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THE LORDS found, " That Robert Lundin having possessed the estate three years, not as apparent heir to his mother, but as donatar to his father's liferent, this case does not fall under the act 1695."

Sel. Dec. No 18. p. 20.

1759. July 20.

JAMES MACNEIL, Deputy Collector of the Customs at Greenock, *against*
MARGARET MATTHIE, Relict of William Taylor.

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An adjudication acquired by an apparent heir, and possession assumed upon it during his father's life, is not reducible on the act 1695.

ALEXANDER TAYLOR was possessed of a house in Greenock; for attaching which, an adjudication was led in the year 1709, at the instance of one of his creditors, Lilius Morison, for the accumulate sum of L. 387 Scots. The adjudger obtained a charter from the superior, and was infest in the year 1713. In the year 1719, another adjudication was led at the instance of another creditor, Magdalen Bryce, for the accumulate sum of L. 516: 19: 6 Scots.

William Taylor, the eldest son of Alexander, purchased these two adjudications from the creditors in the years 1721 and 1724; and entered to the possession of the house during the lifetime of his father. In the year 1725, his father being still alive, he obtained a declarator of expiration of the legal upon the first adjudication led in 1709.

William Taylor having married Margaret Matthie, he executed, upon the 1st June 1741, a postnuptial contract of marriage with her, by which he conveyed this house, and other subjects, to himself and his wife in conjunct fee and liferent, and to the children of the marriage in fee.

After the death of William Taylor, his relict continued the possession of the subject without challenge, till James Macniel, as having right to an adjudication led in the 1726, against the same subject, upon a debt due by Alexander Taylor, brought a process of reduction of the two adjudications upon which William Taylor's right was founded, *insisting*, That as they were acquired by William Taylor, the eldest son of Alexander the debtor, and were the title under which he possessed after his father's death, they fell under the sanction of the second clause of the act 1695, which declares, That every such adjudication shall be reputed a behaviour as heir; and that consequently the diligences, by coming into his person, became extinguished *confusione*; at least that they could not stand in competition with the onerous creditors of his father.

The second clause of the act 1695 is in these words: ' If any apparent heir for hereafter shall, without being lawfully served or entered heir, either enter to possess his predecessor's estate, or any part thereof, or shall purchase, by himself, or any other for his behoof, any right thereto, or to any legal diligence or other right affecting the same, whether redeemable or irredeemable, otherwise than the said estate is exposed to a lawful public roup, and as the highest offerer thereat, without any collusion, 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, sicklike as if the said apparent heir possessing or purchasing, as said is, were lawfully served and entered heir to his said predecessor; declaring always, That the said apparent heir may bring the said estate to a roup, whether the estate be bankrupt or not.'

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Answered for the defender, *1mo*, The words of the statute appear to apply only to the case of a proper apparent heir entering to possess, or acquiring debts, after his predecessor's death. The designations of predecessor and apparent heir are correlative terms. It is absurd to call a man a predecessor while he is alive; and it is improper to design his son apparent heir during that period. The apparent heir who comes under the sanction of this clause of the act 1695, is described to be one who has it in his power to serve or enter heir, and, in place of taking that method, chuses to enter to possess his predecessor's estate, and to purchase legal diligences affecting it. To apply any of those things to a son during his father's life, is impossible. It cannot be said, that he neglects to serve or enter heir; and it would be equally absurd to say, while his father is alive, that he is possessing his predecessor's estate. Further, the possession or purchase is declared to be reputed a behaviour as heir, and a sufficient passive title to infer a representation of the predecessor universally; but a behaviour as heir will only apply to one who has it in his power to enter to a predecessor who is dead; for it is impossible to represent a predecessor universally while he is alive, or to be liable in all his debts and deeds, the extent of which cannot be known till his death; and the manner of the representation is described in the statute to be the same as if the apparent heir possessing or purchasing were lawfully served and entered to his predecessor, which supposes him capable of entering heir at the time of the purchase; and the clause concludes with allowing the apparent heir to bring the estate to a roup; which evidently supposes, that the predecessor is then deceased.

2do, The words of this statute ought not to be extended beyond their proper meaning; because the sanction is extremely severe, depriving the apparent heir, not only of all benefit from the acquisition he may have made, but condemning him in an universal representation. The statute is also a correctory law; and upon that account likewise ought not to be extended. Accordingly the Court has restricted the general words, debts and deeds, made use of in the first clause of the statute, to such debts or deeds as are strictly onerous, to which alone the heir passing by is subjected; and the Court has also refused to extend the first clause of the act to the case where an apparent heir possesses the estate without making up any title; and these constructions of the statute have been confirmed in the last resort.

3tio, The consequences of extending this penal clause would be extremely severe. If a son or a younger brother happens, by any accident, to be creditor to his father or elder brother, and does diligence against their lands, and

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enters into possession for payment of his debt ; this creditor, by extending the clause to possession attained during the predecessor's life, would be subjected universally to the whole debts of his father or brother, not only such as they have then contracted, but also what they may thereafter contract at any time in their life.—Further, if a father, as is very common, happen to dispoise a part of his lands to his eldest son, when he comes to be of age, or when he enters into marriage ; by such construction, if the father afterwards contract debt, the son, by entering to possess, though during his father's life, would be subjected to an universal representation, and liable for all such debts.

