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GRANT v SUTHERLAND.

Sir LUDOVICK GRANT, *et alii*, . . *Appellants*;
JAMES SUTHERLAND, and his TUTOR *ad litem*, - - } *Respondents*.

11 *May*, 1749.

PASSIVE TITLE UNDER THE ACT 1695.—HEIR APPARENT.—POSSESSION.—A debtor having died in apparency, after having been in possession of an estate for three years, and decrees of constitution and adjudication having been deduced against his infant son, who had been charged to enter heir without renouncing: Found that these decrees were so far effectual against the son, as to attach the lands possessed by the father in apparency.

The possession by a life-rentrix of part of the lands, in virtue of a right not flowing from the heir apparent, is not accounted the possession of the heir, so as to subject the life-rented lands in terms of the statute. Neither was that part of the life-rented lands subjected, which the heir apparent had acquired and possessed under a contract of excambion with the life-rentrix.

[Falconer, 2, 14. Kilk. 372. Elchies, *voce* Minor, No. 12; Kames's Remark. Dec. 2. 172; Mor. p. 5265.]

No. 80. ALEXANDER Sutherland died in possession of the estates of Kinminity and Clyne, after having contracted considerable debts. In the former estate he had been infeft in virtue of a conveyance from his wife. The latter, it was alleged, he had possessed for more than three years, as apparent heir to his father. The estates then devolved to his son James, the respondent, a minor, and the appellants, who were creditors of Alexander, charged the respondent and his guardian to enter him heir in general to his father in his whole estate, and afterwards brought separate actions of constitution, in which they obtained decrees. They

then charged him to enter heir in special to his father and other predecessors last infeft in the estates of Kinminity and Clyne; and they afterwards obtained decrees of adjudication against both estates, as the minor and his guardians did not renounce.

Upon application of the creditors, the court sequestrated the two estates, except such parts of the estate of Clyne as were liferented by the respondent's grandmother.

The creditors afterwards brought an action of ranking and sale of the estate, in which the respondent was called as defendant.

The respondent brought a counter action of reduction, for reducing the above decrees of constitution and adjudication, in so far as they affected his person, and the estates of Kinminity and Clyne, upon the head of minority and lesion. He likewise gave in a renunciation to enter heir to his father. The appellants admitted that he should be relieved from the personal effect of the diligence; but insisted that as to the estates, of which his father had been in possession, the same should remain in full force.

The Lord Ordinary, Tinwald (21 Nov. 1746,) "repelled the reasons of reduction of the decrees "of constitution and adjudication obtained at the "instance of the defenders, (appellants,) against "the pursuer, by which the lands and estate of "Clyne, and others in them mentioned, pertain-"ing to his predecessors, have been adjudged by "the defenders for payment of his predecessor's "debts, and that in so far as concerned the said "lands allenarly; but reponed the pursuer, and "sustained the said reasons of reduction, quoad the "pursuer's person, and separate estate, in respect of

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" the pursuer's minority and his renunciation pro-
" duced; and found that the foresaid decree of
" constitution and adjudication obtained against
" him on the grounds of debt in them contained,
" could not affect the pursuer, nor any other means
" or estates belonging to him, or to which he may
" succeed or make up titles, other than these lands
" and estates already comprehended under the said
" diligences of adjudication, and which are affected
" for payment of his predecessor's debts; and assoil-
" zied from the reduction," &c.

In a representation against this interlocutor, Sutherland pleaded—*First*, That, supposing he had possessed the estate of Clyne, this would not have subjected him in payment of his father's debt, either by common law previous to the statute 1695, or in virtue of that act. By the construction which had been put upon the statute, the heir who only possessed the estates of his predecessors, without making up a title, either by service or adjudication, has not been subjected to the debts of his predecessor, who died in apparency; and in the present case the respondent has not made up a title in either of these ways: *Secondly*, that certain parts of the estate of Clyne had been life-rented by his grandmother, and never were in the possession of his father, who predeceased her; and therefore could not be affected by the appellant's diligence.

