*** Harcarse reports this case:

No 30.

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 apprised, and the legal expired before Lord Robert's death. 2*do*, The defender offered to prove, that he had a factory from the appriser, in case the legal were not expired; which allegeances 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.

1

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

The Lords advised the cause pursued by the Earl of Airly and Urquhart of Knockleith, his trustee, against Sir William Sharp of Scotscraig, as representing his uncle, Sir William Sharp of Stonyhill, on the passive titles, for payment of 9000 merks, contained in his ticket and obligement. 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

No 31.
infer behaviour, though, in his oath, he owned his entering the closet where the defunct's writs lay, without either the presence or the warrant of a judge.

only from intromission with the rents of their predecessor's lands, but likewise with his writs, with which no apparent heir should meddle *brevi manu* at his own hand, without the presence and authority of a Judge, and making of an inventory. *Alleged* for Sir William Sharp, That *gestio pro hærede* is only inferred by meddling with a charter-chest, and the writs and evidents of the defunct's lands; but here it was only the entering into a closet, and touching no papers relating to heritage, by which *gestio pro hærede* is inferred, but only the writs of his personal estate, whereunto he had right; 2*do*, Meddling with the writs of a moveable fortune is not *gestio*, but vitious intromission, which in law is purgeable by any *titulus coloratus*. But Sir William had more; for he had a legal and valid disposition from his uncle to his whole personal estate, which was a sufficient warrant for his intromission, and must purge the passive title; 3*tio*, You having no other probation but by my oath, you cannot divide it, but must take it complexly; and I have deponed I took out no papers but what I had right to by assignation from my uncle. *Answered*, Whereas it is denied, that he meddled with the charter-chest, this is *lis de nomine*, and a playing on the ambiguity of the word; for many have no charter-chest, properly so called. But it is all one, if the apparent heir contrectate the defunct's papers, whether they be in trunks or cabinets, or in a closet and study, or in shelfs, or lying on a table in a lock-fast room. And it is a great mistake to assert, nothing infers behaviour but meddling with writs of lands; for Sir William's entering where his uncle's writs lay was an immixtion *per universitatem*, and it is not sufficient to exoner him, that he took away none but what he was assigned to; for, 1*mo*, This is to depone *in jure*, which law does not allow, in making himself judge what he had right to; and, suppose his uncle had disponed to him a part of his lands, Sir William's deponing that he took out no more writs but the evidents of the room disponed to him, would *nullo modo* exoner or excuse him from behaviour; 2*do*, The quality of his oath, that he took out no more writs but his own, is wholly incompetent and extrinsic, and noways to be regarded, unless it were otherwise proved; and his right by assignation from his uncle can be no title to intromit with the writs at his own hand, after his uncle's death, without the warrant of a Judge: And, on the 28th of June 1670, in the case of Eleis of Southside against Carse, No 27. p. 9668. the Lords found an apparent heir's granting a receipt of the charter-chest was a behaviour; and February 1682, (after the time of Stair's printed decisions,) between Innes of Cockston and Duff of Drummuir, No 28. p. 9670. the meddling with a charter-chest was a *gestio*, though received from an appriser, whose right was expired, and legal run. Sir William's Lawyers cited the common law, *l.* 20. *D. De acquir. vel omit. hæred.* where *gestio pro hærede est magis animi quam facti.* It must be considered, *quo animo* he meddled. And the tract of decisions favour him; as 8th July 1628, Dunbar against Lesly, No 26. p. 9668. where simple intromission with writs, where no use is made of them, does not import behaviour; and 22d March 1628, Farquhar

against Campbell, No 5. p. 9654.; 26th February 1663, Cuthbert against Monro, No 24. p. 9666.; 4th July 1665, Innes against Wilson, *infra, h. t.* and 17th July 1666, Ogilvy against Gray, No 42. p. 9684. And seeing there is neither law nor custom against such intromissions, whatever inconveniencies may follow, Sir William ought to be assoilzied. And the Lords, for preventing the danger arising to creditors, may make an act of sederunt, regulating the case, and prohibiting such clandestine intromission in time coming, and declare it shall infer a passive title hereafter, as the LORDS did in the known case of Glendonwyne against the Earl of Nithsdale, in 1662, *infra, h. t.*; or may procure an act of Parliament *pro futuro*.—THE LORDS, by a scrimp plurality of six against five, assoilzied Sir William, and refused to divide his oath, though most were convinced this might embolden apparent heirs to embezzle their predecessor's writs *in necem creditorum*; but some thought it hard to begin the preparative here.—*See* QUALIFIED OATH. No 31.

Fol. Dic. v. 2. *p.* 29. *Fountainhall, v.* 1. *p.* 817.

1698. *February* 26. MURRAY *against* BLAIR.

No 32.

MURRAY of Levistoun having pursued Blair of that Ilk, on the passive titles, for payment of a debt of his father's; which being referred to his oath, he deponed, he being put in the fee of his father's estate at the age of six years old, he meddled with no other papers of that charter-chest, but what concerned the lands disponed to him. Which being advised, the LORDS thought this different from Sir William Sharp's case, *supra*, 28th January 1698, No 31. p. 9673. a charter-chest being *nomen universitatis*, and found him liable. Blair finding the hazard of the decision laying him open to all his father's creditors, he immediately transacts with Levistoun, and gets up the hail process from the Clerks, particularly the oath, and burns them. Boyle of Kelburn, and the other creditors who were attending the event of this cause, give in a bill, craving the process might be secured, and the Clerks who had lent it up ordained to call it back. Some argued, that parties agreed might take up their papers, and do what they pleased with them. Others *answered*, That a party might take up his bonds, or other writs produced by him, as instructions; but it was *pessimi exempli* to give up principal oaths, or depositions judicially taken; for these became common evidents to all concerned, and to burn or cancel these might be pursued criminally and punished. THE LORDS did not determine this, being the last day of the Session; but ordained the Clerks to do diligence against him who had given his receipt for the process, that the Lords might know what had become of it.

Fol. Dic. v. 2. *p.* 29. *Fountainhall, v.* 1. *p.* 829.