holds a real right over the lands in security of the debt, with interest, and the whole of the penalty, and therefore ought to be so *ranked*, whatever he may be allowed to *draw;* yet the matter has been otherwise decided. Like an obligation and security in relief, the right of the heritable creditor, under the penalty, is never held to attach, except so far as expenses are actually incurred.[1]

PART II.

THE DOCTRINE OF PASSIVE TITLES, OR THE EFFECT OF DEBT AGAINST REPRESENTATIVES.

We have hitherto considered debts as operating against the original obligant; but they are available also against heirs representing such original debtor; taking his estate, and becoming in consequence liable for his debts, either universally or to a limited extent.

The estate of the debtor, as well as his person, is liable for the performance of his engagements; and may be attached not only during his life, but after his death. The transference of the estate to his heir does not extinguish this liability; but on the contrary, according to the law of Scotland, his heir taking up the universal right and character of heir, is held, in assuming the benefit, to undertake also the burden, and to become liable for every debt of the proprietor deceased. The extent of this liability should naturally be measured by the value of the estate; but the law of Scotland has carried it to an unlimited extent, discharging the creditors from any necessity of making inquiry into the exact amount of what the heir has so taken, and by a presumption of law holding the estate to be fully adequate to the payment of any debts. An undertaking, accordingly, to this extent, is inferred from the service of the heir; and is called the passive title of an heir, as the right which gives him access to the estate is called his active title. It is on account of this liability that the doctrine which prevails in the laws of other countries is not admitted in

' the accumulated sum contained in his decree of adju-
' dication, and interest thereof from the date of the
' said decree, till payment;' and to this, by their first judgment, the Court adhered. But afterwards, upon considering the important change produced on the common opinion respecting the nature of a general adjudication, by the decision in Campbell and Scotland's case, they ' altered and restricted the adjudica-
' tion to a security for principal sum, interest, and
' necessary expenses of adjudication.' 10th July 1800. It is true that, afterwards, this judgment was altered, but upon a ground quite foreign from the point now under discussion, viz. the effect of certain objections to the adjudication.

It was understood upon the Bench, when this decision was pronounced, that the decision was in no shape to affect the method of adjudging, or to prevent a creditor from adjudging for his full penalties, reserving for future consideration to what extent the claim should be mitigated. On the other hand, he may be a loser by dead interest, which the Court will, as in the case of Murray of Stanhope against the Earl of March in 1772, think themselves bound in equity to recompense out of the penalty; and, on the other hand, while he regularly receives his interest, or holds possession, he may, by repeated adjudications, give ground for condemning his conduct as oppressive, and so authorize the Court to refuse all claim under the penalty.

[1] In the Ranking of Jarvieston, already quoted, an inquiry was ordered into the practice of accountants in ranking creditors by heritable bonds upon the penalties; and the Court, upon considering the result, found,—' That penalties, to the extent of the necessary
' expenses, have the benefit of the real security upon
' infeftments, such as those founded on; therefore
' found the creditors in this case preferable for their
' penalties, to the extent of the necessary expense;
' but found, that the expense laid out in recovering
' the contents of a collateral security, could not be
' understood as a part of the penalty in the heritable
' bond.'

Scotland, namely, that the heir's right is completed by the death of the ancestor; mortuus sasit vivum. The title of heir must be completed, so as to give to him an opportunity of refusing, or of recognizing this extensive responsibility, or of taking the proper measures for having it limited and restrained to the true amount of the estate. Without inquiring historically into the progress by which this unlimited or universal liability came to be established as a consequence of the heir's entry, the rules are these:—1. That the heir who enters unconditionally to the succession of his ancestor, is liable without limitation to his debts. But this applies only to the heritable, and not to the moveable estate; no such unlimited responsibility arises from taking the moveable succession, except in cases of fraudulent and unchecked intromissions, against which the law guards by a presumption that the funds intromitted with were sufficient for all the debts. 2. That the heir cannot escape from this consequence by varying the form, without changing the substance of the act by which he takes the estate. 3. That he may guard himself and his estate against this unlimited responsibility, by taking measures at once to shew the true extent of the estates which he assumes as heir, and to limit his acknowledgment. And, 4. That the law has favoured creditors of the ancestor so far, that diligence by them, used within a certain term, has preference over the creditors of the heir; and that, although the ancestor's title to the estate may not have been feudally completed, his debts will affect it, if, by a certain course of possession as proprietor, a credit has on that footing been established, by which tradesmen and others may be deceived.

