

Robert's death, his son John passed by him and his elder brother, and entered heir to his grandmother Sophia, and was infest, and on his death this defender James was served heir to him. Therefore Mrs Wilson sued him on the act 1695, as heir served to John, who had passed by Robert her debtor, who was not only 3 years but 17 years in possession, and served heir to his grandmother Sophia;—and the cause coming before me, I sustained the passive title, and found the defender liable. But on a reclaiming bill and answers, the Lords altered; and in respect that the Earl of Melfort had the liferent of the estate, found that possession during his life did not subject the next heir passing by Robert; but remitted to hear whether Robert had possessed three years after his death.

No. 12. 1758, Jan. 23. TRAILL *against* FEA.

CLESTRON being married to the apparent-heiress of Buchanan of Sound, who had two old apprisings of the lands of Woodwick and North Ronaldsay, but which had been declared satisfied and paid in a process at Nisbet of Carphin's instance in 1679; but of which decret a reduction had been raised, and as was said, the decret was laid open before 1690; but Carphin still continued in possession. Clestron in 1734, to encourage James Trail to purchase those lands from Carphin, gave him an obligation that he and his wife should grant a trust-bond on which these two apprisings might be adjudged from his wife and him, to convey to him that adjudication, in order to remove that encumbrance, providing that his granting that trust-bond, and conveying the adjudication, should not involve him or his wife in any passive title, as representing the Buchanans of Sound. James Trail, after purchasing the lands from Carphin, died, and Trail of Westness succeeded, who now sues Clestron to perform his obligation, who alleged *inter alia*, that he could not perform it without incurring a passive title, and therefore by the said quality of the bond was not bound. Answered, No passive title would thereby be incurred if the defender's wife did not possess. Replied, If her assignee possess upon that trust-adjudication, it will be the same as if she possessed; at least if in any competition between the creditors of Sound and the pursuer, the pursuer's other rights should be set aside, and he obliged to defend himself by that adjudication, the defender and his wife would be obliged to purge it as a debt of their contracting, or pay the creditor off Sound's debt. However, the Lords repelled the defence, and found him obliged to implement, only with the usual quality, not to affect any other estate. *Me referente*. There were some other defences in the cause; but this one only I thought worth marking; and I own I could hardly come up to the opinion of the Court, and therefore proposed that the bond should contain a quality, that the adjudication on it should not compete with any of the lawful creditors of the Buchanans of Sound. But the Court would not agree.—16th December. But when the interlocutor was extended, the President added another quality to the bond, viz. that it should not infer any passive title as representing the Buchanans of Sound, which possibly may have the same effect with what I proposed, and it was signed in these terms. But 23d January altered this part, and found there was hazard of passive titles, and therefore that they were not bound to give the bond.