

No 143. hold the estate without paying the debts of the immediate apparent heir, which debts the statute in question was intended to protect.

‘ Found, that David Sutherland is not liable to pay the pursuer, Isabella Grant, her annuity in her contract of marriage with James Sutherland; and therefore assoilzied.’

Act. *Macdowal, W. Grant, And. Pringle.*
J. D.

Alt. *Ferguson, Brown, Simon Fraser.*
Fac. Col. No 121. p. 178.

* * * This cause was appealed :

THE HOUSE OF LORDS ‘ Ordered that the interlocutors complained of be affirmed.’

1796. December 7.

JOHN BUCHAN, Trustee for the Creditors of DAVID LOCH against DONALD MACDONALD.

No 144.
The possession of a judicial factor is not held equivalent to the possession of the heir apparent, so as to make the succeeding heir liable for his debts, in terms of the act 1695.

AN action of ranking and sale of the estate of Appine, belonging to Dugald Stewart, having been brought in 1757, it was sequestrated, and a judicial factor appointed over it, with the usual powers.

Dugald Stewart died in 1764, upon which Anne Stewart his daughter and heir of provision, within a year after his death, made up inventories, with the view of entering heir to him *cum beneficio*.

She was afterwards called as a party in the action of sale, and took various steps in it, in order to encrease the reversion. In particular, she stated objections to the debts of several creditors, and also obtained a delay of the judicial sale, in the hope of selling the estate more beneficially by private bargain.

Having failed, however, in this, the estate was sold judicially in September 1766. The purchaser's entry was declared to be at Whitsunday 1767; and after paying Dugald Stewart's creditors, there was a reversion of the price, amounting to L. 595 : 9 : 3^d.

In 1770, Anne Stewart married David Loch; and by an ante-nuptial contract of marriage, in consideration of certain provisions made on her and the children of the marriage, she conveyed to him her whole real and personal estate; and afterwards, by a separate deed in June 1772, she specially conveyed to him her right to the reversion of her father's estate.

Mrs Loch died in September 1772, without leaving children, or making up titles heir of her father.

Her husband having become bankrupt soon after, he put his affairs into the hands of a trustee, for behoof of his creditors.

The purchaser of Appine having also become bankrupt, his estate was sequestrated, and a factor appointed on it, who, in 1795, brought a multiple-

pointing, in order to have the right to the reversion of the price which still remained in the purchaser's hands ascertained.

Appearance was made for Donald Macdonald, who claimed it as heir of Dugald Stewart, on the failure of Anne Stewart, his daughter.

On the other hand, John Buchan, trustee on Loch's estate, *contended*, That it belonged to his creditors, because Mr Macdonald could not take up the reversion without serving heir to Dugald Stewart, and by doing so, rendering himself liable, in terms of the act 1695, for the onerous deeds of Anne Stewart, who had been in possession, in virtue of her apparenacy, for three years before the purchaser's entry.

In defence, Mr Macdonald

Pleaded; The act 1695 being correctory of the common law, is to be strictly interpreted; 26th January 1726, Marquis of Clidsdale, No 138. p. 9809.; February 1727, Mitchel, (See APPENDIX); 12th February 1736, Lady Rattar, No 141. p. 9810.; 1st July 1707, Sympson, No 136. p. 9807.; 13th May 1735, Graham, (See APPENDIX.) Now, in order to subject the remoter heir to the passive-title which that act introduces, the apparent heir whom he passes by, must have been three years in the actual possession of the estate; whereas the estate, during the whole of Anne Stewart's apparenacy, was in possession of the judicial factor.

Neither does this case fall within the spirit of the enactment. Its object was to prevent those creditors of apparent heirs from being defrauded, who, from seeing the apparent heir in possession of his ancestor's estates for years together, very naturally contracted with him, on the belief that he had made up his titles; Erskine, b. 3. tit. 8. § 94. But no person could contract with Anne Stewart on that supposition, as the estate was sequestrated, and in possession of the Court before her father's death.

Answered, It is sufficient to entitle the creditors of an apparent heir to the benefit of the act 1695, that he has been three years in the possession of it; 10th February 1758, Yule, No 45. p. 5299.; 27th June 1760, Irvine, No 33. p. 5276. Now, the sequestration of an estate gives the Court merely a temporary right of custody, for behoof of the common debtor and his creditors; 18th June 1747, Earl of Galloway, No 160. p. 7438.; 30th November 1785, Campbell *voce* TACK. The proprietor's infestment in the lands still remains; consequently he retains the civil possession of them, and by paying his debts, he may instantly put an end to the right of the Court and recover the natural possession also. In this case, therefore, the possession of the judicial factor was in fact the possession of Dugald Stewart, and at his death came to be the possession of his daughter.

From the judicial steps too, which she took, with a view to encrease the reversion of the price, her creditors were entitled to presume, that it was her property, and as much subject to her debts as if she had been in the actual possession of it.

NO 144.

THE LORD ORDINARY 'preferred Donald Macdonald to the sums in the hands of the raisers of the multiplepinding.'

A reclaiming petition for John Buchan was appointed to be answered; and the Court, considering the case to be attended with great difficulty, afterwards ordered memorials.

On advising them, several Judges thought the Lord Ordinary's interlocutor should be altered. Mrs Loch (it was observed) had exerted herself to the utmost to encrease the reversion; and from the steps publicly taken by her for this purpose, her creditors had reason to suppose that it was her property. Besides, she had an undoubted right, in consequence of her apparenacy, to draw the interest of the reversion from the time when the estate was sold; and had she done so, it would have been impossible to maintain that she did not attain possession of it. But to give the creditors of an apparent heir the benefit of the statute, it does not seem necessary that he should have drawn the rents; it is sufficient that he should have had it in his power to do so. This is not a naked civil possession like that of a fiar, while the subject is possessed by the liferenter.

A majority of the COURT were however of opinion, that the creditors of an apparent heir could not avail themselves of the statute, unless their debtor had actually attained possession, which it was admitted Mrs Loch had not done.

THE LORDS 'adhered.'

Lord Ordinary, *Justice-Clerk Brasfield.*

For Buchan, *G. Fergusson, Ja. Gordon.*

Att. Solicitor-General Blair, Macleod Bannatyne.

Clerk, Home.

R. D.

Fac. Col. No 5. p. 12.

DIVISION IV.

Vicious Intromission.

S E C T. I.

In which circumstances intromission does or does not infer a Passive Title.—Action transmits against heirs *in valorem* only.

1623. December 5. SCOT against LIVINGSTON.

No 145.

A widow's
intromission
with a small
quantity of

IN an action betwixt Scot *contra* Livingston, the defender being convened, as universal intromissatrix, for a debt owing by the defunct, her husband, it being *alleged*, That there were executors nominated in the defunct's testament,