

This reply was FOUND RELEVANT. Neither was it respected that the sum in the bond was 2000 merks, and so a matter of importance; for my Lord Stair called to mind where the Lords *in præsentia* had sustained a bond for L.500 Sterling, where the party subscribed only by a mark like to a craw-tae, because of the reply of use, though he was averse from it himself.

*Act. Lermont.*

*Alt. Yeoman.*

*Advocates' MS. No. 38, folio 77.*

1670. *June 25.*

WALKER *against* RONALD.

THIS was an action for proving the tenor of a writ that was lost, wherein it was ALLEGED They behoved to be clear and special *super casu omissionis*, otherwise the bond must be presumed not lost but retired.

To which it was REPLIED, it was impossible to be clear on that, viz. what way, in what part, and at what time, he lost it; for if a man remembered these circumstances, he needed not prove the tenor, but after some search he might recover the very writ. The *casus omissionis* here was, that the party to whom the bond was granted his wife foolishly and recklessly had burnt the same at a candle, at which time there being none present, and so none could depone thereon but herself.

*Advocates' MS. No. 39, folio 77.*

1670. *June 21 and 29.*

ELEIS of Southside *against* DR. CARSE.

*June 21.*—THIS is a pursuit for payment of a debt against this defender, as representing the debtor; *Imo*, In so far as he being his apparent heir, he meddled with his charter-kist, which, by the constant practice, infers gestion. *2do*, As heir, he made a revocation of all deeds done by the debtor, his predecessor, which might tend to his prejudice. *3tio*, He called the comprisers to count and reckoning, offering to prove them paid by their intromissions, and more than paid; and so craved the superplus to be given back to him.

Against his meddling with the charter-kist, it was ALLEGED, *Imo*, That Dr. Carse, (though a Scotchman,) yet, from his infancy almost, having been bred, and having resided in England, (being one of the king's chaplains,) upon the death of his friend, he came down to Scotland; and being altogether ignorant of our laws and customs, he simply, without any intention of being heir, took inspection of some writs that were in the defunct's charter-kist, and this, within the year allowed to apparent heirs for deliberation: and within the year also, he offered the charter-kist back to those who had interest, which they refused. Which kind of meddling being so innocent, and also within the time prescribed by law, can in no equity nor reason make the Doctor liable to the defunct's debts. To the second *non relevat* a revocation, unless ye will say that something followed

thereupon; *vid.* a summons of reduction, &c. To the third, his calling the other comprisers, &c. can never bind on him a passive title, because he did it by virtue of a comprising of the reversion, the right whereof was established in his person.

To this it was REPLIED,—*1mo*, That *ignorantia juris neminem excusat*. *2do*, He can never pretend he meddled only for inspection; seeing he should have done it *modo et via juris*, and should have had a sentence of a Judge to that effect, and not have done it at his own hand. *3tio*, It were a most dangerous thing to find meddling with a charter-kist, (they offering it back, though within the year,) not to infer a passive title; seeing there may be none that knew what was in the charter-kist, and by this means an apparent heir might abstract the very marrow of it, and yet none should be permitted to quarrel him therefore. To the *2d*, about the revocation, it deserves no answer. To the *3d*, offers to prove, in that count and reckoning, he received that to which he could lay no other title nor claim but as heir to the defunct, who had the right of reversion.

*Act.* Eleis and Lockhart.

*Alt.* Sinclair.

*Advocates' MS. No. 30, folio 76.*

1670. *June 29.*—In the cause Eleis and Carse, mentioned before on the 22d day, *referente Domino Stair*, FOUND, That his intromission with the charter-kist (proven by his receipt thereof granted to my Lord Arniston, from whom he borrowed it,) was sufficient to infer a behaviour.

*Advocates' MS. No. 40, folio 77.*

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1670. *June 29.* HOYLLS *against* FALCONERS, Master and Warden of the Cunyie-house, and my Lord Halton.

THEIR persons were executors to one Hoyll, who was copper-melter to thir defenders, and had of them a bond for some lignates of copper furnished by him to them; and on this title pursuing, it was ALLEGED, That they could not be heard; because it was offered to be proven that those lignates were altogether insufficient, neither dighted nor brushed from the sand, wherewith they were extremely deceived in the weight, and so sustained a huge damage and prejudice.

REPLIED,—They could not now obtrude insufficiency, since they had accepted the same on their hazard, and had in their own count-book set them down at such a price.

My Lord Stair would not sustain the allegiance, unless they would say the insufficiency was such as could not well be perceived at the time of the bargaining.

*Advocates' MS. No. 43, folio 77.*