The subject may be considered under the following heads:—

1. Of the passive representation of an heir entering by service, or assuming the possession generally.
2. Of limited representation.
3. Of the debts of apparent heirs in possession.

CHAPTER I.

OF PASSIVE REPRESENTATION.

Heir entering by Service.

1. WHERE an heir enters as such by service in any character of universal succession, he is held to recognize a general responsibility, as eadem persona cum defuncto. From all the regular methods of completing the titles of an heir in heritage, whether as heir of line, heir of conquest, or heir male; this effect follows.

Heir of Provision.

2. It is not so, however, as to an heir succeeding by a particular destination, not being hæres alioquin successurus. He is under a limited responsibility, liable to the extent only of the value of that to which he has succeeded.[1]

Heir in Moveables.

3. The rule does not extend to the moveable succession; the title by which that estate is administered proceeding on an inventory, and being limited to the amount of the inventory.

[1] Erskine, 3. 8. § 51. disputes this doctrine, against the authority of Dirleton, Stewart, and Bankton; extending it only to the case of an heir nominatim substituted in a bond, or a grantee in a disposition omnium bonorum, to take effect at the death of the granter. But the point is settled by the case of BAIRD against the Earl of ROSEBERY, 16th July 1766; Fac. Coll. 267. (14,019.); affirmed 3d April 1767. 'In this 'case,' Lord Monboddo says, 'the Lords determined 'a very general point of law, viz. That an heir of pro- 'vision of a particular estate, such as an heir of tailzie, 'is not by his service universally liable, but only in 'valorem, like an heir cum beneficio inventarii. The 'direct contrary of this was as unanimously decided in 'the case of Pitrichie, and a petition refused without 'answers. Lord Pitfour observed the change of our law 'in this respect, and how much inclined our forefathers 'were to introduce universal passive titles, as appears 'from the Act 1695.' 5. Brown's Sup. 926.

[2] See below, Of Confirmation.

Præceptio Hæreditatis.

2. By anticipating the heritable succession, and accepting of a gratuitous conveyance from the ancestor, the heir is held to undertake responsibility for all previous debts. He is held as successor titulo lucrativo post debitum contractum; and his act is considered as præceptio hæreditatis.[1]

It may be observed, with regard to this passive title, 1. That it does not prevent a prior creditor from seeking his remedy under the Act 1621, c. 18. by which creditors are protected against gratuitous alienations to conjunct and confident persons; and it may be of importance to proceed on this ground, rather than on the passive title, in order to establish a preference over the heir's own creditors.[2] 2. That no creditor has the benefit of this passive title, whose debt was not contracted previously to the conveyance being accepted by the heir.[3] 3. That this not being a representation founded on presumed delict, it transmits against the heirs of the persons so taking præceptione.

Where a conveyance is made to the heir under the burden of the granter's debts, it is effectual to posterior creditors, as well as prior, to the extent of the property conveyed; but it infers no passive title of which the posterior creditors may avail themselves.[4]

Gestio pro Hærede.

3. Where the person entitled to succeed as heir proceeds, after the death of the ancestor, without service, to occupy and enjoy the estate, so as no one but an heir is entitled to do; not only is he held to recognize a general liability, but by removing as far as he can, or eluding, all check on the extent of what he receives, he farther confirms the right of creditors to look to him for unlimited engagement.[5] That the doctrine rests partly on the implied acknowledgment of responsibility, is manifest in all those examples of it which preclude the possibility of creditors being defrauded by concealment; as in the conveyance of a subject to a third party, or the consenting to such a conveyance, or the granting of discharges or receipts for debts or rents: That it rests partly on the danger of fraud, appears in those cases where there is uncontrolled intromission with rents, heirship moveables, title-deeds.[6] This, like all other passive titles, is much relaxed in modern times. And, 1. It is excluded by any right in a third party taking the estate out of the ancestor's person. 2. By any singular title in the heir. 3. If the intromission be inconsiderable, and without any marks of intention to defraud the creditors.[7] The passive title of gestio pro hærede is not transmissible against the heir of the gestor, who will be liable only in valorem.[8]

