

\*\*\* Spottiswood reports this case :

No 82.

In an action of registration pursued by N. Goodlet against John Adamson, as heir to his father, the pursuer produced to verify the defender to be heir, an act of court of the Bailies of St. Andrews, bearing, that, by sentence and ward of court, John Adamson was recognised to be heir to his father James, whereupon the said John's procurator asked instruments.—THE LORDS thought not this sufficient to prove one heir, thereby to infer any action against him.

*Spottiswood, (HEIRS.) p. 139.*

No 83.

1670. June 28.

ELIES *against* CARSE.

THE taking out brieves from the Chancery, in order to serve heir, was found not a behaviour, the same not having been followed out.

*Stair. Gosford.*

\*\*\* This case is No 27. p. 9668.

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SECT. XI.

Behaviour upon Act of Sederunt 1662.

No 84.

1662. January 22.

GLENDONWYNE *against* The EARL of NITHSDALE.

An apparent heir having granted a simulate bond, in order to lead an adjudication of his predecessor's estate, his intromission, by virtue of this title, was not reckoned a behaviour, being *singulari titulo*, and not as heir.

GEORGE GLENDINNING pursues the Earl of Nithsdale, as lawfully charged to enter heir to his father, for fulfilling his father's bond. It was *excepted*, That the Earl was content to renounce. It was *answered*, That he could not renounce; because he had given bond to the Earl of Dirleton, whereupon, to his own behoof, his father's estate was adjudged from him; to which adjudication the defender was assigned by Dirleton, and he thereupon infest, and in possession. It was *replied*, That the defender might nevertheless renounce; because nothing could hinder him but *gestio pro heredede*, or some other passive title, which, by the law of Scotland, could make him heir, or behaving himself as heir, &c. But so it is, that the granting of the foresaid bond is not such a passive title; but, on the contrary, implies a direct mind, that he intends not

to be heir to his father, but to enjoy his estate *singulari titulo*; and he is content it be declared, that the adjudication shall not prejudice his father's creditors; and offered, that, notwithstanding thereof, and of other rights of comprising acquired by him of his father's estate, he should be countable for his intromission, and for all lands he has sold, and other benefit he could make thereby, he being satisfied for what he had truly paid out therefor. It was *duplicated*, That the adjudication upon the defender's own deed, acquired by himself, was a fraudulent acquisition of his father's estate, and his intromission and disposing on his father's lands, by virtue thereof, was equivalent, as if he had done the same by no right at all, but as apparent heir; and if such deeds should be sustained, never man needed to be heir, or to enter heir to an estate as heir, which were most absurd, and of dangerous consequence.

THE LORDS found, that the Earl might renounce, he being countable to the creditors for his intromission, and for what he has received as the price of any lands sold or wadset by him, being the true worth thereof; and that in time coming, he should not ascribe his right and possession to the said adjudication, but prejudice of any other right of adjudication, deduced against his father, and acquired by him; he being always liable for his intromissions with the farms to his father's creditors; he being first satisfied of what he truly paid out for acquiring of the same. And the LORDS declared, that, in time coming, if apparent heirs should grant such bonds, whereupon adjudication or apprising should follow to their own behoof; or that the same at any time should return to them, or to any person to their behoof, they should be liable to their predecessors debts, as behaving themselves as heirs; and thereupon an act of sederunt was made and published.

*Fol. Dic. v. 2. p. 33. Gilmour, No 20. p. 16.*

\* \* \* Stair reports this case.

1662. *January 22.*—GEORGE GLENDINNING of Partoun pursues the Earl of Nithsdale, for fulfilling of a contract of excambion betwixt the Earl's father and the pursuer's grandfather; and insists against the Earl, as lawfully charged to enter heir to his father. The Earl *alleged*, Absolvitor; because he offers him to renounce to be heir. The pursuer *replied*, The defence ought to be repelled, *quia res non est integra*; because the Earl has done a deed prejudicial to his renunciation, *viz.* he granted a bond for L. 2000 Sterling to the Earl of Dirleton, only simulately to his own behoof, whereupon his father's whole estate was adjudged, and that adjudication assigned to the Earl himself, and so he having intromitted, by that simulate title, with the mails and duties of his father's lands, he hath behaved himself as heir, and cannot renounce. The defender *duplicated*, That the reply ought to be repelled; because he offered not only to renounce, but also to purge that deed of his, and the adjudication of L. 2000

No 84.

Sterling, and to declare that it should not prejudice the pursuer, nor his father's lawful creditors, and that he should be countable for the price of any lands he had sold, or any rents he had uplifted. The pursuer *triplied*, That the duply ought to be repelled; because, *medio tempore*, the Earl had bought in expired apprisings with the profits of the lands. The defender *quadruplied*, That he was content to restrict any such rights to the sums he truly paid for them, and not to exclude the pursuer by them. The pursuer *answered*, That he having once behaved himself as heir, no offer nor renunciation could be received. The defender *answered*, That his intromission could not be *gestio pro hærede*, because it was *singulari titulo*, and not as heir, and *in gestione* there must appear *animus adeundi aut immiscendi*. The contrary whereof is here, for the granting of the bond, and the taking right to the adjudication thereupon, was of purpose, that his intromission might not be as heir, or as immixtion, which can never be without an illegal and unwarrantable deed; but all that was here done was legal, there being no law nor custom to hinder the Earl to grant a bond, albeit *gratis*; and after Dirleton had adjudged the lands, there was no law to hinder the apparent heir to take assignation thereto, and bruik thereby, more than a stranger; and albeit there were simulation or fraud, that might be a ground to reduce upon, but not to infer a general passive title, to make the defender liable to all his father's debts, from which passive title, *qualis coloratus titulus excusat*; and albeit this passive title be not any where else in the world but in Scotland, yet it was never applied to this case now in question, but by the contrary, since the act of Parliament 1621, by which heirs may be charged to enter heirs to their predecessors, not only for the defunct's debts, but their own, any bond granted by the apparent heir, although *gratis*, would be valid, to apprise or adjudge the defunct's estate; and, therefore, there being many cases, in which the apparent heir could not probably know whether the heritage would be hurtful or profitable; this hath been oftentimes advised, as the remeid, by Sir Thomas Hope, and many since, that the heir apparent might grant a bond, and thereupon the lands being adjudged, might take right thereunto. The pursuer *answered*, The defender had intromitted with the rents of his predecessor's land, which, albeit not *animo adeundi*, yet *animo immiscendi et lucrandi*, which cannot be maintained by a simulate null bond by himself to his own behoof, and adjudication thereupon; and if this were sustained, no person would ever after enter heir to his predecessor, but take this indirect way, to the defraud and vexation of creditors; and entering so to possess, would buy in other rights, and maintain his possession, as this defender hath done, and would not be obliged or willing to restrict these rights, as he doth.

THE LORDS, after long consideration and debate in the matter, found the Earl's offers relevant; but resolved to make and publish an act of sederunt against any such courses in time coming; and declared, that it should be *gestio pro hærede* to intromit upon such simulate titles.