No 140. session, and obliging him to pay the neat annualrents of the wadset sum in name of tack-duty, and the apparent heir of the wadsetter uplifting these tack-duties for three years, this was found a possession in terms of the statute, so as to subject the next apparent heir who passed him by, to his onerous debts and deeds.

The possession of a relict by a liferent right granted by her husband, the defunct proprietor, found not to be the apparent heir's possesion in the sense of the act 1695, so as to involve the apparent heir, passing him by, in a passive title. See Appendix.

Fol. Dic. v. 2. p. 40.

No 141. 1736. *January* 8. Janet Sinclair *against* John Sinclair of Rattar.

A son possessed an estate without making up any title thereto, in which his grandfather had died infeft. He was found not liable, on the act 1695, to the creditors of his father, who had died in a state of apparency, after being more than three years in possession.

By contract of marriage betwixt the deceased John Sinclair of Rattar and the said Janet, he provided her, in case she survived him, to the liferent of certain lands, which he continued to possess many years, but died without making up any titles thereto.

Whereupon she brought a process against the said John Sinclair her son, in order to make the provisions in her contract effectual; and insisted particularly on the passive title introduced by the act 1695, her husband having been more than three years in possession.

Pleaded for the defender; The above act can give the pursuer no aid; seeing it provides only for the creditors of the interjected apparent heir, where the next heir succeeds to the remoter predecessor, either by serving heir to him, or by adjudication on his own bond; but the defender is not in either of these cases, in so far as he has not served heir to the remoter predecessor; neither does he possess the estate upon an adjudication on his own bond. And, the statute being correctory of our common law, cannot be extended from the cases specially mentioned to others that are omitted.

Answered for the pursuer; Her action is well founded, both on the first and second clauses of the act, whether they are considered separately or jointly. And, with respect to the first, which ordains, "That, if any man shall serve himself heir, or by adjudication on his own bond, succeed not to his immediate predecessor, but to one remoter, as passing by his father to his grandfather, or the like, then, and in that case, he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who was in possession of the lands and estate to which he is served for the space of three years, and that in so far as may extend to the value of the said lands and estate, and no farther." Now, though this clause mentions only the next heir succeeding to the remoter predecessor by service or adjudication, these being the ordinary methods of heirs making up titles to their predecessor's estate; yet that does not exclude the case, where the next heir bruiks the estate by other

titles authorised by law, or without making up any whatsomever; seeing the titles specially mentioned are only intended to exemplify the statute, which must be understood in the most extensive sense, so as to comprehend all the cases, where the next heir possesses the estate of which the interjected apparent heir was three years in possession, in order that he may be liable to the debts and deeds of the interjected person to the value thereof; seeing what the law intended to prevent was the fraud committed against creditors upon the decease of their debtors, through the contrivance of apparent heirs; and the specific fraud this act had in view to remedy, was, that heirs not only refused to represent the interjected apparent heir, but carried off the estate to the prejudice of his creditors, by entering to the remoter predecessor; to remedy which it provides, That the heir, in such case, shall be liable to the deceased apparent heir's debts who was three years in possession; and which must take place, whether the next apparent heir renounces to be heir to the interjected person or not, or whether he passes by him expressly, by serving heir to the remoter predecessor, or tacitly, by possessing as apparent heir to the remoter predecessor, seeing that must be constructed, in the eye of law, a passing by the interjected; as it is obvious, that the next apparent heir, who refuses to pay the interjected person's debts, must acknowledge that he possesses upon some title or other, and the only one that his possession can properly be ascribed to, is the right of the predecessor who stood last infeft, which is plainly a passing by the interjected person. No 141.

In the *next* place, it observable in this clause, That the person interjected is not only called predecessor to the next heir, who, passing by him, serves heir to the remoter predecessor, but likewise such next heir is said to be apparent heir to the person interjected; wherefore the interjected person, who, after possessing the estate three years, died in a state of apparency, is, by this law, deemed predecessor, and the next heir esteemed apparent heir to him in the estate so possessed, though he never make up a title thereto, and that in order to subject him to the deeds of the interjected person; consequently the defender's possessing his grandfather's estate (who died in the fee thereof) as apparent heir to him, must, by the intendment of the statute, be esteemed as possessing the estate of his father, the interjected person, in order to subject him to his debts.

And, though this action is well founded on the first clause, yet it receives additional strength from the second; which statutes, " That, if any apparent heir for hereafter shall, without being lawfully served or entered heir, either enter to possess his predecessor's estate, or purchase the same, or rights affecting the same, otherwise than as the highest offerer at a public roup, without collusion, his foresaid possession or purchase shall be reputed a behaviour as heir, and subject him to all his predecessor's debts and deeds, as if he were served and entered heir to him.

No 141.