4^{to}, Supposing that William Taylor did incur a passive title by the purchase of these adjudications, or by possessing upon them after his father's death ; yet this will not be a ground for reducing these adjudications, to the prejudice of the defender, his relict, a singular successor, who must be preferred upon the adjudications, leaving the pursuer to insist in a personal action against the representatives of her husband.

Replied, imo, If the words of the statute are taken in a strict grammatical sense, they will no doubt apply only to an heir after his predecessor's death ; but the expression, in the common use of language, applies to the case of an heir, whether his predecessor be dead or alive ; and the utmost accuracy of language is not to be looked for in the statute 1695.

2^{do}, Statutes relating to fraud are entitled to the most liberal interpretation ; and it is the duty of Judges to explain them in such a manner as to answer the intention of the legislature. This has been the practice in explaining other statutes : Particularly, the Court has, in many instances, given an extensive interpretation to the statute 1621, against unlawful alienations made by bankrupts. The statute 1661, for obviating the frauds of apparent heirs, has been explained in the same extensive manner. By that statute it was ordained, that in case the apparent heir of any debtor, or any other confident person for his behoof, should at any time thereafter acquire the right of an expired apprising, the said right should be redeemable within ten years after it was acquired by the posterior apprisers. The Court has found, that, under the words apparent heir in this statute, were comprehended presumptive heirs. It has also been found, that the purchase of apprisings during the currency of the legal fell under the intention of the act, though the words only mention expired apprisings ; and the act has been extended so as to allow, not only posterior apprisers to redeem, but also personal creditors. The statute 1661 and 1695 are extremely analogous ; and therefore ought to be explained in the same manner. Both of them were intended to prevent the frauds practised by heirs ; and the last act was only calculated to make the remedy more effectual. The statute 1695 itself has been explained by the Court in this extensive manner, in two several cases ; *Watson contra Brown* No 88. p. 9743. ; and 24th November 1714, *Mercer contra Leith*, No 89. p. 9747. ; and the same statute was

extensively interpreted by the Court as to a different clause of it, in a late case, *Burns contra Dickens*, 4th July 1758, No 31. p. 5273.

3tio, The cases of a son becoming debtor to his father, or of a father disposing to his son upon occasion of his marriage, do not apply. The statute only relates to the acquiring diligences against the predecessor's estate, in order to carry it off to the prejudice of creditors; and it is most just, that heirs should be prohibited from all traffic of this sort, as well during the predecessor's life as after his death.

4to, The effect of the present reduction must be to set aside the adjudications in competition with the pursuer's title, because the apparent heir, who became liable on a passive title by the purchase of these adjudications, could not have set them up in competition with the pursuer; and the defender is in effect only the gratuitous disponee of the apparent heir, her husband, by a postnuptial contract of marriage, containing exorbitant provisions.

"THE LORDS repelled the reasons of reduction; and assolizied."

Alt. *Dav. Dalrymple, Lockhart.*

Alt. *Williamson, Ferguson.*

W. J.

Fol. Dic. v. 4. p. 43. Fac. Col. No 192. p. 341.

1775. January 17. GEORGE HAY against JAMES HAY.

GEORGE HAY being creditor to the deceased John Hay in 1680 merks, by bill, brought an action of constitution and adjudication, before the Sheriff of Stirling, against the defender, as representing the said John Hay, his father. In this action, the defender renounced to be heir to his father, and he was assolizied from the process; and the matter was allowed to lie over for several years, without any extract being taken out.

The pursuer having got notice of the defender's being since entered and infest in the lands, wakened the process before the Sheriff, who dismissed it as incompetent, after the former absolvitor; whereupon the pursuer brought the process by advocacy into this Court; and the Lord Ordinary, upon the pursuer's restricting his action to the conclusion of constitution, pronounced an interlocutor, repelling the defence as to the competency, advocating the cause, and ordaining the defender to produce his sasine, and allowing a proof of the defender's father having been three years in possession of the lands of Bankhead, being those included in the conclusion of adjudication before the Sheriff.

The defender accordingly produced his sasine in the said lands, bearing date the 4th March 1773, and proceeding upon a precept of *clare constat* from Sir Laurence Dundas, the superior, to the defender, as heir to Agnes Binny, his great-grandmother. And, from other writings recovered out of his hands by a diligence, it appeared, that the lands of Bankhead, which belonged to Agnes Binny, were disposed by her in 1738 to Matthew Hay her eldest son,

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Found that a person passing by his father, who was three years in possession as apparent heir, and also passing by his grandfather, the person last infest base, and making up titles to a remote predecessor, who was the last publicly infest in the lands, is liable for the debts contracted by his father, upon the statute 1695.