No 27.

1627. *February* 28. LIVINGSTON *against* FULLERTON.

ONE Livingston seeking decree to be transferred in one William Fullerton, as lawfully charged to enter heir to his father, it was *alleged*, That the summons was raised before year and day had past after the defender's birth, though his father had died year and day before; for the child was *posthumous*. It was found, that he should have waited year and day after the child's birth before he had raised summons upon his charge.

Fol. Dic. v. 1. *p.* 467. *Spottiswood*, (HEIR.) *p.* 137.

No 28.

1628. *June* 19. M'CULLOCH *against* MARSHALL.

THE heir may be charged to enter heir at any time after his father's decease; but no summons may be executed against him that is charged to enter heir, while year and day after his father's decease be expired. But it is not necessary to delay the action 60 days after the year and day be expired.

Fol. Dic. v. 1. *p.* 467. *Auchinleck, MS. p.* 2.

*** Durie's report of this case is No 2. p. 2168.

No 29.

If an apparent heir renounced, a decree *cognitionis causa*, and adjudication, may be obtained within the year.

1631. *July* 14. BLAIR *against* BROWN.

THE deceased Alexander Brown being addebted in a sum to Alexander Blair writer, he pursues this Brown, as lawfully charged to enter heir to the said umquhile Alexander, for payment; and the said Brown compearing, and producing a renunciation subscribed by him, whereby he renounced to be heir; whereupon the pursuer obtains decreet *cognitionis causa*, that he might have execution *contra hæreditatem jacentem*; and thereupon pursues an action of adjudication; wherein the rest of Alexander Brown's creditors compeared, and *alleged*, That the pursuer's decreet foresaid, obtained upon the defender's renunciation, was null, because it was obtained before the expiring of year and day after the debtor's decease, against the 76th act, Parl. 6. Ja. 4. and 106th act, Parl. 7. Ja. 5. which prohibits any such process to be granted before year and day be expired; and against the act of session made in *anno* 1613, which gives liberty to raise charges within the year, but not to intent summons. This allegeance was repelled, and the process and decreet sustained; for, by the party charged his renouncing to be heir, by that voluntary deed he had renounced that benefit and liberty which he had by the acts of Parliament, to deliberate if he would be heir, seeing he resolved to renounce; and that renunciation behoved to be as effectual to the creditor as if he had retoured him-

self to be heir, *quo casu* the creditor would ever get process, as is usual, before the expiring of the year. No 29.

Clerk, *Hay.*

Fol. Dic. v. 1. *p.* 468. *Durie, p.* 596.

1666. *January* 17. JAMES CRAWFORD *against* AUCHINLECK.

No 30.
A decree of cognition being obtained against an apparent heir, was, after his death, allowed to be transferred against the next apparent heir, that an adjudication of the *hæreditas jacens* might immediately pass. But the Lords declared, that if the apparent heir should infeft himself within year and day, the adjudication should be redeemable by him within the legal; by which neither was the creditor prejudged of his diligence, nor the heir of his privilege.

THE heirs of line of umquhile Sir George Auchinleck of Balmanno being provided to a portion, payable by the heirs male, did thereupon charge the apparent heir male; and, upon his renunciation to be heir, obtained decreet *cognitionis causa*; after which that apparent heir died, and the decreet being assigned to James Crawford writer, he now insists in a summons of adjudication, containing a declarator, that he having charged the next apparent heir to enter to the last apparent heir, against whom the decreet *cognitionis causa* was obtained, that that decreet should be transferred against him, and it should be declared, that the adjudication should proceed against the next apparent heir. It was *alleged* for the defender, That the former apparent heir having died before adjudication, and so the diligence being incomplete, there could be no process thereon till this defender were again charged to enter heir to the first defunct, especially seeing he had *annum deliberandi* competent to him of the law, which would be taken from him if this order were sustained; and as an apparent heir charged, though the days of the charge were run before his death, the same would be void, if no decreet had followed thereupon; and the obtainer behoved to obtain his diligence thereupon renewed; so it ought to be in this case. It was *answered*, The case was not alike, for here there is a decreet obtained upon the heir's renunciation, and there is no reason to put the creditor to do diligence again, especially now, since the late act of Parliament, whereby, if he get not adjudication within a year, he will be excluded, and there are other apprisings already deduced.

THE LORDS sustained the process *hoc ordine*, with this provision, that if this apparent heir entered, and infeft himself within year and day, the adjudication should be redeemable to him within the legal reversion of 10 years; by which neither the creditor was prejudged of his diligence, nor the heir of his privilege.

Fol. Dic. v. 1. *p.* 468. *Stair, v.* 1. *p.* 338.

*** Newbyth reports this case:

BY a contract of marriage betwixt Sir George Auchinleck and Dame Agnes Murray, Sir George having provided his lands of Balm[illegible] to the heirs-male of the marriage; which failing, to his other heirs-male whatsoever, therefore