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.

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,

and which the heir-male will evict when he comes to be pursued by the creditors; seeing the executry is bound to relieve the heir *quoad* all moveable debts. And the truth is, the parties' principal view, and the substantial part of the transaction, was the lands. And it cannot be *emptio hæreditatis*; because *L.* 7, *Dict. tit.* requires that there be a *hæreditas:* but here there was none. And this intromission was abundantly purged by the posterior confirmation.

The Lords, by plurality, assoilyied him from this pursuit; and found him not liable. But, when they insist against the heir-male, he will recur upon the moveables for his relief *pro tanto.* *Vol. II. Page* 740.

1712. *June* 21 *and July* 30. CHARLES MENZIES *against* MENZIES, and JOHN MUIR.

June 21.—LORD Ormiston reported Menzies against Menzies. Charles Menzies, writer to the signet, having purchased the lands of Kinmundy at a roup, and being preferred to Gordon of Pitlurg, who competed with him for the bargain, and being pursued by his brother's daughter, to whom the price is payable, he craved two deductions: the first was of £1200 Scots, as a stock corresponding to £5 sterling, wherein the rental fell short of what it was given up to him; and he offered to prove it was that much less; and the possessors did not pay what it was given up for.

ALLEGED,—The only rental that can be the rule of the price, must be the rental proven at the time of the sale, which was done by the tenants' oaths confessing what each of them paid; and, whatever a stranger might pretend, Charles could never plead ignorance, for it was his brother's lands, he managed the sale, and led the probation itself. He caused Pitlurg count to him for his possession by that rental to the utmost denier, *et quod quisque juris in alium statuerit ipse eodem utatur.* If he took advantage of that rental to cause another count by it, with what face can he now object against it? His mouth is stopped *personali objectione doli mali.* And Pitlurg was willing to accept the bargain without any such deduction.

ANSWERED,—There is a great difference betwixt a judicial and a voluntary roup. In the first case, the rental is proven before the Lords with the utmost niceness and exactitude; but, in a voluntary sale, (as this was,) the rental depended much on the tutor's word; and, at most, it was but a *talis qualis probatio,* founded upon expediency for dispatch, but can never be the rule of the purchase; and the tutor is expressly obliged to warrant to him the rental to be no less than what it is stated in the decreet of sale. So he has right to crave this deduction by express paction and stipulation; and, though he wanted that, it arises to him *ex natura rei;* for how unjust were it to cause him pay for a non-ens, a chalder of victual which he gets not? And, if Pitlurg omitted to seek this deduction, that can be no preparative for Charles Menzies; for he had other advantages to compensate the short rental.

REPLIED,—The distinction here, of judicial and voluntary, is chimerical and imaginary; for the rental is as much fixed in the one as the other, and are both alike led in the absence of the purchaser, who is not then known: and the buying conform to a rental implies such a homologation and acquiescence as excludes all quarrelling of it hereafter.