[11*th July*, 1842.]

JAMES CORBET PORTERFIELD, Esq. *Appellant.*

NATHANIEL GORDON CORBET, Esq. *Respondent.*

Passive Titles, 1695, cap. 24.—The receipt and payment over of rents by a factor, under an agreement between parties holding competing brieves for service of heirs, that the factor should draw the rents and divide them between the parties during the competition, *held* sufficient to establish possession in apparency by the party ultimately successful in the competition, who died before having made up his title, so as to subject the next heir making up his titles by passing him over, in liability for his debts on the passive title of the act 1695.

Acquiescence.—*Implied Discharge.*—Dealings by a party who claimed under a trust-disposition and settlement by his father, executed to supply the place of a bond of provision, in case the bond should become ineffectual, on the erroneous supposition that the bond was invalid, *held* not to preclude the party from recurring to the bond, on being better advised as to its validity.

BOYD PORTERFIELD possessed the lands of Duchal under a strict entail, which gave the heirs in possession power to provide for their wives and younger children, in these terms:— " Excepting always furth and from the said clause irritant, full " power and liberty to the said William Porterfield, in case of " the decease of the said Julian Steill, his present spouse, before " him, and to the heirs-male of his body, and the other heirs " and members of tailzie above mentioned, to grant liferent " infeftments to their ladys or husbands, in satisfaction to them " of all terces and courtesies (from which the ladys and husbands " of the said heirs are hereby altogether secluded and debarred)

" of the saids lands and others foresaids, not exceeding one-third
" part thereof, so far as the same is free, unaffected for the time
" with former liferents, or real debts, and after deduction of the
" annualrent of the personal debts that may affect the same; and
" also, excepting and reserving furth and from the said clause irri-
" tant, full power and liberty to the said William Porterfield, and
" the heirs-male of his body, or the other heirs-male of the body
" of the said Alexander Porterfield, or the other heirs of tailzie
" above mentioned, to contract and take on debts for the provi-
" sion of their younger children, not exceeding three years' free
" rent of the lands and others foresaids, after deduction of life-
" rents and real debts, and the annualrent of personal debts;
" and also to contract and take on for just and necessary causes
" the sum of 6000 merks therewith, at least with as much of the
" said 6000 merks as shall be uncontracted, and the estate not
" affected with for the time, so that the debt to be contracted by
" them, and wherewith they may burden and affect the said
" lands, shall never exceed 6000 merks at any one time, and three
" years' free rent of the lands and others foresaids, after deduc-
" tion of liferents and real debts, and the annualrent of personal
" debts."

Boyd Porterfield, during his possession, executed the reserved power, by granting a bond in favour of his younger children, for L.2400, payable on failure of heirs-male of his body.

In 1815, Alexander, the surviving son of Boyd Porterfield, died after the term of Whitsunday of that year, having possessed the lands as his father's heir. On this event Colonel Porterfield purchased brieves for serving himself next heir of entail, and entered into possession of the lands. At the same time Stewart purchased competing brieves for serving himself heir of entail.

On the 4th October, 1816, Colonel Porterfield executed a bond, reciting the entails, and the power of provision thereby

reserved to the heirs, and continuing thus, "and whereas I am "heir of entail to the said lands, and am desirous of making a "proper provision for my younger children, therefore I, the said "James Corbet Porterfield, do hereby bind and oblige myself, "and the heirs of tailzie succeeding to me in the said entailed "lands and estate of Duchal and others, to content and pay to "Nathaniel Gordon Corbet, my second son, and to Laura "Corbet, my only daughter, being the two younger children "procreated of the marriage between me and the deceased Laura "Gordon, my spouse; All and Whole, three years' free rent of "the foresaid entailed lands and estate of Duchal, as the same "shall stand and be ascertained for the crop and year previous "to my death, and that in the proportions following, viz.," &c.— "with a fifth part of each instalment farther of liquidate penalty, "damages and expenses, in case of failure, and the lawful in- "terest thereof, from and after the terms of payment aforesaid, "aye and until the same be paid. But providing and declar- "ing always, as it is hereby expressly provided and declared, "that the provision hereby constituted in favour of my said "younger children, shall be effectual, and take place only in so "far as the same is consistent with the conditions and limitations "specified in the said deeds of entail, and with the powers "thereby vested in me; and, if the same shall be found discon- "form to the foresaid deeds of entail, it is declared, that the said "provision shall be restricted, and it is hereby accordingly re- "stricted, so as to be precisely conform to the powers given by "the said deeds of entail, and no otherwise; which provision "before written in favour of my younger children, shall be in "full to them of all portion natural, bairn's part of gear, exe- "cutry, or any other thing whatever, which they, or either of "them, can ask or claim, in and through my decease, in any "manner of way; and I hereby reserve to myself full power and "liberty at any time of my life, and even on deathbed, to alter,