It was answered, 1*st*, That the steps of diligence resorted to by the appellants did not depend upon the act 1695. They were introduced by various acts of parliament long previous to that act, and were therefore complete and effectual without it. But, 2*dly*, That the construction which had been

put upon the act 1695 was not sound, as it tended in a great measure to defeat the intention of the law for "preventing the frauds of apparent heirs," and was not agreeable to the words of the act, by which it was provided, "That if any apparent heir "enter to *possess* his predecessor's estates, such "possession shall be reputed a behaviour as heir, "and a sufficient passive title to make him repre- "sent his predecessor universally." But, 3*dly*, That supposing this construction had been just, it would amount to no more than this, that the statute had left one obvious fraud of apparent heirs not provided against, an omission which could never entitle the respondent, on pretence of minority, to be restored to an opportunity of practising such fraud, which was truly the object of the reduction. 4*thly*, That with respect to that part of the lands which had been liferented by the respondent's grand-mother, it was clear that Alexander Sutherland's possession of part of the estate of Clyne amounted to a behaving as heir in the whole. The fee of the part liferented belonged to him; and besides the liferenter did, by contract with her son, exchange a part of the liferent lands for a part of those not liferented, in virtue of which Alexander, her son, possessed that part of the liferent, and thus behaved as the heir in the whole.

The Lord Ordinary (24 Dec. 1747,) found, that the "possession of the said Jean Gordon, under the "contract of marriage, was not to be considered "as the possession of the said Alexander Suther- "land, her son, the apparent heir, so as to subject "the pursuer passing by the said Alexander, his "father, and making up titles to the liferented "lands, to her said father's debts; and also found,

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" that such parcels of the liferent lands, as were " possessed by the said Alexander Sutherland, only " in consequence of the contract of excambion, " were not to be considered a possession within the " statute 1695; and therefore sustained the reasons " of reduction, and reduced the creditor's diligence " with respect to the lands possessed by the said " Alexander Sutherland, in virtue of the said con- " tract of excambion; but found that in as far as " concerned the lands possessed by the said Jean " Gordon, the liferentrix, as deriving right from " the said Alexander Sutherland, in virtue of the " said contract of excambion, her possession was " to be held as the possession of the apparent heir; " and therefore found that the rights and diligences " of the creditors as to these lands, as well as to " the other lands not liferented by the said Jean " Gordon, did subsist, and with respect to these " repelled the reasons of reduction, and adhered to " the former interlocutor, with these alterations, " and decerned."

Sutherland reclaimed against this interlocutor, in so far as it found that the liferentrix's possession of the lands exchanged with her son was to be held as the possession of the apparent heir, and that the defender's diligence did subsist as to these as well as to the other lands which were not liferented; and maintained that the appellant's decrees of constitution should be reduced so as to have only the effect of decrees *cognitionis causa*, and the adjudication following on them, so as only to affect lands legally vested in the person of Alexander Sutherland, and consequently that they should be reduced as to the estate of Clyne.

It was answered, that it was upon the credit of the

two estates that the creditors had advanced the several sums to Alexander Sutherland now claimed by them, that he had possessed the estate of Clyne above three years on his apparency, and therefore that in pursuance of the act 1695, this estate was equally liable for his debts. The respondent could not make up a title to it without being liable at least *in valorem*, and it was impossible for him, therefore, to plead lesion, more particularly as the creditors had, on account of his minority, relieved him from the personal effect of their diligence.

On the other hand, the creditors reclaimed against so much of the interlocutor of the Lord Ordinary as found "That the liferenter's posses-
"sion under her contract of marriage, was not to
"be considered the possession of Alexander
"Sutherland, the apparent heir, and that the
"pendicle of land possessed by the said Alex-
"ander, in pursuance of the contract of excam-
"bion, was not within the statute 1695."

