

manner as they would have been, if her husband had been infeft, and her provisions had been constituted by a deed wanting procuratory and precept. Her claim can in no event exceed the value of the estate, as it is only payable out of it; and she makes her demand against the rents, or personally against the defender, only to supply the want of specific performance.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: The act 1695 transmits the obligation of the interjected heir against his successor, in the same manner as if his titles had been completed. It protects his onerous and rational debts and deeds; and there is no occasion at present to consider its effect as to those which are gratuitous; because a widow's provision is clearly onerous. An heir of entail, in so far as he is not restricted by the prohibitions, is an unlimited fiar. The provisions in question being authorised by the entail, the late Mr. Graham and his successors are bound in specific implement, and the obligation does not depend on the amount of rents received by them.

The case of Hourston was well decided upon the grounds suggested in the pursuer's argument.

The Lords, by a great majority, repelled the defences, and remitted to the Lord Ordinary to proceed accordingly.

Lord Reporter, *Glenlee*. Act. *Mat. Ross*. Alt. *Fletcher*. Clerk, *Menzies*.

D. D. *Fac. Coll. No. 179. p. 405.*

* * This case was appealed. The House of Lords ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of be affirmed.

1803: February 2. MIDDLEMORE against MACFARLANE.

William Richard Middlemore, brother and apparent heir of the late John Middlemore of Donavouird, brought a process of sale under the act 1695, C. 24. against the widow and creditors of his predecessor. Part of the estate was purchased by Andrew Macfarlane, and, after payment of the debts, a considerable reversion remained for the heir of the deceased.

The greater part of the lands purchased by Macfarlane, had been held by John Middlemore under base infeftments, upon the precepts contained in the disposition from his authors, the procuratories of resignation continuing unexecuted.

It was objected by Macfarlane, that the reversion of the price should not be paid until the pursuer had made up a public feudal title to his brother, by entering with the paramount superiors. The pursuer maintained that this was not necessary; but at the same time offered to take out precepts of *clare constat* from the immediate superiors of the base infeftments, and infeft himself upon these. But Macfarlane was not satisfied with this, and

No. 1.

No. 2.

What title necessary for taking up the reversion after a judicial sale at the instance of an apparent heir?

No. 2. Pledged: The pursuer is bound, as heir to his brother, to make up public titles to the lands, and to convey them to him, so as to put it in his power, on the most advantageous terms, to infest himself publicly, both in the property and in the superiority. The reversion of the price of the estate is *in hæreditate jacente* of the deceased; and the apparent heir can only acquire a right to it, by making up titles in the same manner as he must have done to the estate itself. The act 1695, C. 24. makes no change upon the law as to the rights and privileges of an heir, otherwise it would be easy for every apparent heir to avoid the necessity of entering to his predecessor at all, by bringing the estate to a judicial sale under the statute, by which he would become entitled to the reversion of the price. A purchaser has a right to insist upon obtaining the most complete and most beneficial titles that can be given; and it is the pursuer's duty to make up public titles to the lands, because a base infestment does not afford the same security as a public right, and the estate is subjected to the feudal casualties due to the interjected superiors.

Answered: The object of the act 1695, is to permit an heir to bring his predecessor's estate to sale, without any danger to himself, when it is doubtful whether it will be sufficient for the payment of the debts. This would be utterly defeated, if it were necessary to make up feudal titles to his predecessor, by which he would become his universal representative; for it is only in cases approaching to bankruptcy that recourse is had to the provisions of this statute. The act accordingly gives a liberty to the heir to enter *cum beneficio*, but does not absolutely require it. The heir bringing the estate thus to sale, acts in the capacity of a trustee for the creditors; and if there happen to be any reversion of the price, he is entitled to receive it from the purchaser, being answerable to that extent in absolute warrandice; Erskine, B. 2. Tit. 12. § 61. Bankton, B. 3. Tit. 2; Irving against Maxwell, June 10th, 1747, No. 27. p. 5264; Hamilton, Dec. 14, 1750, No. 43. p. 5297; DICT. *voce* HEIR APPARENT. But supposing it to be necessary to make up a feudal title, the pursuer cannot be obliged to do any thing farther than to place himself exactly in the situation of his predecessor, which he does by obtaining a precept of *clare constat*, and taking infestment upon it in the manner proposed.

The Lord Ordinary found, "that in offering to obtain precepts of *clare constat*, and take infestment, the pursuer had done more than he was in strict law bound to do; and therefore repelled the objection."

And the Court, upon advising a petition against this interlocutor with answers, adhered; being of opinion, that the decree of sale was to be held as an adjudication for the general behoof, and a sufficient title for the heir to take up the reversion.

Lord Ordinary, *Hermand.*
Alt. *W. Clerk.*

Act. *Williamson.*
Agent, *Ja. Gibson, W. S.*

Agent, *Geo. Andrew.*
Clerk, *Menzies.*