of a charter for composition, bearing a *de novodamus*, was relevant *per se* to infer a behaviour; as likewise, that he had possessed or granted right to the Lady Couper to possess her own liferent right, being reducible, as granted on death-bed; but, as to the last point, of causing comprise for his own debts, contracted before he was apparent heir, whereby he pretended not to fall under the act of sederunt, I was not decided, but it seems the law can make no difference, seeing the foundation is the same whether the bonds be before or after, viz. that taking an indirect course *animo de fraudandi creditores*, where the defunct had little or inconsiderable debt of his own, whereby they intend to possess their predecessor's estate, which may be great, and frustrate all creditors, by putting them to great expenses of plea, of necessity to compone with them as they please. No 51.

Gosford, MS. No 887. *p.* 568. *& No* 920. *p.* 596.

1711. *June* 28.

THOMAS DICK and WILLIAM ERSKINE *against* JOHN CARSTAIRS of Kinneuchar.

No 52.
An adjudger, after the legal was expired, sold part of the lands, but his right being doubted by the purchaser, the apparent heir of the debtor granted a bond, obliging himself to deliver to the purchaser the writs of the lands, to purge incumbrances, and to give absolute warrandice. Found that this imported a behaviour.

THOMAS DICK and WILLIAM ERSKINE being creditors in considerable sums to the deceast Carstairs of Kilconquhar, *alias* Kinneuchar, they pursue John Carstairs, now of Kinneuchar, his son, for payment, on the passive titles, and condescended on this act of behaviour, that Mr John Wood having adjudged his father's lands, did, after the legal, sell a part of them to Sir Philip Anstruther; but, in regard his right was looked upon as dubious and insufficient, and he gave only warrandice from his own fact and deed, Sir Philip the purchaser declined to pay an adequate price, or rely on Wood's right; and therefore Carstairs, now of Kinneuchar, gave him a bond of the same date, and before the same witnesses, expressly relative to the minute, obliging himself to deliver to Sir Philip the writs of the lands, to purge incumbrances, to warrant absolutely at all hands, and against all deadly; and, for his better security, to enter heir in certain lands which did belong to his grandfather, to make Sir Philip's warrandice more effectual; and he found Sir William Bruce, his father-in-law, cautioner for performance of the premises; by which deeds it was evident he was the principal disponer, and Wood only a mere name to cover and palliate the contrivance; and that he had plainly meddled with the charter-chest and writs, which was *per se* a sufficient passive title without any more. *Alleged* for the defender, This was one of the nicest passive titles had ever been fallen upon, and it being odious to subject a man to an ocean of debt, where his *animus gerendi* does, not appear, but, on the contrary, a formed design and intention not to represent, his concurrence being merely to do a kindness to his father's creditors, without a sixpence of benefit to himself, Wood having got the price, and purged some preferable writs therewith: But where the