Upon advising the former petition with answers, the Court (22d Nov. 1748,) found, "That the de-
"crees of constitution (no renunciation being pro-
"duced,) could have no other effect than as de-
"crees *cognitionis causa*, and therefore could only
"affect those lands to which the debtor had a title
"established in his person." And, of the same date, upon advising the petition for the creditors,
"Found no necessity to give any interlocutor
"upon this petition."

The Lord Ordinary (10 Dec.) decerned in terms of these interlocutors, and accordingly reduced the adjudications *quoad* the estate of Clyne. And thereafter, the Court, upon advising a petition to this effect for the respondents, with answers, "Re-

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" called the sequestration granted over the estate " of Clyne, &c."

The appeal was brought from the interlocutors, of the 22d November and 10th December 1748; the two interlocutors of the 4th January 1749, (and from so much of the interlocutor of the Lord Ordinary of the 24th December, 1747, as reduced the diligence of the creditors, with respect to the liferented lands, and the pendicle of land exchanged,*) praying that the same may be reversed, and that the interlocutors of the 14th June 1744, and 21st November 1746, may be affirmed.

Pleaded for the Appellants:—1. The appellants are acknowledged creditors of Alexander Sutherland, and have completed regular, and (in point of form) undisputed titles to his estate, in consequence whereof, they had, under the sequestration attained possession of the lands, of which the respondent could not justly deprive them by his bare right of apparency, without making up any title to the estate.

It is not agreeable either to law or equity, that a total want or defect of title should screen a party in possession of an estate, to the prejudice of onerous creditors, when the law points out a method to supply that want or defect; and the doing so would make the estate liable to the creditors.

By virtue of the act 1695, the respondent can in no shape complete his title to the lands in question, without subjecting them to the debts of his father. By the acts 1540 and 1621, the creditor

* It is stated in the appellant's case, but not in the Journals of the House of Lords, that the interlocutor of the 24th Dec. 1747 was appealed from as above.

may charge the heir either to enter or to renounce the lands liable to his demand. The defence here is just this, that the respondent will neither enter nor renounce; he renounces entering heir to his father, but if he enters to his grandfather, the estate is liable to his father's debt; he makes his election, therefore, to hold the land without a title, and defeat creditors in that way, because he can make up no title which will not subject the estate to their demands. The meaning of the law empowering a creditor to charge the heir to enter, is to make him pay the debt if he chooses to possess the fund which ought to satisfy them. The charge against the respondent is in respect of the lands, and not in respect of his being the son of his father; he ought, therefore, either to enter, in which case the land is liable, or give up the land. To say that he renounces the succession of his father, because in these lands he may enter to his grandfather, and then refuse to enter heir to his grandfather, because by so doing the lands would be rendered liable for the father's debts, is a gross evasion, and such as cannot be countenanced, to defeat onerous creditors, especially after the three acts of parliament have been made to prevent the frauds of heirs. The respondent, therefore cannot, on the ground of his minority, be relieved from the decrees pronounced on the head of lesion, because it cannot be accounted lesion that he should be prevented from practising fraud.

2. By the law of Scotland, the possession of a life-rentrix is deemed the possession of the heir entitled to the fee, and he makes up his titles in the same manner to liferented lands as to lands which are

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not incumbered with a liferent, and they are equally liable for his debts. If Alexander Sutherland had completed his title to the estate, the liferented lands would unquestionably have been liable to his creditors after the death of the liferentrix; and as by the act 1695, estates possessed three years upon apparency are liable to the debts of the possessor, in the same manner as if he had made up titles, that part of the estate of Clyne liferented by his mother must, after his death, be attachable by the creditors, in the same manner that it would have been, if Alexander Sutherland had completed his titles.

Pleaded for the Respondent.—A pupil is in every case entitled to be restored against decrees pronounced against him through an omission of defence and want of a guardian, and to be put in the same state in which he would have been had he been properly defended; and if he had been so defended, no decree could have been pronounced other than *cognitionis causa*, and such could not be the foundation for adjudging any other estate than that which had been vested in the debtor.