" innovate, or cancel these presents, in whole or in part, as I may " see cause; and I dispense with the delivery hereof, and de- " clare the same, though found lying by me, or in the custody of " any other person to whom I may intrust the same undelivered " at the time of my decease, shall have all the effect of a delivered " evident, any law, practice, or custom to the contrary notwith- " standing." This bond was never delivered by the granter to either of the parties in whose favour it was made, but was found in his repositories at his death. At the date of this bond, the bond by Boyd Porterfield, and provisions by the other heirs of entail, of the aggregate amount of about L.6000, were subsisting, and they remained undischarged at the time of the Colonel's death.

On the same 4th October, 1816, Colonel Porterfield executed a trust-disposition and deed of settlement, which proceeded on this recital, — " Considering that whereas I have of this date " executed a deed of settlement in favour of my younger chil- " dren; binding my heirs of tailzie, in the lands and estate of " Duchal, to make payment to them of three years' free rent of " the said entailed estate, payable in the proportions, by the in- " stalments, and at the terms therein mentioned, as the said deed " in itself more fully bears. And whereas it may hereafter be " found that the said deed is invalid and ineffectual in law, for " securing to my younger children the provision therein con- " ceived in their favour, it therefore becomes necessary for me " to provide against that contingency, by securing for them a " suitable provision, out of my other means and estate: There- " fore, and for the paternal love, favour, and affection, which I " have and bear to my whole children after named, and for other " good and onerous causes me moving, (and in the event of the " deed of settlement before narrated not proving effectual for " securing to my younger children the provision therein con- " ceived in their favour.)" This deed conveyed to trustees the

whole real and personal estate of which the maker should die possessed, in trust to pay his debts, and, "next, in payment to "Nathaniel Gordon Corbet, my second son, of the sum of "L.4000 sterling, and to Laura Corbet, my only daughter, "of the sum of L.1000 sterling, which sums shall bear interest "from and after my decease, and shall be payable as soon there-"after as my trustees conveniently can. And, lastly, to pay the "residue of my said subjects to James Corbet, my eldest son, "which provisions before written in favour of my said children, "shall be in full to them of all portion natural, bairn's part of "gear, executry, or any other thing whatever, which they, or "either of them, can ask or claim, in and through my decease, "any manner of way."

On the 28th October, and 4th November, 1816, Colonel Porterfield, and Stewart, executed an agreement, which, after reciting the competition then going on between them, continued thus,—"And farther, considering that the said parties, soon "after the commencement of these actions, concurred in appoint-"ing William Campbell, writer in Johnston, as factor for uplift-"ing the rents of the said entailed estates, falling due during the "dependance of the foresaid actions, which rents he was ordered "to lodge in a bank, there to remain until the conclusion of the "said actions, and until it should be finally determined by the "Court of Session, or by the House of Peers, in the event of an "appeal being taken, which of the said parties had right to the "entailed estate, and that in virtue of the said letter of factory, "the said William Campbell has uplifted one half year's rents "of the said entailed estates, being the last half of crop and "year 1815, which by the tacks is payable at Whitsunday last, "and will be ready to uplift another half year's rent at Martin-"mas next, being the first half of crop and year 1816. And "as the final decisions of the said processes may not take place "for some time." On this recital the parties "agreed, and do

" hereby agree, that the rents collected at or since last term by
" the said William Campbell the factor, after deducting all feu-
" duties, public and parochial burdens, repairs of houses, and
" other necessary outlays on the estate, and the incidents and
" charges of the factor, &c., proper fee for his trouble, shall be
" immediately paid and divided between the parties equally; and
" for this purpose, that an account of the said rents and charges
" shall be made out, of which two duplicates shall be docqueted
" by both parties, and that each party shall grant to the factor
" a receipt annexed to one of the duplicates for his share of the
" free proceeds, which two receipts shall be a sufficient discharge
" to the factor, who shall not thereafter be liable to be called to
" account by either of the parties, or his heirs, for the rents so
" settled and discharged; and that on uplifting each half year's
" rent in time to come, during the dependence of the said pro-
" cess of competition of brieves in the Court of Session, and until
" the final decision thereof in the said Court, the accounts shall
" be made out, docqueted, settled, and the free proceeds paid
" and discharged in the manner before specified, until the final
" decision of the said competition of brieves in the Court of
" Session; but in case either party shall take the same by appeal
" to the House of Lords, then this agreement shall cease, and
" the rents shall be collected, as may be then agreed on by the
" said parties, or by order of the Court of Session, and the suc-
" cessful party and his heirs shall have no claim against the losing
" party for any part of the bygone rents which may have been
" divided, or declared subject to division by this agreement, but
" each shall retain his share thereof, whatever may be the decision
" of the cause in the Court of Session, and each party for him-
" self and his heirs hereby renounces and gives up all claim for
" repetition of any share of the bygone rents from the opposite
" party, in so far as the same are divided or subject to be divided
" at the final decision of the Court of Session, and both parties

