1754. *December* 12. GRANT *against* SUTHERLAND.

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BY the President's casting vote, it was carried that the statute 1695, as correctory of the common law, must be strictly interpreted; and therefore, that the possession of the heir who forbears to make up a title to the land estate of his ancestor, does not make him liable to the debts or deeds of the interjected heir-apparent.

Fol. Dic v. 4. *p.* 46. *Sel. Dec. No* 71. *p.* 96.

*** This case is reported in the Faculty Collection:

BY marriage-contract between James Sutherland of Pronsie and Isabella Grant, James bound himself to provide her in a certain jointure.

At this time, James, as apparent heir to his predecessor, was in possession of the estate of Pronzie, but had never made up any title thereto; in this manner of possession he continued till he died.

After his death, David Sutherland made up no titles to the estate, but continued to possess it as apparent heir, in the same manner that James had done.

Isabella Grant brought a process against David for payment to her of her jointures.

David's defence against the action was, That James not being infeft, had no power to make a jointure effectual against the estate; and he not having connected himself with James, was not bound by his deeds.

Isabella *answered*; That, for the deeds of the first apparent heir, three years in possession, the act 24th, 1695, bound the second apparent heir, either making up titles to a remote predecessor, or not making up titles at all.

The abstract question came to be, whether an apparent heir, possessing the estate, but not making up titles to it, was bound by the onerous deeds of the immediately former apparent heir three years in possession.

The statute, so far as regards this question, consists of two clauses. By the *first*, upon a recital 'of the frequent frauds and disappointments that creditors 'suffer upon the decease of their debtors, and through the contrivance of ap-'parent heirs to their prejudice, it is enacted, That if any one serve himself 'heir, or, by adjudication on his own bond, shall succeed, not to his immediate 'predecessor, but to one remoter, as passing by his father to his good-sir, or the 'like, then he shall be liable for the debts and deeds of the person interjected, 'to whom he was apparent heir, and who was in the 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 lands and estate, and no further.' By the *second* clause it is enacted, That 'if any apparent heir shall, without being 'lawfully served or entered heir, either enter to possess his predecessor's estate, 'or any part thereof, or shall purchase any right thereto, or to any legal dili-

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'gence or other right affecting the same, otherwise than the said estate is ex-
'posed to a lawful public roup, and as the highest offerer thereat; his foresaid
'possession or purchase shall be reputed a behaviour as heir, and a sufficient
'passive title to make him represent his predecessor universally, and to be
'liable for all his debts and deeds, as if the said apparent heir possessing or
'purchasing, as said is, were lawfully served and entered heir to his said pre-
'decessor.'

David Sutherland *pleaded* his defence in this manner:

By the general law of Scotland, an estate not vested in a person by proper titles, could not be made liable for his debts, nor had the creditor of an apparent heir, who died unentered, any remedy against his estate.

Certain frauds committed by apparent heirs, made some exceptions from this rule necessary. These exceptions are contained in the act 1695. This act did not mean to overturn the general law, but to correct it in some instances.

The first clause of the statute 1695 introduced an exception, where one not vested in an estate, but remaining apparent heir in it, has continued to possess it for three years; the next heir who, passing him by, serves heir to a former predecessor, or who, by adjudication on his own bond, as charged to serve heir to a remote predecessor, takes up the estate, shall be subject to his debts to the extent of the estate; but here the defender has neither served, nor taken up the estate of Pronsie by adjudication on a trust-bond; therefore he is not liable on the first branch of the statute.

Again, by the ancient law of Scotland, if the heir lie out unentered, the creditor of his predecessor could not reach even the estate in which the predecessor had been vested. To remedy this, the act 106, 7th Parl. James V. 1540, and 27, Parl. 23. James VI. 1621, were made, empowering creditors to reach the estate of their debtor, though he had not been vested in it.

To elude these facts, and to be able to compete with the creditors, apparent heirs fell upon a contrivance of purchasing in diligences against the estate, and possessed it as creditors when they refused to possess it as heirs.

The remedy which applied to the evil which occasioned the statutes 1540 and 1621 was too weak; for all that the heir could lose by his obstinacy was the estate itself, and there was no remedy applied to the other evil at all.

To increase the penalty in the one case, and to invent a penalty in the other, the second branch of the statute 1695 was passed, which subjected the apparent heir possessing, yet not serving to the person last vested, or purchasing in diligences affecting the estate of the person last vested, not only to the value of the estate, but to the extent of the whole debts of his predecessor who was so vested; but James Sutherland was never vested; therefore the defender is not liable on the second branch of the statute.