The property of lands does not transmit *ipso jure* from the dead to the living, but remains *in hereditate jacente* of the person who died last vest and seised, until the heir for the time being establishes the proper titles in his own person; and by the common law no apparent heir can charge an estate with debt to which he has established no title by service and infeftment.

Previous to the act 1695, the possession of an apparent heir for any length of time did not subject the succeeding heir to the payment of such ancestor's debts. The former law is by that act so

far altered, that the debts of an apparent heir who has been in possession of an estate for three years, will affect the next heir *in valorem*, provided he is served heir to a remote ancestor, or possesses the estate under a trust adjudication upon his own bond. But the respondent does not stand in either of these situations, and is not therefore within the provision of that act any more than he would have been though served heir, if the possession of the interjected heir had not continued for three years.

After hearing counsel, "it is ordered and ad- Judgment, May 11, 1749.
"judged, &c. that the said several interlocutors
"of the 22d November, 1748, the 10th Decem-
"ber, 1748, and the two interlocutors of the 4th
"January, 1749, be, and the same are hereby re-
"versed; and it is further ordered and adjudged,
"that the said interlocutor of the Lord Ordinary
"of the 24th December, 1747, be, and the same
"is hereby affirmed; and it is also ordered and
"adjudged, that the interlocutor of the said Lord
"Ordinary of the 21st November, 1746, so far as
"the same is not reversed or varied by the said in-
"terlocutor of the 24th December, 1747, be and
"the same is hereby affirmed."

For Appellants—*W. Grant, W. Murray.*
For Respondents—*Alex. Lockhart, C. Erskine.*

This case seems to have been argued and decided on different grounds in the House of Lords from those decided in the Court of Session. Falconer says, (vol. ii. p. 15,) that "the arguments pled "upon, (before the House of Peers,) as is related from good autho- "rity, were not those pled before the Court of Session, but that to "possess an estate without making up titles, subjected the possessor, "in virtue of the act 1695, to the debts of a former apparent heir "who had possessed for three years."

Lord Elchies says, "The Lord Advocate told me it was upon "the general point, that when "the last apparent heir, the debtor,

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" was three years in possession, the next apparent heir is liable in " the same manner as if the debtor had been infeft, if he possesses; " whether he passes him by, and serves to a remoter predecessor or " not, and that the Lords meant to extend the act 1695 further " than we thought we could do, and further than we did in the cases " of Lord Banff, &c." (9810, 9815.)

Lord Kames says, " This cause was carried by appeal to the House " of Lords, and was debated two full days. The Chancellor observ- " ed that their notions in England about what we call correctory laws, " differ widely from ours. Penal laws, he admitted, are to be strictly " interpreted; but where a remedy is provided by a statute to supply " a wrong or defect in common law, it was, he said, an established " rule in England, that the judges ought to supply every defect in " such a statute, and to complete the remedy intended by the legis- " lature, that they ought to regulate their judgments by the spirit " and meaning of the statute, without allowing themselves to be li- " mited by the precise words.

" According to this rule of interpreting correctory laws, which ap- " pears exceedingly rational, our judges have done wrong in refusing " to apply the act 1695 against an heir apparent, who in order to evade " the law, contents himself with possession without passing by and " making up titles. The legislature undoubtedly intended a complete " remedy for the disease, and the remedy is imperfect if the apparent " heir can possess the estate without acknowledging the debts of the " interjected heir apparent. According to the said rule, our judges " may and ought to supply what is defective in the words of the sta- " tute, and to complete the remedy according to its spirit and inten- " tion.

" The decree was reversed, and the decrees of constitution and ad- " judication were sustained with regard to the estate of Clyne, as " well as with regard to the estate of Kinminity. It was the opinion " of the House, that the heir of Kinminity was not enabled to pos- " sess the estate of Clyne without being liable for his father's debts, " and therefore that he could not specify lesion, in suffering the estate " of Clyne to be adjudged by his father's creditors."

Vide Bankton, III, 5. § 106. Grant *v.* Sutherland of Pronsie, 12th Dec. 1754. (9819.)