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easy for apparent heirs to defraud all the predecessor's creditors, by giving back, or abstracting of the rights of the lands, and taking new rights from the authors; and seeing the law has made the intromitting with the father's charter-chest, rights of lands, or other papers, and things of very little moment, that belonged to the predecessor, to infer a behaviour as heir; much more ought the giving back a right of lands granted to the predecessor, and taking new rights in the apparent heirs own name, infer a behaviour; seeing in that case there is not only an intromitting with the rights of the predecessor's estate, but there is *dolus* and fraud in giving back these rights in the apparent heirs own person, of purpose to defraud the predecessor's creditors; and seeing the least intromission in law without a lawful title, will infer a behaviour; much more ought such a deed which is both intromission and fraud; and the defender her paying of the price, that her father should have given for that right, with her own money, will not liberate her from the passive title, because the lands were her father's, albeit the price was not paid. And if any man should buy a barony of land, and give bond for the price, if his apparent heir should intromit with the rents of the lands, he would be liable as behaving as heir, albeit he paid the price of the lands, after his predecessor's decease. THE LORDS repelled the defence proponed for the defender, bearing, that her intromission was by virtue of a right acquired by her from Linthill; in respect of the reply proponed for the pursuer, bearing, there being a right formerly granted by Linthill in favour of the defender's father, the defender gave back that right of wadset to Linthill, and took a new right from him in her own name, which they admitted to the pursuer's probation.

Sir P. Home, MS. v. 2. p. 629.

1687. January 26.

JOHN JOLLY Merchant in Edinburgh against The VISCOUNT of KENMURE.

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THE debate, John Jolly merchant in Edinburgh, against the Viscount of Kenmure, on the passive titles, was advised; and the LORDS found it a passive title, that he had given back a tack of teinds which was for years to run, and had taken a new one in his own name. See the like found before in Stair's Institutes, B. 3. T. 7. But they found the Viscount's allegiance relevant to purge this passive title, that he bruiked by an expired comprising, providing always that the comprising expressly mentioned and contained tacks of teinds; which was thought too favourable for apparent heirs.

Fol. Dic. v. 2. p. 29. Fountainhall, v. 1. p. 443.

* * * Harcarse reports this case :

1686.—*March*—. My Lord Kenmure being pursued as representing Lord Robert, upon this passive title, that he, the defunct's heir-male, had intromitted with teinds, whereof his predecessor had died in the possession by virtue of tacks yet unexpired;

Answered; The procuring a tack from the bishop, and paying a grassum to him by the defender, (who was not master of the charter-chest that was sequestered,) being *error facti invincibilis*, ought not to make a passive title.

Replied; An apparent heir cannot pass by the predecessor's rights, and acquire new rights of the same subject; and the defender's predecessor's right to the teinds uplifted, was notour in the country.

THE LORDS sustained the passive title; but thereafter stop till November.

1687.—*February*—. IN the foresaid cause at the instance of Jolly *contra* the Lord of Kenmure, mentioned *supra*, March 1686; it was farther *alleged* for the defender, That the tack of teinds was appraised, and the legal expired before Lord Robert's death. *2do*, The defender offered to prove, that he had a factory from the appriser, in case the legal were not expired; which allegances the LORDS found relevant *separatim*; and it was not pleaded by the pursuer, that Lord Robert died in possession of the teinds, though the legal expired.

Harcarse, (HEIRS.) No 64. & 67. p. 12.

1698. *January 28.*

EARL OF AIRLY and URQUHART *against* SIR WILLIAM SHARP.

THE LORDS advised the cause pursued by the Earl of Airly and Urquhart of Knockleith, his trustee, against Sir William Sharp of Scotsraig, as representing his uncle, Sir William Sharp of Stonyhill, on the passive titles, for payment of 9000 merks, contained in his ticket and obligation. And Sir William having deponed, he denied any intromission with the charter-chest, or writs of his uncle's lands; but acknowledged, his uncle, five days before his decease, gave Sir James Cockburn the key of his closet (where some of his writs lay) to deliver to him, who was then absent; and having received the same after his uncle's death, he opened the closet, and went in with Cockburn and Sir Thomas Moncrieff, and afterwards he entered several times alone, but meddled with no papers, save what were his own by the assignation his uncle had made to him of all his personal estate. From this oath it was *argued* for Airly, That it was sufficient to prove behaviour as heir, which was inferred not

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Intromission with the defunct's writs being referred to the apparent heir's oath, he deponed he intromitted with no writs but what were his own, in consequence of an assignation made to him by the defunct of his personal estate; this was found not to