Now, though the principal design of this clause seems to respect the creditors of the predecessor who was last infeft, yet it must likewise be understood to give a security to the creditors of the interjected apparent heir who was three years in possession; as it expressly declares the apparent heir's possessing, upon any other title whatever, other than as highest bidder at a public roup, to be equivalent to an actual service in the lands; consequently the defender's possessing his grandfather's estate is, by this act, declared to be the same as if he were served heir to him; so that he must be in the same case with respect to his father's creditors, as if the service were actually expede; seeing it is absurd to suppose his possessing, without making up any title to his grandfather, should put him in a better situation than if he had purchased rights to the estate wherewith to clothe his possession. And, if the defender's doctrine were to take place, it would follow, that, whenever the interjected person had contracted debts to the value of the estate, if his heirs refused to serve, and abstained from possessing, the creditors would not only be defeated of their payment, but the estate might become caduciary, and fall to the Crown; or, as abandoned and derelinquished, become a wilderness; but no such consequences ought to follow from this act; since it should receive execution in the following manner, viz. if the next heir possess the estate of a remoter predecessor, he ought to be decerned to the value thereof in an action at the instance of the creditors of the interjected person; or, if he abstain from possessing altogether, when it is only affectable by the creditors of the interjected predecessor, a decreet declaratory should pass, upon a proof of the deceased debtor's being three years in possession, whereupon adjudication may follow, so as the estate might be subjected to their payment; and, even supposing the statute were defective, the Court ought to lay down a rule in order to its being carried into execution. Thus the Lords introduced a method, when the heir of the debtor lay out unentered, whereby an adjudication *cognitionis causa* proceeded upon a renunciation, in obedience to a charge to enter heir.

Duplied for the defender; That an heir entered is deemed, by the law of every country, as *eadem persona* with the defunct; and, if one intromit with the defunct's effects, he is likewise considered as heir, and liable to his debts, under different limitations, conform to the laws of each place; but, that one should be liable to the debts and deeds of another, to whom he is not served heir, and of whose estate he cannot take a shilling, must be admitted to be contrary to the common rules of law. It was unknown in Scotland till this statute; and therefore, if the maxim, 'Quod contra juris regulas est introductum,' hold in any case, it must in the present, where one is subjected to the debts of a party to whom he is not heir served, and who has left no estate to the party subjected to his debts. If the law is viewed in this light, it is plain, that the defender cannot be liable to his father's debts, upon the first clause; seeing the passive title, introduced by it, can only take place in the two instances therein mentioned; the Legislature having left all other cases to be de-

termined by the rules of common law, which, it is believed, the LORDS will not judge themselves empowered to break in upon, further than has been done by the statute; on the contrary, the general indefinite words of this act have always been restricted, as often as opportunities occurred, so that it might derogate as little as possible from the common law; particularly, though the words of the statute are general, comprehending all debts and deeds of the apparent heir, whether gratuitous or onerous; yet the COURT has found, that it concerns only the onerous debts and deeds of the apparent heir; therefore the pursuer argues unjustly, when she pleads, that the defender's possession of his grandfather's estate is a virtual passing by his father; seeing he could not take nor possess it as his father's, no more than if his father had died before his grandfather. But, supposing that possessing of the grandfather's estate was a passing by the father, still the law has not declared it to be a passive title, so as to subject him to the apparent heir's debts; as it has limited the passive title, thereby introduced, to the two cases above mentioned, leaving the creditors, in every other instance, upon the same footing they were before the date of the act. No 141.

And, with respect to the *second* clause, it relates to a quite different matter from what is provided for by the first; as it concerns only the creditors of a defunct, who was proprietor of an estate, and who were liable to be defrauded by the arts of his apparent heir, neglecting not only to serve heir to his predecessor, but likewise purchasing in adjudications, &c. in order to avoid payment of his debts, whereby his predecessor's creditors were often obliged to dispute with him concerning the validity of his titles; to remedy which, the second clause is calculated. But there is not, in the whole clause, one word of the creditors of an apparent heir; nor could it well be, as they were provided for by the first part of the act, as far as was judged necessary by the Legislature. Further, this second clause concerns only the creditors of a predecessor, whose estate might have been taken by his apparent heir's serving to him; which cannot apply to the estate of an apparent heir, which is none, in the construction of law, as it cannot be taken up by a service. *2dly*, The diligence supposed to be acquired is such as affected his predecessor's estate; which cannot relate to the apparent heir, whose debts cannot affect the estate to which he never had made up any title. *3dly*, This clause makes no mention of the predecessor's possessing the estate; therefore, should it be construed to extend to the creditors of an apparent heir, it would repeal the former clause; as it would secure the creditors of an apparent heir, though he had never possessed the estate.

