1725. *July* 22.

SCHAWS and their HUSBANDS, and RANKEN in Blairquhan, their Assignee, *against* The HEIRS-PORTIONERS of Glenour.

No 30.
Præceptio hæreditatis transit in hæredes.

THE deceased John Kennedy of Glenour, granted bond to Schaw of Nether-Grimmot, to which the pursuers had right by progress. After contracting this debt, Glenour, the debtor, disponed his estate to Alexander Kennedy, his eldest son and apparent heir, who became thereby liable to his father's debts *præceptione hæreditatis*. Alexander Kennedy afterwards dying, an action was brought upon the said bond against his sisters, as heirs served to their brother, who represented the father *præceptione hæreditatis*.

The defence insisted on, was, That the passive title *præceptio hæreditatis non transit in hæredes;* and therefore the defenders, heirs only to the person who was liable in that passive title, could not be made liable upon that *medium*, farther than *quatenus pervenit;* that is, for the value of the subject disponed to their brother. And it was *pleaded*, That *præceptio hæreditatis* is a penal passive title; none of which go against heirs; an apparent heir accepting a disposition, without any burden of debts mentioned, has no intention thereby to represent his predecessor, neither is he made liable under the character of heir; for then he would be equally subject to all the debts prior or posserior: It remains only, that he is liable upon the *medium* of a penal certification, made by the law *in odium* of apparent heirs, to punish their accepting conveyances of their predecessor's estate, with a design to exclude his creditors. It was added, That this passive title has a great resemblance to that of a behaviour; and, indeed, behaviour ought rather to pass against heirs, than *præceptio*: By behaving, one mixes himself in the succession, whereby his design to represent the predecessor is presumed; and therefore the law subjects him universally; but in regard that it is penal for one who makes but a trifle, perhaps nothing by his behaviour, to be liable *in infinitum*, the passive title becomes extinct with himself; and his heir cannot be reached upon that *medium*. All which, equally applies to the passive title now in dispute.

It was *answered*, If by the allegeance, 'that penal actions do not transmit 'against heirs,' the defenders mean, that no action transmits against an heir, farther than the defunct was *lucratus*; this is contrary to express principles of law; for when one enters heir in a *damnosa hereditas*, the making him liable *in infinitum*, is in this sense penal; and yet this burden would pass against the heir's representatives, without the least mitigation. By penal actions, are only meant such as have their rise *ex delicto*, or *quasi delicto*; which is the foundation of that passive title, vitious intromission. A disorderly intromission with a defunct's effects, the law absolutely prohibits, and has annexed a sanction to the prohibition; in which view, the passive title is evidently a penalty: But from this, a *præceptio hæreditatis* differs in every article. No body has said,

save the defender, that the law discourages conveyances to apparent heirs, or that the passive title *præceptio hereditatis* is introduced *in odium* of apparent heirs; on the contrary, transactions of that kind are highly reasonable, providing there is no intention to defraud creditors, (and therefore, the law has burdened them with the then existing debts of the disponer): And since they are authorised by the law, under that limitation, they can have nothing of delinquency in their nature, and the passive title cannot be penal. That this passive title of preception is not introduced *in odium* of apparent heirs, will further appear from this consideration, that were this the motive, it ought to extend to all gratuitous dispositions, whether the receivers were *alioqui successuri*, or not; being all of them equally hurtful to creditors; and yet a gratuitous conveyance, though in law reducible where fraudulent, makes no receiver universally liable, but he who is *alioqui successurus;* and yet surely there is no more vitiosity in the case, than if the conveyance had been made to a stranger. As for the *gestio pro hærede* mentioned by the defender, as one of the passive titles that pass not against heirs; the reason is not, that there is any thing penal in this passive title in any proper sense of the word; but because, it being *magis animi quam facti*, after the death of him who is said to behave, his successors cannot well explain *quo animo* or *titulo* he did intromit. In the *last* place, it was noticed for the pursuer, that this point was already decided, 3d December 1701, George Wilson *contra* Innes, (*see* APPENDIX.) where it was adjudged, that this passive title, *præceptio hæreditatis*, had the same effect with a service as heir, in these two respects; 1*mo*, That it did not prescribe; 2*do*, That *transit in hæredis*. No 30.

" THE LORDS found the defenders liable *in solidum*.

Fol. Dic. v. 2. p. 74. Rem. Dec. v. 1. No. 59. p. 114.

*** Edgar reports this case:

THE deceased John Kennedy of Glenour granted bond to Shaw of Nether-Grimmot for 300 merks; to which the pursuers had right by progress.

After contracting of this debt, Glenour the debtor disponed his estate in favours of his eldest son Alexander Kennedy, who obtained a charter under the Great Seal, and was thereupon infeft.

The defenders, sisters to the said Alexander Kennedy, being served heirs to their brother, who represented his father *præceptione hæreditatis*, were pursued for payment of the above bond.

The defence made for them was, That though their brother would have been liable for their father's debt *præceptione hæreditatis*, yet that being a penal passive title *non transit in hæredes*, and therefore it could not be transmitted against the heirs of the disponee beyond the extent of the subject; that this passive

No 30. title had a near resemblance to that of *gestio pro hærede*, which is not transmitted against the heirs, neither should the other.

To which it was *answered*, That the rule by which penal passive titles do not transmit against heirs comes from this, that such actions have their rise *ex delicto* or *quasi delicto*; and that there is further reason likewise, that *gestio pro hærede* does not transmit, that it is *magis animi quam facti*, and after the death of the person who is said to behave, his successors cannot so well explain *quo animo* or *titulo* his predecessors did intromit.

"THE LORDS found the defenders liable *in solidum*."

Reporter, *Lord Milton*. Act. *Pat. Grant*. Alt. *And. Macdowal*. Clerk, *Murray*.

N. B. It was *alleged* for the pursuer, That a question, such as this, had been determined 3d December 1701, Wilson *contra* Innes, (*see* APPENDIX.) where the LORDS found, that this passive title had the same effect with a service as heir, because it did not prescribe, and did transmit against the heir.

Edgar, p. 201.

1732. *July*.

CREDITORS of MERCHISTON *against* REPRESENTATIVES of COLONEL CHARTERIS.

No 31. A CREDITOR dying during the dependence of a reduction upon the head of usury intented against him, it was questioned if this penal process could transmit against his Representatives; the LORDS found, that the effect of usury being to annul the bond as a real exception, it was good against every person claiming upon the bond; and if good against the heir by way of exception, it must be good by way of action, being the same thing in a different form.—*See* APPENDIX.

Fol. Dic. v. 2. *p.* 74.

1744. *February* 22. A. *against* B.

No 32. THE passive title of vitious intromission, where the proof had been led in the intromitter's time, was found to transmit against his executors. The case would have been the same although it had not gone farther in the intromitter's time than litiscontestation.

Kilkerran, (PERSONAL AND TRANSMISSIBLE.) *No* 2. *p.* 396.