

1759. August 3.

DAVID SUTHERLAND of Pronsie *against* GEORGE GRAHAM of Drynie.

No 32.
An apparent heir cannot remove a tenant possessing under a tack granted by a person who had no right to the lands.

JAMES SUTHERLAND of Pronsie, after possessing the estate more than three years, died in apparenacy; and was succeeded by David Sutherland, who took possession of the estate without making up titles.

Isabella Grant, the relict of James, continued her husband's possession of the lands of Aberscross, which she afterwards let in tack to George Graham of Drynie; and this tack was renewed to Graham by her second husband, Dr Gordon.

David Sutherland brought an action of removing against Graham, after his lease was expired; who *contended*, That an apparent heir, without infeftment, has no title to insist in an action of removing.

Answered, The relict of James Sutherland, from whom the defender derived his possession, had herself no right to possess, although she had a personal obligation from her husband for an annuity; for that any other person had as good a title to seize the vacant possession as she had. It will not be pretended, that the estate of an apparent heir is to belong to the first occupant. And if this were allowed, the illegal possessor, who takes hold of the lands which were in the natural possession of the defunct, would not even be obliged to pay any rent.

Though the apparent heir cannot, without infeftment, remove those who derive their possession from the defunct; yet, where there is no person deriving a right from the defunct, he may enter into the natural possession himself; and as a necessary consequence, he may remove those who intrude themselves into the possession, without deriving right from the defunct. Where there are tenants, the apparent heir enters to the possession of the rents; where there are no tenants, he has a right to the natural possession of the subject, and he is entitled to vindicate this right by an action of removing.

“THE LORDS assoelzied from the action of removing.”

Act. *Burnett*.

W. J.

Fol. Dic. v. 3. p. 258. Fac. Col. No 195. p. 348.

1759. November 21. JAMES KNOX *against* IRVINE and FORSYTH.

No 33.
The son of an heiress possessing in a state of apparenacy falls under the act 1695, not.

By the death of Sarah Irvine, proprietrix of the land of Kirkconnel, her surviving husband William Knox was entitled to the courtesy. Dr Knox the heir-apparent was allowed by his father to possess the bulk of the land, by levying rents and giving tacks in quality of heritable proprietor, assuming that designation in every one of his deeds. Particularly, he set a tack of certain

houses and yards in the town of Ecclefechan, to Robert Irvine and Thomas Forsyth, to endure for 1260 years. The Doctor having died in apparen- cy, his sister Janet Knox the next heir, was infeft upon a precept of *clare constat* from the superior. She brought a reduction of the tack as granted *a non habente potestatem*, insisting, that she was not bound by her brother's deeds, though he was more than three years in possession; because he was excluded by the courtesy, and therefore could not possess as heir-apparent, but only in the father's right. It was *answered*, That the courtesy cannot take place unless it be claimed; and that it was not claimed is evident from the following circumstance, that the son possessed as heritable proprietor; and that this possession must subject Janet the next heir to his onerous deeds, unless Janet will bring evidence that the son's title of possession was derived from his father claiming the courtesy. THE COURT repelled the defence upon the courtesy; found, 'that Dr Knox possessed as heir-apparent; and, therefore, assoilzied from the reduction.'

Fol. Dic. v. 3. p. 258. Sel. Dec. No 157. p. 217.

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withstanding
his father's
having right
to the liferent
by courtesy.

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

June 27. 1760.—SARAH IRVINE stood infeft as proprietor of the lands of Kirkconnel. She was married to William Knox, and had children by him. Upon her death, in 1740, her eldest son, Dr William Knox, succeeded to the estate; but never made up his titles. He survived his mother for several years, and died while his father was yet alive. The succession then opened to Janet, the Doctor's sister.

Dr Knox, after his mother's death, intromitted with part of the rents of the estate; for which he granted receipts. He also granted five tacks under the character of 'heritable proprietor of the lands.' Some of those tacks were of a long endurance; and particularly he granted one to Robert Irvine and Thomas Forsyth, and their heirs, of a house and yard in the village of Ecclefechan, and five acres of the commonty of Hoddam, (then under division), for 1260 years. The tack acknowledged the receipt of a grassum of L. 20 Sterling; and bore also an obligation for payment of a tack-duty of 5s. Sterling yearly.

The tenants entered to possession upon those tacks; but the division of the commonty of Hoddam not being completed till after Dr Knox's death, Irvine and Forsyth brought a process against Knox, his sister, the next heir to the estate, for having her decerned to implement that part of the tack respecting the five acres of that commonty.

Janet Knox *pleaded* in defence, That Dr Knox, the granter of the tack, had made up no title as heir to his mother in the lands; and therefore that it was not binding upon her; and *separatim* objected to the extraordinary length of

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its endurance ; but did not much insist on this point. Upon these grounds she also repeated a reduction of the tack.

