

have behaved as heir, and cannot clothe himself with any other title; especially the pretended executor being his own servant, whom he had confirmed to colour his intromission. *Duplied*, Nisi animus adsit in adeunda hæreditate, non præsumitur gestio pro hærede, and his intromission by virtue of any particular title should free him, at the least he should be no further obliged, but to restore the said horse of the price of him. "THE LORDS repelled the allegiance and found his intromission foresaid, although upon a pretended title, made him heir and convenable *in solidum*."

No 40.

Spottiswood, (HEIRS.) p. 141.

* * * This case is also reported by Auchinleck :

BESSY WEIR pursues registration of a bond granted by umquhile John Ker of Duddingston against Cavers, heir to the said umquhile John, at least intromitter with his heirship goods, viz. the best horse, &c. It is *excepted* by the defender, That the heirship goods condescended were confirmed by the executor of the defunct, and that the defender bought the same goods from the executor, and so was *in bona fide* to intromit therewith, and that *titulus coloratus*, was enough in this case to defend him from bringing upon him to be heir, and the most that can be decerned is that he make the price and goods furthcoming to the creditor. To which it was *replied*, That the heirship goods ought not nor should not be confirmed in the testament, and that this coloured title ought not to defend the apparent heir, seeing he used a manifest fraud in all this to the prejudice of the creditors; for it was offered to be proved, that this testament was confirmed to the defender's use, *hoc attento*, that his own domestic servant was confirmed executor, and that he made and debursed all the charges. THE LORDS repelled the exception in respect of the reply.

Auchinleck, MS. p. 7.

* * * A similar decision was pronounced 10th June 1663, Gordon against Leith, No 25. p. 9667.

1662. January 8. BARCLAY against The LAIRD of CRAIGIVAR.

No 41.

ANDREW BARCLAY pursues Craigivar, as intromitter with his father's lands wherein he died infest, for payment of a debt owing by his father. It was *excepted*, That any intromission that he had, was by virtue of a comprising deduced against him for his father's debt, for which decret was obtained against him as charged to enter heir to his father, to which comprising the defender had right. It was *answered*, That the defender being apparent heir, and having right to the legal reversion of the comprising deduced against himself, the

No 41.

comprised was not expired; and to acquire such a right and possess thereby imports *gestionem pro hærede*.

THE LORDS found the exception relevant, notwithstanding of the answer unless the pursuer would allege and prove, that he intromitted with more than satisfied the comprising; and found, that he might as lawfully buy an unexpired comprising as a wadset.

Fol. Dic. v. 2. p. 30. Gilmour, No 14. p. 13.

. Stair reports this case:

1662. *January 10*—ANDREW BARCLAY pursues the Laird of Craigivar, as representing his father upon all the passive titles, to pay a bond due by his father, and insists against him, as behaving himself as heir, by intromission with the mails and duties of the lands of Craigivar and Fintry. The defender *alleged* Absolvitor, because if any intromission he had (not granting the same) it was by virtue of a singular title, viz. an apprising led against himself, upon a bond due by his father. The pursuer *answered, Non relevat*, unless the legal expired; for if the apparent heir intromit within the legal, during which, the right of reversion is unextinct, *immiscuit se hæreditati*, and it is *gestio pro hærede*.

“ THE LORDS found the defence relevant, albeit the apprising was not expired, unless the pursuer allege, that the defender’s intromission was more than satisfied the whole apprising.

Stair, v. 1. p. 78.

. The like was found, though the apparent heir had intromitted with more than satisfied the apprising, 26th February 1663, Cuthbert against Munro, No 24. p. 9666.

No 42.

The condescendence of behaviour as heir, by intromission with the mails and duties, was elided, the apparent heir having possessed by a warrant from the donatar of recognition; for, although that was not a proper title to possess, yet it

1666. *July 17.*

THOMAS OGILVY against LORD GRAY.

THOMAS OGILVY pursues the Lord Gray, as behaving himself as heir to his father, by intromission with the mails and duties of the lands wherein his father died infest, as of fee, for payment of a debt of his father’s; who *alleged* Absolvitor, because any intromission he had, was by a warrant and tolerance of Sir George Kinnaird, who stood infest in the lands upon a gift of recognition. It was *answered, Non relevat*, unless the gift had been declared before the defender’s intromission; because the gift would not have given right to the donatar himself to possess. The defender *answered*, That the gift was declared before the intending of the pursuer’s cause, which declarator, albeit after intromission, yet must be drawn back to the gift, to purge the vitiosity of the defender’s intromission, in the same way that the confirmation of a testament