852.

1723. *November* 14. WILKIESON *against* ALVES.

No 99.

AN apparent heir having subjected himself to the passive title of behaviour, by intromitting at his own hand with his predecessor's writs and evidents, and having thereafter within year and day entered heir *cum beneficio inventarii*, he pleaded, that the passive title of behaviour was purged by his entering heir *cum beneficio*, just as vitious intromission is purged by a posterior confirmation. *Answered*, The act 1695, gives not the benefit of inventory to those who have had any prior intromission with the defunct's estate; and therefore the heir cannot plead upon his inventory.

THE LORDS repelled the defence. *See* APPENDIX.

Fol. Dic. v. 2 *p.* 34.