" farther agree, that the successful party shall not demand from " the Court of Session any decree for expenses of process against " the losing party, but that each shall pay his own expenses of " process, in so far as may be incurred in the Court of Session. " Moreover, the parties farther agree, that in the event of the " death of either of them during the dependence of the foresaid " competition of brieves, and before the same is brought to a " final decision in the Court of Session as before specified, then " this agreement shall cease and be at an end as to any rents to " become payable by the tacks subsequent to the death of either " of the parties, but the same shall continue binding and effectual " as to the term's rent payable by the tacks, at the term immediately " preceding the decease of either of the parties, whether the same " be actually divided at that time or not, and as to all preceding " terms' rents; and the heir of the party deceasing shall not be " entitled either to call upon the factor, or upon the surviving " party, to account for the share of the bygone rents." The eldest sons of both parties were consenters to this agreement; the appellant being the eldest son of Colonel Porterfield. The rents of the entailed lands which fell due at Whitsunday, 1816, were paid to the executor of Alexander Porterfield, as he had survived that term. The subsequent rents were received and applied under the terms of the above agreement.

In October, 1818, Colonel Porterfield died, while the competition with Stewart was as yet not finally decided. The appellant then purchased brieves for serving himself heir of entail to Alexander Porterfield, the heir last infeft, and the litigation was resumed at the point at which it was left off on the death of his father. In May, 1821, the Court finally preferred him in the competition, and this decision was affirmed on appeal.

On Colonel Porterfield's death it was found that he had not left funds sufficient for the discharge of his debts; in consequence, the concurrence of his creditors to the trust raised by the general

disposition and settlement executed by him in October 1816, was obtained, with a view to settling his affairs under it. A few days before the Colonel's death, the respondent, his second son, left Glasgow, the place of his father's residence, for Plymouth, to resume his duties as an officer in the navy. On the suggestion of the appellant he granted, before his departure, a factory in favour of Ewing, a writer in Glasgow, and deposited with the appellant a general power to act for him "in the same manner as he could have "done if personally present." Under these powers a claim was prepared by Ewing, for the sum provided to the respondent by the disposition and settlement. This claim, which was signed by the respondent, after he had been informed by the appellant that counsel considered the bond of provision executed by their father as invalid, was lodged with the trustees of the settlement. Upon the claim the respondent received payment of a dividend of L.146.

Afterwards the appellant made various advances of money to the respondent, and on the occasion of his marriage, in 1832, settled a jointure of L.200 per annum on his wife, in case she should survive him, and also commenced paying him an annual allowance of L.250. These payments, taken together, amounted, as at the date of the action out of which the appeal arose, according to the admission of the respondent, to the sum of L.2322, 13s.

In 1837 the appellant restricted his annual allowance to the respondent to L.150, and intimated the necessity for a continuance of the reduction.

In January, 1838, the respondent brought an action against the appellant, setting forth, among other things, the bond of provision executed by their father, and concluding, that the appellant should be ordained to exhibit a rental of the entailed lands, and, on the free rental being ascertained, should be ordained to make payment to him of three-fourths of three years' free rent, with interest on the amount.

The respondent supported this action on the following pleas in law: —

"I. As the late Colonel Porterfield possessed the estate of "Duchal, in apparency for more than three years, and executed "a bond of provision in the pursuer's favour, the defender, as "the heir passing by, is liable for the payment of it under the "act 1695, c. 24.

"II. In terms of the provisions of the bond granted by the "late Colonel Porterfield, the pursuer is entitled to three-fourths "of the sum which may be ascertained to be equal to three years' "free rent of the entailed lands, according to the rent for the "crop and year 1817, under deduction of the interest of any "debts affecting them at the time."

On the other hand, the appellant pleaded in defence, —

"I. The provisions contained in the deed of settlement and "provision libelled on, do not form an effectual burden on the "entailed estate.

"II. The defender is not liable for these provisions under the "act 1695, c. 24.

