had cleared with one another, and the other parties concerned, he ought to have no advantage from it; and, further the circumſtances of the caſe, and the vouchers founded on by the reſpondents muſt find greater credit, than any evidence that could ariſe from the oaths of perſons whoſe characters are unknown, and who were not particularly acquainted with the whole facts in queſtion.

If the appellant really ſold ſuch parcel of herrings to the royal deputation, it was upon his own riſk, having acted only in purſuance of the limited commiſſion given to James Sheriff, who neither lawfully could, nor did conſent to the diſpoſing of the herrings but upon the condition of being reloaded with iron and deals: he had 4 per cent. upon the whole cargo, for procuring the ſaid iron in exchange for the herrings; and if the iron had really afterwards been delivered by the royal deputation, when the price advanced, the appellant neither would have accounted, nor could he have been compelled to pay the difference to the reſpondents of the advanced price upon the iron; ſo that the ſale, if any ſuch there was to the royal deputation, was at his own peril.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutors therein complained of be affirmed.* Judgment, 23 April 1725.

For Appellant, *Dun. Forbes. C. Talbot. Will. Hamilton.*
For Reſpondents, *C. Wearg. C. Areſkine.*

Sir Alexander Maxwell of Monreith, Bart. *Appellant;* Caſe 124.
Andrew Houſton, Eſq. *Reſpondent.* Dalrymple, 28 Jan. 1715.

Et e contra.

30th *April* 1725.

Vitiation.—An objection to a deed that it was erazed in *ſubſtantialibus* is repelled.
Vitious Intromiſſion and *Geſtio pro Hærede.*—A perſon grants an entail of his eſtate to his ſon, and his heirs male whatſoever; with the burden of his debts; the ſon grants a back bond, in conſideration of ſaid entail to pay the father's debts: after the death of the father and ſon, the daughters convey the eſtate real and perſonal of their father to a creditor, without making up titles by inventory or confirmation; and the creditor grants bond to protect them againſt what they had done, and from the debts of their father; the heir male of entail having got back the eſtate ſues the ſaid creditor for debts of the father as a vitious intrometter, in which he obtains decree; and the Court alſo find the moveable debts due to ſuch intrometter to be extinguiſhed: but their judgment is reverſed; and the creditor is ordered to account for actual intromiſſions only.

WILLIAM HOUSTON of Cultreoch on the 17th of January 1691, made a ſettlement and entail of his eſtate to himſelf in life-rent, and to William his ſon, and his heirs male whatſoever,

ever, with the burden of payment of the grantor's debts: and at the ſame time William the ſon executed a bond whereby he became perſonally bound to relieve his father of certain debts he had contracted before making the entail. William the father dying in February 1709, leaving his ſaid ſon and four daughters; and the ſon dying in March thereafter without iſſue, the eſtate by ſaid entail deſcended to the father of the reſpondent the brother of William Maxwell the elder; and the reſpondent's father in July 1709, was duly ſerved heir of proviſion in the ſaid eſtate, and after his death the reſpondent obtained a charter thereof, under the great ſeal upon which he was duly infeft.

The eſtate of Cultreoch being conveniently ſituated for the appellant's father, he had procured from William the father, and William the ſon a deed, dated 30th April, and 3d May 1708, whereby they became bound under a penalty of 2000*l.* Scots, to prefer Sir William Maxwell to any other purchaſer in caſe they ſhould ſell theſe lands; and ſoon after the death of the two Williams, father and ſon, the appellant's father brought an action againſt the daughters, on the ground of the ſaid deed, and of certain debts ſecured on the eſtate which he had purchaſed: two of the daughters who were married, and their huſbands, and two who were ſingle, diſponed and conveyed to the appellant (his father being then dead,) the whole real and perſonal eſtate of their father and brother, for the conſideration of a ſmall ſum: and the appellant granted them an obligation to indemnify the daughters and their huſbands againſt all debts owing by the father and brother, and all actions that might be brought againſt them on that account; theſe deeds were dated in April and May 1709.