As to the observation made for the pursuer, That, by the second clause, "An apparent heir's possessing his predecessor's estate is declared equal to a service; and that, by the first, such service to his predecessor subjects him to the apparent heir's debts;"—it is *answered*, That the argument is founded on several mistakes; for the second clause neither did, nor could say, That an apparent heir's possessing or purchasing diligences against his predecessor's

No 141. estate was equal to a service, without overturning our feudal rights; seeing possession alone can never establish a feudal right in lands. It indeed saith, That the apparent heir's possession or purchase shall be reputed a behaviour as heir, and an universal passive title, to the same extent as if he had been actually served; but the service there is only mentioned in order to determine the extent of the passive title; and not at all with a view that the possession or purchase was to have all the other legal effects of a service; consequently it cannot answer the first clause of the act, which requires an actual service. Further, this second clause makes the purchase or possession an universal passive title only in favours of the creditors of the predecessor, whose estate might have been taken by a service, but gives no benefit to the creditors of an apparent heir.

In the *next* place, as to the argument, That "the apparent heir, who was three years in possession, is designed predecessor to the party, passing by and serving heir to the person who died in fee of the estate; and therefore, in the second clause, he must be comprehended under the general designation of predecessor;"—it is *answered*, That, in the first clause, the apparent heir is called predecessor, and is made a predecessor to the heir, entering under the limitations therein mentioned; and so far only is he made a predecessor to a person who can take none of his estate; but it will not from thence follow, that, in a posterior part of the act, which speaks of a predecessor in general, that this is also to be interpreted of a person to whom one neither has nor can succeed; seeing a predecessor is a legal word, which, when indefinitely expressed, can only denote one to whom the apparent heir may actually succeed.

Lastly, As to the suggestion, "That, if the defender's doctrine were to take place, the fee of an estate might remain for ever *in hæreditate jacente* of the person last infeft, by the heir's refusing to make up titles; whereby, as he would have no right himself, so he would exclude the creditors of a former apparent heir; wherefore the Court ought to find out a remedy, by allowing an adjudication to pass upon the apparent heir's debt;"—it is *answered*, That, as the law neither has, nor intended to give a remedy in such a case, the Court cannot introduce one, by obliging any person to enter heir to his predecessor, unless he think fit; which, in this case, might be attended with very bad consequences. *E. g.* Suppose that the debts of the person last infeft were equal to the value of the estate, and that the debts of the apparent heir were of the same extent, if, in such a case, the heir was obliged to enter, he would be liable to the apparent heir's creditors *in valorem* of the estate, and to his predecessor's creditors to the full extent of their debts, whereby it would be in their power to allow the creditors of the apparent heir to evict the value of the estate, and leave the heir entering subject to pay it a second time to them out of his own estate; therefore it was just and reasonable to allow the heir to choose whether he would subject himself to the apparent heir's debts or not, leaving

the estate to be affected by his predecessor's creditors who had a legal interest therein. No 141.

THE LORDS found the heir not liable.

And, upon a reclaiming bill and answers, the LORDS adhered. After which, the pursuer gave in a new petition, upon a different *medium*, craving, That her son might be found liable from time to time *in valorem* of his intromission, chiefly founding on an argument drawn by analogy from the decision, 3d November 1682, Blyth, No 87. p. 9742. *2do*, *Et separatim*, she *insisted*, That, as the Lords had formerly modified an *interim* aliment to her; therefore she again craved, That they would modify one *super jure naturæ*. THE LORDS modified L. 50 Sterling.

C. Home, No 6. p. 19.

1741. *December* 9. LEITH and his Factor *against* LORD BANFF.

NO 142. An apparent heir, possessing the estate, but not making up titles, is not liable upon the act 1695 to the debts of the preceding apparent heir.

IT had been found in the year 1736, in a question between the Lady Ratter and the apparent heir of that estate,(*supra*) than an apparent heir does not become liable upon the act 1695 to the debt of the preceding apparent heir, who had been three years in possession, by his possessing his predecessor's estate, but only by serving to the remoter predecessor last infeft, or by making up titles by adjudication on his bond, which are the terms of the statute; and beyond which, being a correctory law, and introducing a passive title *contra communes juris regulas*, it was not to be extended.

The like case now occurring, and the President declaring himself of a different opinion from that judgment, a hearing in presence was appointed, that the point might be fully settled; and upon the hearing, the LORDS "gave the like judgment as in the said former case."

Fol. Dic. v. 4. p. 46. Kilkerran, (PASSIVE TITLE.) *No 5. p. 369.*

*** C. Home reports this case:

JOHN Lord Banff, after possessing his estate for several years, (at least more than three), died in a state of apparency, whereupon it devolved to Alexander his younger brother, who continued to possess the same, without making up any titles thereto. James Leith, a creditor of John's, brought a process against Alexander the present Lord, alleging, that the defender had, under the title of his apparency, intromitted with the rents which fell due in his brother's time, as well as those since his death; and therefore concluded, that he should be liable to the pursuer in payment. The defender renounced to be heir to his brother; whereupon this question occurred, Whether, notwithstanding the renunciation, he was liable for his brother's debts, in consequence of the statute 1695?