

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. I. p. 468. Durie, p. 596.

1666. January 17. JAMES CRAWFORD against AUCHINLECK.

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 decret *cognitionis causa*; after which that apparent heir died, and the decret 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 decret *cognitionis causa* was obtained, that that decret 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 decret 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 decret 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 infest 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. I. p. 468. Stair, v. I. 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 Balmanno to the heirs-male of the marriage; which failing, to his other heirs-male whatsoever, therefore

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 *hereditas jacens* might immediately pass. But the Lords declared, that if the apparent heir should infest 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.

No 30.

he was obliged, in case there were any daughters of the marriage, to make payment to them of the sums of money therein contained; and that when they should attain to their respective ages of 15 years, and in the meantime to educate and alimment them; there being only two daughters of the marriage, they, after the attaining of 15 years, did not only lie out of the provision due to them by their mother's contract, but also were forced to entertain themselves, and were put to great charges therefor; whereupon they having assigned the obligation in the contract of marriage in favours of William Crawford, he pursues William Auchinleck as lawfully charged to enter heir-male to the said George; and the said daughters to enter heirs of line for making payment to him of the provisions due by the contract of marriage, as also of the annual-rents of the same of all years due since the decease of the said Sir George their father, at the least of the sum of _____, as for the alimment of the said daughters since that time; and thereupon doth recover a decret not only for payment of the said provisions, but also modifying 1,000 merks yearly, as for the yearly alimment of the said two daughters since the decease of their father, in respect it was libelled and proved, that the two daughters had entertained themselves, and had lain out of the provisions due by the contract of marriage; but in respect of the renunciation both of the heirs of line and of the heirs-male to be heir, this decret was only *cognitionis causa*, allowing execution *contra fundum et hæreditatem jacentem*. Since this decret the heir-male is deceased, whereupon this pursuer has raised a summons against Archibald Auchinleck the next apparent heir male, and the heirs of line, who formerly renounced, and the Marquis of Douglas superior of the said lands; making mention of the said decret and of the decease of William Auchinleck, and of the charge to enter heir executed against Archibald the next apparent heir; and craved that it might be found and declared, that in respect of the decret *cognitionis causa*, recovered upon the renunciation of the apparent heir-male, and the heirs of line for the time, that it might be lawful to the pursuer to proceed in his diligence of adjudication against the lands, by calling the next apparent heir-male for his interest, in the same manner and way as he might have proceeded in case the heir-male had not deceased after the said decret. It was *alleged*, The desire of the summons could not be sustained, in respect the apparent heir-male being deceased, after the decret *cognitionis causa* no farther diligence could be used thereupon, which was interrupted by his decease; so that there was a necessity to begin *de novo*, and charging the next apparent heir-male to enter heir, and recovering decreets against him *eo nomine*. To which it was *replied*, The summons ought to be sustained, in respect of the foresaid decret *cognitionis causa*, which was recovered against the foresaid apparent heir-male and of line for the time, decerning execution *contra hæreditatem*; and albeit, in case the heir-male or of line had deceased during the dependance, there might have been some reason to have apprehended, that the diligence should have been repelled and begun *de novo*; that there is not the

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.*