No 52. apparent heir has no actual intromission, nor any deed of disposal and alienation made, where can this passive title be fixed? Indeed, if any part of the price had come to his pocket, he would not struggle, seeing *pretium succedit loco rei*; but Mr Wood was the sole disponer, transacter, and bargainer, and all the obligations he entered into had nothing dispositive in them, but mere accessories, as to deliver a progress, warrant the right, &c. which are no part of the transmissision of the property, but might all be done by a stranger, as well as by an apparent heir, and so can never infer a *gestio pro hærede*, which being a *fictio juris* can go no farther than the reality. So the deeds must be such as are peculiar to him as heir; but if they be common to him and an extraneous person, they can never bind the character of behaviour on him; for that were to make the copy exceed the principal: And so determines the learned Voet, *ad tit. De acq. et om. hæred.* § 6. If an heir apparent do such things as may be acted both *tanquam hæres et tanquam extraneus, non intelligitur in tali casu pro hærede se gessisse.* And as to the having the writs, they were not in his hands, but lying beside Robert Carstairs, his father's writer, so he had no intromission therewith; *et in dubio respondendum est pro reo.* Yea, there be stronger cases which will not infer a passive title, such as the apparent heir's corroborating his father's bond; or even paying one of his creditors will not operate to make him liable to the rest. Next, the taking out brieves to serve heir, if he stop there and do not proceed to perfect it by an actual service, it will not import behaviour, as was found 28th June 1670, Ellis *contra* Carse, No 27. p. 9668. And law requires an actual contrectation and meddling with the *res hæreditariæ*, or a disposing thereon, none of which can be subsumed in this case. *Answered*, That it is not to be expected that heirs lying at the watch to defraud their father's creditors, and yet to draw the emoluments, will do positive direct deeds, but contrive all *per ambages* and interposed persons, as Mr Wood is plainly, and *plus valet quod agitur quam quod simulate concipitur.* And his obligements being *ex incontinenti*, is as good as if ingrossed in the disposition, and makes up the principal part thereof, without which Sir Philip would never have paid the price. And what man in his right senses will believe, that an apparent heir would put himself under such strict obligations of delivering the writs, of absolute warrandice, &c. and get nothing for it? And it is remembered, that, about the year 1666, the Lords found an apparent heir liable for giving a renunciation of his predecessor's estate, as having the force of compleating a third party's right, betwixt the heirs of Ord and John Lutfoot, *infra, h. t.* And we are not to consider whether the heir designs a behaviour or not; but we must look to what the law presumes, which Paulus *L.* 9. *D. De acq. et omit. hæred.* very well explains, *si is qui bonis paternis se abstinuit per suppositam personam bona patris mercatus fuerit, perinde eum convenire oportere a creditoribus ac si bonis paternis se immiscuisset.* And it holds just as well in the selling his father's heritage by an interposed person, as it does in buying it; and it is plain Mr Wood was nothing but a cloak and cover to his fraud.

And whereas it is *contended*, Wood was the sole disponer, bargainer, and transacter; it was *answered*, There is a flood and torrent of words, but little thought, verity, or sound reasoning; for Wood only conveys some lame rights; and saves himself by giving no warrandice but from fact and deed; whereas the thing that completes the right is the apparent heir's engagements, without which the purchaser would never have bought them; so it is a plain contrivance to palliate the fraud.—THE LORDS, by plurality, found the apparent heir's granting the bond of the tenor foresaid imported a behaviour; but, on a reclaiming bill, the Lords ordained the case to be farther heard. No 52.

1712. *July* 8.—ERSKINE and Dick *contra* Carstairs, mentioned *supra* 28th June 1711. The deceased Captain Carstairs of Kilconquhar being debtor to Mr William Erskine, Governor of Blackness Castle, William Erskine, his son, pursues John Carstairs, the Captain's son, for payment on the passive titles, which they qualify thus: That Sir Philip Anstruther being to purchase a part of the Captain's lands, the contrivance was, that Mr John Wood, a creditor-adjudger, should be the disponer, not simply as absolute proprietor, but as having right to several adjudications, and who would give no other warrandice but only from his own fact and deed; therefore to make up a complete right to Sir Philip, the buyer, Kilconquhar, the apparent heir, grants a backbond of the same date, and before the same witnesses, with Mr Wood's minute, obliging himself to exhibit and deliver a sufficient progress of the writs of the lands, to purge incumbrances, and to be bound in absolute warrandice, to free the purchaser of all minister's stipends and public burdens preceding his entry; and to make his warrandice more effectual, he obliged himself to enter himself infeft in an estate descending to him by his uncle, and found Sir William Bruce cautioner for that effect. From which premisses the argument of his representing *gestione pro hærede* was pushed thus: Wood was only an interposed name, Kilconquhar was the only true disponer, as being the chief obligant in all the material and essential clauses of a sale or alienation, viz. absolute warrandice, delivery of the writs, (which imported his intromission with the charter-chest) and purging incumbrances, which proved that the price was converted to his utility, being to free and disburden the lands; and accordingly the purchaser got the writs, and is now in the peaceable possession of the lands, who would never have relied on Wood's right, unless Kilconquhar, the apparent heir, had interposed; and he alone gave the finishing stroke to the perfection and consummation of the right, so there cannot be a clearer behaviour. *Alleged*, This passive title of *gestio* requires two things; 1*mo*, *Animus adeundi et immiscendi*; and 2*do*, Actual contrectation and immixtion, none of which appears in this case; for his design was both laudable and honest, to have his father's debts paid out of the sale of his own lands; and no lawyer can pretend, that an apparent heir's paying any of his predecessor's creditors

