ANSWERED,—The Lords cannot forget the constant uninterrupted law-war waged betwixt Sir D. Arnot and Sir William Bruce, all his lifetime, which will soon convince them there was neither collusion nor simulation on Sir William's part. But, *2do*, This is utterly *jus tertii* to Bailie Whyte, and only competent to one who has taken out a second gift; which you have not.

4to, OBJECTED,—Gifts of escheat do not extend *ad acquirenda*, but only to the goods, lands, and possessions they had at the time of the denunciation to the horn, and were purchased and acquired within the year of rebellion; but, *ita est*, this adjudication is long after.

ANSWERED,—The principal laid down is not so sure; for, in inhibitions, it is *indubitati juris* that they reach *etiam acquirenda*. But the truth is, this adjudication was no new purchase, for the original debt for which it is led was long prior. And how can a right coming in the rebel's own person, (as this adjudication did,) pretend to compete with the donatar to his escheat? Yet see Hope's Major Practics, *25th and 28th June* 1622, *Laird of Caprinton;* and *23d January* 1684, *Wilson and Kennedy*, observed by President Newton.

5to, OBJECTED,—That Sir William adjudged for this very debt, and entered in possession of the lands of Arnot; and is now overpaid.

ANSWERED,—Sir William's intromission was by virtue of other rights upon Arnot's estate above the value: and so his possession can never be ascribed to extinguish this right.

The Lords repelled the objection in respect of the answers; and preferred the donatar to the rents of the lands in question. *Vol. II. Page* 701.

1707, 1710, 1711, 1712. The EARL of WINTON *against* HAY of DRUMMELZIER and his LADY, and JAMES SEATON, Brother to Viscount Kingston.

1707. *November* 11.—GEORGE, Earl of Winton, after seven or eight years' absence out of the country, being now returned, gives in a bill to the Lords, complaining of Mr James Seaton, brother to the Viscount of Kingston, that, on the death of Mr Christopher Seaton, the Earl's brother, in 1703, the said Mr James had officiously intruded himself, without any legal warrant, into the possession of his house of Seaton, and intromitted with his whole rents, besides his casual estate of coal and salt; and usurped the management of his girnels; so that now, on his return, he keeps up the keys of his closets and granaries: And though he, as master and proprietor, might open them summarily at his own hand, yet he resolves not to make a forcible entry, lest it might be pretended there were papers there left which truly are carried away, as his horses and furniture are: And therefore craves the Lords would name Mr John Stodhart to open the cabinets and granaries, and inventory the papers, and measure the wheat and salt; and that Mr James Seaton, and John Gordon, his servant, may be warned to be present thereat, that the same may be an exoneration to the said Mr James of his intromissions *pro tanto*, and that my lord may have access to his own estate.

The Lords thought the desire of the bill so reasonable, that, without ordaining it to be seen and answered, they granted the desire thereof, in so far as con-

cerned the putting the Earl in possession of his own estate; the time of opening and measuring being always intimated to the said Mr James, to attend if he pleased.

Whereupon, Mr James applied to the Lords by a bill, representing, that his entry upon the administration of that estate was by the advice of the nearest friends of the family, and judged absolutely necessary for preservation of it from perishing and being rent in pieces by the creditors' diligence; especially there being little or no account given by any, of my Lord's design of returning: And that all the benefit he has by overseeing is, that the creditors have taken out decreets against him for intromissions, and threaten to distress him every day; so he begs his accounts may be taken off his hands, and he relieved of the rigorous diligence of creditors against him, and a full exoneration given him of his service; seeing *officium nemini debet esse damnosum.*

The Lords thought his offering to count summarily for his intromissions was very fair and reasonable. But he urging to be immediately relieved, *ante omnia,* by the Earl, of the engagements and diligences he lay under; they ordained his counting to proceed; for *non constat* what balance he may have in his hand to relieve himself. *Vol. II. Page* 391.

1710. *June* 24.—[See the Report of this date, Dictionary, page 12,096.]

1711. *November* 23.—Lord Bowhill reported George, Earl of Winton, against Hay of Drummelzier and his Lady, and Mr James Seton, brother to the Viscount of Kingston. When this Earl was abroad in his travels, both his father, mother, and Mr Christopher his brother, died. He being at a great distance, and no letters from him, Mr James Seton, as one of the nearest friends to the family, entered to the possession of the estate, took up his residence in the mansion-house of Seton, uplifted the casual rent of the coal and salt, sold the victual in the girnels, and uplifted all the rents he could get from the tenants; till, at last, a factor was put in by the Lords; and then the Earl came home in November 1708: And he, after search and examination of the condition of the estate, alleging he discovered great embezzlements, not only of his rents, but with the moveables and plenishing of his house, and writs, with the most precious jewels and ornaments of the family; he raises a process against Drummelzier, Mr James Seton, &c. libelling their unwarrantable intrusion into his house and intromission with his rents and moveables, without any order of law, or authority of a judge, whereby he is damnified in upwards of 4 or 500,000 merks; and craves they may be each of them found liable *in solidum,* conform to his oath *in litem,* though each particular libelled cannot be proven. Which conclusion was thus conceived, because Mr James, the principal intromitter, not being responsal, Drummelzier, as accessory, was designed to be reached; as law, in ejections and spuilyies, makes all the parties guilty liable *in solidum,* as if, *ex societate criminis,* they were bound conjunctly and severally.