[1] There is something obscure in the principle on which this passive title rests. For, 1. It is not universal, giving no ground of action to a creditor of the ancestor, whose debt is posterior to the conveyance. 2. It corresponds with the operation of the Act of 1621, c. 18. in subjecting the heir in valorem to all prior creditors. Yet, 3. It does not stop there, but infers responsibility for prior debts, however inconsiderable the subject thus taken, and whatever the amount of the debts. Stair (3. 7. § 1.) places it on the ground of an expedient extension of the Act 1621 in the peculiar case of apparent heirs. Erskine (3. 8. § 88.) resolves it into the heir's acknowledgment of the character of heir; which is not perfectly correct, otherwise it would infer a universal passive title. Both of them add this limitation, that the responsibility is only for antecedent debts. Stair (§ 1.) says, that the heir's representation is 'with this temperament, that he shall be liable only to the debt contracted before the disposition or right made to him by the defunct.' Erskine (§ 88.) says, 'The effect of the passive title becomes restricted, as if the ancestor had died immediately after executing the right; and so extends to no debts contracted by him afterwards.'

[2] See below, Commentary on the Act 1621, c. 18.

[3] 3. Ersk. § 88. See above, Note [1].

[4] SMITH against MARSHALL, 21st July 1780; Fac. Coll. 222.
See BRUCE against BRUCE, 13th December 1826; 5. Shaw and Dunlop, 119.

[5] 3. Ersk. 8. § 82. 1695, c. 24.

[6] See 3. Ersk. 8. § 83, 84.

[7] 3. Ersk. 8. § 86. JEFFREY against BLAIR, 13th May 1791; Bell's Cases, 482.

[8] 3. Ersk. 8. § 91.
See PENMAN against BROWN, 15th December 1775; Fac. Coll. 152.

Private acquisition of the Estate.

4. The heir will not escape from unlimited responsibility, by altering the form, while he enjoys the substance of the succession. So, 1. If an apparent heir, after the ancestor's death, purchase otherwise than at a public judicial sale, he is held to represent his predecessor universally, and to be liable for all his debts and deeds as if served heir.[1] 2. Where rights, or legal diligence affecting the predecessor's estate, are settled on a relation so near to the apparent heir, that the heir succeeds; if he shall possess the estate on such rights or diligence, except on lawful purchase at public roup, he shall be held liable as on a passive title, while the rights and diligences shall be available against creditors, only so far as it shall be proved that they were purchased for sums of money.[2] 3. If the heir shall complete his title by adjudication on his own trust-bond, (which was a mode of evasion of the universal responsibility formerly attempted), he shall be held to represent universally;[3] unless the right shall be completed, and possession obtained before the ancestor's death.[4]

Vitious Intromissions.

5. In moveables there is no entry as by service, and no universal responsibility on the part of the executor, whose entry is by inventory in the character of administrator, not of heir. But wherever any one having access to the effects and moveable estate of a person deceased, unwarrantably takes possession of and intermeddles with those funds, the law infers a universal responsibility from the uncontrolled intromission.[5] It may be observed, 1. That it is not necessary for raising this presumption that the intromitter shall, as in the passive titles in heritage, be entitled to take up the succession. 2. That any probable title of intromission, or circumstances removing the presumption of fraud, and affording fair grounds of scrutiny into the actual state of the succession, are held sufficient to relieve from this penal consequence;[6] and although the spirit of the law has become much milder, and the form of the presumption is much mitigated even since that rule was laid down, yet wherever there are circumstances of suspicion, or the removal of the natural and reasonable checks on the intromission, the presumption of the law still is enforced.[7] 3. That, according to the law of penal actions, a demand by the creditors of the defunct, on the footing of this passive title, cannot competently be made against the heirs of the intromitter.[8]

CHAPTER II.

OF LIMITED REPRESENTATION.

THERE are some passive titles which do not extend to a responsibility for the whole debts of the deceased, but to a responsibility bounded by certain limits.

[1] 1695, c. 24.

[2] 1695, c. 24.

[3] Act of Sederunt, 28th February 1662; 1695, c. 24.

[4] M'NIEL against MATHIE, 20th July 1759; Fac. Coll. 341. (9752).

[5] 3. Stair, 9. § 9. 3. Ersk. 9. § 49.