The appellant thereupon took poſſeſſion of the charter cheſt of the family, and carried the ſame to his own houſe, having broken the ſeals put on it by the proper judge; and he alſo poſſeſſed himſelf of the whole eſtate real and perſonal; and having poſſeſſed the perſonal eſtate for ſeveral months without confirmation, he afterwards to guard himſelf againſt any bad conſequences therefrom, procured himſelf to be confirmed executor, and got the confirmation to be antedated ſeveral months.

In the mean time the reſpondent having made up a title by ſervice, charter and ſaſine, the appellant brought an action againſt him for payment of certain debts to which he had acquired right, and which were ſecured upon the eſtate; and the reſpondent thereupon commenced his counter action concluding that it ſhould be declared, that the daughters as vitious intrometters, and having behaved as heirs to their father, and Sir Alexander Maxwell, as repreſenting them, were bound to pay all the father's debts; and that the debts in the perſon of Sir Alexander were thereby extinguiſhed.

The appellant appeared, and ſtated in defence to this action, that there was a manifeſt erazure in the deed 1691, under which the reſpondent claimed, for which he inſiſted the deed was invalid; in the clauſe ſettling the eſtate upon William the father in life-

life-rent, and William the ſon *and his heirs male whatſoever* as it ſtood in the deed, after the words *heirs male*, there was a plain erazure of two or three words, and thereon was written the word *whatſoever*: The Court on the 20th of June 1711, "ſuſ- Appealed
"tained the deed of ſettlement, and repelled the objection from by Sir
"founded on the alleged vitiation thereof." And to this inter- Alexander.
locutor they adhered on the 10th and 17th of July thereafter. Ditto ditto.

The reſpondent then inſiſted on the vitious intromiſſion by the heirs general, whom the appellant was bound to indemnify; and the appellant having ſtated his defence, that he had obtained confirmation before commencement of the action againſt him, as ſufficient to defend him from the effects of vitious intromiſſion; the reſpondent anſwered that not only the confirmation was antedated, but that the appellant had intromitted with more than he had given up in the inventory. The Court on the 13th of De- Ditto ditto.
cember 1711, "ſuſtained the appellant's defence as relevant;
"and allowed both the appellant and reſpondent a proof of the
"ſeveral facts alleged by them:" and, after various proceed- Ditto ditto.
ings, this interlocutor was adhered to on the 13th of February 1713.

The appellant now preſented a petition to the Court praying that the ſheriff depute, and juſtice of the peace who inſpected the charter cheſt, when it was ſealed up at the deſire of the daughters upon the death of William the ſon might be examined as to what writings they ſaw; and alſo that the Court would allow a probation of William the father's, and William the ſon's circumſtances at the times of their death; and that certain creditors, to whom the appellant alleged his father had paid their debts, by the directions of William the father, might be examined as to the reality of their debts, and the payments ſo made to them, by which it might appear how far the appellant was a juſt creditor for the ſums claimed by him. The reſpondent in his anſwers acknowledged that ſome of the debts had been truly owing, but he inſiſted upon the ground of law, that the whole debts were extinguiſhed by coming into the perſon of one who was obliged to pay them. The Court on the 25th of February 1713, "re- Ditto ditto.
"ſuſed the deſire of the petition as to proving Cultreoch's cir-
"cumſtances, or taking the oaths of the petitioner's cedents;
"but allowed a conjunct probation to both parties for proving
"what papers were in the charter cheſt."

The objection made to the confirmation by the reſpondent, was, that though ſigned in October 1710, it bore date the 13th of July 1709, being the date of the decree dative: the appellant offered to prove that ſuch was the common practice of the Court which granted the confirmation; but the Court on the 29th of July Ditto ditto.
1713, "refuſed the deſire of this petition."

