SECT. IV.

Intromitting with the Predecessor's Writs and Evidents.

No 26.

1628. *July* 8. Dunbar *against* Leslie.

Bare intromission with evidents, no other deed being done thereon, was not sustained to the effect of behaviour. See No 28. p. 9670.

Fol. Dic. v. 2. *p.* 16. *Durie.*

*** This case is No 15. p. 5392, *voce* Heirship Moveables.

No 27.
Intromission with a charter-chest, but not upon inventory, and keeping it more than a year, found to infer behaviour, altho' the apparent heir gave a bond to be accountable, and had never any benefit by, nor intromission with the estate.

1670. *June* 28. Eleis of Southside *against* Charles Carse.

Richard Carse of Fordell, during his minority, granted a bond to his sister Anna Carse in liferent, and Katharine Eleis her daughter in fee, for the sum of 4000 merks; which being assigned to James Eleis of Southside, he did pursue Charles Carse as heir to Dr Carse his father, who was heir, at least behaved himself as heir to the said Richard, granter of the bond, in so far as the defender's father, Dr Carse, being apparent heir-male to the said Richard, did revoke all deeds done by him during his minority, which revocation was registered in the Sheriff-court books; as likewise, did intromit with the charter-chest of the whole writs and evidents belonging to the said Richard of the estate of Fordell, whereof he granted a receipt, and did keep the same for the space of two years until he died. It was *alleged* by the defender, That albeit he was heir to his father Dr Carse, yet the passive titles libelled were not relevant to make his father represent Richard Carse of Fordell his nephew; 1*mo*, Because his father's being only apparent heir-male by revocation of his nephew's deeds, who was minor when he granted this bond, did not behave himself as heir, unless he had served himself heir and intented reduction thereon, which he never did; 2*do*, His intromission with the charter-chest could not infer *gestionem pro hærede*, because there being an heir of line who had tutors, and the Doctor being apparent heir-male, any intromission he had with the charter-chest, was upon an agreement and receipt bearing an obligement to make forthcoming to any who should have best right, which being granted *intra annum deliberandi*, and that he might advise that the lands were provided to the heirs-male, could not infer *gestionem pro hærede* to make him liable to the whole debt, seeing he never made any use of the said writs, nor did serve himself heir, nor ever had any benefit of the estate. The Lords did sustain the first defence, and found that a naked revocation, whereupon nothing followed, did not infer a behavi-

our, albeit there were a brieve raised to serve heir, seeing it was never served nor retoured, which deeds were *meræ voluntatis sed non actus legitimi*; but they repelled the second, and sustained the Doctor's intromission with the charter-chest to be a behaviour as heir, seeing it was not done upon an inventory, and that he had never offered to deliver the same by the space of two years; which interlocutor seems very hard, seeing his intromission could not be called vitious, being upon an agreement with the tutors of the heirs of line, and the receipt bearing a bond to make forthcoming, and that he never made benefit of the estate. No 27.

Fol. Dic. v. 2. p. 28. Gosford, MS. No 284. p.

*** Stair reports this case:

MR RICHARD CARSSE of Fordel, having granted a bond of 4000 merks, to his sister in liferent, and after her decease to her daughter, she assigns the same to James Eleis her brother, who now pursues Charles Carsse as heir to Dr Carsse, who behaved himself as heir to Mr Richard Carsse the debtor, in so far as he intromitted with the charter chest, and gave a receipt thereof to Arniston, bearing, that he as heir to Mr Richard Carsse, had received his charter-chest, and all the writs and evidences belonging to the house of Fordel, which charter-chest he kept two years, and died, it being in his possession; likeas, he raised brieves to serve himself heir, and subscribed a revocation of all deeds done by Mr Richard in his minority, which is registrate; the defender *alleged*, the condescendences are no ways relevant, for as to the charter chest, as he might have pursued Arniston to produce it for inspection *ad deliberandum*, so he might receive it from Arniston voluntarily for that same effect, which cannot import behaviour, unless he had made use of some of the writs belonging to him as heir; and this being an odious universal passive title, any probable excuse ought to liberate, especially this Doctor, who was a Doctor of Divinity, residing in England, and ignorant of the law of Scotland, and who never enjoyed the least benefit of Mr Richard's estate, and the defender was content to restore the charter-chest *re integra*, and to instruct by the oaths of the friends consenters, in his discharge, that there was nothing wanting, but it was in the same case he received it; as for the taking out of brieves, albeit it signified the Doctor's purpose to have been heir, yet behaviour must include an act of immixtion, or medling with the heritage, and *animus adeundi*, as having no other title or intent, but as heir; and as for the revocation, it is a null act, operative of nothing, but for reduction which was not intented, and is no meddling with the heritage. The pursuer *answered*, That there could be no more palpable and unquestionable immixtion, than by the receipt of the defuncts whole writs and evidences, and that without so much as making an inventory thereof, to have been subscribed by the haver of the charter-chest and him; neither has he qualified his receipt, so as that he might deliberate, but bears him an apparent

No 27. heir, to have received the same simply, likeas he detained the same two years; and as to his ignorance, *ignorantia juris neminem excusat*, and the pursuer is in this also favourable, that this bond is a provision granted to Mr Richard's sister, and heir of line, and the Doctor, and this defender was but heir of tailzie of a further degree.

The Lords found the condescendence relevant conform to the receipt of the tenor foresaid, and the retention of the charter-chest without inventory so long; whereas it was moved amongst the Lords, that they had often times refused vitious intromission against any representing the intromitter, unless sentence or pursuit had been against the intromitters in their own life, whether that should be extended to behaviour as heir, where there was no pursuit against the behaviour in his own life; but the behaviour being so considerable and universal, with all the evidents without inventory, it did not take with the Lords, neither did the party plead it; but the Lords did not find that the taking out of brieves, or the revocation imported behaviour.

Stair, *v.* 1. *p.* 686.

1682. *February* 16.

Laird of Coxtoun *against* Adam Duff of Drummore.

No 28.
The reverse of No 26. p. 9668.

The tutors of an apparent heir (whose predecessor died after expiring of the legal of an apprising against him) having intromitted with the charter-chest and writs, and received from the pupil after his majority a discharge of all their actings and intromissions; and he having continued in possession of these writs after he was major, he was pursued *ex eo capite*, as *passive* liable for his predecessor's debt.

Alleged for the defender; He could not be liable, because the writs being apprised before the defunct died, they belonged not to him but to the appriser; and the defender meddled with them only *custodiæ causa*, without disposing of any of them; and the discharge to the tutors was general, making no mention of papers.

Answered for the pursuer; If apparent heirs were allowed to put their hands amongst the defunct's writs, they might endanger the diligence of creditors, by abstracting and destroying evidents; and it is now a matter of three years since the defunct's decease.

The Lords sustained the said discharge, and continuation of possession of the writs, as a passive title against the defender; although formerly July 8th 1628, Dunbar *contra* Leslie, No 26. p. 9668.; it was otherwise decided.

Fol. Dic. v. 2. *p.* 29. *Harcarse*, (Passive Titles.) *No* 29. *p.* 7.