[6] 3. Ersk. 9. § 52.

[7] See GARDENER against DAVIDSON, 9th December 1802; Fac. Coll. (9840).
SCOTT against Lord BELHAVEN, 25th May 1821; 1. Shaw and Ballantine, 33.
CUNNINGHAM and BELL against M'KIRDY, 8th February 1827; 5. Shaw and Dunlop, 315.

[8] See case of PENMAN, supra, p. 660. Note [8].

SECTION I.

LIMITED REPRESENTATION PRODUCED BY JUDICIAL PROCEEDINGS.

THERE are two occasions on which representation, to a limited extent, may be established by adverse proceedings on the part of the creditor.

Peremptory Defence.

1. Where an action is raised against the heir of a debtor, and he, acquiescing in the character under which he has been called, states a peremptory defence on the merits of the cause; as payment, discharge, prescription, &c.; he is held to incur a passive title to the effect of being liable for that particular debt, but no farther.[1]

Charge to Enter.

2. Where a creditor has no direct means of attaching the estate of his debtor, the heir not being entered, it is provided by particular statutes,[2] that the creditor may charge the heir to enter, under certification that, if he fail so to do, he shall be considered as liable to the debt of the charger in the same way as if he had entered; so that not only may adjudication proceed, but action may be sued out personally against the heir not renouncing.[3]

SECTION II.

OF ENTRY AS HEIR CUM BENEFICIO INVENTARII.

IT would be a very inexpedient deviation from the rules of justice to infer against an heir an unlimited responsibility, without any regard to the extent of the succession, were there no remedy to mitigate the harshness of the rule. But the Scottish legislature, in the statute already referred to, adopted from the Roman law[4] a regulation enabling the heir to enter cum beneficio inventarii. By this law the legislature provided,[5] that on following out particular proceedings, and observing certain precautions for ascertaining the true extent of the succession,[6] the heir's responsibility should be limited to extend 'so 'far as the value of the heritage given up in the inventory will extend, and no further.'

[1] 3. Ersk. 8. § 93. LUNDIE against Lord SINCLAIR, 11th February 1713, (12,064).

[2] See Commentary on these Acts, 1540, c. 106. below, under Adjudication.

[3] 3. Ersk. 8. § 93.

[4] Cod. Lib. Tit. De Jure deliber. l. 22. § 2, 3, 4.

[5] The second part of the Act 1695, c. 24. is in these words: 'That for hereafter any apparent heir 'shall have free liberty and access to enter to his pre- 'decessor cum beneficio inventarii, or upon inventory, 'as use is in executries and moveables, allowing still 'to the said apparent heir year and day to deliberate; 'in which time he may make up the foresaid inventory, 'which he is to give up upon oath, full and particular 'as to all lands, houses, annualrents, or other heritable 'rights whatsoever to which the said apparent heir may 'or pretends to succeed. Which inventory, to be sub- 'scribed by him before witnesses, duly insert and de- 'signed, shall be given to the clerk of the Sheriff Court 'of the shire where the defunct's lands and heritage 'lie. To which inventory the sheriff, &c. with the 'clerk, shall also subscribe in judgment, and record 'the same in their registers, and give extracts thereof; 'and this inventory is to be given in recorded and 'extracted, as said is, within the said year and day to 'deliberate.'

[6] An heir defending himself on the inventory must show strict compliance with the Act. See M'KAY against SINCLAIR, 11th February 1708. It is sufficient if the inventory be given up and registered within the year, though the service is subsequent. And if any unavoidable obstacle prevent the completing of the inventories within the prescribed time, the Court will authorize them to be registered, reserving all objections. 12th July 1749, Sir R. M'KENZIE; Kilk. 240. Elchies, *Heir cum beneficio*, No. 5. BELL, 17th November 1818. Fac. Coll. The inventory, however, must be lodged before the heir is served, otherwise he is held to have, by his service, incurred a representation not to be purged by inventory. 11th February 1818, CODRINGTON against JOHNSTON'S Trustees, Fac. Coll. Affirmed 31st March 1824.

