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. No 92.

3*tio*, The cases of a son becoming debtor to his father, or of a father disponing 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.

4*to*, 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 assoilzied."

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.

No 93.
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 infeft base, and making up titles to a remoter predecessor, who was the last publickly infeft in the lands, is liable for the debts contracted by his father, upon the statute 1695.

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 assoilzied 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 infeft 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 advocation 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 disponed by her in 1738 to Matthew Hay her eldest son,

No 93. the defender's grandfather, with a reservation of her own, and of James Hay her husband's liferent of the one-half of these lands; that the said Matthew Hay was duly infeft, on the precept contained in the disposition; and, after his death, John Hay the defender's father entered into the possession of the half which was not liferented by the said Agnes Binny and her husband, and continued in that possession for more than three years, in virtue of his apparency, but died without making up any titles in his person; but the defender, although he at length admitted, that his father had been more than three years in the possession, rested his defence upon this circumstance, that, as his grandfather Matthew Hay was infeft in the fee of the whole lands, the precept of *clare constat*, which was taken from Sir Laurence Dundas, for infefting himself as heir to his great-grandmother, and the infeftment that followed upon that precept, were not only inept, but totally null and void.

The words of the statute are: 'That if any man, since the 1st of January '1661, have served, or shall hereafter serve himself heir, or, by adjudication 'on his own bond, hath, since the time foresaid, succeeded, or shall hereafter 'succeed, 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 li-'able for the debts and deeds of the person interjected,' &c.

The Lord Ordinary pronounced the following judgment: "Finds it instructed, that John Hay the defender's father, and debtor to the pursuer in the bill libelled on, was three years in possession of the half of the lands mentioned in the libel, as apparent heir to his predecessors; and that the defender has made up titles to these lands, as heir to a remoter predecessor, passing by his said father; and, therefore, in terms of the act 1695, is liable *in valorem* of the half of the said lands, for the said debt contracted by his said father."

The defender reclaimed, and

Pleaded; In the *first* place, it is an established point, that, by the general law of this country, independent of the statute 1695, no estate could be made liable for the debts of a person who had not vested that estate in him by proper titles; and that, however long such person might have possessed the estate in the character of apparent heir, the next in possession was at liberty to make up his titles, by serving heir to the person who was last infeft, without being subject to any of the acts or deeds of such apparent heir.

In the *next* place, although an alteration was made in that respect by the statute 1695, yet, as that statute was correctory of the former law, it must undoubtedly fall to be strictly interpreted. And, although it should be judged to be defective, even with regard to particular cases, which the legislature may be supposed to have had in view, yet that defect cannot be supplied by courts of law, who have no authority to extend such correctory acts beyond what the words necessarily imply. It was upon this principle that the judgment proceeded, in the case of Isabella Grant against David Sutherland, 12th December 1754, affirmed in the last resort, *infra, h. t.*

It is therefore undeniable, that, if the defender had made up no sort of title to the lands in question, he could not be subjected in payment of any of his father's debts, however long he might possess these lands in the right of his apparency; and the only question at present is, Whether the titles that have been made up can make any variation upon the case? or, to speak more correctly, Whether these titles can bring him under the predicament of the penal and correctory statute 1695? No 93.

On this head, *argued*;

The penalty introduced by that statute applies only to those who, passing by the apparent heir, serve themselves heirs to their predecessor who was last infeft; but not to those who likewise pass by the person so last infeft, and serve themselves heir to a still remoter predecessor. But, in this case, the defender has made up no titles to his grandfather Matthew Hay, who was the person last infeft, but only to his great-grandmother Agnes Binny: And so the words of the statute have been uniformly understood by the writers on the law of this country, and particularly by Lord Bankton, B. 3. Tit. 5. § 104.

