1671. *June* 13. PITREICHY *against* The LAIRD OF WOODNEY.

ALEXANDER SEATON, merchant in Edinburgh, being debtor to Udney in 2000 merks, and to Pitreichy in 1400 merks; and one Ruthven being debtor to him in a sum near equivalent to them both, he for their payment assigns them in and to the sum contained in Ruthven's bond; and though the Laird of Udney, (as having the larger share,) got the keeping of the said assignation, and its grounds and warrants, yet there was an express quality in the assignation in favours of Pitreichy, *vid.* that Udney was assigned to the said bond for himself, and for the special use and behoof of Pitreichy, to the effect he, out of the said sum, might be paid of 1400 merks addebted to him by the cedent. Notwithstanding of this clog, it would appear Udney transacts for the haill, pays himself, and leaves Pitreichy to the lang sands. Pitreichy raises a summons against Udney for declaring there was such an assignation with a quality in his favours, and how it was in Udney's custody, and how without his knowledge and consent he had uplifted the said sum, both his own part and his, and had given back the bond; and therefore craved he might be decerned to pay to him his share, or put him in his own place as to the said bond and assignation.

Against this it was ALLEGED,—That Pitreichy could never be heard to reclaim against the upgiving of the bond, in so far as his eldest son and apparent heir, who was *præpositus negotiis*, his trustee general, him whom he had employed to do his business here at Edinburgh, went along with him in his transaction with Ruthven the debtor; approved thereof; received in behalf of his father 500 merks of the sum addebted to him; accepted of a bond for the superplus from one Campbell a merchant in town; and granted the defender a bond to cause his father hold firm and stable what he had done in relation to that particular; took home Campbell's bond with him to his father; told him what he had done; who approved of his service, accepted the bond as his own evident, and kept it more nor a year in his own custody; till, discovering Campbell his debtor to be not so responsal, he attempts to overthrow and undo the said rational transaction made by his son either by his previous warrant, at least *id ratum habuit*, consequentially because being certiorate thereof *non reclamavit non contradixit.*

To this it was ANSWERED by Sir George Lockhart,—That trustee general was not *nomen juris;* and he entreated Sir J. Cunyghame to give him a name or title in law by which the son could do any such business without a mandate from his father. Next I have oft heard in law cases wherein the father can oblige the son, but remember not any wherein the son can bind the father without his consent. *3tio,* The assignation expressly ordaining the 1400 merks to be paid to the father and not one word of the son, there is no shadow nor pretext of law can be brought, why the son's interposing in that matter wherein he had no interest, should prejudge his father. *4to,* The son, as minor and lesed at the time, has revoked the said deeds, and raised reduction thereof upon the foresaid heads. *5to,* If they will say that what the son did was by order from his father, we will find it relevant of consent, or that the father *ratum habuit* in the general; but for the qualification that the father must be presumed to have ratified, in regard he took the bond from his son, kept it beside him a certain space, complained not that his son had overacted, the same is a most irrelevant condescendence,

noways inferring the meanest degree of a homologation; for what should he have done with it, should he have thrown it away? *6to,* The son never consented to the upgiving of the bond and assignation, because it is offered to be proven, if need be, that he had given back the same by the space of a year before the said pretended assent given by the son.

REPLIED,—It had *nomen juris,* in so far as the son was *utilis negotiorum gestor* to the father.

DUPLIED,—It was never heard in the world that *negotiorum gestor* had power to uplift or discharge sums. *2do,* The defenders intimated the plea to young Pitreichy's Advocate, viz. to Mr. William Moir, whom they minded to pursue, as him who induced them to make that transaction. And for the manner they qualified the father's ratihabition, the defender craved the Lords' answer thereon.

This Halkerton refused, except they would say that old Pitreichy accepted of Campbell's bonds from his son as his own evident; which was no otherwise probable than by his oath.

Advocates' MS. No. 167, *folio* 97.

1671. *June* 13. ALEXANDER and OTHERS, *against* The LORD and MASTER of Salton.

WILLIAM GRAY of Pittendrum, Provost of Aberdeen, dying without heirs of his body, and his father being a bastard, his estate falls to the king as *ultimus hæres.* The gift thereof is made over to the Earl of Hadington, who obtains general declarator thereon; and before his death assigns the right of the gift and declarator to Alexander Bailie in Aberdeen, one Mercer, and one Johnstone there. They finding the laird of Philorth, now Lord Salton, debtor by bond to the said William in the sum of 10,000 merks, they pursue him to make payment to them as having right in manner foresaid of that sum.

ALLEGED,—They cannot be decerned to pay the said sum; because they offer them to prove by the pursuer's oath of knowledge, that the money contained in the bond pursued on is a part of the price of the lands of Pittendrum, bought by Philorth from the said Wm. Gray; which being, then they must have retention and compensation of this sum in their own hands, till the pursuers perform to them such deeds as the said William, (in whose right they are come,) stood bound by the contract of alienation of these lands to do, viz. to purge one Ramsay's inhibition, to procure a valid renunciation of my Lord Newbyth's comprising, &c. which incumbrances being cleared, he is content to pay the said superplus, conditioned to be retained by him in the mean time.

ANSWERED,—Though this retention would have met Wm. Gray the defunct, if he had been insisting on this bond; yet the same can in no law be obtruded to thir pursuers, who in effect are singular successors to him, and his Majesty's donatars, who pays no debt, neither acknowledges any creditors.

REPLIED,—The king succeeds two manner of ways, *vel ex delicto vel ex caduco;* if *ex delicto,* then indeed he pays no debt; but where he succeeds *ex caduco,* (as in the case where he is *ultimus hæres,)* then *hæreditas transit cum omni onere;*