The requisites to be observed are, 1. That this privilege shall be claimed, and the inventory given in, recorded and extracted, within the annus deliberandi. 2. That the inventory shall be full, and upon oath, of all lands, houses, &c. which the heir claims as such. 3. That it shall be subscribed before witnesses, duly insert and designed. 4. That it shall be given in to the clerk of the Sheriff Court of the shire where the lands lie, or if there be no lands requiring sasine, to the Sheriff clerk of the shire where the ancestor died. 5. That the inventory shall be sanctioned, subscribed by the Judge, and recorded and extracted.

As to the effect of this statute, and of the heir's entry under its provisions, the following points may be observed:—1. The heir does not thereby vest the estate in his person, strictly speaking, as a trust estate, or so that the debts of his ancestor are, by his act, to be held as real burdens on the lands. The heir must indeed account for the value, on the principles which regulate a trustee's intromissions, (see below, p. 664.) But under a service cum beneficio, as under the ordinary form of service, the heir becomes the absolute proprietor of the land, with only a personal responsibility for his predecessor's debts,[1] the sole difference being, that this responsibility is limited in the one case, universal in the other. A demand against the heir thus served, is grounded on his title as heir. The conclusion of the summons is for a personal decree; and the proper tenor of that decree is, 'decerning 'against him for the debt, reserving to him his objections against full payment.'[2] 2. If any of the creditors of the predecessor desire to attach the estate, they must proceed by adjudication in the manner hereafter to be explained; and with such limited benefit as the law has assigned to the ancestor's creditors. 3. If a demand be made by a particular creditor, the heir not only may, but is bound to satisfy it, unless there shall appear danger of similar demands to a greater amount than the value of the estate; in which case the heir may raise an action of multiplepoinding, calling all the creditors of the ancestor into the field, to have the fund fairly divided. 4. As the heir may pay to the creditor who first makes his demand, other creditors who come afterwards may be excluded by the exhausting of the whole value of the heritage in the inventory; or their demands may be limited to a small dividend from the inadequate residue. And against this the creditors seem to have no other protection than their own vigilance in citing the heir, and so by interpellation compelling him to bring all into the field by a multiplepoinding; or by themselves raising a multiplepoinding in the heir's name. 5. The heir may sell, or voluntarily alienate the estate, to the disappointment of the ancestor's creditors; and against this, as against the other danger which they run, there is no protection but the vigilance of the creditors themselves in using the diligence of inhibition. 6. While the estate remains in the hands of the heir, unexhausted by payment actually made, no preference is acquired by creditors either citing the heir, or obtaining decree against him; but the whole estate, or what remains unexhausted and unapplied, is a fund in the heir's hand, on which the creditors are to be ranked preferably, according to the diligence they have used for attaching it; or pari passu if no real diligence have been used.[3] The creditors attaching the estate will be preferred accordingly;[4] and, on the same principle, if the heir have prevented diligence, by granting an heritable security, that security will be available to give

Not a Trust Estate.

Personal Limited Responsibility.

Pay Debts to the Amount.

Heir full Proprietor.

[1] The entry of the heir cum beneficio, cannot therefore be considered as diligence on the part of the ancestor's creditors, to secure their preference under the Act 1661, c. 24.

[2] GORDON against Ross, 22d July 1741; Kilk. 240. This reservation is best discussed in a multiplepoinding; wherein the heir cum beneficio, condescending on the value of the estate, may show how it has been exhausted, or is subject to competing demands.

[3] LAWSON against M'DOUGALL, 28th November 1738; Kilk. 239. Elchies, *Heir cum ben. inv.* No. 2.

[4] SCOTT against BURNET, 4th January; 1. Kames, 49.

preference where there is no collusion or fraud.[1] The ranking of such security seems to be equivalent to payment in accounting for the fund. It is different from the effect of a mere decree on which no payment has been made. 7. The heir, although he does not hold the estate as vested in him in trust, is yet substantially a trustee, holding a fund equal to the value of the estate, for the benefit of the creditors of the predecessor, and for payment of which both the estate of his ancestor and his own may be attached. Accordingly, he is on the principle of trust bound to account for this fund: And so, *First*, Meliorations are imputed as part of the trust. *Secondly*, Whatever indulgence, deduction, or ease, he receives in settling with individual creditors, are taken to be for the benefit of the whole.[2] And, *Thirdly*, The heir must either pay the debt, or assign the subjects in the inventory, and is not entitled to insist on paying only the value.[3] 8. As the inventory does not present any evidence of the *value*, but only of the *extent* of the estate; and indeed, as the whole is a proceeding of voluntary, and not of contentious jurisdiction, and so gives no assurance of correctness; difficulties may arise after the heir has assumed the possession. Thus, 1. If, without taking any precaution to discriminate, he shall improve the estate, it is difficult to say, that the right of the creditors shall be restrained to the original unimproved value; and accordingly it has been held, that the creditors are entitled to reckon his responsibility at the value of the improved estate.[4] 2. Although the heir may, in a process of cognition, have the value of the estate ascertained, as a rule of liability and payment;[5] and if the matter should stop there, all future improvements will be held as made by the heir upon his own estate, just as if he had purchased it; yet he cannot compel creditors to acquiesce in this mode of ascertaining the value. They may insist on bringing the estate to a sale.[6]