Witneſſes having been examined, the cauſe was heard, and the Court on the 9th of December 1714, "found that Sir Alexander Ditto ditto.
"Maxwell by his bond of relief to the heirs of line is in the ſame
"ſituation as to the debts of Cultreoch, paid and tranſacted by him,
"as the ſaid heirs of line would have been, if they had paid and
"had

" had tranſacted the ſaid debts:" and to this interlocutor
Appealed from by Sir Alexander. the Court adhered on the 12th of January 1715. On the 21ſt
of ſame month, the Court pronounced the following interlocutor:
Ditto ditto. " having again conſidered the ſtate of the proceſs, and adviſed the
" ſame with the teſtimonies of the witneſſes adduced, and writs
" produced for probation, with the debate, and petition given in
" by Sir Alexander Maxwell, and anſwers thereto by Andrew
" Houſton, find the defence of extinction of heritable debts in
" the perſon of a vitious intrometter not relevant to be alleged by
" an heir male; but ſuſtain the defence of extinction of move-
" able debts paid by a vitious intrometter: and find the qualifi-
" cations of vitious intromiſſion againſt Sir Alexander Maxwell,
" relevant and proved: and likewiſe find the qualifications of the
" paſſive title of Behaviour as heir, relevant and proved againſt
" the heirs of line: and find that Andrew Houſton now the
" heir male, is not obliged to relieve the heirs of line, by the
" quality of the diſpoſition granted by Cultreoch elder to his ſon
" and heirs male; and the bond granted by Cultreoch younger
" obliging him, his heirs, executors, and ſucceſſors to relieve his
" father of all debts." And to different parts of this interlocutor
the Court adhered on the 12th of July and 9th of November
1716.

After a further hearing of the cauſe, however, the Court on
Dittoditto. the 12th of July 1717, " found that abſtracting from the diſ-
" poſition by Cultreoch the elder to his ſon, and qualities thereof,
" there is no relief competent to the heirs of line, or to Sir
" Alexander Maxwell, as coming in their places againſt the heir
" male for any debts of Cultreoch's, paid by the ſaid heirs of line,
Ditto by Houſton. " or by Sir Alexander himſelf: but having conſidered the
" diſpoſition by Cultreoch elder to his ſon, and qualities thereof,
" found that the debts of Cultreoch elder, were burdens on the
" ſubject diſponed by him to his ſon, and that Andrew Houſton
" as heir male to the eſtate of Cultreoch, contained in the ſaid
" diſpoſition, in right and virtue of that diſpoſition is obliged to
" relieve the ſaid Sir Alexander and the heirs of line of all the
" ſaid debts." To this interlocutor the Court adhered on the
Appealed fr: m by both. 29th of November and 12th of December 1717; and on the 10th
Ditto ditto. of June 1718 they " ordained Sir Alexander to give in a conde-
Appealed from by Sir Alexander. " ſcendance of the debts due by William the father at the time
" he made the entail."

Ditto ditto Afterwards on the 22d of January 1720, the Court " ſuſtained
" the defence proponed for Andrew Houſton, that Sir Alexander
" Maxwell had intrometted with the moveables which belonged
" to Cultreoch the elder, or to his ſon after their deceaſe, rele-
" vant *in tantum* to extinguiſh the debts of the ſaid Cultreoch,
" and his ſon in the perſon of Sir Alexander the intrometter to
" the extent and value of theſe moveables intrometted with;
" and alſo found that relief is not competent to Sir Alexander,
" againſt Andrew Houſton, for any ſums in new bonds granted
" after the date of the diſpoſition by the ſaid Cultreoch the elder
" to his ſon, though it were inſtructed that theſe new bonds

" were

" were both innovations of old bonds, dated before the ſaid diſ-
" poſition, and coming in place of theſe old bonds."

The original appeal was brought from " ſeveral interlocutory " ſentences or decrees of the Lords of Seſſion of the 20th of June, " 10th and 17th of July, and 13th of December 1711, the 13th " and 25th of February, and 29th of July 1713, the 9th of " December 1714, the 12th and 21ſt of January 1715, the 12th " of July and 9th of November 1716, the 12th of July, 29th " of November and 12th of December 1717, the 10th of June " 1718, and 22d of January 1720." Entered, 25 Nov. 1724.

And the croſs appeal from " part of the abovementioned inter- " locutor of the 12th of July 1717, and of an interlocutor of the " 29th of November 1717." Entered, 3 March 1724-5.

On the Original Appeal.—Heads of the Appellant's Argument.