"III. The pursuer, by ratification of the trust-deed and "acquiescence in the proceedings under it, has abandoned and "lost all claim on the deed of provision.

"IV. In any view the defender, in accounting with the pur-"suer, is entitled to take credit for whatever sums he has paid "him since his father's death, with interest. He is also entitled "to be relieved of the obligation for the jointure of the pursuer's "wife.

"V. The pursuer's claim is at all events subject to deduction "of all liferents, real debts, and the annualrent of personal debts "which may at present affect the entailed lands, and which were "effectual burdens on it at the date of Colonel Porterfield's "succession to them."

On the 9th March, 1839, the Lord Ordinary (*Lord Cockburn*)

pronounced the following interlocutor, adding the subjoined note: — " The Lord Ordinary having heard parties' procurators, " and considered the process, in respect it is admitted that the " bond libelled on was granted in conformity with the provisions " of the entail of Duchal, Finds, that it constitutes a legal obli- " gation, by virtue of the act 1695, chap. 24, against the defen- " der, who completed his titles to the entailed estate, by passing " by his father, Colonel Porterfield, the granter of the bond; " Finds, that the pursuer is not barred by the facts and circum- " stances founded on by the defender, from asserting his right to " payment under the said bond, and to this extent repels the " defences; Finds the pursuer entitled to the expenses hitherto " incurred; appoints the case to be enrolled in order that the " parties may come prepared to state in what mode they propose " that the exact amount of the provision claimed by the pursuer " may be ascertained, and the remaining points of the case de- " termined."

" *Note.*— This is an action for subjecting the defender, under the " Act 1695, c. 24, in payment of a debt due by his father, whom he " passed by in making up his titles.

" The two main points of defence are, that the debt was not oner- " ous in the sense of the statute; and that the interjected person " was not, for three years, in such possession as the act requires.

" 1st, The entail of Duchal allowed the heir in possession to burden " the estate on certain conditions, with provisions to younger children. " The late Colonel Porterfield, the father of both the present parties, " availed himself of this power, by executing a bond on behalf of the " pursuer, his second son. There is no objection to the validity of " this bond, either as being struck at by the entail, or as being ex- " cessive, or on any other ground. But as it was not delivered dur- " ing the granter's life, but was only found in his repositories at his " death, it is argued that this circumstance places it beyond the reach " of the act. The argument is, that the statute was meant for the

" protection of creditors; that is, of creditors existing during the
" three years, and who are held to rely that the titles of the person
" they see in possession, have been made up; but that this principle
" cannot apply to the case of an undelivered and revocable deed,
" which does not bind the granter during his life; and when there
" could be no reliance on his possession, by a person who was not
" aware that he had any interest in the possession.

" If the matter were all open, such a case might deserve great con-
" sideration. For the freedom of the granter from obligation, and the
" consequent ignorance of the grantee of his having even an expec-
" tation of a future claim, suggests many views, on which it might be
" questioned, whether it formed one of the sort of debts meant to be
" included within the act.

" But the doubt comes too late. The statute has been explained
" by judgments, the principles of which clearly reach this case.

" Rational provisions, either to wives or to children, are onerous
" deeds, so onerous, that they compete with the debts of ordinary
" creditors. It was first found, therefore, that an heir passing by
" was liable for a provision to a child made in an antenuptial con-
" tract, (Muirhead, 17th January, 1724.) This principle was then
" extended to the case of a locality, to a wife in a postnuptial deed,
" (Glencairn, 23d May, 1800.) It was held in the case of Kennedy,
" (11th February, 1829,) to reach a bond of provision to a son. No
" doubt, that bond was clothed by infeftment. It may be doubted,
" however, if this changed the nature of the right. But at any rate,
" there was no such circumstance in the case of Adamson, (16th
" November, 1832,) where the provision was in favour of a niece, and
" proceeded partly on 'love, favour, and affection,' and partly on a
" vague averment of 'long services,' which last pretence, (for it was
" really little else,) was held sufficient to establish onerosity, and this,
" though the deed was declared to be revocable; the same quality of
" revocability distinguished the case of Ogilvie, 16th December, 1817.
" There are many other reported examples, in which it is plain that
" no obligation lay against the granter, until it was fixed by his death,
" and that the grantee had not trusted to the defunct's titles being

" made up, because, not knowing that he was, or was to be a creditor,
" he never thought of the subject.

