

DIVISION III.

Apparent Heir three years in possession.

1707. July 1.

WALTER SYMPSON, Servant to Robert Boyd, Writer in Edinburgh, *against*
JEAN HAMILTON, Daughter to Claud Hamilton of Garrin.

IN the competition betwixt the said Walter Sympson and Jean Hamilton, the LORDS found that an adjudication against an apparent heir for his own debt, who had been three years in possession but never infeft, is not sufficient to prefer the adjudger in a competition for mails and duties with one deriving right by dispositions from persons infeft as heirs-portioners to the remoter predecessor last infeft; without prejudice to the said adjudger to pursue these heirs passing by their immediate predecessor to make them personally liable for his debt, as accords in the terms of the act, 24th Sess. 5. Parl. William and Mary. (1695.)

Fol. Dic. v. 2. p. 40. Forbes, p. 175.

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1724. January 17.

AGNES MUIRHEAD *against* DAVID MUIRHEAD.

THE investitures of the estate of Drumpark, standing in favours of heirs-male, John Muirhead apparent heir of that estate, *anno* 1697, in his contract of marriage with Agnes Welsh, proceeding upon the narrative, that he was not infeft, 'obliged himself to provide the lands, in case of no male children of the marriage, in favours of the female children, and to grant all writs and securities requisite thereanent.' John died uninfeft, leaving a daughter, Agnes, only child of the marriage; whereupon David Muirhead, heir-male of the investiture, passing by John, was served heir to the last infeft, and expedite a charter and infeftment; against whom Agnes insisted in a declarator of her right by the said contract of marriage, upon the 24th act, Parl. 1695, her father, apparent heir, having been more than three years in possession.

It was *pleaded* for the defender, That the act of Parliament respects only onerous *debts* and *deeds*; to secure which only, was the act introduced; and as gratuitous alienations are not favourable, *in dubio* they will never be understood to be comprehended.

It was *answered*, That provisions and conveyances in contracts of marriage, are both favourable and onerous; so far from gratuitous, that they tie up the husband from making gratuitous deeds in their prejudice; and the words of the act being general, *viz. debts* and *deeds*, since it is even a question, whether

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One passing by an apparent heir three years in possession, is liable to implement the apparent heir's rational deeds in his contract of marriage.

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gratuitous debts and deeds should not be comprehended, there can be no doubt about rational deeds in contracts of marriage.

“ THE LORDS, in regard that John, though not infeft, was three years in the possession of the estate, found the obligation in the contract of marriage binding on the heir-male.”

Fol. Dic. v. 2. p. 40. Rem. Dec. v. 1. No 44. p. 88.

* * * Edgar reports this case :

1724. February 11. DAVID MUIRHEAD of Drumpark, grandfather to these parties, disposed his lands, in a contract of marriage *anno* 1671, in favours of his eldest son Robert, his heirs-male, of line, tailzie, and provision.

Robert was infeft upon this right, and John his son succeeded him, but was never served heir to his father, nor infeft. He, in the year 1697, in his marriage-contract with Agnes Welsh, obliged himself to provide the lands of Drumpark to the female children of the marriage, in case there should be no males.

Agnes Muirhead, the only child of John, raised a declarator of her right by virtue of the said contract of marriage, against David Muirhead (grandson to old David by his younger son James) heir-male of the investiture, who passed by John, who had been upwards of three years in possession of the estate, and served himself heir to Robert who was last infeft. Her declarator was founded upon the 24th act, Parl. 1695, whereby it is provided, That if any man, since the act 1661, served or shall hereafter serve himself not to his immediate predecessor, but to one remoter, 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 was served, for the space of three years.

It was *pleaded* in defence for David, That the law had no where said, that an apparent heir not infeft, though three years in possession, might alter the settlements made by his ancestors, and convey the lands, in the same manner as he might have done had he been infeft; for that would have contradicted an undeniable principle, that one can transfer no more right than he has; and that an apparent heir, in the naked right of his apparency, cannot by his *deed* transmit an estate to which he has no right. *2do*, That the act of Parliament was intended only for a security of onerous *debts* and *deeds*, such as the contractor could have been compelled in his lifetime to have paid or implemented, but could never be extended to provisions in a contract of marriage, which were not to take effect till after his decease; and that the Legislature could not intend that total alienations of estates should be made in such a manner.

It was *answered*, That the word *deeds* being expressed in the act of Parliament as well as *debts*, they must be taken *cum effectu*, and that none of them were to be looked upon as useless; and whether the word *deeds* might be extended to such as were gratuitous, the pursuer did not need to dispute, because

her case was a provision in a contract of marriage, which was both rational and onerous; and the pursuer did not plead, that the defunct, as apparent heir three years in possession, could make a valid conveyance or settlement of the estate, but only contended, that the obligation by him in his contract of marriage, providing the lands to the heirs-female of the marriage, was effectual, by the act 1695, to compel the defender, as heir in the investiture, to deduce in favours of the pursuer.

THE LORDS found, That by the contract of marriage *in anno* 1697, the destination was altered in favours of heirs whatsoever; and in regard that John, though not infeft, was three years in possession of the estate, found the obligation in the contract of marriage binding on the heirs-male. See No 66. p. 8955, *voce* MINOR.

Reporter, *Lord Kimmergham*
Clerk, *Gibson.*

Act. *Ja. Fergusson, sen.*

Act. *Ja. Graham, sen.*

Edgar, p. 28.

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1726. *January 26.* Marquis of CLYDESDALE *against* Earl of DUNDONALD.

ONE passing by an apparent heir three years in possession, and serving to a remoter predecessor, is not bound to fulfil the gratuitous debts and deeds of the apparent heir, and has relief of what debts he pays of the apparent heir' against the apparent heir's representatives in any separate estate.

Fol. Dic. v. 2. p. 40. Rem. Dec.

. This case is No 3. p. 1274.; *voce* BASE INFESTMENT.

. A similar decision was pronounced February 1727, Mitchell against Wilson.
See APPENDIX.

1729. *January.* Lord HALKERTON *against* DRUMMOND.

AN apparent heir three years in possession of an infeftment of annualrent, having uplifted the same, and granted discharge and assignation, it was found that another apparent heir, passing him by, and serving in the annualrent to a remoter predecessor, could not quarrel the said discharge and assignation. See APPENDIX.

Fol. Dic. v. 2. p. 39.

1733. *December 19.* JOHNSTON *against* STEIL.

THE defunct's estate, in which he died infeft, being a wadset holding base of the reverser, in which there was a back-tack continuing the reverser in pos-

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