The ſettlement, under which the reſpondent claims, is plainly erazed in the moſt material article, the very part on which the reſpondent's right depends. There might, and probably have been words in that ſpace, which now ſtand obliterated, that would have defeated the reſpondent's claim; and the reſpondent produced no manner of evidence that the deed ſtood ſo erazed at the time it was executed, or at any other time during the grantor's life, though ſurely he muſt have been ſuppoſed capable of making ſuch proof had the fact been true; and by the deed as it ſtands erazed, the eſtate, on failure of heirs male, muſt have devolved on the crown in prejudice of the grantor's own daughters, and the iſſue female of his ſon, a ſettlement which no man in his ſenſes can be ſuppoſed capable of having made.

Suppoſing this deed valid notwithſtanding the erazure, yet as it was dormant, and not publiſhed in the proper manner by regiſtration, or infeftment, all the debts contracted by the grantor during his life were as much a charge upon the eſtate by the undoubted law of Scotland, as thoſe contracted before the date of the ſettlement; and the making any diſtinction by cutting off the one kind, and allowing the other, is erroneous.

As this deed was dormant, the heirs at law might lawfully enter on the eſtate; and the appellant's purchaſe was honeſt and fair, the firſt offer of the eſtate having been intended him by the deceaſed, the undoubted proprietor: in theſe circumſtances the entry of the heirs, and the appellant's purchaſing could be attended with no penalty.

The heirs at law by intrometting with their father's eſtate, did not ſubject themſelves univerſally to their father's debts, if it be true that the eſtate with which they intrometted, did not deſcend to them by reaſon of the ſettlement under which the reſpondent claims, becauſe, by the law of Scotland, *acting as heir* is inferred only from a perſon's meddling with an eſtate to which he has an undoubted title to ſucceed. And as the heirs at law, whom the appellant was bound to indemnify, were not liable for the debts, ſo neither could the appellant in conſequence of his bond, becauſe that bond and the obligation therein contained

became void, the moment the conveyance in conſideration of which it was granted was ſet aſide.

The appellant's intromiſſion with the perſonal eſtate was innocent in virtue of a proper title, an aſſignment by the daughters, to whom the perſonal eſtate had formerly been aſſigned by their father; and they had alſo a legal title to it as neareſt in kin; ſo that on the ſuppoſition that this perſonal eſtate is, in the firſt place, liable to anſwer the debts of the deceaſed, the appellant can be no further liable than to account for ſo much thereof as he received, in terms of the interlocutor 22d January 1720.

With regard to what the reſpondent founded upon the poſſeſſion had by the appellant of the charter cheſt; the daughters, no other right appearing, had a title to the deeds; and they being aſſigned to the appellant he might warrantably take them into his poſſeſſion. The argument of the reſpondent goes only to this, that it is poſſible the debts now claimed by the appellant might have been paid off by the deceaſed in his lifetime, and that the bonds might have been locked up amongſt his writings, and might have been taken from thence by the appellant, who might again have procured freſh aſſignments from the original creditors in his own name. But this ſuggeſtion muſt have been totally deſtroyed by the evidence which the appellant offered, had he been permitted to bring it, viz. the oaths of the creditors, and of the writers of, and witneſſes to the ſeveral aſſignments; moſt of theſe debts too were ſecured by heritable bonds, and if theſe had been paid off, the diſcharges muſt have been recorded within 60 days, ſo that the taking away ſuch diſcharges could have been of no uſe.

Heads of the Reſpondent's Argument.

By the known laws of Scotland, the heirs of line, or heirs general, who ſeize upon the perſonal eſtate of their predeceſſor without making an inventory of it, or who conceal a part of the eſtate, and make up imperfect inventories, which is called *vitious intromiſſion*, are bound to pay all the debts of their predeceſſor: and ſuch heirs general as intermeddle with the charter cheſt, or writings, or any part of the real eſtate of their predeceſſor, which is called *behaving as heirs*, are bound to pay his whole debts real and perſonal, and to relieve the heir of entail of them. Nor can this burden upon the heirs general be reſtricted to the value of the eſtate they ſucceeded to, even though they entered with the uſual ſolemnities, unleſs they have in a regular manner made up faithful inventories of the eſtate before intermeddling with it.