" How often does it happen, that claims are not known to exist
" until they be disclosed by death. A person lives and dies without
" ever imagining that he owed a shilling. Nor did any human
" creature ever fancy that he was his creditor. But at his death, the
" law, to the surprise of every body, detects him the unknown partner
" of a company, or liable constructively in some other way for a debt.
" It is presumed, that if he had possessed three years in apparency,
" the act 1695 would make his heir apparent liable for these unsus-
" pected claims. As to the granter's remaining unbound himself,
" this will avoid the application of the statute if he was so entirely
" free, that the deed is gratuitous. But where he has a right to bind
" himself, and is under a moral obligation to do so, as in the case of
" providing for children, and leaves a revocable deed unrevoked, his
" death, which prevents the power of revocation, fixes the provision
" on his estate, as thoroughly as if it had been an ordinary debt. If
" the provision now sued on would have been a debt, supposing the
" titles to have been made up, then by this statute it is equally a debt
" after three years' possession.

" 2d, There are two objections taken to the possession.

" First, That as it began on the 22d of May, 1815, leaving that
" half year's rent to the executor of the former proprietor, and ended
" in October, 1818, the Colonel did not draw three years' rent. The
" Lord Ordinary does not think that there is any thing in this. If
" the last half year be taken into account, the Colonel did draw six
" half years' rents. But, besides, drawing the rents is not the only
" criterion or mode of possession. The estate, as has been found,
" was his, and (unless the next objection be sound,) it was in his
" general possession for three years and five months.

" Second, That it was not that sort of possession that the act re-
" quires. This objection is founded upon the fact, that the Colonel
" and Sir Michael Stewart, who were at law about the estate, con-
" curred in granting a factory to a Mr Campbell, empowering him to
" levy the rents, and to divide them during the dispute between the
" two competitors, neither of whom were to claim any expenses or

" process against the other. This, it is said, destroyed the possession " as the possession of the Colonel; and made it either the possession " of the factor, or of Sir Michael, or of neither party, and puts the " property under a sort of sequestration, and destroyed that public " reputation, and display of ownership, on which the statute rests.

" The factory, which was by a letter, has not been recovered, but " its substance is described in the agreement into which the parties " entered, and in the record. It is material to observe, that the " arrangement was confined to the single purpose of letting the factor " levy the rents, and give a half to each party. He is not put gene- " rally into possession, nor does the Colonel give up any iota of right " of possession which he previously had, or was then entitled to have, " as the heir apparent of the former holder, beyond the mere partial " abstinence from receiving and appropriating the whole rents. And " the question is, whether such an arrangement, whereby the person " in whom the title truly is, concurs with a groundless claimant in " each disclaiming costs, provided each share the rents in the mean- " while, and a stranger draws them, under an authority derived from " both, excludes the operation of the statute?

" It appears to the Lord Ordinary that it does not, and that if it " did, it would not be difficult always to evade it. The cases of " judicial factors, or of liferented estates, have no application here. " These are cases where the authority to possess does not flow from " the heir, whose titles are not made up, and the law corresponds with " the plain fact, that the heir is not held to possess, where the pos- " session neither proceeds from him, nor can be controlled by him. " But it has been decided, on the other hand, that the possesion of a " tutor, a factor, or even a disponee, where they represent the heir, " is to be deemed possession by him. Accordingly, it is not disputed " that, if this factory had been granted by the Colonel alone, it could " not have been held to have ousted himself. But the peculiarity is " said to be, that it was granted by Sir Michael as much as by him.

" So it was. But, in the first place, drawing the rents is not the " only mode of possessing an estate. There are many conceivable " ways (such as a proprietor putting the rents, for years after his " death, into the hands of a trustee, for payment of debt) in which a

" property may be possessed, though no rents whatever be drawn or
" be due. It is not disputed in the record, or otherwise, that, in every
" other respect, the Colonel kept himself clear. In the second place,
" how can it be said, that a joint factory to levy rents destroys the
" possession of both constituents? The statute does not require the
" heir to be for three years in the fullest possible possession. The
" case of Donald, 27th February, 1835, was decided on the principle
" that there must be 'possession and enjoyment, at least to some real
" extent;' and the estate having been possessed entirely by trustees,
" for the former owner, the act was found not to apply. But there
" surely was possession by the Colonel to a very great extent. He
" got half the rents, and *quoad ultra* he got every thing. It is not
" averred, that his obtaining his portion of the rents through a factor,
" misled any creditor to suppose that the possession was renounced,
" either in behalf of the factor, or of his other constituents, and it is
" inconceivable how it could have done so. It is a plain perversion
" of the fact to say, that he drew part of the rents only by Sir
" Michael's permission, since the legal right was in him, it is nearer
" the truth to say, that Sir Michael drew his half by permission of
" the Colonel. Stating it as unfavourably for the Colonel as possible,
" the exact fact is, that, in so far as the rents were concerned, they
" were both in possession.