Alleged,—This was a process of a very nice nature; for, however it was palliated under the smooth name of a vitious intromission, yet truly they were attacked as robbers and depredators; and all pretended against Drummelzier and his lady is, that they carried away some horse-loads of moveables out of the house of Seton, to Whittingham. The thing is utterly mistaken; for, at the Earl's burial, there being use for napery, silver plate, and linens, to entertain the

persons invited, he brought of his own to Seton, and after the burial took it home again; which is all the rise and foundation for that calumnious story. And, as to Mr James' meddling, it was both honest and necessary; for, after Mr Christopher's death, and no account if the Earl was dead or alive, the worthy friends of the family ordered him to look after the estate, especially the coal and salt, which otherwise would certainly have perished: and this being an estate then wholly abandoned and derelinquished, and none to look after it, he acted as *negotiorum gestor* for the heritor then absent, and merely for custody and preservation; and has always offered to count to the Earl for the least sixpence of intromissions he can charge him with, and for exact diligence as to what he did not recover. And no law law will require any more of him but simple restitution of what he meddled with. And it were strange logic to make Drummelzier countable for another man's intromission. And the learned Craig says, vitious intromitters *solummodo tenentur in partes viriles;* and so did the Lords find on the 17*th January* 1668. And it is sufficient to exculpate Mr James Seton, that no relation nearer to the family appeared to act in that dismal juncture, *custodiæ causa*: so what he did, he judged his indispensable duty, and deserves a reward rather than such an accusation. And any probable ground excuses *a spolio;* as was found in *December* 1681, *Adam* and *Fullerton;* where intromission was done *in aperto sole* before friends and witnesses, it only amounted to restitution. And Dirleton, at the 26th June 1677, observes, it was not found a spuilyie where the party was not in possession of the goods *ut sua*, as the Earl here in this case was not; and so could not be done *reluctante domino*. And where it was to prevent confusion and disorder to his affairs, it was such a colourable title for *bona fides*, that it cannot be charged with such hard words. Intrusion it was not; for there were none violently dispossessed. It was less a spulyie, not being *animo lucrandi*, but as *curator bonis pro iis conservandis*, without any design of appropriation; and was so decided 14*th December* 1633, *Kirkwood:* See the like, 22*d January and* 14*th March* 1635, *Mackay;* 30*th January* 1662, *Irving*; 8*th January* 1611, *Elliot*. Mr James sees a *hæreditas jacens*, none nearer to own it. Was not this both a probable and charitable call to preserve it from ruin, the proprietor being at a great distance, and not likely to appear; nor any commission from him, empowering any other to act; it being known that he declined to write or subscribe any paper whatsoever? See the 19*th January* 1634, *Ruthven* against *Gairns*; and 18*th January* 1681, *Cant.* He might more justly have been censured if he had stood an idle spectator, and seen the estate of Winton sunk and shipwrecked. So he had a plain call both from nature, law, humanity, and honour, to offer his assistance as *negotiorum gestor hæreditatis jacentis*; which presupposes it is done without any command or commission; for then he would act *ratione mandati*; and which negotiation is most profitable, *ne res absentium pereant* before their return. And the common necessities of human affairs encourage such interposition of friends, and gives them a recompense; even though, by some accident, a coal-work or other business should miscarry, providing they acted prudently, as one would do in his own affairs.

Answered for the Earl,—That whatever varnish they colour their intromission with now, he experimentally finds it was to his infinite loss. And his entry can never be justified, being without all authority of a judge, to whom he ought to have applied for a warrant; and he who enters otherwise, does it on his hazard