The pursuers *answered*, That the Doctor had possessed the lands, as apparent heir to his mother, for much more than three years, as appeared from the tacks, and discharges of rent, granted by him ; and therefore the defender, the next heir passing by, was liable for his onerous debts and deeds, in pursuance of the act 1695 ; and that the onerosity of this tack would be sufficiently instructed.

The defender *replied*, *1mo*, Dr Knox had no total possession of the estate ; neither did he possess any particular part of it as apparent heir ; but only granted some partial receipts for rents, not amounting all together to a full year's rent. This he did by tolerance from his father, who had a preferable and exclusive right to possess the estate by the courtesy, as having been husband to the heiress, and had children by her. *2do*, The tacks were granted without his father's permission ; and as he was designed in them younger of Kirkconnel, the tacksmen must have known his father's preferable right ; which must likewise be presumed, as the courtesy is a public, and not a private, title of possession. *3tio*, The act 1695 being a correctory law, cannot be extended beyond its precise words and sanction. The possession intended, and spoken of, in the statute, is only the possession of an apparent heir entitled to possess under that character. The possession of a son whose father has a liferent, by which he the father has a preferable title to possess, is not such as is intended by the statute, as it can only be constructed to have flowed from the father's tolerance ; and must be considered as properly his possession, since, without his consent, the son could not have access to possess. This construction of the statute is supported by the decision 24th July 1752, Pitcairn *contra* Lundin, *voce* PASSIVE TITLE.

Pleaded for the pursuers, *1mo*, The father never was in possession of more than the half of the mains, being but a small part of the estate ; and Dr Knox appears to have possessed the whole lands set in tenantry, from his mother's death, in 1740, till his own death, in 1748, though the whole receipts granted by him have not been recovered. He had no other title than his apparency ; nor does any mandate or commission from his father to him appear, or evidence that it was in virtue of a tolerance from him that the Doctor possessed. *2do*, The title he assumed of heritable proprietor, though not strictly proper, because he was not infeft, yet being the title under which apparent heirs commonly act, proves, that he ascribed his possession to that title. Though the courtesy is a part of the common law ; yet the actual title which a husband may thereby have is *facti*, and can only appear by his possession, seeing the extent of it depends on the wife's infeftment ; it is often restricted by the marriage-articles, and creditors are not obliged to know these particulars. Here creditors and tenants who contracted with Dr Knox, could not ascribe his possession to a title derived from his father, of which they had no knowledge, especially when they saw the apparent heir for so many years ascribing his pos-

session to his own heritable title only. And, *3tio*, The act 1695 is correctory ; but this case falls under both the intent and words of it. The fair construction of the statute is, that where an apparent heir possesses his predecessor's estate for more than three years, his onerous debts and deeds are effectual against the succeeding heir, unless it is proved, that the apparent heir did not possess under his heritable title, but under a singular title derived from some other person, preferable to and exclusive of his apparency, and to which separate title he openly ascribed his possession. There is no difference between the courtesy and any other right competent to exclude the apparency ; and a third party having such right, but lying by, can never be said to exclude the apparent heir from possessing properly as such, merely because if that third party had used his right, the heir would not have had access to possess. Neither can an apparent heir's acquiring any singular title, keep him from falling under the act 1695, when that title is latent ; far less when he expressly ascribes his possession to his heritable title.—The case of Pitcairn does not apply ; for there Lunding, who contracted the debt, not only possessed under a singular title, but truly was not *in potestate* to possess as apparent heir to his mother, because no such title was known to belong to him at the time.

The Court gave different interlocutors in this case ; which seemed to be attended with difficulty.—It was *observed* on the Bench, That here the apparent heir did in fact possess ; and that third parties were *in bona fide* to contract with him, as supposing him to possess under that character.

THE LORDS repelled the defence on the courtesy ; and found, that William Knox possessed three years as apparent heir ; and also found, that the tack, notwithstanding of its endurance, is good against Janet Knox, the heir passing by. See TACK.

Act. Miller, *Advocatus*. Alex. Montgomery, *Hew Dalrymple*. Clerk, Kirkpatrick.
D. R. *Eac. Col. No 224. p. 413.*

1765. February 14.

CHARLES M'KINNON of M'Kinnon against SIR JAMES M'DONALD.

THE lands of M'Kinnon having, *anno 1715*, been forfeited to the Crown by the attainder of the deceased John M'Kinnon, were purchased from the Crown by Sir James Grant, who conveyed the same to John M'Kinnon, *junior*, eldest son to the said John M'Kinnon the attainted person, and the heirs-male of his body ; whom failing, to the heirs-male of the body of the said John M'Kinnon elder ; whom failing, to John M'Kinnon tacksman of Missinish, and the heirs-male of his body ; whom failing, &c.' And, upon the procuratory of resignation contained in the disposition, the said John M'Kinnon, *junior*, expedited a charter under the Great Seal, and was infeft. John M'Kinnon, *junior*,

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Where a fee becomes void by the death of the proprietor, the next heir in existence may serve, tho' there be a nearer in hope. And this heir who may be termed heir ex-