" The defender attempted to make a third point, which, however,
" plainly will not do. The Colonel, fearing some possibility that his
" bond of provision under the entail might some how or other prove
" ineffectual, granted a subsidiary bond, to operate against his general
" succession, in the event of the first one failing. And the pursuer,
" under an error as to his rights, made a claim on his father's trustees,
" under the substitute bond, and drew a dividend of about L.146. It
" is attempted to be maintained that this was an abandonment of his
" right on the original bond. But it was not. It only evinces an
" erroneous doubt of its efficacy. There was no discharge of the pre-
" sent claim, and indeed no demand on this bond, or against the de-
" fender. The demand was made against the trustees of the deceased,
" who had no power to discharge the bond now sued on. The offer

" to give the defender credit for the dividend, restores every thing to " its just position."

This interlocutor was adhered to by the Court (*First Division*) on 18th June, 1839.

The Lord Ordinary then ordered cases to the Court " upon the remaining points of the cause," and on advising these papers, the Court, on the 12th February, 1840, pronounced the following interlocutor: — " The Lords having advised the reclaiming " note, (should have been revised cases,) and heard counsel for " the parties, Find, that in estimating the amount of the provi- " sions for younger children, the interest on the real debts, and " not the principal sums, fall to be deducted; Find, that the " amount of provisions, with which the entailed estate may at " one time be burdened, cannot exceed three years' free rents, " after deduction of the liferents and interests on the real and " personal debts affecting the same; Find, that the bond of pro- " vision executed by the late Colonel Porterfield, constitutes a " valid burden against the entailed estate in so far as its amount, " together with any provisions granted by prior heirs, and in- " terest which had accrued thereon up to the date of Colonel " Porterfield's death, and affecting the estate, did not exceed " three years' free rent at that date; and with the above find- " ings, remit to the Lord Ordinary to dispose of the case, and to " determine all questions of expenses."

The respondent thereafter, under an interlocutor of the Lord Ordinary, stated the sums he claimed payment of from the appellant, and the deductions he was willing to make, which included the annual allowance he had received from the appellant since his marriage, and, at the same time, expressed the willingness of himself and his wife to renounce her jointure. In consequence of a difference between the parties as to the exact amount of the deductions, a reference was made to the respon-

dent's oath, and thereafter, the Lord Ordinary, (on 18th July, 1840,) pronounced the following interlocutor:—"The Lord "Ordinary having heard parties' procurators on the application "of the interlocutor of Court, of the 12th February, 1840, and "on the remaining points in the case, and having considered the "pursuer's deposition in the reference to his oath of verity by "the defender; Finds, that the pursuer is entitled, under the "bond libelled on, to a sum equal to three-fourths of three years' "free rent of the estate of Duchal, as for crop and year 1818, "with legal interest at five per cent on the successive instal-"ments of the said sum, as these fell due respectively until the "date of decree, under deduction, in terms of the said interlocu-"tor of Court, and of the admission by the pursuer in his re-"vised condescendence and state of claim, No. 55 of process, of "the sums therein specified, and interest thereon at five per "cent; Finds, that the sum due the pursuer by the defender, "under the bond libelled, after deducting the sums above "mentioned, amounts, with interest to this date, to L.5226, "7s. 9¾d., as per state produced by him, No. 60 of process: "Finds the defender liable to the pursuer in payment of that "sum, with legal interest thereon, from the date of decree until "payment, and decerns. And in respect the pursuer has agreed, "by the said revised condescendence and state of claim, to dis-"charge the jointure provided by the defender, to the wife of "the pursuer, by the pursuer's marriage contract, in the events "therein mentioned, Finds, that the pursuer is bound, on re-"ceiving payment of the above sum of L.5226, 7s. 9¾d. with "interest, to deliver a discharge of the said jointure to the "defender, and decerns: Finds the pursuer entitled to the "expenses of process incurred by him in the discussion before "the Lord Ordinary, subsequent to the interlocutor of the Inner "House, of date 12th February, 1840; allows an account thereof "to be given in, and remits to the auditor to tax the same and "to report."

This interlocutor was adhered to by the Court, on the 3d December, 1840.

The appeal was against these several interlocutors.

