

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 Haddington, 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*;

and as he has *commodum*, so he grudges not to take the *incommodum* with it. And this is now above all controversy, the Lords having found in this same very declarator of the Earl of Hadington's gift, and in a pursuit by Provost Gilbert Gray against the said Earl, for payment to him of some sums justly addebted to him by the defunct, (both which *vide apud me* in my collection out of the register of decreets; the one is at the 21st January, 1664, and the other at the 20th January, 1665,) that the donatar in such cases must be liable to all the lawful creditors of the defunct; especially considering that the said Earl, author to thir pursuers in their right, either by his back-bond, or by an act and ordinance of Exchequer, was bound to satisfy the defunct's creditors by assigning them to so much of the bastard's estate as would do the same; only the Lords declared he should not be liable *ultra vires hæreditatis*, and that his own estate should be free thereof.

DUPLIED,—It is confest, the Lords after very contentious debate in that cause, did find that a donatar of this kind must pay debt *secundum vires hæreditatis*; so that it would be very relevant to elide this pursuit, if Salton had any bond or other liquid debt owing to him by the said defunct Gray, whereon he sought compensation; but it is altogether against law and reason that he should seek to compensate his own clear liquid bond with such illiquid facts, *de quibus non constat* whether they incumber the land or no; so that all that in form and justice can be done here is to decern the bond to be put to execution, reserving to Salton his declarator against the pursuers, for fulfilling to him the deeds wherein Gray stood bound to him, and which he would make to be the pretence of a retention; and to purge the lands of the said inhibitions and apprisings.

To which it was TRIPLIED,—The pursuers in no reason can be in a better case than the defunct Gray would have been in; but *ita est* he would have been forced to perform these obligations ere he could have sought this money; *ergo*, next they have a declarator depending for fulfilling these obligations granted by the defunct.

The Lords found the pursuers behoved to fulfil the defunct's deeds ere they could obtain sentence on this bond; whereupon a day was assigned them for doing thereof.\*

*Advocates' MS. No. 168, folio 98.*

1671. June 13. Anent the EXECUTION of an ARRESTMENT.

A MESSENGER employed to use an arrestment, in the subscribed copy he gives to the party in whose hands he lays the arrestment, mentions only 1000 merks; in the execution he gives to the party at whose instance the arrestment is made, he sets down 2000 merks less or more arrested by him in such a man's hands. Seeing there is here a discrepancy between the copy and the execution; *quæritur*,

\* *At bona cum sua quodammodo causa a fisco sunt vindicanda l. 17, p. 5to. D. ad Senatusconsultum Trebellianum. Vide infra, No. 288, and Vandus there cited. Vide Craig, page 255; and Harprechtum ad principium Tituli Institutionum, de hæreditatibus quæ ab intestato, numero 510.*