

like reason after the decret, and where the pursuer's diligence had so far proceeded as the length of a decret; and it were an unnecessary and sumptuous formality to put the lieges to any such diligence, the pursuer having no necessity to call except the superior in a summons of adjudication, but *dicis causa*; and having now called the next apparent heir-male, and being content that he debate against the decret, in the same way and manner, as if he were yet in the first instance; especially considering there are comprisings led at Clackmannan's instance, for vast sums against the said lands, which the pursuer will not be able to redeem within year and day, unless his diligence be sustained. THE LORDS repelled the allegiance, sustained process, and adjudged; but prejudice to the defender *intra tempus deliberandum*, being served heir to his predecessors, and ten years thereafter to redeem, as accords of the law.

Newbyth, MS. p. 48.

No 30.

1667. June 26.

DEWAR against PATERSON.

No 31.

IN a transference of count and reckoning against an apparent heir, there was found no process, both the citation and day of compearance being within the *annus deliberandi*.

Though reductions, declarators and such like real actions require no charge to enter heir, they are not competent within the year of deliberation, because in these the heir cannot defend without behaving as heir.

Fol. Dic. v. 1. p. 467. Stair.

* * * This case is No 7. p. 2171.

1677. February 6.

HAMILTON against BONAR.

No 32.

THE LORDS found, that apparent heirs may be pursued, as behaving before the year expire; seeing *eo ipso* that *miscent, adeunt passive*; and as to that pretence, that they would be wronged if it should have appeared by the probation that they did not meddle; it is of no weight, seeing the LORDS may modify expenses.

Fol. Dic. v. 1. p. 468. Dirleton, No 450. p. 219.

* * * Stair reports this case :

JEAN LOCKHART and Hamilton of Raploch her spouse, pursue James Bonar as representing his brother, for payment of bonds granted by his brother to her, and insist against him as behaving as heir, who *alleged* no process, because this pursuit was *intra annum deliberandi*. It was *answered*, That *annus deliberandi*,

An apparent heir intromitting with moveable heirship and rents of land, within year and day after the defunct's decease, may be pursued for his debts, *et non habet animus deliberandi intra annum et diem.*

No 32. is only granted in favours of apparent heirs to deliberate, and choose, whether they will abstain from the heritage, or will meddle therewith; but if either they enter or immix themselves, by behaving as heir, they can pretend no further privilege to deliberate.

THE LORDS found, that behaving as heir, might be pursued within the year, as well as against an heir entered, although Sir Thomas Hope's opinion was adduced in the contrary.

February 13.—IN this cause it was further *alleged*, That James Bonar had behaved as heir, because a little before his brother's death, he and his wife entered in possession of the house where his brother dwelt and died, and has continued to possess the same ever since. It was *answered*, That the allegiance is not relevant, it being ordinary for apparent heirs to remain in their predecessors house, *custodiæ causa*; and the defender had a great quantity of merchant ware that was in the house, to dispose of; and to shew that he had no mind to immix, he obtained a warrant from the Magistrates of Edinburgh, to one of their number to set his brother's whole tenements, that they might not fall waste, and to lift the rents, that they might not perish, and accordingly did pay the next term's rent of the house he possessed. It was *replied*, That no inferior Magistrate could grant such warrant, but only the LORDS, and that he had continued possession before that warrant. It was *duplicated*, That any colourable title was sufficient to purge this odious passive title, where the apparent heir made no profit, but paid the rent of the house.

THE LORDS found the defence relevant against the foresaid condescendence of behaviour.

Stair, v. 2. p. 502. & 503.

* * This case is also reported by Gosford :

THE deceased John Bonar being bound by contract of marriage to pay L. 10,000 to Jean Lockhart, which she did assign to the Laird of Raploch her second husband, he did thereupon intent an action against James Bonar, as representing him upon all the passive titles, and especially as intromitter with the moveable heirship, and with the lands and tenements wherein his brother died infest, and as a possessor of one of the tenements himself. It was *alleged* for the defender, That there could be no process, because the summons against him as apparent heir, and representing his brother, was raised and executed within year and day, and by act of Parliament he had *annum deliberandi*, so that he was not obliged to answer until there was a new summons raised and executed. It was *replied*, That the law did only indulge that time to apparent heirs who did abstain from any behaviour by intromitting with moveable heirship, or any rents of lands which could fall to them, being served heirs; but if they did actually intrommit and possess, that was as binding as if they had been

served heirs ; and it was of a public concernment, because there was no more place to deliberate where behaviour was clear and proved, *et non refert an actu vel animo*, they declared themselves heirs ; and if they might lawfully intromit within the year, and yet not be liable to process, they might retire off the country with a full hand before decret could be recovered against them. It was *duplied*, That it was against our law and practice, that apparent heirs could be pursued until after year and day ; and Sir Thomas Hope in his Treatise, having expressly stated that case, hath given his judgment, that upon the passive titles apparent heirs could not be pursued till after year and day ; and the reason of his judgment is, that if it were otherways sustained, then intromission and behaviour depending upon probation and the pursuer should fail, the LORDS would necessarily find that they had done wrong. THE LORDS did seriously consider the case, and found that an apparent heir actually intromitting and behaving himself as heir, might be pursued within year and day, as effectually as if he had been served heir, and that thereby he had renounced the benefit of *annus deliberandi* ; and if the pursuer should prove it, it was most just he should not be delayed ; and albeit he should succumb, the apparent heir could have no prejudice until he were of new pursued ; and for Hope's opinion they had no regard thereto, as being an error, and so repelled the defence and duply, and sustained the summons in respect of the reply.

No 32.

Gosford, MS. No 952. p. 631.

1684. *January.* JAMES OGILVIE *against* MR CHARLES HUME of Aytoun.

IN the reduction of a disposition of tailzie, with a conclusion of declarator, pursued against the apparent heir of tailzie *ex capite inhibitionis*, executed against the defunct before the disposition ; the defender *alleged* no process, because the *annus deliberandi* was yet current.

No 33.

Answered ; That such processes having no personal conclusion, may be insisted in within the year of deliberation ; and the defender could have no prejudice by a simple reduction of the right, which he might take off by purging the inhibition.

Replied ; It is unreasonable to pursue an apparent heir *intra annum deliberandi* ; for that he may have competent defences, which he dares not propone for fear of incurring a behaviour, which would cut off the benefit of deliberation.

THE LORDS found the defender's allegiance and reply relevant to sist the process against him till expiring of the *annus deliberandi* ; and that the summons bearing the day of compearance within the year, could not be insisted in after the year.

Fol. Dic. v. 1. p. 468. Harsarse, (AIRES GESTO AND PASSIVE TITLES.)

No 46. p. 10.