tion, relevant, and in respect the minority was not denied, reduced the decreets of constitution and adjudication quarelled, obtained against the pursuer, in as far as these decreets for his father's debts, might or could affect the pursuer's person, or the estate descending to him from his Grandfather, by the mother, or any estate which might belong to him, other than the lands and estate which belonged to his father the contracter of the debts, to whom the pursuer renounced to be heir. And 11th instant, found that the possession of the Grandfather's widow was not to be considered as the possession of Janet Cliemy the apparent heir, so as to subject John M'Caul, who had passed her by, to the consequences of the act 1695."

No 90.

Pleaded in a reclaiming bill, That the wife was apparent heir, and three years in possession; and therefore her disposition to her husband must be effectual in favour of his creditors; nor can the son passing by his mother, serve to his remoter predecessor, without being subject to her deeds; for the subjects were possessed by the liferentrix, and the liferenter's possession is reckoned in law to be the fiar's, and will be effectual to acquire him the property by prescription, the civil possession being in the fiar, *l*, 12. *pr*. *D*. *De acquirenda vel amittenda possessione*, *Voet. super eo titulo* § 3.

The law regards the *bona fides* of creditors who trust upon the notoriety of the succession's having devolved; and this notoriety is equal from the possession either of fiar or liferenter.

The possession of the liferenter ought especially to validate the deeds of the apparent fiar, when he does any deed acknowledging the succession, which Janet Cliemy here did, by disponing the subject to her husband: If the fiar of lands liferented should sell the property, and receive the price, the buyer would surely have a claim to the subject against the subsequent heir; and here Janet Cliemy it to be considered as a seller, and her husband as an onerous purchaser.

THE LORDS adhered.

Pet. *A. Macdowall.*

D. Falconer, *v*. 1. *p*. 108.

1752. *July* 24. PITCAIRN *against* LUNDIN.

No 91.

IT was in this case found, That the years of an apparent heir's possessing a subject liferented, do not come *in computo* of the three years possession, which the act 1695 requires to make the apparent heir liable to the debts of the preceding apparent heir.

Fol. Dic. v. 4. *p*. 43. *Kilkerran*, (PASSIVE TITLE.) *No* 11. *p*. 373.

*** This case is reported in the Faculty Collection :

No 91.

IN the year 1707, Robert Lundin granted a bond for 400 merks, to which Anne Pitcairn the pursuer obtained right by progress. Upon this bond she sued James Lundin of Lundin his son ; and set forth, that Robert possessed the estate of Lundin for more than three years, and was, during that time, apparent heir ; that therefore the defender is liable to pay his debts to the extent of the value of the estate, in pursuance of act 1695, Will. Sess. 5. cap. 24.

The defender set forth, That by contract of marriage between Sophia Lundin his grandmother, and John Drummond afterwards Earl of Melfort, Margaret Lundin, mother to Sophia, settled her estate upon the wife and husband, and longest liver of them, and the heir-male procreated betwixt them ; with a long series of heirs, under a strict entail : That, upon this settlement, a charter under the great seal was expede in 1674, and Sophia and her husband were infeft : That, in the year 1695, the Earl of Melfort was attainted of high treason by the Parliament of Scotland, with a salvo, that the attainder should not taint the blood of his children by the said Sophia : That James Lundin, eldest son of the said marriage, received from the crown a right of the said estate as supposed to be forfeited by his father's attainder : That upon James's death, Robert his brother was served heir in special to him, and infeft : That it came afterwards to be discovered, that only the liferent of the estate of Lnndin was in the Earl of Melfort ; and therefore, that no more than the liferent was forfeited to the crown ; whereupon Robert, in 1707, obtained a new grant from the crown of the Earl of Melfort's liferent ; and by virtue thereof possessed the estate until the Earl's death in the 1714, and thereafter continued his possession until his own death in the 1716.

John, the eldest son of Robert, being advised, that no other right was vested in his father than the Earl of Melfort's liferent, made up his titles as heir to Sophia his grandmother. Upon his death, James his brother, the defender, was in like manner served heir to him, and infeft.

Upon this state of the facts, the said defender, without producing or founding upon the entail in the contract of marriage, pleaded, That his father Robert's possession during the Earl of Melfort's life, was not as apparent heir, but as donee of the Earl's liferent : The possession in that period was the possession of the liferenter : Robert the granter of the bond was in the situation of an apparent heir, who had got a lease from an universal liferenter, and had possessed in virtue thereof.

Replied for the pursuer, That, admitting the facts with respect to the forfeiture to be true, Robert was certainly apparent heir, and did possess the estate for upwards of three years : If so, his obtaining a collateral right would not exempt him from falling under the description of the statute : That this statute ought to be beneficially interpreted in favour of creditors : The other clauses

of it make possession of the predecessor's estate, by any other right than as purchaser at a public roup, an universal passive title against the apparent heir with respect to his predecessors debts: It is therefore not supposable, that the first clause would intend to give so easy an evasion of the apparent heir's own debts, where only a limited passive title is incurred.