No 52. voluntarily, subjects him to a passive title *quoad* the rest, and all this arguing is from remote inferences and implication; but passive titles must be inferred from direct positive deeds, according to their definition of being a disorderly illegal immixtion, which implies actual contrectation, whereas not one farthing of the price came to Kilconquhar, but all to the creditors; and Wood is the direct disponer, and the apparent heir only concurs for the purchaser's farther security. It is the proprietor's will by the dispositive clause that only transmits the property. The other clauses of warrandice, writs, and incumbrances, are only accessory, and such as may be undertaken by extraneous persons, who neither by apparency or otherwise, have any right to the subject; and nothing can infer a behaviour but deeds proper *tantum modo* to an heir, and not such as be common to be done either by them or strangers, as the learned Voet *ad tit. De acquir. vel omit hæred.* distinguishes. For if the fact be applicable to any other consideration, it is juster to land it there, than in an unfavourable legal penalty of a passive title; and thus the Lords have explained it, 5th July 1665, Scot *contra* Auchinleck, No 50. p. 9693., where it was found, that a simple renunciation granted by an apparent heir of all pretence or claim he had to the estate, if it did not contain a conveyance of the right, did not infer the passive title of behaviour, even though the apparent heir got a gratuity for his kindness, and so a willing renunciation; and the like was found, July 19th 1676, Nevoy *contra* Lord Balmerino, No 51. p. 9694; and Spottiswood, tit. Heirs, says, *gestio pro hærede* is more *animi quam facti*; and one cannot incur behaviour *sine animo gerendi*. And here, there being no design to prejudge creditors, but rather to pay them, it were beyond measure hard to open a door, not only to pay the debt pursued for, but to let in a flood of creditors far beyond the value of the estate, against one who innocently interposed, and got no part of the price. *Answered*, There have been so many inventions contrived for apparent heirs enjoying their predecessor's estate, and yet defraud the creditors, so that no country has taken more pains to obviate them than Scotland; and allow this once, adieu to the passive titles, for such as Mr Wood shall be a cover to heirs to possess, a cover to acquire in titles, a cover to convey to confident trustees, and all for the apparent heir's behoof, who then may safely undertake all the substantial parts of the transmission; but our law cannot be so defective in remedying such palpable frauds, and the intromitting with a charter-chest is a gross behaviour; and though they came by Robert Carstairs, his father's agent, yet he was but a hand; and *qui per alium quid facit per se facere videtur*. And however the old decisions run, that a renunciation for money did not infer a gestion; yet of late, in the case of Lawrence Ord and John Lutfoot, *infra h. t.*, such a renunciation without a conveyance made him liable. The Lords found Kilconquhar's obligement to exhibit a progress, to purge incumbrances, and to be liable in absolute warrandice, with the actual delivery of the writs, inferred the passive title of behaviour. Some of the Lords preferred a temperament, that it should not make him uni-

versally liable, but only *in valorem*, because of the straitness of the case, but this was waved, and dropt at this time. No 52.

Fol. Dic. v. 2. p. 31. Fountainhall, v. 2. p. 652. and 750.