Rules of Accounting.

SECTION III.

LIMITED RESPONSIBILITY FROM POSSESSION BY APPARENT HEIR, IN CONFERRING ON CREDITORS A RIGHT AGAINST THE NEXT HEIR ENTERING.

It seemed to the Scottish Legislature, while considering the whole of this matter of responsibility by succession to land, that although it might not be expedient to confer the title to land ipso jure, yet, from the possession of the ancestor's estate by an apparent heir, a degree of credit arises, which called for some modification of the ordinary rule that makes land and the heir succeeding to it responsible only for the debts of a proprietor feudally vested. When creditors see a man in possession as owner of an estate for a course of years, they are naturally led, without any particular inquiry into the state of his titles, to trust him as a person of credit and property; and it is hard and unjust that they should

[1] VEITCH against YOUNG, June 1733; 1. Dict. 361.

[2] AIKENHEAD against RUSSELL, December 1725; 1. Kames, 25.

[3] VINT against Lord and Lady HAWLEY, 8th November 1712; Forbes, 629. DOUGLAS against PRINGLE, 5th February 1724; Edgar, 22.

[4] AIKENHEAD against RUSSELL, 6th July 1727; 1. Dict. 363.

[5] GRAY against M'CAUL, 6th July 1733; 1. Dict. 363. This action is declaratory. All the creditors must be called; and the conclusion is, 1. That the worth of the estate shall be ascertained after due inquiry made. 2. That the lands shall be found and declared to belong to the pursuer, and to be free and disburdened of the debts of the predecessor, upon payment to the creditors of the ascertained value. And the proper course is, to have a multiplepoinding and exoneration conjoined with the declarator.

[6] This, after some vacillation, was at last fixed. See the case of the Creditors of PILMURE, 17th February 1736; as corrected by the case of STRACHAN's Heirs against his CREDITORS, 12th July 1738; Kilk. 239. See also, 3. Ersk. 8. § 70.

be disappointed. On this account it was deemed expedient, that wherever such possession should be continued during the space of three years, the next heir completing his title to the land by passing over the person so possessing, should be held responsible for his debts, and bound to fulfil his onerous engagements to the extent of the value of the estate. And provision was so made accordingly,[1] in another part of the same Act, which has already been commented on.

This is a very imperfect law; and the policy on which it is grounded, leads much beyond the remedy actually applied. The points of importance under this Act are these: 1. The remedy is not confined to the case of an estate in which the heir succeeding to the apparent heir connects with the predecessor *last infeft*, for the word *infeftment* is not to be found in the statute. If the next heir complete his title to the estate by service connecting himself with a more remote predecessor than the apparent heir, although that predecessor should have held only a personal right as disponee, it would be a case under the Act.[2] 2. The interjected heir must actually have possessed the subject by himself, or by another under his authority. And so it will not avail his creditors if the estate has been in the possession of a judicial factor in sequestration:[3] neither is it enough that he is apparent heir in the fee, and excluded only by the liferenter's possession, which, though to some effects it is held as the fiar's, never is so held but for the fiar's benefit.[4] But if, as apparent heir, he shall have granted a liferent right, his liferenter's possession would be held as his.[5] 3. If the possession, though actual, has been not on apparency, but on a title ostensibly adverse to it, the creditors will not profit by it.[6] 4. It is only upon the onerous debts and deeds of the interjected heir that a demand can be grounded against the succeeding heir. So a pecuniary debt of the interjected heir; or an obligation in a marriage contract;[7] or a disposition of lands onerous, and with warrandice express or implied; or a lease of any part of the lands; will authorize a demand, and the enforcement of the deed against the next heir. But a gratuitous engagement or conveyance, as a simple destination, or a bond of tailzie, will not sustain action under the statute.[8] 5. The words of the Act require, that the heir who is called upon as responsible must enter by service, or by adjudication on a trust-bond, to one more remote than the debtor whose possession on apparency had raised the credit, otherwise there is no action against him. It was therefore held, that where the next heir possessed merely on apparency, without

Passing by.