to meddle with a subject they had no right to. *L.* 11 *C. Unde vi*, says well, *omnes enim scire debent quod suum non est hoc ad alios omnibus modis pertinere. 2do*, As you had no warrant, so you made no inventary as you ought to have done; which Manoz d'Escobar, *De Ratiociniis Administratorum, cap.* 9, *sec.* 14, lays down as a certain rule: *astrictus est inventarium facere et calculatoribus exhibere, alias pœnis legalibus subdatur. 3tio*, He was a violent and officious intruder; for Bailie Smith, the chamberlain of Tranent, and the other servants, were willing to continue their trust, *susceptum perficere munus*, but he thrust them out and debarred them; so the pretended fear of the Earl's affairs running into confusion evanishes in smoke; for there was neither confusion nor disorder but what you made yourself, by so irregular an entry, when it was notour the Earl was alive, and means used to intercept any letters giving him account how his affairs stood; which is an instance not to be met with in the history of any civilized nation; and which takes off his specious pretence of his acting *bona fide* and as *negotiorum gestor;* for whoever ingeres himself into such an office, and debars others, who were in possession, of acting, the law esteems such a one *prædo*, and is called a *pro-possessor*, who can give no other reason of his possessing but only *possideo quia possideo;* which is the very character of a robber. And the Act of Sederunt, in February 1692, obliged them to have sealed up the writs and precious moveables in lockfast trunks or rooms, and delivered the keys to the next judge ordinary, till the apparent heir were advertised: but nothing of this was observed; but he masterfully sits down in the house, and on the estate, as if he had been the Earl, and acted as *dominus* over the tenants and salters, without any power but what he assumed to himself. And though *factum unius cujusque sibi tantum, non aliis, debet nocere*, yet that takes not place where the intromission is not with single particulars, but *per aversionem et per universitatem*, and total as here; where the law justly presumes fraud. And this defeats all his pretences to colourable titles and *bona fides* to excuse the spuilyie; for he had no manner of necessity to intrude, the former managers being willing to continue till the Earl's return, or his sending his orders and directions thereanent; but he debarred them, and took the sole administration on himself, turning out the Earl's former servants, and bringing in new ones of his own. And, *esto* it were taken on the foot of a *gestio*, he must still be liable when *alius diligentior et commodior* offered to manage; but he secluded them, because they reclaimed against his usurpation.

The Lords thought the point strait, to find them all liable *in solidum:* and therefore, before determining that relevancy, inclined to make an act, before answer, to prove the nature of their intromission, and several kinds of it. But, because the libel was not special enough, therefore they declared they would hear them in their own presence, to condescend more particularly on the facts the Earl charged the defenders with. *Vol. II. Page* 676.

1712. *January* 12.—The Lords advised the debate betwixt the Earl of Winton and Mr James Seton and Drummelzier, mentioned *supra*, November 23d, 1711; and the Lords were generally clear, that the defenders were not all in the same case; Mr James's intrusion and intromission being plain, but Drummelzier's accession being only *ope vel consilio*. Some moved, that the most expedite way would be to turn the action to a count and reckoning, wherein Mr James should be ordained to give in a charge and discharge against himself, in

terms of the late Act of Sederunt, 20th November last; with certification, if farther intromission be proven against him, he shall be liable in the double. And it was alleged this must be easily formed; seeing the books would instruct what coals were then lying on the hill, and how much salt in the girnels, and what victual was in the lofts, at the time of Mr James's entry. Others thought this was to state him in the favourable case of a *negotiorum gestor;* whereas, the Earl convened him as a predonious possessor, and expected his *juramentum in litem* against him. Therefore the Lords, by a plurality, allowed a conjunct probation, before answer, of the facts mutually alleged; from which it would appear in what quality and character he should afterwards count; though this method seemed to retard the process and counting. *Vol. II. Page* 702.

1693, 1695, 1704, 1709, 1711, 1712. SARAH CAMPBELL, ANDREW BLAIR, her Husband, and JOHN WILSON of SPANGO *against* JAMES FARQUHAR of GILMINSCROFT.

1693. *January* 24.—FARQUHAR of Gillmilnscroft against Wilson of Spango. The Lords refused to stop execution upon Spango's clear bond, on the pretence of his reduction; seeing his reduction was not against the bond, but only against the pursuer's right of assignation thereto; which was reserved to him, as accords. *Vol. I. Page* 549.

1695. *November* 29.—IN the mutual actions pursued between James Farquhar of Gilmilnscroft and John Wilson of Spango,

The Lords having advised the probation, they sustained Andrew Blair's title as nearest of kin to the deceased Campbell of Glassnock; and found the disposition granted by the said Glassnock to Gilmilnscroft was proven to be signed the day before his decease, and that he was then so stricken with a lethargic palsy, that he did not know the nature of it, nor was the same read, nor the tenor thereof intimated to him, nor he capable to understand it; and therefore reduced the disposition, and assoilyied Spango. But in regard it resulted from the testimonies, that John Ferguson, the notary, had been very instrumental in drawing and offering that disposition to the sick man, and yet afterwards entered into a contract with the heir to quarrel it, and was to have a share of the gain in the event of the reduction; therefore it was contended, that he ought to be liable in damages to Gilmilnscroft, in whose favours the disposition now reduced was granted, he having concurred in subverting a right he had been employed to procure.

The Lords thought, the being a witness in a writ could not preclude the witness from impugning the same; but, where one was active to reduce a deed which he had managed and carried on, they thought this might be construed a breach of trust.

The question then arose, How this could be drawn in upon this process, where Ferguson was not a party?

Some moved, that they should be remitted to pursue him by way of action. But the Lords finding that, as the fact seemed fraudulent and unfair, they might try it instantly; and therefore ordained him to be cited *incidenter* in this same