Nor will it avail the pursuer to allege, that putting so narrow and limited a construction upon the statute, which was avowedly meant to prevent the frauds of apparent heirs, would open a door to such frauds, to the great prejudice of onerous creditors. The fraud, if it can with propriety be called a fraud, is equally strong when the heir lies out unentered, without making up any titles; but, as the statute has made no provision in that behalf, the creditors of the immediate preceding apparent heir can make no demand. And, as the statute is equally silent with regard to the case that has here happened, the pursuer cannot show that the defender falls under the predicament of that statute, and, of consequence, can have no claim against him for payment of his father's debts.

Indeed, when it is considered that Agnes Binny was totally divested of the lands, the fee whereof was fully established in her son Matthew Hay, by his infeftment, the precept of *clare constat* in favour of the defender, and the infeftment following thereon, can have no manner of effect. They were perfectly inept, and null and void, in respect that the said Agnes Binny was not the person who died last vest and seised: They can, therefore, establish no sort of title in these lands to the defender. He must be considered as still possessing, in virtue of his apparency to his grandfather Matthew Hay; and, of course, he cannot be subjected in payment of his father's debt, more than if he had remained, without making any attempt whatever to establish a feudal title to them in his person.

But, even supposing this erroneous title effectual to bring the defender under the predicament of the statute, unless it can be legally taken away, yet, as the defender was only about 14 years of age when it was made up, he is entitled to be reponed against it, upon the head of minority and lesion, and to be relieved of every consequence that might otherwise attend it.

No 93.

It was, indeed, maintained, upon the part of the pursuer, That the defender's entering heir to his great-grandmother, was with a view to defraud the pursuer of his just debt; and that although, where real lesion appears, the law will lend its aid to a minor, yet it will not lend its aid to his being reponed against an act which was done with an obvious intention to defraud.

But to this the defender answers, that the pursuer's insinuation of the defender's intention to defraud him, by making up titles to Agnes Binny, is altogether ideal and imaginary; for, surely, the defender had occasion to devise a scheme of that kind, in order to relieve himself from any claim for debts.

Answered; That the substance of the defender's argument really comes to this: That, as he has been unsuccessful in his attempt to defraud the pursuer, by entering heir to Agnes Binny, and suppressing the writs since recovered, he ought to be restored against that fraud to his former state, in order to enable him to practise another species of fraud, by lying out unentered to Matthew; for the purpose of the defender serving heir to Agnes Binny, was to defraud the pursuer of his just debt, and avoid the very ground on which he is now subjected, viz. his father's having been more than three years in possession, as apparent heir. But this justice will not permit. The law will lend its aid to a minor who has suffered real lesion; but it will lend no aid to a minor, to repone him against his own rational and proper act, in order to put it in his power to hurt or defraud his neighbour, especially as the act against which he craves restitution was done obviously with an intention to defraud.

The title and the purpose of the act 1695 was to obviate, not to encourage, the fraud of apparent heirs; and it does by no means require or suppose, that the titles are to be strictly legal, but the contrary; and that, in the making them up, the services are expede to persons more remote than strict law demanded, and that there is a degree of fraud in passing by predecessors. All the act requires and supposes, is, that the heir hold the possession on a service to a more remote predecessor, without considering whether the title be made up according to the strict rules of the feudal law. If the titles be made up to a more remote predecessor, that is sufficient, whether it be done from necessity or choice. In many cases, necessity requires, that, in making up titles, the interjected person be passed by; but several instances might be specified in which that is not the case.

The defender is mistaken when he maintains, that Agnes Binny was totally divested of the lands, and that his precept of *clare* and infeftment could be no advantage to him. As to lesion, there is none in the case. By making up titles to Agnes Binny, he incurs no greater burden than what would have fallen upon him had he entered heir to Matthew. It was certainly a rational, proper, and necessary act, that the defender should enter to the subjects, in order to vest the property of them in him: Now, had he entered heir to Matthew, upon what ground could he be restored, and seek restitution? The only lesion he can allege is, that, by this entry, he was prevented from defrauding his father's

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