The erazure in the deed 1691, ſtated by the appellant, is no more than may commonly happen in every writing; nor is the deed vitiated in any ſubſtantial part of it. To ſhew how groundleſs the objection was, the reſpondent all along offered to allow any words to be ſuppoſed, that could be contained in that ſpace, and were conſiſtent with common ſenſe, and the uſual form of ſuch writings: but none can be contrived that will give the appellant any advantage.

The

The appellant did indeed get himſelf confirmed executor, but the confirmation was antedated ſeveral months, to give a colour to his defence on that head: and though the inventories were made up ſeveral months after the appellant had intrometted with the perſonal eſtate, yet he concealed part of the goods he had actually ſeized; which, by the law of Scotland, does unqueſtionably render him liable for the whole perſonal debts.

With regard to the proof offered by the appellant by the oaths of creditors, the reſpondent acknowledged that ſome of the debts were truly owing; but he contended that others were ſimulate, or had been paid and the bonds retired; and to examine perſons upon oath to eſtabliſh debts due to themſelves would have been inconſiſtent. But the reſpondent reſted upon this unqueſtionable ground of law, that the debts, whether true or not, were extinguiſhed by coming into the perſon of the appellant, who was obliged to pay them.

Heads of the Appellant's Argument—On the Croſs Appeal.

Though the perſonal bond of William the ſon be mentioned and recited in the deed of entail, yet it is by no means made a condition of the entail, nor inſerted in the procuratory of reſignation, or precept of ſaſine, without which, by the law of Scotland, it can never be a real burden on the eſtate.

By this perſonal bond William the ſon obliges himſelf, his heirs, executors, and ſucceſſors, to pay the debts of his father, and by the known law of Scotland, the heirs general are in the firſt place obliged to perform this bond, and to relieve the heir male of it; which was known and underſtood by William the father when he accepted of the bond.

Even upon the footing of William the ſon's perſonal bond being a real burden on the eſtate, yet where William the father obtained a diſcharge of any debt due to him at the time of making the entail, that debt could be no longer a burden on the entailed eſtate, but muſt be conſidered as extinguiſhed, and cannot afford a pretext for ſubjecting the heir of entail to new debts contracted after the date of the deed of ſettlement: and at all events ſuch part of the eſtate as Sir Alexander intrometted with, ſhould be applied towards payment of the debts of William the elder.

Heads of the Reſpondent's Argument.

The deed of ſettlement under which the appellant claims is made ſubject to the payment of the grantor's debts, and there ſeems to be no reaſon for the appellant to claim that eſtate, without performing the conditions of the deed under which he claims; that is, paying off the debts before that time owing by the grantor: and in equity he ought to relieve the heirs at law, and the reſpondent as claiming under them, of all the debts, both before and after the date of the conveyance, the eſtate being truly ſubject to them.

Judgement, 30 April 1725.

After hearing counſel on both ſides, and due conſideration had of what was offered by them in theſe cauſes, *It is ordered and adjudged, that the interlocutory ſentences or decrees of the* 20*th of June,* 10*th of July, and* 17*th of July* 1711, *be affirmed: and that all the other ſubſequent interlocutors complained of by the appellant Sir Alexander Maxwell be reverſed; and that the croſs appeal of the reſpondent Andrew Houſton, Eſquire, be diſmiſſed; and that in the further proceedings in this cauſe, the Lords of Seſſion do allow to the appellant Sir Alexander Maxwell all ſuch debts as he ſhall make out a right to, and that he be anſwerable to the reſpondent for ſo much of the perſonal eſtate, and of the rents and profits of the real eſtate as ſhall be made out that he hath received; and if it be proved that the appellant Sir Alexander Maxwell hath abſtracted or taken away any particular papers out of the charter cheſt, the ſaid Lords ſhall, for ſo doing, proceed againſt him as is juſt.*

For Sir Alexander Maxwell,	*Dun. Forbes.* *Will Hamilton.*	*C. Talbot.*
For Andrew Houſton, -	*C. Wearg.*	*Will. Fraſer.*

Part of the judgment, here reverſed, is ſtated in the Dictionary as an exiſting deciſion, vol. 2. *Paſſive Title*, p. 44.

It is alſo ſo ſtated by Lord Bankton, b. 3. tit. 9. § 16. and by Erſkine, b. 3. tit. 9. § 55.