

No 117. the grandchild might have been pleaded to be an heir of tailzie *per praeceptionem*, and so liable to the debt; but the case was not so pleaded, nor under the LORDS' consideration when determined.

In this case, the pleading did not so clearly distinguish the title whereupon the defender might be overtaken, whether upon the act of Parliament 1621, or as an heir of tailzie; but the LORDS did difference the case in the reasoning, "and found the defender liable as heir of tailzie *per praeceptionem*, by progress, to his father, who purchased the said lands by his means, after contracting of the pursuer's debt, and also reserved a faculty to burden the fee."

The defender having reclaimed, representing that the original fee, in favours of the son of the second marriage, was anterior to the pursuer's debt; but that the father and son resigned, and took a new charter, with a faculty to burden, posterior to the pursuer's debt;

Upon which the LORDS, by interlocutor of the 29th November 1698, "found the defender was not liable as an heir of tailzie, the original fee being taken to the son before the pursuer's debt, albeit it was but three days prior, and the disposition retained by the father till the new resignation; but allowed a further hearing how far the defender was liable by virtue of the reserved faculty. *Vide* 16th December 1698, *inter eosdem*, No 22. p. 4130, *voce* FACULTY.

*Fol. Dic. v. 2. p. 35. Dalrymple, No 3. p. 4.*

1717. January 24.

Mr JOHN HENDERSON *against* JANET WILSON and COLONEL LAWSON,  
her Husband.

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▲ son obtaining a disposition from his father was thereon infeft, and in possession. He dying before his father, could not be liable *praeceptione hereditatis*, but his heir was found liable, serving to him in that special subject, and possessing after the father's decease.

Mr JOHN HENDERSON pursues Janet Wilson, as representing her father, on this ground, that the defender's father disposed his estate to Francis Wilson, his eldest son, who thereupon was infeft, and in possession *praeceptione hereditatis*, and the defender, the Colonel's Lady, is heir to, or otherwise represents her said brother, and thereby is liable to the pursuer's debt, which is anterior to the father's disposition in favours of the eldest son.

The defender *alleged*, That her brother could not be liable *per praeceptionem*, because he died before his father; and, though he had accepted the disposition, and been in possession during his father's life, he might have abstained after his father's decease, and thereby would not be liable personally; and as little can the defender be liable as representing him.

It was *answered*, The defender is liable, albeit the brother was not; because she was heir served and retoured to her brother in the estate which her father disposed to him, at the least that she continued to possess the said estate after the death of her father; and, as her brother would have been liable, if he had continued his possession after the decease of her father, so the defender having

represented him by intromission with the mails and duties of these lands wherein he died, and in possession, and continued to intromit after the father's decease, she is liable, as her brother would have been liable, even though she were not specially served heir, as the pursuer offers to prove she is. And whatever might be alleged in the defender's favours, if she did represent her brother only as executor, or if she had represented him any other estate, or by another passive title; yet her intromission with the rents of, and her special service and infestment in the estate disposed to her brother, subject her to the passive titles of *præceptio*.

"THE LORDS found it relevant to make the defender liable *per præceptionem*, that she was infest as served heir in special to her brother in the lands disposed to him by her father; but found her intromission with the rents of the said lands, after her father's decease, if she was not infest therein, only relevant to make her liable *in valorem* of her intromission, because she might be *in bona fide* to continue her brother's possession, without inquiring into his title, being willing to represent him; yet that still she was liable *in valorem* of the subject of her intromissions with her father's estate; but found no other representation of her brother relevant to make her liable for any thing."

*Fol. Dic. v. 2. p. 36. Dalrymple, No 165. p. 230.*

\*.\* Bruce reports this case.

WILLIAM WILSON of Holmshaw having contracted a debt from the said Mr John Henderson, thereafter disposes his estate to Francis his son: The son dies before the father; and, after the decease of both, Mr John Henderson insists against Janet Wilson, sister to the said Francis, as representing him on some one or other of the passive titles; and founds himself on these grounds, viz.

*1mo*, That the said Francis Wilson having accepted a disposition from his father of his lands, he became thereby liable for all debts due by his father preceding the date thereof, as fully as if he had been served heir to him.

*2do*, That the disposition granted by the father, and accepted by the son, was a right that descended to the son's heirs and successors.

*3tio*, That the son's heirs representing him on any of the passive titles, makes them liable for the son's debts; and therefore, in the present case, though the sister be not served heir to her brother in special, yet, if she have behaved, &c. she must be liable for her brother's whole debts; nor can an unwarrantable intromission be restricted *ad valorem*, seeing in law they are the same persons with him, and so should be as far liable as he was; nay, there is more reason to say so here than in the case of actual entry; for, when a person enters heir in special, here there appears no design of fraud to conceal their title from the creditors; but, in case of behaviour, there seems to be a latency and work of

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*Answered* for the defender, *imo*, That the passive titles, in so far as they are penal, do not affect the heir, who is only liable *in valorem*, when the passive title is not established in the predecessor's lifetime, which is founded upon the nature of all penal actions, which are extinguished by the death of the delinquent.

*2do*, Francis himself, if he had been pursued when his father and he were alive together, could not have been liable in more than the value of the subject disposed; for the acquiring a right by an heir before the death of his predecessor, is not a passive title to make the apparent heir liable in his predecessor's lifetime universally, though a creditor be founded in the act of Parliament 1621 to reduce it; but the vitiosity and passive title are founded on this, that an apparent heir pretends to bruik his predecessor's estate after his death, by virtue of a disposition made by the predecessor to him; for our law has not prohibited all commerce betwixt fathers and their children, nor made it penal, only when such dispositions after a father's death are made use of by the son, or any other heir than the law has insroduced; but, since Francis predeceased, the passive title of successor *titulo lucrativo*, &c. could not be applied to this case; nor could his heir or successor, who found that he was vested in the right of the said lands, be further liable than for the value.

“THE LORDS found the defender being served heir in special to her brother, in the subject disposed to him by her father, relevant to make her liable for the debts of the father contracted before the disposition, &c. *præceptione hereditatis* of the father; but found, that no other representation of her brother could be relevant to make her liable, excepting intromission with the rents of the lands disposed; and that such intromission could make her liable only *in valorem*, she not being specially served.” This interlocutor was reclaimed against, and adhered to. See PERSONAL and TRANSMISSIBLE.

Act. *Ila.*

Alt. *Binning.*

Clerk, *M'Kenzie.*

*Bruce, v. 2. No 50. p. 68.*

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In an action on the passive titles, it was insisted for the pursuer, that the defender was universally liable upon the passive title of heir served of

1745: June 6:

MERCER against SCOTLAND.

It is an established point, that clauses burdening with debts, when in dispositions to particular subjects, are understood as intended by the granter only for the security of creditors, and not to subject the disponee *ultra valorem*; but whether such clauses in dispositions *omnium bonorum* did not admit a different consideration was the question in this case.

Adam Mercer, writer in Edinburgh, by his disposition in 1732, “assigned and disposed to Mary Graham, his spouse, in liferent, and to the children pro-