Here however there is sufficient ground to relieve the defender, by setting aside the service altogether, in a proper action brought for that purpose. No 74.

THE LORDS remitted the cause to the Lord Ordinary, in order that a reduction of the service might be brought by the defender.

Lord Ordinary, *Gardenston.* Act. *Wight.* Alt. *Maconochie.* Clerk, *Robertson.*
C. *Fol. Dic. v. 4. p. 44. Fac. Col. No 168. p. 263.*

1789. *January 27.* HUGH GORDON *against* ALEXANDER CLERK.

No 75.
An heir-at-law, who, as such, had concurred with a gratuitous disponee in heritage, in granting a discharge of an heritable debt falling to the heir, but from enjoying which he was precluded, by the disponee's claims of relief from the ancestor's debts, found not thereby to incur the passive title of *gestio pro hærede.*

JOHN CLERK executed several special deeds of settlement, by which he conveyed to James, one of his younger sons, all his moveables, and also his whole heritage, but an heritable bond for L. 60, that being omitted in the enumeration contained in the different dispositions.

On the death of John Clerk his debts far exceeded his executry-funds. Afterwards, when the heritable bond came to be paid, Alexander, the eldest son, joined with James in granting the discharge; the former denominating himself "the heir at law," and the latter "the disponee and executor" of John Clerk.

James having become insolvent, Gordon, a creditor of John Clerk's, sued Alexander for payment of the debt, as having in that manner incurred the passive title of *gestio pro hærede.*

The defence stated was, that the debt had been conveyed in a general disposition to James, so that the discharging of it by Alexander was an inept and insignificant proceeding. It turned out, however, that no such general disposition had been made; and the Court finally "repelled the defence."

The defender having appealed to the House of Peers, "the cause was thence remitted to the Court of Session, without prejudice, with liberty to the defender to produce such proofs as he could, that James Clerk, at the date of the discharge, was entitled to the debt of L. 60."

When the cause thus came again into Court,

The defender *pleaded*; James Clerk, who was his father's executor, was also his disponee in heritage; while the defender, as heir-at-law, had right to the undisposed of security for L. 60. Now, as the executry-funds fell far short of the personal debts, James was entitled to attach the subject falling to the heir-at-law, in order to extinguish those debts, that the right might be preserved to him, which, as a singular successor, he had obtained by his father's settlements. In the subject of the discharge, therefore, the defender had no real or substantial interest; and it would be hard to construe an act, which could not reasonably be done, with any view to his own profit, into the passive title of *gestio pro hærede.* "Passive titles are not now so strictly attended to as they were formerly." Ersk. b. 3. tit. 8. § 83. Even at a more early period relief was

No 75. given in a case not dissimilar to the present. Harcarse, 16th December 1682, Thomson *contra* Anderson, No 80. p. 9736.

Answered; No act of behaviour as heir can be conceived more complete than that in question, done not only in the character but under the appellation of heir-at-law; l. 20. *D. De acquirend. vel. amittend. hæred.* Stair, B. 3. T. 6.; Bankt. B. 3. T. 6.; Ersk. B. 3. T. 8. § 82. Nor is there any room for the defender's plea of favour, in opposition to a passive title so salutary in guarding against the fraud of heirs. The law should act with a constant and regular operation, giving in all cases a settled effect to settled principles, however individuals may happen to be affected; nor, in truth, is any thing more favourable than a due and steady application of the same law to all cases falling under it. If this be departed from, a *jus vagum et incertum* will be introduced, under which no man can know to what he should trust; and it is better that one man should suffer by his own inattention or fault, than that the law, and through it the security of the whole subjects, should be injured. Accordingly heirs are held to be liable, even where there is not the least suspicion of intromission; Stair, July 1672, Foulis *contra* Forbes, No 59. p. 9711.; July 2. 1743, Hutchison *contra* Menzies, No 66. p. 9722.; HERITABLE AND MOVEABLE, Sect. 28.; Ersk. B. 3. T. 8. § 84.; Bankt. B. 3. T. 5. § 102. Nor is the case quoted from Harcarse different; for the defence there was, that the debt had not been discharged. At the same time it is to be observed, that James could have no occasion for a claim of relief against the L. 60 security, because it was only *quoad* the excess of the debts beyond that part of the disponer's estate, that the disposition to James was reducible at the suit of creditors.

The Lord Ordinary again repelled the defence; and the defender reclaimed to the Court, when it was

Observed on the Bench; As the Court, in the case of Maitland of Pitrichie, No 70. p. 9730.; in that of the Creditors of Ayton, No 74. p. 9732.; and in other instances, have given relief against an actual service, when there was no intention to represent; so, *a fortiori*, is that indulgence due here, where the claim is laid on the mere appearance of *gestio pro hærede*.

The COURT altered the Lord Ordinary's interlocutor, and "sustained the defence against the passive title of *gestio pro hærede*."

Lord Ordinary, *Alva*. Act. *M. Ross*. Alt. *Lord Advocate*. Clerk, *Gordon*.

S. *Fol. Dic. v. 4. p. 41. Fac. Col. No 56. p. 98.*

1791. *May* 13.

No 76. Where the intromissions of the heir have been

The CREDITORS of BRYCE, WILLIAM, and GEORGE BLAIRS, *against* DAVID BLAIR.

AFTER the death of Bryce Blair, and his two sons William and George, who were proprietors of certain lands in the county of Dumfries, David Blair, their