

1680. January 1. URQUHART against DALGAINO.

JOHN URQUHART pursues Arthur Dalgairno, as vitious intromitter with his father's goods, for payment of a bond due by his father to the pursuer. The defender *alleged*, Absolvitor, because his father died in September at the horn, and he did all possible diligence to purge vitious intromission; and, in November thereafter, at the first time the Exchequer did sit after his father's death, he had obtained the gift of his father's escheat, which hath the same effect as if he had confirmed himself executor to his father, which would unquestionably have purged vitious intromission; for, where the defunct is rebel, the habile way is a gift of escheat, and not a confirmation. The pursuer *answered*, That neither confirmation nor gift could exclude vitious intromission, unless they had been obtained *ante litem motam*: but here this pursuit was moved before the gift. It was *replied*, That albeit the ordinary terms of the defence of confirmation be *ante litem motam*, yet if the pursuit be intended before confirmation, or gift can be obtained, it is sufficient that there is no negligence in obtaining thereof; but unto wives, children, or any having interest in the moveables of defuncts, a term to confirm, or to obtain a gift, is necessarily required, and ordinarily allowed for six months at least; and it were inconsistent with law and reason, that if creditors should use citation within a day or two after the defunct's death, that thereby vitious intromission should be inferred, which could not be purged by confirmation or gift, though obtained as soon as it were possible. It was *duplicated*, That *lis mota* ought to stop all meddling, at least it did oblige the meddlers to get warrant from the Commissaries to intromit upon inventory, till edicts might be served, and confirmation past; and, whatever may be allowed to the wife and children in the family, to preserve the goods for some time, till confirmation or gift were taken, yet this defender, who was *extra familiam*, and forisfamiliar, could not without inventory meddle. It was *triplied*, That the defender did not meddle as *prædo*, but did meddle as having just interest in the goods, for relieving of his father's debts and his estate.

THE LORDS found, that the defender having an interest to preserve his father's moveables, and having followed the habile way of obtaining the gift of escheat, obtained in November, whereas his father died in September, that it was sufficient to purge vitious intromission, although the intromission was after citation, and albeit he had no warrant from the Commissaries to intromit upon inventory, which is not an ordinary method, but used by the more knowing and cautious. This cause being so determined in December last, and the whole debate being repeated in a bill by the pursuer, this day the LORDS adhered to their former interlocutor.

*Fol. Dic. v. 2. p. 46. Stair, v. 2. p. 729.*

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Where the gift of escheat was taken out without delay after the rebel's death, it was sustained to purge vitious intromission, though the gift was *post litem motam*.