Possession.

Debts and Deeds.

Entry of next Heir.

[1] The words of this part of the statute are: 'If any 'man shall serve himself heir, or by adjudication on 'his own bond shall succeed, not to his immediate pre- 'decessor, 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 per- 'son interjected, to whom he was appearand heir, and 'who was in the possession of the lands and estate to 'which he is served for the space of three years, and 'that in so far as may extend to the value of the said 'lands and estate, and no further, deducing the debts 'already paid.' 1695, c. 24.

[2] Principles of Equity, 124. Observe here the extreme inaccuracy of Lord Kames in grounding his argument on a misquotation of the Act, p. 122. He imagines the case which he puts, to be resolvable only on the equitable extension of the Act upon its policy, whereas the words fully comprehend it.

[3] BUCHANAN against MACDONALD, 7th December 1796; Fac. Coll.

[4] Creditors of M'CAUL against M'CAUL, 26th July 1745; Kilk. 371.

[5] M'TURK against HUNTER, 27th February 1819.

[6] 3. Ersk. 8. § 94. But observe, that the case of IRVINE against KNOX, there quoted, does not support the doctrine, though it seems to have been stated in argument, and probably was sanctioned by the Judges in the opinions.

[7] MUIRHEAD against MUIRHEAD, 17th January 1724; 1. Kames, 88. Countess-Dowager of GLENCAIRN against CUNINGHAM GRAHAM, 23d May 1800; Fac. Coll. Affirmed in House of Lords. See also OGILVY against OGILVY, 16th December 1817; Fac. Coll.

[8] Marquis of CLYDESDALE against Earl of DUNDONALD, 26th January 1726; the fifth branch of the cause.

service or adjudication on bond, he was not responsible.[1] This seems to be so little satisfactory, so far short of the principle of the Act, and to have been so much discountenanced in the House of Lords in one case,[2] that our lawyers have expressed little confidence in this rule being adhered to:[3] But in a subsequent case, a judgment was affirmed in the House of Lords, holding the heir who forbears to enter as not liable for this statutory passive title.[4] 6. Where the next heir abstains from entering or adjudging, but gives a bond gratuitous, or for a small consideration, on which the land is adjudged, this has been held equivalent to entry, as under the fair meaning, though not within the words of the Act.[5] 7. The responsibility is personal, but limited to the value of the estate; 'so far as 'may extend to the value of the said lands and estate, and no further, deducing the debts 'already paid.' The creditor of the apparent heir, therefore, can attach the estate only by adjudication, after having constituted his debt against the heir who has entered. But here it may be questioned, *first*, Whether the creditors of the apparent heir have, in pecuniary debts, the preference conferred on the ancestor's creditors by 1661, c. 24.? It would rather seem that they have such preference, since there are no words in the Act to exclude them, while the intendment of it is to confer on such creditors, to the value of the estate, the full privilege, as against the heir next entering, to which they would have been entitled had their debtor completed his titles. The whole purport of the statute of 1661, c. 24. seems consistent with this view of the matter; and it seems to have been the intention of the saving clause introduced into the Act of 1695,[6] to avoid the injustice which, 'as to the time past,' would have arisen from giving a preference to a class of creditors not formerly thought entitled to an action. *Secondly*, Another question may be raised, Whether adjudication in implement be competent on a conveyance or minute of sale, or other obligation to convey, by the apparent heir three years in possession? If so, the debt of the unentered heir may be made preferable to that of him who has completed his titles, since adjudication in implement is not subject to the pari passu preference of ordinary adjudgers.[7] But although it seems quite clear, that directly a conveyance by one unentered in the feudal right can give no preference,[8] there appears to be no objection to a decree of adjudication in implement after due constitution of the obligation against the entered heir: the statute itself declaring not the debts only, but the deeds of the apparent heir effectual against the heir who enters.[9] 8. The personal responsibility of the entered heir,

Responsibility.