No 91.

It was observed on the bench, than an apparent heir would be liable on the statute, under whatever title he might possess, provided there was access for him to possess as apparent heir. But here there was no such access.

Found, " That the possession of Robert Lundin, the immediate heir, during the subsistence of the forfeiture of the Earl of Melfort's liferent, cannot be brought *in computo* of three years possession; reserving to parties to be heard how far he possessed for three years after the expiration of the liferent.

Act. *Alex. Lockhart.* Alt. *Ro. Craigie.* Clerk, *Gibson.*

S. *Fac. Col. No* 31. *p.* 50.

*** Lord Kames also reports this case:

In the contract of marriage betwixt the heiress of Lundin and John Drummond, afterwards Earl of Melfort, the estate of Lundin was settled upon the husband and wife, and the heirs-male of the marriage; which failing, to her heirs. In the 1695, the husband was attainted of high treason, whereby his liferent fell to the Crown, of which a gift was procured in favour of Robert Lundin the heir of the marriage. Upon this title Robert possessed the estate till the year 1714, when his father died. He continued his possession as heir apparent to his mother the heiress till his death, which happened in the year 1716.

James Lundin having made up his titles to the estate, as representing his grand-mother the heiress, was called in a process to answer for the debts of Robert Lundin the interjected apparent heir. The defence was, That Robert's possession till the year 1714, was not as apparent heir, but as donatar to his father's liferent; and that he did not possess three years afterwards *qua* apparent heir. It was *answered*, That the purpose of the statute 1695, was to protect persons ignorant of law, who, furnishing goods to a man representing a family, and possessing the estate, ought not to be entrapped in the subtilties of law; which must happen if the title of possession is to be weighed with the same nicety in this case, as where the question is of an universal representation. *Replied*; This consideration may possibly so far weigh as to bar the pretext of a singular title, which is partial, or which may consist with the possession of the apparent heir. But here the Earl's liferent being total, was a total bar to any other possession, and made it impracticable for the apparent heir to possess while it subsisted. Therefore the purchase of this liferent by Robert the apparent heir, cannot be constructed a blind to cover his possession *qua* apparent heir.

No 91.

The Lords found, "That Robert Lundin having possessed the estate three years, not as apparent heir to his mother, but as donatar to his father's liferent, this case does not fall under the act 1695."

Sel. Dec. No 18. *p.* 20.

1759. *July* 20.

James Macneil, Deputy Collector of the Customs at Greenock, *against* Margaret Matthie, Relict of William Taylor.

No 92.
An adjudication acquired by an apparent heir, and possession assumed upon it during his father's life, is not reducible on the act 1695.

Alexander Taylor was possessed of a house in Greenock; for attaching which, an adjudication was led in the year 1709, at the instance of one of his creditors, Lilias Morison, for the accumulate sum of L. 387 Scots. The adjudger obtained a charter from the superior, and was infeft in the year 1713. In the year 1719, another adjudication was led at the instance of another creditor, Magdalen Bryce, for the accumulate sum of L. 516 : 19 : 6 Scots.

William Taylor, the eldest son of Alexander, purchased these two adjudications from the creditors in the years 1721 and 1724; and entered to the possession of the house during the lifetime of his father. In the year 1725, his father being still alive, he obtained a declarator of expiration of the legal upon the first adjudication led in 1709.

William Taylor having married Margaret Matthie, he executed, upon the 1st June 1741, a postnuptial contract of marriage with her, by which he conveyed this house, and other subjects, to himself and his wife in conjunct fee and liferent, and to the children of the marriage in fee.

After the death of William Taylor, his relict continued the possession of the subject without challenge, till James Macniel, as having right to an adjudication led in the 1726, against the same subject, upon a debt due by Alexander Taylor, brought a process of reduction of the two adjudications upon which William Taylor's right was founded, *insisting*, That as they were acquired by William Taylor, the eldest son of Alexander the debtor, and were the title under which he possessed after his father's death, they fell under the sanction of the second clause of the act 1695, which declares, That every such adjudication shall be reputed a behaviour as heir; and that consequently the diligences, by coming into his person, became extinguished *confusione*; at least that they could not stand in competition with the onerous creditors of his father.

The second clause of the act 1695 is in these words: '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 thereof, or shall purchase, by 'himself, or any other for his behoof, any right thereto, or to any legal diligence 'or other right affecting the same, whether redeemable or irredeemable, other- 'wise than the said estate is exposed to a lawful public roup, and as the high- 'est offerer thereat, without any collusion, his foresaid possession or purchase