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?

No 142. For the pursuer it was *urged*, That as the law has considered three years possession of the apparent heir to be sufficient to constitute the creditors *in bona fide* to contract with him, and consequently had in view, that creditors so contracting, should recover their payment out of the estate, to which that apparent heir might have completed his titles; so the same statute considers it as fraudulent on the part of the apparent heir, who thus lay unentered, to the prejudice of his just and lawful creditor, which fraud was specially intended to be thereby remedied. Both the rubric and recital of the statute bear to be for correcting the frauds of apparent heirs; consequently it ought to be constructed in the most favourable way, so as to remedy the evil which it intended to obviate: And if this is the principle that the law proceeds upon, it ought surely to be extended *de casu in casum*, so as to obtain what was obviously the intention of the legislature; nor is it any objection, that the enacting words allenarly respect the case of an heir actually served, or, by his own bond, succeeding to a remoter predecessor; since the statute had not only in view to obviate the frauds of apparent heirs, but also to provide for the payment of the just and lawful creditors of the apparent heir. It was not the making up of titles in this or the other way that was designed to be remedied, but the use that was made of the titles so established, to avoid payment of the debts of the apparent heir; as, to this hour, even since the act, these are the most proper, if not the only methods of connecting the titles to the person who died last infeft. And this should hold the more especially as there are no taxative words in the law, to limit the benefit intended, to the two cases specially mentioned. Suppose the case, that the defender had obtained from the superior a precept of *clare constat*, and been thereon infeft as heir to his predecessor, who had died last vest and seized; in propriety of language, this would not be an actual service, or succeeding by adjudication to the apparent heir's own bond; yet as, in the eye of law, it was doing the very same thing in another shape, it is impossible to think, that the legislature could possibly mean, that such person should thereby get free from payment of his immediate predecessor's debts. Were the act to be otherwise construed, this absurdity would follow, that the apparent heir's possession, without making up any titles, which is a sort of vitious intromission, and infers a general passive title, would be more beneficial than a regular entry, though, in all other instances, the irregular adition is attended with penal consequences, from which the heir regularly entering may be free. Besides, the pursuer's plea is even founded in the words of the law, by which the person interjected is called the predecessor of the apparent heir, who passes him by, as well as the person last vest, to whom the apparent heir connects by service; and by a posterior clause, the apparent heir possessing is made universally liable to his predecessor's debts; that is, both to the debts of the interjected person, and of the predecessor last vest and seized; consequently the defender is liable on the statute to pay the Lord's debts, the last Lord Banff being, in the sense of the act, the defender's predecessor.

Answered for Lord Banff, That by the common law of Scotland, where the rule does not obtain, that *mortuus sasit vivum*, the debts of an apparent heir dying unentered, died with himself; they could not be made effectual against the estate, nor against the next apparent heir passing him by: The statute 1695, introducing a remedy in this case, cannot, nor does not go upon any intentional fraud in the next apparent heir, who himself had never made up any titles to it; and therefore cannot be supposed to intend any fraud in passing him by. It was intended solely to relieve creditors, lending their money to a personal possession, either not strictly enquiring, whether the borrower is infeft, or hoping that he will soon take that step for his own benefit and theirs. It is a correctory law, introducing a passive title *contra communes regulas juris*, consequently cannot be extended *de casu in casum*: So far as it provides a remedy, it is the part of Judges to apply it; but where it stops short, they cannot go on to provide further remedy: This would be a legislative power which Judges have not. It is likewise a mistake to suppose, that, in all cases where an apparent heir has been three years in possession, there must be a remedy in law to make his debts effectual. Let us suppose, that the next apparent heir, instead of passing him by, contracts debt to the value of the subject, and allows the estate to be carried off by legal diligence for payment of those debts; In this case, there is no remedy provided for the interjected apparent heir's debts. And several others may be figured, even where titles are directly made up to the estate by the apparent heir passing by, for which the law has provided no remedy. At first view, it may naturally be thought the intention of the statute, to oblige an heir, in whatever manner he makes up titles to the estate, to pay the debts of the interjected apparent heir, who was three years in possession, so far as he is benefited by the succession. Even this fails in several instances: But surely the act never intended, that an heir continuing in apparency, without making up any titles, should be liable to the interjected heir's debts, to the value of that estate, of which possibly he has not uplifted one full year's rent. And it is a mistake to say, that the interjected person is considered as predecessor to the apparent heir who passes him by, because, though the statute talks of a man's succeeding to his immediate or remoter predecessor, it does not follow, that, when one succeeds to a remoter predecessor, the person interjected must also be understood to be a predecessor. 2*do*, Supposing the act were inaccurately worded, which is by no means the case, yet it would be an unsound method of interpretation, to carry this inaccuracy to the second clause, in which it is most obvious, that, by the word predecessor, is meant the person who died last vested and seised, and denied that he had touched any of the rents which fell due in his brother's lifetime. No 142.

The Lords found the present Lord Banff's intromission with the rents falling due, during the apparency of the last Lord, does not infer a passive title,

No 142. but makes him liable to the last Lord's creditors *in valorem* of his intromissions; and repel the passive title alleged on the act of Parliament 1695.

C. Home, No 186. *p*, 309.

*** This case is also reported by Lord Kames:

John Lord Banff, after possessing his estate for three years, during which time he contracted great debts, having died in the state of apparency, one of his creditors brought an action upon the passive titles, against the present Lord Banff, brother to the deceased, concluding, that he should be found liable upon the act 1695, as being now in possession of the estate. He *urged*, 1*mo*, That, though he could not subsume upon the express words of the first branch of the statute, since the defender was not served heir to the remoter predecessor, passing by the interjected apparent heir; the equitable construction of the statute was for him, the fraud being as great, to possess the estate without acknowledging the interjected apparent heir's debts, as to serve to the remoter predecessor without acknowledging them. 2*do*, That he was in the case provided for by the second branch of the statute, and could subsume in terms thereof, that the defender's possession of the estate subjected him universally to the predecessor's debts; because, in the sense of this act, the interjected apparent heir is a predecessor whose creditors are provided for.

To the *first* it was *answered*, That the statute 1695, being a correctory law, it would be assuming no less than a legislative authority, to extend the remedy beyond the letter of the statute. To the *second*, *answered*, The interjected apparent heir is not a predecessor in the sense of the statute; nor is it any part of the intendment of the second branch, to afford his creditors relief. The first branch of the statute is calculated for their relief; and so far are they secured by it, that the next heir-apparent is barred from making up a feudal right to the estate, without doing justice to these creditors *in valorem*. The purpose of the second branch is, to provide an additional check against the fraud of heirs-apparent, who, by possessing upon singular titles, found means to elude all the checks formerly contrived; and the additional check is, to make the possession of an heir-apparent, whatever his title be, an universal passive title, equally as if he were entered heir, so as to subject him to all the debts of his predecessors; that is, to the debts of those who died infeft in the estate. To interpret this clause so as to benefit the creditors of the interjected heir-apparent, is to make the statute inconsistent with itself; for, upon that footing, the heir in possession would be liable to the debts of the interjected heir-apparent, not only universally, but even though the interjected heir-apparent should die without possessing a month; contrary in both articles to the first branch of the statute.

"The Lords assoilzied the defender."

Rem. Dec. v. 2. *No* 23. *p.* 37.