

No 39.

ing married thereafter, remaining with him together in one family, that could not make the father to be esteemed possessor, seeing rather the son might be reputed to entertain his father, which was sustained. See PRESUMPTION.

Clerk, Hay.

Fol. Dic. v. 2. p. 30. Durie, p. 488.

No 40.

The heirship being confirmed promiscuously with the rest of the moveables, and the apparent heir having right from the executor, the confirmation, though not effectual to carry the heirship, was founded upon as a colourable title to shew, that the apparent heir had not *animus-immiscendi*, since he intromitted by a singular title. This was repelled, the executor being the apparent heir's servant, and confirmed for his master's behoof.

1630. December 16. RELICT of KER against KER.

ONE Weir relict of umquhile John Ker, being made assignee to a bond, made by the said umquhile John, pursues Ker of Cavers, as behaving himself as heir to him, by intromission with his heirship goods, for registration of the bond. And the defender *alleging*, That these goods were contained, and confirmed in the defunct's testament, and that he bought the same from the executor confirmed, whereby he could not be liable for the defunct's debts, as heir, having another title for his intromission, albeit the goods might be found heirship, seeing he intromitted not with the same as heir, but by another title; the LORDS repelled this exception, and found, that the confirmation of the heirship goods, which were not in law confirmable, except the heir had offered collation thereof to the executors, that he might have been partaker with them of the defunct's goods, and the buying of them from the executor, could not liberate this defender from being answerable for the defunct's whole debts, he being that person who was heir of blood, and apparent heir to him, and who ought to have adverted to his own case and danger. This was done specially seeing the pursuer offered to prove, that the testament was confirmed by the travel and expenses of this defender; and that the executor confirmed was his own actual servant, whose name he had used, and interponed in the confirmation, to his own use and behoof; which the LORDS sustained, and admitted it to probation, to infer *ut supra*.

Act. ———.

Alt. Trotter.

Fol. Dic. v. 2. p. 30. Durie, p. 549.

* * Spottiswood reports this case :

BESSY WEIR convened Thomas Ker of Cavers, as he that had behaved himself as heir to his uncle John Ker, by intromission with his heirship goods and gear. *Alleged*, Any intromission he had was by buying an horse from him that was confirmed executor to John. *Replied*, That horse being the best of the defunct's and pertaining to the heir, could not be confirmed as falling under executry. But notwithstanding thereof he being the party that should be heir, and having intromitted with the said heirship horse, must be thought *eo ipso* to

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