Mr Pemberton, and Mr Anderson, for the appellant.—I. The fraud which the statute 1695, cap. 24, intended to provide against, is not in the heir who makes up his titles by passing by the party who contracted the debt during a possession in apparency, but in the heir who contracts the debt on the credit of land to which he had not a valid title. This is evident, for the heir making up his titles has no option — he must pass by the interjected person — and the fraud, if in the party making up his title, could not be affected by the length of the interjected party's possession, one day would be as good as three years. Whereas, if the fraud be in the interjected party, three years may be supposed to have been adopted as such a length of possession as might reasonably have induced an idea of property and fund of credit.

If this be the true object of the statute, it cannot apply to gratuitous obligations, or to debts contracted with parties cognizant of the true state of the debtor's title. That it does not apply to gratuitous obligations, was decided in the Clydesdale case, *Mor.* 1274, and by implication in the case of Ogilvie *v.* Ogilvie, 16th December, 1817, 19 *F.C.* 422, where the judgment was rested on the onerosity of the obligation. As to the case of Muirhead, *Mor.* 9807, it was founded on an antenuptial contract, or onerous obligation. No doubt Glencairn *v.* Graham, 23d May, 1800, 8 *F.C.* 405, was founded on a postnuptial provision to a widow; but such a provision is onerous, and may compete with ordinary debts, Walker, *Mor.* 953; Robertson, *Mor.* 957; Campbell, *Mor.* 988. But a *mortis causa* provision to a child is not onerous; it creates a mere *spes*, Ersk. III. 7. 40. The case of Kennedy, 7 *S.* and *D.* 397, no way impinges upon

this. There the father had given an heritable bond in security, upon which infeftment had been taken, whereby the provision gave a real right of credit. And the case of Adamson, 11 *S.* and *D.* 40, was expressly rested on the debt of service owing from the granter. In the present case, Colonel Porterfield could never have been compelled to grant the bond, and inasmuch as it was never delivered in his lifetime, or the respondent made aware of its existence, and was subject to revocation, how can it in any sense be said to be onerous, or its non-payment in the lifetime of the granter to have been fraudulent ?

II. The possession contemplated by the statute, is a real and ostensible possession, inducing a belief of ownership, not a constructive and inferential possession. The possession of a liferenter is in law the possession of the fiar, but it is not such a possession as under this statute will make the heir liable for the debts of the fiar, M'Call *v.* M'Call, *Mor.* 9748; Pitcairn *v.* Lundin, *Mor.* 9750. It is not the right to possess, but the fact of possession that rules Knox *v.* Irving, *Mor.* 5276; Donald *v.* Colquhoun, 13 *S.* and *D.* 574. Here Colonel Porterfield was never in actual possession at any period of his life.

[*Lord Campbell.* — Who was in possession then ?]

The agent of both the parties.

[*Lord Brougham.* — Or of the party who should ultimately succeed. The decision was retrospective, and ambulatory.]

The possession was not affected by the ultimate decision. Colonel Porterfield would have got neither more nor less.

But the cases go upon this, that the party must have been in actual possession, of which the case of Buchan *v.* M'Donald, *Mor.* 9822, is a strong illustration, where it was held, that the possession by a judicial factor in a ranking and sale, was not a possession coming under the statute, though the heir apparent had received payment of the reversion of the price of the lands.

Moreover, Colonel Porterfield was not three years even in constructive possession by the drawing of the rents, for the rents payable in October, 1816, were drawn and paid over to the executor of Alexander Porterfield, and the Colonel himself died in October, 1818.

III. The disposition and settlement was intended to operate only in case the bond of provision should prove ineffectual, and was so expressed. The respondent was aware of this, and elected to claim, and did claim under the disposition; he thereby consented to hold the bond as ineffectual, and upon that understanding the appellant made him the heavy payments and allowances which have been made the subject of deduction from his claim. After such acquiescence he cannot be allowed to turn round and recur to the bond.

Mr Solicitor General, and Mr Cook for the respondents, were not called upon.

Lord Chancellor. — I have not heard the whole of this case, but as far as I have heard it, I do not feel any doubt about it. I shall be glad to hear the opinion of my noble and learned friends.

Lord Cottenham. — It appears to me that the appellant has failed in all his points. With regard to the deed, the Glencairn case established a rule applicable in every point to the present. That case was decided on appeal in this House, and on the value of that decision it appears to me there can be no question raised.

The former possessor in the present case, died in May, 1815, and the heir continued in possession till the year 1818, beyond three years; the possession during that time was not in himself personally, but in a person whom he, with Sir Michael Shaw Stewart, who was competing with him, had appointed for the purpose of receiving the rents, (a Mr Campbell;) and all the

rents which accrued between the death of the former possessor, and his own death in 1818, were received by this Mr Campbell, who was appointed by agreement between himself and the other party. It was the possession therefore of the party whose claim might be established, and the claim of Colonel Porterfield was established by the Court of Session.