The first clause regarded an apparent heir, who, to elude the debts of the last apparent heir three years in possession, passed him by, either by serving

to a remote predecessor, or by being charged to serve to him on his trust-bond. No 143.
The last clause regards the apparent heir who, to elude the debts of the person last vested, avoids serving to him, or purchases diligences affecting his estate; and the statute in question, being a correctory law, and a penal law derogating from the general law of Scotland, is strictly to be interpreted, and ought not to be extended to cases beyond the letter of the act.

Answered for Isabella Grant; The view of the statute 1695, was to obviate all the frauds of apparent heirs that could be used. It is not penal; it is only preventive of fraud, and enabling the general rules of law and justice to take place. Where there is a defect in the common law with regard to the prevention of fraud, and a remedy is provided by a correctory statute, that statute ought to be extended to every fraud that falls within the purview and reason of it.

In this view the defender is liable, even on the first clause of the statute; for the particular frauds enumerated in that clause, are only descriptive of the common methods in which apparent heirs took up their predecessors estates; but are not meant to limit the remedy to those frauds only, but on the contrary are meant to comprehend every other device by which apparent heirs took up their predecessors estates, passing over the interjected apparent heir. If it provided for the fraud of those who made up titles in a certain way, is it to be supposed, it intended no provision for the fraud of those who made up no titles at all?

Again, he is liable even on the words of the second branch of the statute; for that branch is directed against those who, in order to disappoint the creditors of the former apparent heir, continue to possess the estate under the naked title of apparency.

The words in this branch, 'enter to possess his predecessor's estate,' cannot mean the estate of the person last vested, but must mean the estate of the former apparent heir; for the first branch of the statute, speaking of one who makes not up a title to the former apparent heir three years in possession, calls that apparent heir immediate predecessor. If then predecessor in the first clause means apparent heir, it cannot in the second clause be transmuted, and made to apply to a different person, to wit, the predecessor last vested.

The same thing appears from the consequence of a contrary construction.

It never was doubted that the apparent heir possessing became thereby universally liable for the debts of the remoter predecessor who died last vested; could it then be in the view of the Legislature, in a branch of this correctory statute, to enact what was formerly known to be undoubted law; this branch then relates to one succeeding to an apparent heir, and not to one succeeding to the person last vested.

According to the construction pleaded for the defender, this statute, calculated to obviate the frauds of apparent heirs, would give the strongest encouragement to those frauds; for then an apparent heir refusing to enter, might

No 143. hold the estate without paying the debts of the immediate apparent heir, which debts the statute in question was intended to protect.

'Found, that David Sutherland is not liable to pay the pursuer, Isabella 'Grant, her annuity in her contract of marriage with James Sutherland; and 'therefore assoilzied.'

Act. *Macdowal, W. Grant, And. Pringle.* Alt. *Ferguson, Brown, Simon Fraser.*
J. D. *Fac. Col. No* 121. *p.* 178.

*** This cause was appealed:

The House of Lords 'Ordered that the interlocotors complained of be affirmed.'

1796. *December* 7.

John Buchan, Trustee for the Creditors of David Loch *against* Donald Macdonald.

No 144. The possession of a judicial factor is not held equivalent to the possession of the heir apparent, so as to make the succeeding heir liable for his debts, in terms of the act 1695.

An action of ranking and sale of the estate of Appine, belonging to Dugald Stewart, having been brought in 1757, it was sequestrated, and a judicial factor appointed over it, with the usual powers.

Dugald Stewart died in 1764, upon which Anne Stewart his daughter and heir of provision, within a year after his death, made up inventories, with the view of entering heir to him *cum beneficio.*

She was afterwards called as a party in the action of sale, and took various steps in it, in order to encrease the reversion. In particular, she stated objections to the debts of several creditors, and also obtained a delay of the judicial sale, in the hope of selling the estate more beneficially by private bargain.

Having failed, however, in this, the estate was sold judicially in September 1766. The purchaser's entry was declared to be at Whitsunday 1767; and after paying Dugald Stewart's creditors. there was a reversion of the price, amounting to L. 595 : 9 : 3½d.

In 1770, Anne Stewart married David Loch; and by an ante-nuptial contract of marriage, in consideration of certain provisions made on her and the children of the marriage, she conveyed to him her whole real and personal estate; and afterwards, by a separate deed in June 1772, she specially conveyed to him her right to the reversion of her father's estate.

Mrs Loch died in September 1772, without leaving children, or making up titles heir of her father.

Her husband having become bankrupt soon after, he put his affairs into the hands of a trustee, for behoof of his creditors.

The purchaser of Appine having also become bankrupt, his estate was sequestrated, and a factor appointed on it, who, in 1795, brought a multiple-