

No 89.

cease, when the succession was devolved to him, which falls clearly under the words of the 24th act of Parliament 1695, declaring, that an apparent heir entering to possess his predecessors estate, or purchasing any right thereto otherwise than by a public roup, shall be liable as if he were heir served: and if it were otherwise the act of Parliament would be easily eluded, either by acquiring a disposition from the predecessor and pretending an onerous cause, as in this case, which strangers could not disprove, or by acquiring rights from third parties in the father's lifetime; and the Lords in the interpretation of all laws do consider the design of the law, which they will not suffer to be evaded by the contrivances of apparent heirs; and thus it was found in the case of Watson against Brown upon full debate, and very unanimously, and a reclaiming bill refused; and for the same reason the right of an expired comprising acquired by an apparent heir in his father's lifetime, was found to be redeemable at the instance of his father's creditors upon the act of Parliament 1661, 19th June 1668, Burnet of Carlons against Nasmyth, No 48. p. 5302.

THE LORDS repelled the defence.

Fol. Dic. v. 2. p. 34. Dalrymple, No 117. p. 164.

1745. June 26.

CREDITORS OF M'CAUL against M'CAUL.

No 90.

THE liferenter's possession found not to be the fiar's possession in the sense of the act 1695, not only as it is a corrective law *et stricta interpretationis*, but for this more special reason, That in no case the possession of the liferenter is held to be the possession of the fiar, but where the liferenter's possession tends to the fiar's benefit, as where prescription runs in his favour by the liferenter's possession, or the like.

Kilkerran, (PASSIVE TITLE.) No 7. p. 371.

* * D. Falconer reports this case.

1745. June 25.—HENRY M'CAUL merchant in Glasgow, married Janet Cliemy daughter and heiress of James Cliemy merchant there, and she in their contract of marriage disposed to him certain tenements in Glasgow, reserving to her mother her liferent thereof; but there were no titles made up in the person of Janet Cliemy, who predeceast her mother or her husband.

After Henry M'Caul's death, his creditors pursued John M'Caul his son, and adjudged from him both his father's proper estate, and what had come by his mother.

He raised a reduction, on the head of minority, of the decreets finding him personally liable, offering yet to renounce, and likeways of the adjudications of the subjects belonging to his mother; and the Lord Ordinary, 12th December 1744. " Found the reasons of reduction on the head of minority and le-

tion, relevant, and in respect the minority was not denied, reduced the decreets of constitution and adjudication quarell'd, obtained against the pursuer, in as far as these decreets for his father's debts, might or could affect the pursuer's person, or the estate descending to him from his Grandfather, by the mother, or any estate which might belong to him, other than the lands and estate which belonged to his father the contractor of the debts, to whom the pursuer renounced to be heir. And 11th instant, found that the possession of the Grandfather's widow was not to be considered as the possession of Janet Cliemy the apparent heir, so as to subject John M'Caul, who had passed her by, to the consequences of the act 1695."

No 90.

Pleaded in a reclaiming bill, That the wife was apparent heir, and three years in possession; and therefore her disposition to her husband must be effectual in favour of his creditors; nor can the son passing by his mother, serve to his remoter predecessor, without being subject to her deeds; for the subjects were possessed by the liferentrix, and the liferenter's possession is reckoned in law to be the fiar's, and will be effectual to acquire him the property by prescription, the civil possession being in the fiar, *l. 12. pr. D. De acquirenda vel amittenda possessione, Voet. super eo titulo § 3.*

The law regards the *bona fides* of creditors who trust upon the notoriety of the succession's having devolved; and this notoriety is equal from the possession either of fiar or liferenter.

The possession of the liferenter ought especially to validate the deeds of the apparent fiar, when he does any deed acknowledging the succession, which Janet Cliemy here did, by disposing the subject to her husband: If the fiar of lands liferented should sell the property, and receive the price, the buyer would surely have a claim to the subject against the subsequent heir; and here Janet Cliemy it to be considered as a seller, and her husband as an onerous purchaser.

THE LORDS adhered.

Pet. A. Macdowall.

D. Falconer, v. 1. p. 108.

1752. July 24.

PITCAIRN against LUNDIN.

It was in this case found, That the years of an apparent heir's possessing a subject liferented, do not come *in computo* of the three years possession, which the act 1695 requires to make the apparent heir liable to the debts of the preceding apparent heir.

No 91.

Fol. Dic. v. 4. p. 43. Kilkerran, (PASSIVE TITLE.) No 11. p. 373.