detained his haircloth, gantries, and brewing looms, which put him to the expense of renewing them.

ANSWERED,—The Commissaries committed no iniquity; for you got them in good repair; and, if they failed, your legal remedy was by requisition of the setter; and, if he had neglected, then to have craved a visitation from the Dean of Guild, and his warrant; in which case you might have repaired yourself, and got deduction and allowance of it in the fore-end of your tack-duty. But you was so far from taking this method, that you paid your rent without seeking retention. *2do*, I am a singular successor; and so not liable for any damages before my right: and these being personal prestations, they can only affect the setter, my author, whom you may pursue to fulfil his part of the tack. And, as to any deteriorations since my right, I am willing to repair them. And, though my right flow from my brother, yet I offer to instruct the adequate onerous cause of my purchase. And, for the hair-cloth, &c. I have offered them back.

REPLIED,—My payment was on your obligement to allow my reparations, when instructed. And, though the tack be expired, yet the bruiking *per tacitam relocationem*, you are as much liable as your author was to perform his mutual obligements: for *tantum operatur consensus tacitus in casu tacito quantum expressus:* and *L.* 13, *sec.* 11, *D. Locati, et L.* 16 *C. Eod.* says, *qui tacuerunt videntur eandem locationem renovasse.* And it were a great discouragement to poor tenants, if their master's selling the land should deprive them of their damages sustained in his time, and not reach singular successors: his voluntary deed should not wrong them. And, in the strictest law, all prestations arising *ex natura rei* follow the thing into whatever hands it comes; and therefore this clause, obliging the setter to keep the house in repair, being both useful and necessary, must affect the singular successor as well as the original setter.

The Lords inclined to think the reparation and damages even followed singular successors; but, the case being new, they remitted it to the Ordinary to be farther heard. *Vol. II. Page* 737.

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1712. *June* 17. COLONEL ERSKINE and PRESTON of VALLEYFIELD *against* The EARL of KINCARDINE.

COLONEL Erskine and Preston of Valleyfield pursuing the Earl of Kincardine, for extinguishing, at least restricting, a right he had; and referring it to his oath, and he claiming his privilege as a peer, that he ought only to give his word of honour, refused to depone: the Lords repelled this, and over-ruled him. But then, he still declining, and the Colonel craving a caption to bring him in, the Lords found, by the Articles of the Union, that he had the privilege of an English peer, not to be liable to personal diligence by caption; but considered our law must not be defective in such cases; and, if one compulsitor fail, then another must be introduced to make it effectual; which can be no less than the value and import of the cause, which you make me lose by refusing to depone. But, because that damage cannot be instantly liquidated, therefore the Lords, as an interim remedy, granted letters of diligence to charge the Earl to depone; and that under the penalty of £50 sterling in case of his contumacy; but prejudice to the Colonel to constitute and liquidate his farther damage as

accords. And it being asked how that certification should be made effectual? it was said, when that existed, it behoved to be by poinding and arresting in the tenant's hands, and putting the creditors summarily in possession of his estate by sequestration. *Vol. II. Page* 739.

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1712. *June* 19. JACOB MOIR *against* SIR ALEXANDER MAXWELL of MONREITH.

MOIR against Maxwell. William Houston of Cultreoch having no male issue, but four daughters; and the lands lying convenient for Sir William and Alexander Maxwells of Monreith, they enter in a transaction with these four heirs-portioners, to purchase the lands from them. But, in regard that, by their serving heirs, they exposed themselves to the debts, which were considerable, he gave them a bond of relief to free them of the debts. After they are served and infeft, Andrew Houston of Calderhall instructs that these lands of Cultreoch were tailyied to the heir-male, which he was; and so evicted the lands both from the daughters, as heirs of line, and from Monreith their assignee. Jacob Moir being a considerable creditor to Cultreoch, he pursues Monreith for payment of his debt, on thir grounds,—That he had accepted a disposition from the heirs, and stated himself in their vice and place; and, as they would be liable *gestione pro hærede*, so must he; likeas, he was obliged to relieve them by his backbond; and *Stio*, had intromitted with the moveables before confirmation; and so was vitious intromitter, in terms of the 20th Act 1696.

ALLEGED for Sir Alexander,—That the onerous cause for which he granted the bond of relief was the daughters' disposition of the estate to him, which proved wholly void and ineffectual, through the heir-male's reducing their right, and getting himself preferred; so that passive title of behaviour would not so much as reach the heirs of line, who now find their mistake that they were not *alioqui successuri*, as they thought, not knowing then of the heir male's right; and if *gestio* could not strike against them, much less can it affect Sir Alexander deriving a right from them, which is now found to be no right at all. So it is a synallagma, whereof the one branch has failed, and is either *sine causa* or *causa data causa non secuta*. And, as their disposition to him falls to the ground, so must his correspective obligement of relief to them fall in consequence, the one being the mutual cause of the other.

ANSWERED, 1*mo*,—The disposition of the heritage was not the sole onerous cause of his relieving them; but he likewise took an assignation to the moveable estate, to which the heir-male could pretend no right: so the disposition subsisting *quoad* that, there remained still an onerous cause for supporting the bond of relief. 2*do*, This bargain was a plain purchase of Cultreoch's whole succession *per universitatem et aversionem*; and, if he has made an incautious transaction, *sibi imputet et discat postea cautius mercari*; for this *emptio hæreditatis* is like the buying of a *jactus retis*. If there be nothing in the net when drawn, you can claim nothing,—*l.* 2 *D. de Hæred. vel Act. Vend.* And the eviction arising from no deeds of the heirs of line, he must sit down with his loss.

REPLIED,—The disappointment arising *ex casu improviso*, from unforeseen accidents, no law punishes such innocent mistakes. And the assigning the moveables can never make him liable, being of a small and inconsiderable value,