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ALEX. CLERK, Aberdeen, - - *Appellant;*
HUGH GORDON, - - - - *Respondent.*

CLERK
v.
GORDON.

House of Lords, 9th March 1787.

GESTIO PRO HÆREDE—PASSIVE TITLE.—A father had conveyed *his whole* estate, heritable and moveable, to his *third son*, who, in recovering, found an heritable debt of £60, which was not specially embraced in the conveyance. To remove objections to his title to receive and discharge the debt, the father's eldest son and heir-at-law, consented to sign the discharge along with his brother. Held, that this subjected him in the passive title of *gestio pro hærede*. But, in the House of Lords, case remitted back for consideration, and to adduce proof that, at the date of the discharge, his brother was in right to receive the debt of £60.

The appellant, Alexander Clerk, was the *eldest* son of the deceased John Clerk, advocate in Aberdeen. The appellant's father, before his death, conveyed his whole heritable and moveable estate to his *third* son James; and in the course of the latter recovering that estate, it was found that there was an heritable debt of £60 which the settlements did not specially convey, and the debtor, when payment was demanded, having objected to James' title, unless a discharge was got under the hand of the heir at law, or an adjudication in implement expede. The appellant was accordingly solicited by his brother to sign a discharge for the £60 bond. On its being explained that it was a mere form, to dispense with the expense of making up a title by adjudication in implement, he signed the discharges along with his brother,—the latter having three months previously received the money. The question was, on the failure of the father's funds to pay his debts, whether the appellant, the eldest son and heir at law, had thereby subjected himself in liability for his father's debts, under the passive title of *gestio pro hærede?*

By the appellant, who was defender in the action, it was contended, on the special circumstances above set forth, that he had not incurred a passive title by granting a discharge, simply to facilitate his brother's recovery of this small debt,—that he had taken no advantage from that deed,—that his brother had received the money, and had a universal right to receive it, and his signature was only adhibited to com-

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plete the latter's title (otherwise imperfect) to that sum. It was answered, that these circumstances could not redargue the plain language and legal effect of the discharge, whereby he acknowledged receipt of that sum, and discharged his father's debtor accordingly.

Jan. 25, 1785. The Lord Ordinary, of this date, found "that the said "Alexander Clerk behaving as heir to his father, is suffi- "ciently instructed by the discharge founded on by the "pursuer, therefore recalls the commission granted by the "former interlocutor as unnecessary, advocates the cause, "and finds the defender liable in the principal sum, and in- "terest libelled."

Nov. 29, 1785. On two reclaiming petitions to the Court, the Lords
Dec. 14. —— adhered.
Dec. 17, ——

Against these interlocutors, the present appeal was brought.

Pleaded for the Appellant.—The Court of Session has decided that the mere circumstance of signing the discharge, apart from the circumstances and special object for which it was signed, is a behaviour as heir sufficient to subject him in liability for his father's debts. For this proposition, the appellant maintains there is no authority in law, because, when the circumstances under which he signed the discharge are considered—circumstances which must necessarily enter into consideration, before any legal conclusion can be deduced, in order simply to ascertain whether they be such as in law commonly infer a behaviour as heir, it at once appears that they do not make out any such behaviour as heir, that the law recognizes as such. He has not intermeddled with the repositories of the deceased,—he has not taken possession of his papers, or any of his household goods, his jewellery, &c. None of his means, real or personal, has been touched by him. His father's settlement constituted his brother executor, intromitter, and universal legatory of his whole means and estate. He alone intromitted with the universitas of that estate; and all the appellant did was to lend the use of his name to his brother, in order to complete his title to an heritable debt of £60, and thereby save him considerable expense. He is ready to prove, that this alone was the precise extent of his whole interference,—that he never fingered a shilling of that £60,—and that he never manifested any intention whatever, either by this discharge or otherwise, of intromitting with the smallest portion of his

father's estate. Besides, the discharge itself, sufficiently proves all this.—He does not sign it alone, he signs along with his brother, the party alone entitled to, and who alone received the £60. When these circumstances are considered, it plainly appears that no *mala intention*, which is of the essence of the passive titles,—no fraud,—no actual intromission,—and not even an intention of such, can be set up in support of the present interlocutor. The estate too was moveable and not heritable. No infeftment had followed on the disposition in which it was made a burden, and was carried by the father's testament.

Pleaded by the Respondent.—Where a party acts or behaves himself as heir, in any thing or in any way, with respect to his ancestor's estate, he makes himself universally liable for his ancestor's debts. Such is the settled law of Scotland. And the appellant, in the present case, has just done what exactly answers the legal description of behaviour as heir. He has granted a discharge for an heritable debt as such, which is perhaps the most unequivocal act of behaviour as heir that could possibly exist. And it is mere pretence to say, that he gave the money to his brother, or allowed him to receive it, because this is by no means proved; and even if less doubtful than it seems, still, the argument would be immaterial and unavailing, because, in point of fact, the £60 heritable debt was his, as heir at law, and not his brother's, to whom it had not been conveyed, and the discharge was as much a behaviour as heir, and an incurring of the passive titles as such, whether the money was paid to another or directly to himself.

After hearing counsel, it was

Ordered and adjudged "that the cause be remitted back to the Court of Session in Scotland, without prejudice, "with liberty to the defender to produce such proofs "as he can that James Clerk, on the 30th Sept. 1778, "(date of discharge), was entitled to the debt of £60 "due by Raitt, or the trustees of Raitt, mentioned in "the pleadings, reserving such objections to the competency of the evidence as the nature of the evidence "itself, or the period of the cause in which it is produced may be liable to."

For Appellant, *Ilay Campbell, Wm. Alexander.*
For Respondent, *Alex. Macdonald, Sylv. Douglas.*

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SINCLAIR v. YOUNG, &c.

NOTE.—When this case came back to the Court of Session, the Court sustained the defence pleaded against the passive title *gestio pro hærede*, it being observed on the Bench, that as the Court had given relief in the case of actual service, while there was no intention to represent, so *a fortiori*, the same indulgence was due here. —M. 9734.

ARTHUR SINCLAIR of Masilapatam, Esq., *Appellant;*

MARGARET YOUNG, wife of JAMES GORDON, Younger of Cairston, and GEORGE ANDREW, Writer in Edinburgh, her Curator, - - - } *Respondents.*

House of Lords, 20th March 1787.

SUCCESSION TO ADJUDICATIONS—INTEREST—HERITABLE OR MOVEABLE.—Whether the accruing interest in an adjudication belongs to the heir or executor? Held, in a question of compensation, that the interest accumulated and accruing, in an adjudication, is heritable, and belongs to the heir, and therefore did not fall under the husband's *jus mariti.*

Captain Allan was, before his death, owing Andrew Young, the respondent's father, the sum of £12,000 Scots, (£1000 sterling), for which debt he adjudged Allan's estate of Cairston for the accumulated sum of principal and interest, amounting to £18,305. 10s. Scots.

Andrew Young having died, was represented by his only child, the respondent Margaret Young. On Captain Allan's death the appellant succeeded to his estate, and being anxious to redeem the same from the adjudication, offered to do so; but insisted that he had a right to compensate or set off against that part of the accumulated sum and interest which belonged to Margaret Young, a sum of £300 owing by her husband, James Gordon, to him, which being refused, he brought a bill of suspension to try the question.

July 5, 1785. The Lord Ordinary, of this date, found "That Mr. Gordon, Margaret Young's husband, has right to the annual-"rents arising from the accumulated sum in the adjudica-"tion, *jure mariti*, and that during the subsistence of the "marriage; therefore sustains the reasons of suspension, as