creditors, by lying out unentered. The titles were made up in the manner above stated, not from mistake, but from design; and, even though they were erroneous, that could not avail the defender, unless it were in his power to instruct, that, if they had been made up in any other way, he would have got free of the pursuer's claims; but it is impossible for him to do so, and, therefore, there can be no lesion. No 93.

THE COURT "unanimously adhered to the Lord Ordinary's judgment."

Act. *M'Laurin.* Alt. *Wight.* Clerk, *Ross.*

Fol. Dic. v. 4. *p.* 43. *Fac. Col. No* 148. *p.* 4.

1796. *June* 10. JOHN CALLAND and his Attorney *against* DONALD CAMPBELL.

No 94.
An heir apparent does not incur a passive title by purchasing a debt affecting the estate of his ancestor, unless he possess the estate in consequence of it.

COLONEL CAMPBELL of Barbreck having died much in debt, Captain Donald Campbell, his eldest son, declined representing him, and brought a sale of the estate, as apparent heir.

He afterwards entered into a transaction with John Calland of London, by which the latter agreed to make over to him certain heritable and personal bonds due by Colonel Campbell, in return for some contingent securities which Captain Campbell held from the Earl of Glencairn.

The transaction was preceded by a communing for several months, and it was completed by the parties themselves in London, without the presence of any person acquainted with the law of Scotland, by missives, obliging themselves to grant regular conveyances of the securities *hinc inde.*

Captain Campbell afterwards became apprehensive, that the acquisition of Calland's debt would involve him in a passive title, in terms of the act 1695, c. 24. and refused to grant the conveyances on his part.

After this, Calland brought an action against him for implement, in which he contended, that as the transaction was fair and deliberate, its validity could not be affected by its having consequences of which the parties were not aware at the time. The defender, on the other hand, maintained, that if fulfilling the agreement was to have the effect of involving him in a passive title, the transaction would be so hurtful to him as to entitle a court of equity to set it aside, as taking its rise from a fundamental ignorance of the subject.

The Lord Ordinary reported the cause on informations.

THE LORDS, before answer, sisted precess, until it should be tried, between the defender and his father's creditors, "How far fulfilling the agreement in question would subject him in an universal title, as representing his father?"

In a petition against this interlocutor, the pursuer stated the prejudice which, owing to the contingent nature of the defender's securities, he might sustain by the delay which this interlocutor would occasion, and contended, that it was

No 94. incumbent on the defender to prove his defence, without calling additional parties.

The Court ordered a hearing in presence, upon the question stated in the interlocutor.

Captain Campbell

Pleaded; By our early law, the heir might have possessed on apparency without subjecting himself in payment of the debts of his predecessor; an evil which was removed by the introduction of the passive title of *gestio pro hærede*. Still, however, he might have got himself vested with the character of creditor to his ancestor, and in that way obstructed the interest of other creditors. For this reason, the act 1661, c. 62. was passed, making apprisings purchased by an heir-apparent redeemable at the instance of posterior apprisers upon payment of the sum which the former had actually given for them. But it being often difficult to ascertain that sum, the act 1695 was at last passed, with a view to prevent every interference of apparent heirs with the estate of their ancestors. It declares, That the heir shall incur a passive title, if he 'either enter 'to possess his predecessor's estate, or any part thereof, or shall purchase' any right affecting it. From the disjunctive words of the statute, therefore, as well as from the spirit of the enactment, it is evident that the penalty is incurred by the mere act of purchasing the right, though no possession should follow; Erskine, b. 3. tit. 8. § 85.

Answered; The statute is no doubt inaccurately expressed; but its sole object was to prevent apparent heirs from taking possession of the estate of their predecessors by a singular title. Indeed, it merely followed out the act of sederunt 28th February 1662, which supposes possession; and there would have been neither justice nor expediency in preventing heirs from purchasing the rights of creditors, provided they make no use of them as a title to possess the estate. Accordingly, since the date of the statute, the mere act of purchasing a debt has in no case been found to infer a passive title; and, with the exception of Mr Erskine, it has been the uniform opinion of lawyers, that a passive title was not incurred by so doing; 7th June 1710, Watson, No 88. p. 9743.; 20th July 1759, Macneil, No 92. p. 9752.; Bankton, v. 2. p. 354. § 101. p. 369.

Two of the Judges considered themselves obliged, by the words of the statute, to hold the mere act of purchasing a debt sufficient to infer the passive title; but the rest, upon the grounds last stated, were of the opposite opinion. The defender, (it was further observed,) by bringing the estate to sale, had acted fairly, and had constituted himself trustee for all concerned; and if, in purchasing the debts, he should obtain any benefit, he would be bound to communicate it to the other creditors.

The Lords found, "That the purchase of the debts in question by the defender, upon his father's estate of Barbreck, does not subject him in an univer-

sal passive title, and therefore repelled the defences: Found the defender bound to fulfil the agreement entered into with the pursuer, in terms libelled." No 94.

Lord Ordinary, *Swinton.* Act. *Lord Advocate Dundas, A. Campbell junior.*
Alt. *Solicitor-General Blair, Geo. Fergusson.* Clerk, *Home.*
D. D. *Fac. Col. No 221. p. 518.*

SECT. XIII.

Behaviour how purgeable?

1629. *February* 14. STEVEN *against* PATERSON.

No 95.

INTROMISSION with heirship goods, found purged by the heir's obtaining warrant from the Lords, directed to the Bailies of Edinburgh, to make inventory of the goods in his father's house, and which inventory was accordingly made before process against him at the instance of his father's creditors.

Fol. Dic. v. 2. p. 34. Durie. Spottiswood.

*** This case is No 19. p. 9663.

1633. *February* 15. JAMES BANE *against* HUGH MITCHELL.

No 96.
An apparent heir's intromission with the heirship moveables of his predecessor who had died at the horn, found not purged by a declarator of escheat afterwards obtained and purchased in by the heir, although before process moved against him on the passive titles.

JAMES BANE, as assignee constitute to a bond of 1200 merks granted by the Earl of Tullibardine as principal, and John Mitchell, one of his cautioners, pursued Hugh Mitchell, as son and heir to the said John, at the least behaving himself as heir, by intromission with his father's heirship goods. *Alleged*, He cannot be convened as intromitter, &c. because his father died rebel, and his escheat was disponed, and declarator obtained thereon long before the intenting of this cause; and for any intromission he had, he is countable to the donatar and none other, likeas he has right from the donatar to the said particulars intromitted with by him. *Replied*, Not relevant, except it were alleged, that the gift and declarator were before the excipient's intromission; for his intromission before the same being vitious, cannot be purged by the subsequent right gotten from the donatar, which may make him bruik the same heirship goods as his proper goods, but will never free him at any of his father's creditor's hands. THE LORDS repelled the allegeance, in respect of the reply, in