a subsequent heir passing by, as that heir is only made liable to the extent of the value of the subject, which shows that it concerned only *debita*, or deeds that were resolvable into *debita*, and therefore there was no argument from the case, *e. g.* of an heritable bond to a tack. No 29.

Kilkerran, (HEIR APPARENT.) *No* 2. *p.* 238.

1757. *December* 15. THOMAS PATON *against* JOHN MACINTOSH.

No 30.
An apparent heir cannot remove tenants.

THE Sheriff of Angus having decerned in a removing at the instance of John Macintosh, an apparent heir, against Thomas Paton; Paton suspended, on this ground, that an apparent heir could not sue in a removing; and quoted a late case, Robert Boyd of Penkill against Macgarva,* which had been the subject of Lord Chesterhall's report, when upon his trials, in which the Court had unanimously found so.

'THE LORDS suspended the letters.' *See* REMOVING.

For Charger, *Mackintosh*. For Suspender, *J. Dalrymple*.

J. D. *Fol. Dic. v.* 3. *p.* 258. *Fac. Col. No* 69. *p.* 118.

1758. *July* 4. JAMES BURNS *against* ARCHIBALD PICKENS.

No 31.
An onerous purchase from an apparent heir three years in possesion, cannot be defeated by an adjudication upon a gratuitous bond of a second apparent heir, though deduced for behoof of the gratuitous creditor in the bond, and not of the second apparent heir.

JAMES KNOX, when apparent heir to his brother John, sold several subjects in which John had been infeft, but in which he himself was not infeft. He lived more than three years after the sales so made by him. One of these subjects came into the hands of Archibald Pickens.

George Knox, the brother of James, granted a gratuitous bond to James Burns, to be the foundation of an adjudication of these subjects, for the behoof of Burns; and accordingly Burns obtained adjudication against George, as charged to enter heir to his father John in these subjects; and upon that title brought a reduction of the above sales against the several possessors; and among others against Pickens.

The ground of the reduction was, that the sales had been made by an apparent heir; and therefore flowed *a non habente potestatem*. The defence for Pickens was, that as James Knox, the apparent heir, had been three years in possession, George Knox, the next apparent heir of James, was therefore bound by his onerous deeds; and Burns, on a gratuitous bond from George, could not quarrel those sales which George himself could not quarrel.

The abstract question came therefore to be, whether an onerous purchase from an apparent heir who had been three years in possession, can be defeated by an adjudication upon a gratuitous bond of a subsequent apparent heir, de-

* Examine General List of Names.

No 31. duced, not for his own behoof, but purposely to connect a title to the estate of his predecessor, for behoof of the gratuitous creditor in the bond.

Pleaded for Burns; At common law no man could sell that heritage in which he was not infeft. The statute of 1695 corrected the common law, and gave certain effects to deeds of apparent heirs in certain circumstances; but in statutes correctory of the common law, courts of justice cannot extend their interpretation beyond the strict words of the statute; nor apply decisions to cases falling within the purview and reason of the statute, if they fall not within the letter of it. Now, the alteration made on the common law by the statute of 1695 is, that when a second apparent heir either serves himself heir, or by adjudication on his own bond succeeds to a remoter predecessor, he shall be liable to the debts and deeds of the interjected apparent heir who was three years in possession of the lands with which he connects; but here George has not connected himself with the lands by a service, for he is not served at all; neither has he succeeded by an adjudication on his own bond, for the bond granted by him is not for his own behoof, but for the behoof of Burns; and it is Burns, and not he, who is to succeed upon it.

Answered for Pickens; The statute of 1695 was intended to correct the frauds of apparent heirs; but statutes correctory of fraud are to be extended to every case falling within the purview and reason of them. In order to bind the second apparent heir, or those in his right, all that the statute requires is, that the estate be taken out of the *hæreditas jacens* by his act and deed, whether in the form of a service or an adjudication. It is not the less true, that an heir takes the succession out of the *hæreditas jacens*, that he has thought fit to give it away to another, whether gratuitously or for an onerous cause; even if he should give it away before the titles are made up, that would not relieve him from the sanction of the statute. If the title is made up in consequence of his deed, he must be liable at least *in valorem* of the estate, which he has carried off from the *hæreditas jacens* of his predecessor, whether he keeps it to himself, or disposes of it to another.

Of this many instances may be figured, which cannot be disputed to fall under the statute. Suppose an apparent heir should sell the estate in which his grandfather died infeft, before he makes up titles, and after the purchaser is infeft he makes up his titles by service; or suppose the disposition he had granted before the service had been gratuitous; in either of these cases it could not be doubted, that the heir would be liable to his father's debts, in terms of the statute; though it might be alleged, with the same colour as in the present case, that the heir had not *cum effectu* succeeded to his grandfather's estate, as his service truly gave him nothing; for that the moment it was expede, and completed by infeftment, the right accresced to the purchaser or gratuitous disponee to whom he had before conveyed it.

Again, if in place of serving heir, the purchaser should chuse the other method to make up the title, by charging him to enter to his grandfather, and

adjudging upon the disposition or obligation to infeft, there seems as little ground to doubt, that the heir would be liable in terms of the act, though he had chosen to part with the estate, in place of keeping it, and had made up the title in such manner, that the lands should immediately pass over to the purchaser, without remaining one moment with himself. No 31.

And if that would be the case, even where the title is made up by adjudication upon a disposition, it applies, *a fortiori*, to the present case, where the adjudication is upon a bond. For though the title was directly vested in Burns, to the extent of the sum in the bond, yet as to the reversion of the subjects adjudged over and above that sum, the right was acquired to the heir, and not to the adjudger; and as the heir could not contest payment of the last possessor's debts, to the extent of the value of the reversion which remained with him after adjudication, so a court will not sustain it as a defence against his being liable to the whole value of the lands, that he had given away a part, whether onerously or gratuitously, by the same deed by which he established a title to the subject.

"THE LORDS found, that the pursuer cannot, on his gratuitous bond, and adjudication following upon it, impugn the defender's right flowing from James Knox, upon account of James Knox's not making up his titles, as James is admitted to have been three years in possession."

Act. *Lockhart.* Alt. *Ferguson.*

J. D. *Fol. Dic. v. 3. p. 258. Fac. Col. No 115. p. 209.*

1758. *July* 11. *** This case is reported by Lord Kames:

AN heir apparent three years in possession, having disponed some acres and houses for a valuable consideration, the next heir apparent finding, that if he should make up titles to the estate by a special service, or by an adjudication on his own bond, he would be barred by the act 1695 from objecting to the said alienations; he agreed, upon receiving 20 guineas, to grant a bond upon which the creditor might adjudge the estate, and challenge the said alienations in his own right, because the statute makes no provision for this case. But the Court found, that this case fell under the meaning of the statute, though not under the express words; and therefore, that the pursuer was barred from challenging the said alienations.

Sel. Dec. No 149. p. 205.