[1] SINCLAIR against SINCLAIR, 8th January 1736. Lord Elchies says, the Court pronounced this decision 'most unwillingly, because it makes this clause of the 'Act 1695 of little effect.' Notes, p. 317, 318. See also LEITH against Lord BANFF, 9th December 1741; ib. Notes, p. 318.

[2] Lord Elchies, in his note of the case of the Creditors of KINMINITY, 11th May 1749, where decree of constitution and adjudication having been given against a minor, apparent heir, on debts of his father, who had possessed on apparency three years; and the Court having recalled them, the House of Lords affirmed the first judgment; and he adds,—'Lord Advocate 'told me, it was upon the general point that, when the 'next apparent heir, the debtor, was three years in 'possession, the next apparent heir is liable in the 'same manner as if the debtor had been infeft, if he 'possesses, whether he passes him by and serves to a 'remoter predecessor or not; and that the Lords 'meant to extend the Act 1695 farther than we thought 'we could do, and farther than we did in the cases of 'Lord Banff,' &c. Elchies, voce *Minor*, No. 12.

[3] See 3. Ersk. 8. § 94. 2. Kames' Principles of Equity, 122-3.

[4] GRANT against SUTHERLAND, 12th December 1754.

[5] BURNS against PICKEN, 4th July 1758; Fac. Coll. Sel. Dec. 205.

[6] 'As also with this order, *as to the time past*, that 'all the true and lawful debts of the apparent heir, en- 'tering as said is, and already contracted, with the true 'and real debts of the predecessors to whom he enter- 'ed, shall be preferred in the first place.'

[7] 1661, c. 62. 1672, c. 19.

[8] See SIMPSON against HAMILTON, 1st July 1707.

[9] In OGILVIE against OGILVIE, 16th December 1817, it was held, that the obligation on a contract of marriage to complete valid titles to the estate, can only be fulfilled by the heir making up titles, and

if not heir-at-law and representative of the deceased, is of the nature of a subsidiary obligation after the heirs of the deceased have been discussed.[1] And as a corollary from this rule, if the heir entered shall have paid the debt of the deceased heir without pleading the exception, he will have action of relief against the representatives of that heir if primarily liable, not otherwise.[2]

Where the estate is under a strict entail, which would have prevented the debts of the apparent heir from affecting it though he had been entered and infeft, there can be no passive title under this Act to subject the heir. And although the creditors of an heir of entail infeft, whose debts have been contracted before the tailzie was recorded, may, after it is recorded, adjudge;[3] it is different where the heir of entail dies in apparency, and the entail is not recorded till immediately before the death of the apparent heir: There the creditors of the apparent heir are not entitled to adjudge the estate in the person of the next substitute entering;[4] the creditors in such personal debts are not in a better situation than the creditors of the next heir himself.

denuding in favour of the creditor in the contract of marriage.

[1] VINT against Earl of DALHOUSIE, 13th November 1712; Forbes, 631. 3. Ersk. 8. § 94.

[2] OGILVIE against OGILVIE, 16th December 1817. Here the relief was denied, because the heir pursuing for relief was himself the primary obligant to complete titles to particular lands, and to denude in implement of a contract of marriage. 'Found, that the said obligation not being of a general nature, but specifically for 'the settlement of the estate, does attach upon the heir 'of investiture of that estate; and therefore the heir, '&c. attempting to take the said estate by passing by, '&c. is not entitled to relief from the heir of line, or 'general representative of John Ogilvie.' See also the case there quoted and referred to, Countess of HOPETON against Marquis of ANNANDALE.

[3] SMOLLET's Creditors against SMOLLET, 14th May 1807. Supra, p. 38. Note [6].

[4] An entailed estate was long possessed without the entail being recorded. At last it was recorded during the possession of an apparent heir. After his death, the next substitute made up titles under the entail. The creditors of some of the prior substitutes, who had been infeft while the entail stood unrecorded, adjudged; and the creditors of him who had possessed as apparent heir adjudged also. These last adjudgers were objected to, and the objection sustained. GRAHAM against GRAHAM's Heirs, 13th May 1795; Fac. Coll. 396.