[M. 9819.]

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MRS ISABELLA GRANT, relict of James Sutherland, - - - } *Appellant.*

DAVID SUTHERLAND, heir-apparent of James Sutherland of Pronsie, } *Respondent.*

GRANT *v.* SUTHERLAND.

House of Lords, 15*th April* 1755.

HEREDITATE JACENTE—STATUTE 1695—PASSIVE TITLE.—Held that the statute 1695 as to the passive titles, is a corrective statute, and must be strictly interpreted, and did not apply to the case of an heir who possessed an estate in which his predecessor died unentered, and to which he declined to make up titles.

JAMES SUTHERLAND, brother to the respondent, No. 112. died, seized and infeft in the estate of Pronsie, leaving a son, James Sutherland, to succeed him in the estate. The latter married the appellant, and on his marriage with her, he entered into marriage articles by which he became bound heritably to infeft her, in case she should survive him, in a yearly annuity of 800 merks Scots (L.44, 8s. 10d.); and further, to provide her in a convenient jointure-house, or pay her L.50 Scots yearly (L.4, 3s. 4d.) He afterwards died without ever having been infeft, leaving issue of this marriage, one son, and a daughter. On the son's death in 1743, the estate, which stood limited to *heirs-male*, devolved on the respondent, who, in consequence of the annuities and other debts which affected it, and which exceeded its real value, *did not make up titles* to his brother, for fear of involving himself in the payment of these debts. Notwithstanding this, the appellant raised the present

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action against him for payment of her annuity, secured by marriage-contract. In making this claim, she founded on the two clauses of the Act 1695; *first*, That if any person shall serve, or by adjudication on his bond hath succeeded, "not to his immediate predecessor, but to one remoter, as passing "by his father to his goodsire, or the like, then, and "in that case, he shall be liable for the debts and "deeds of the person interjected, to whom he was "apparent heir, and who was in possession of the "lands and estate to which he is served for the "space of three years." And *second*, That "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 there-"of, or shall purchase by himself, or any other for "his behoof any right thereto, his foresaid posses-"sion, or purchase, shall be reputed a behaviour as "heir." It was alleged by the appellant under the first clause, that had the respondent *been served*, or possessed the estate by an adjudication on his bond, he would have been liable under that clause; but as he had entered into possession without those titles, his possession must, under the second clause, be considered as reputed behaviour as heir, and so to subject him in payment of the debts of his predecessor.

Dec. 12, 1754.

The Court, on the report of the Lord Ordinary, found, of this date, "That the said David Sutherland "(respondent) of Pronsie is not liable to pay to the "pursuer, Mrs Isabella Grant, widow of James "Sutherland late of Pronsie, her annuity in her "contract of marriage with the said James Suther-"land, and therefore assoilzie and decern accord-"ingly."

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—That the estate remains in *hereditate jacente* of the person who died last vested and seized, until the title is established in the person of the heir by infeftment proceeding upon his service. While unentered, the person next entitled to succeed, is called apparent heir, and when entered, he is in the construction of law one and same with the defunct, and is liable universally for his debts. *Pro gestio herede* has the same effect, because the person who so manages as heir, is also liable universally, as if he had entered, for the debts of his predecessor. The Act of Parliament 1695 was intended to prevent the frauds of apparent heirs, so as to secure the rights and interests of creditors, and that their remedy might be more effectual and secure against the party taking the estate. By the first clause the respondent would have been liable had he served heir, or adjudged on his bond; but under the second clause he is equally liable, because he has incurred a passive title by behaviour as heir. He possesses a part of the estate as apparent heir, and yet avoids to complete his title. This ought not to be allowed, as a fraudulent attempt to evade the claims of just creditors, and also because it is neither agreeable to law nor equity, that a defect in title should screen one in possession of the estate. Against this the Act 1695 was expressly enacted. The word "*predecessor*," in both clauses of the act, was to be construed as descriptive of immediate predecessor or first apparent heir, to whose debts the second apparent heir must be liable; and therefore, while the respondent maintains that he will neither enter

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nor renounce, he must still be liable under the statutes.

Pleaded for the Respondent:—The whole argument here assumes that the respondent has taken possession of his predecessor's estate, and therefore, having done so, he is liable under the statute and the passive titles for his predecessor's debts; but this presumed act of possession is a mistake; the fact as to that being, that the appellant herself is and has been in the actual possession of the lands, and realising out of these the sum of L.31 per annum towards payment of her annuity, and had besides retained of her husband's personal estate L.670; whereas all the benefit which the respondent could possibly realize, would be, the small sum of L.6 or L.7 per annum, being all that remained of the profits of the estate after paying this annuity. But having in regard to this always expressed his readiness to renounce the succession, and never having attempted to possess the estate, to enter, or to behave as heir in the sense of the statute, he cannot be held liable to the appellant's annuity. Besides, by the law of Scotland, in order to vest a party in an estate, he must complete titles according to established forms, and be infeft and seized, otherwise on his death the estate is in law not considered his property, and cannot be disposed of by his deeds, nor affected by his debts. The appellant's husband died without ever having completed his title to the estate in question, and therefore his creditors have no remedy against his heir, who could never take the estate as representing their debtor, because it never was his property, but remained *in hereditate jacente* of the former predecessor. The first and second clauses of the statute 1695 do

not therefore apply to the circumstances of this case. The first clause subjects an apparent heir to the debts of his predecessor, who has been three years in possession, in case he should make up his titles by service, or by adjudication on his bond; but the respondent has done neither of these; and the only question is, has he subjected himself to liability under the second clause, which refers to behaviour as heir? Now, it is clear that this second clause refers *not* to the case of an *apparent heir* whose ancestor died *unentered*, but to one whose ancestor died having the property of an estate vested in him; which was not the case here; and the term predecessor must therefore be held to apply only to the latter, and not to the former case.

After hearing counsel, it was

Ordered and adjudged, that the appeal be dismissed, and that the said interlocutors therein complained of be affirmed.

For the Appellant, *W. Murray, Andrew Pringle.*
For the Respondent, *Sam. Cox, S. Frazer.*

Note.—This decision overrules the judgment in the House of Lords in the previous case of Grant *v.* Sutherland, *vide* Craigie and Stewart, p. 416 and 426, and is now the leading authority, together with Sinclair *v.* Sinclair, 8th Jan. 1736 (9810), and Leith *v.* Banff, 9th Dec. 1741 (9815.)—*Professor More's Stair Notes,* cccxxxv.