*** Forbes reports this case.

THOMAS DICK pursued John Carstairs of Kilconquhar, as representing his father, Captain William Carstairs of Newgrange, for payment of a sum in his father's bond, and insisted upon the passive title of behaviour as heir, in so far as Mr John Wood, minister of St Andrews, having by a minute of sale, narrating, That there were in his person several adjudications of the lands of Newgrange, wherein the defender's father died infeft, obliged himself to dispone these lands in favours of Captain Anstruther, with warrandice from fact and deed; and *per verba de præsenti*, assigned and disponed for an adequate price to be paid to him; the defender, by a separate writ of the same date, signed before the same witnesses with the minute, and expressly relative thereto, did, for Captain Anstruther's further security, oblige himself not only to exhibit and deliver to him a valid and sufficient progress of the writs of the lands betwixt and a certain day, but also to warrant Mr Wood's disposition at all hands, and against all deadly; nay further, particularly bound himself to purge the lands of certain incumbrances named; and to capacitate him the better to implement, he, as principal, and Sir William Bruce, his father-in-law, as cautioner, obliged themselves, that the defender should enter, and infeft himself in the barony of Kilconquhar, as heir to John Carstairs, his uncle: Which procedure was a manifest behaviour in the defender, as heir to his father; he being in effect the true disponer of his father's heritage, and Mr Wood's name used but as a cover to elide the passive title. For though the minute bears the price payable to, and discharged by him, law and common sense presumes it was not paid at that time, nor ever paid to Mr Wood; because, there remained a great deal to be performed on the disponer's part, as the purging incumbrances, granting a disposition, delivering of writs. Now why would the defender so anxiously have undertaken an absolute warrandice to get money for Mr Wood, who did only oblige himself to warrant from fact and deed? There is nothing more natural to suppose, than that he who receives the price should warrant the purchase, and consequently, that he who warrants the purchase, hath received the price. Besides, the defender may be charged to enter heir upon his obligement of absolute warrandice, and so by his deed only succeeding heirs are debarred.

Alleged for the defender, Mr Wood's adjudications being expired, the absolute right without any reversion was stated in his person, so that none but he could dispone. And there could be no behaviour as heir by the defender's entering *tanquam quilibet* into these accessory obligements to warrant and make good the progress for encouraging the purchaser, out of kindness to the credi-

No 52. tors, which any stranger might have done as an interposing friend or cautioner; for nothing but intromission with the rents or writs can infer a behaviour.—2*do*, To evidence how loth the Lords have been to extend this passive title, apparent heirs renouncing all claim they had in favours of persons to whom their predecessors had disponed, was found to be no behaviour, though they got some gratification for so doing; because, they transmitted no right, July 5. 1666, Scot *contra* Heirs of Auchinleck, No 50. p. 9693; July 19. 1676, Nevoy *contra* Lord Balmerino, No 51. p. 9694; and the defender received no gratification, nor any part of the money. Again, the taking out brieves without actually serving heir, is not sufficient to import behaving, June 28. 1670, Elies *contra* Carse, No 27. p. 9668, though this discovers *animum adeundi*. All which is exactly conform to the common law, *Voet. Comment. in Pandect. Tit. De acquir. et amit. Poss.* § 6.

Replied for the pursuer, Though intromission with writs and rents be the most open and usual, they are not the only acts of behaviour, in so far as the property is more valuable than the rents; and if apparent heirs should be allowed to dispone safely in such a subtle affected way *in fraudem legis*, creditors shall be no longer secure by the passive title. And in the case of ——— Orr, daughter to Lawrence Orr, and Walter Graham, against the Creditors of the said Lawrence Orr, *infra*, *h. t.* an apparent heir's renunciation, being upon the matter a conveyance, was found to make the heir liable *passive*.—Such an obligement granted by an apparent heir differs from the like granted by a stranger, in that the latter doth not operate a conveyance of the property, but only secures the purchaser against any damage arising through defect of the right; whereas an apparent heir's obligement of that nature turns to a conveyance of the property, in so far as the purchaser might thereupon have adjudged the lands from him upon a charge to enter heir in implement of the warrandice, and made them as much his own irredeemable, as if the apparent heir had disponed them.

The Lords found the defender's granting the bond, of the date of the minute, imported a behaviour as heir to his father; and thereafter, July 4. 1712, upon a new hearing and report, the Lords again found, That the defender's granting the bond of the date of the minute, with the delivery of the writs by one James Carstairs, who received them from Robert Carstairs, the defender's father's agent, imported a behaviour. For the Lords presumed the writs were so delivered in consequence of the defender's obligement to deliver them; by doing whereof, Robert or James Carstairs, as his *negotium gerens*, freed him of his obligement.

Forbes, p. 496.