With regard to the second point, the pursuer was precluded from making his claim, by the supposition that he had no title. No claim can be considered as abandoned, unless the party knowing what are his rights, voluntarily relinquishes those rights. In this case he received a provision under the second deed, on the supposition that he could not succeed under the first. He has now established his claim under that first deed, he has therefore a right to call for an account of what he should receive under the first deed. The appellant suffers no injury by that, he is called upon to pay only what he otherwise would have had to pay, and cannot be allowed to say that the respondent is precluded from asserting the title he has under the first deed.

With regard to the real debts, that point appears to me free from all doubt. Taking the first clause of the deed, with respect to the jointure, which may properly be referred to for the purpose of seeing in what sense the words "real debts" are to be construed in the subsequent parts of the deed, it is impossible to say that the real debts are to be deducted from each year's income, so as to defeat the claim of the widow. It must be taken to mean that it is a yearly income subject to the interest on the real debts. Taking that as furnishing a rule of construction of the other parts of the deed, it is clear that the interest only on the real debts is to be deducted.

With regard to costs, it is quite clear that the pursuer is entitled to his costs; for, being resisted in the whole of his claim, the defendant not offering to pay him what has in fact been found due, but resisting his claim altogether, the pursuer was obliged

to resort to a court of justice to enforce that claim. It follows, that the party who has thus been compelled to enforce his right, ought to be indemnified against the costs of the suit, which was improperly embarked in on the part of the defender. The only possible question would be, not between the pursuer and the defender, the pursuer being at all events entitled to the costs, but whether they ought to be paid out of the estate, or personally by the defender. It is said this claim required to be constituted, in order to make the whole a charge on the estate, but it was not that which made this suit necessary. A suit, if instituted for that purpose, not being a suit litigated, would have had a totally different character, and have been attended with a very different degree of expense to that of the present. The expense of this suit has been incurred by the defender having improperly resisted this suit, and therefore the interlocutor in that respect appears to me to be correct, making the defender not only between himself and the pursuer, but personally, pay the costs of this litigation, which his own improper resistance of the pursuer's demand has rendered necessary.

As to the interest, that is clear beyond all doubt. There is a contract for lawful interest; and there is no ground suggested why the party should not have the benefit of this contract: the length of time which has elapsed, during which the parties have been under misapprehension as to their rights, furnishes no such ground. The contract giving lawful interest, then, must clearly be taken to be five per cent.

Lord Campbell. — I am of the same opinion on all these points.

In the first place, this appears clearly to be a deed within the meaning of the act of 1695, which, notwithstanding the words of the preamble, certainly is not confined to outstanding creditors; and with reference to that it is quite unnecessary to go farther than the case of Glencairn *v.* Graham, which was solemnly decided by this House; it is precisely in point.

Then as to the second point, I think the statute does not say that the party to be charged shall be in exclusive possession of the whole of the lands; but was he not in possession of the lands and estates when he appointed an agent, and received the rents, and disposed of those rents according to the manner in which the arrangement was made that they should be disposed of, until the competition between him and Sir Michael Shaw Stewart terminated. Under the power to receive the rents in the meantime, it would be a joint possession, and it has been decided that a partial possession is quite enough to bring the case within the act of Parliament.

With regard to the renunciation and abandonment, that appears to me not to stand on any intelligible ground.

That brings me to the question of amount. I apprehend it is unnecessary to say a single word as to the deduction of the whole amount of the real debts from the yearly income, because such a thing could not by possibility enter into the meaning of the entailer; he would thereby have utterly defeated the intention which he plainly expresses, of giving a power of jointuring, and making provision for younger children.

Then, with respect to the interest, that is expressly lawful interest, which Mr Anderson allows must be five per cent; what authority, then, has the Court of Session, or this House, to reduce it to four per cent, any more than to say that the creditors shall take half the amount of the principal?

The only remaining point is that of costs, and my opinion is, that the appellant in this case having resisted his liability *in toto*, must be considered as having caused this litigation, and that he is liable to the costs. I think, therefore, that on every ground the interlocutor should be affirmed.

Lord Chancellor.— I have heard only part of the argument. As far as I can form an opinion from listening attentively to what has fallen from Mr Anderson, and from reading the papers,

I concur fully in the opinion expressed by both the noble and learned Lords.

Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be, and the same are, hereby affirmed. And it is farther Ordered, That the appellant do pay, or cause to be paid, to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is farther Ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be, and the same is, hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

GRAHAME, MONCRIEFF, & WEEMS — DEANS & DUNLOP, Agents.