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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.

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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

will purge anterior vitious intromission, the confirmation being before the intending of the cause.

“THE LORDS found the defence relevant to elide the passive title, seeing any colourable title is sufficient to excuse the vitiosity; but did not find that the declarator, before intending the cause, had the same effect as a confirmation; because, by constant customs, such confirmations purge the preceding vitiosity; which has never yet been found in this case of an heir's intromission with the rents of lands; but the LORDS found the defender liable for the single value of his intromission.”

Fol. Dic. v. 2. p. 30. Stair, v. 1. p. 397.

* * * Newbyth reports this case :

THOMAS OGILVY pursues the Lord Gray, as lawfully charged to enter heir to his father the Master of Gray, for payment making to him of the sum of 9,000 merks principal, with the annual rent and expenses. It was *alleged* for the defender, That he was content to renounce. It was *replied*, He could not renounce, because the pursuer offered him to prove, that the defender had intromitted with the plenishing of the house of Fowlis, and other moveables upon the Mains; and, with the mails and duties of the lands wherein his father died infest, upon which last member the pursuer declared that he insisted. To which it was *duplied*, That any intromission the defender had was by virtue of a warrant from Sir George Kennedy, who was donatar to the gift of recognition of the lands and barony of Fowlis; whereunto it was *triplied*, That the gift cannot purge the intromission, because the defender, or some other to his use, did intromit long before the gift of recognition of the lands and barony of Fowlis, at least before declarator. To which it is *answered*, That the defender was content to find the first part of the allegiance relevant; and, as to the second, that he had intromitted before declarator, yet being after the gift, the same ought to be drawn back to the date of the gift; just as a donatar to a liferent escheat, who intromitted before declarator by virtue of his gift, and the subsequent decret of declarator will be drawn back to the date of the gift, *ad hunc effectum* to purge and free him of any vitious intromissions; and the like in a confirmation in a defunct's testament, which will purge being within year and day. To which it was *replied*, That the defender's intromission cannot be drawn back to the date of the recognition, but the same ought to import a behaviour; because there is a great difference in law betwixt a gift of ward and non-entry, and a gift of escheat and a gift of recognition; for it is not denied, but a donatar to a gift of ward may pursue for mails and duties, and for removing; and a donatar to escheat may intromit with goods and gear belonging to a rebel, even before a declarator; and the reason is, because, in all the gifts, the donatar's right is clearly proved by writ, and the decret following thereupon is but *juris*, and not *facti*, against which, hardly any thing

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can be objected that can extinguish the donatar's gift *in toto*; whereas, recognitions being founded upon the vassal's proper delict and contempt of his superior, by dispoing the greatest part of the feu holden ward of him without his superior's consent, there is a necessity for the donatar, not only to allege that, but to prove so many deeds done by the vassal, by granting disposition and infestment as may infer the recognition craved; which deeds of the vassal being *facti* must abide probation, and the event is dubious, wherein possibly the donatar may succumb, and his gift prove ineffectual; and therefore, unless the defender allege, that there is not only a gift of recognition, but a subsequent declarator obtained thereupon, upon probation of so many deeds done by the Master of Gray, as may conclude the gift of recognition, alleged on the defender's intromission had before declarator, must import a behaviour as heir; which he cannot do, there being no such declarator yet obtained, but allenary an act of litiscontestation and circumduction of the term against some of the defenders, called in the recognition, neither was the probation renounced, nor the cause advised, nor the parties heard, why the deeds and dispositions granted by the deceased Master of Gray, did prove the recognitions craved; neither was the rental of the barony of Fowlis proven, or that there were so many deeds proven as would make up a disposition of the greatest part of the said barony, holden ward, as said is; till all which be done, the donatar had no complete right in his person, to intromit or grant licence to this defender as apparent heir to intromit; but his intromission ought to import a behaviour as heir. THE LORDS found the allegiance proponed for the Lord Gray relevant, to free him from that odious passive title libelled, of behaving as heir; but found, that he ought to be liable to the pursuer *in quantum* he had intromitted, to make the same forthcoming to him.

Newbyth, MS. p. 76.

1666. December 16. ALLAN against CAMPBELL.

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EDINAMPLE CAMPBELL being pursued as representing his father, upon the title of behaving as heir; it was *alleged*, That he intromitted with the duties of the lands condescended upon, by a right to two comprisings against his father. It was *replied*, The comprisings were not expired the time of his father's decease, so that in effect he was heritor.

THE LORDS found, that *gestio* being *magis animi quam facti*, the defender's intromission by virtue of a title did not infer behaving.

Fol. Dic. v. 2. p. 30. Dirleton, No 67. p. 28.