

1663. June 10.

SIR WILLIAM GORDON of Lesmore *against* Mr JAMES LEITH.

SIR WILLIAM GORDON of Lesmore pursues Mr James Leith of New Lesly, as representing his father on all the passive titles, and condescended that he behaved himself as heir, by meddling with his father's heirship moveables, and with the mails and duties of his father's lands of New Lesly and Syde. The defender *answered* to the *first*, That his father could have no heirship moveables, because he died rebel, and so his hail goods belonged to the King as escheat; *2dly*, If need be, he offers him to prove that he died not only rebel, but his escheat was gifted; and so as a confirmation takes away vitious intromission with moveables, so the gift with the escheat must purge vitious intromission with heirship, being before intenting of this cause; *3dly*, He offers him to prove that the heirship moveable was confirmed promiscuously with the rest of the moveables, and that the defender had right from the executor; which confirmation, though it could not be effectual to carry the heirship, yet it was a colourable title to show that the defender had not *animus miscendi*, but that he meddled by a singular title, and neither formerly drew an heirship nor meddled therewith, as heir apparent. The pursuer *answered* to the *first*, That it was not relevant that he was rebel, nor that his escheat, unless it had been gifted before his intromission, as well as before intenting of the cause, and that the defender had right from the donator. To the *second*, it was *answered* by the pursuer, That the promiscuous confirmation was not sufficient, because he offered him to prove, the defender confirmed his own servant to his own behoof.

THE LORDS found that the defender's father dying rebel was not sufficient, unless it had been gifted and declared before intromission; and they found the reply relevant, that the promiscuous confirmation was to the defender's behoof.

As to the second member of the condescendence, the defender *alleged*, That albeit his father was infest, yet his infestment was only base, not clad with possession; and that the defender's title was by another party possessing and publicly infest before his father's death.

Which the LORDS found relevant.

*Fol. Dic. v. 4. p. 28. Stair, v. 1. p. 190.*

No 25.

Found in conformity with Grainger against Grainger, No 12. p. 9657.