No 6. such a disposition by the heir to one of his own creditors, is quarrellable by another of his creditors.

Fol. Dic. v. 1. *p.* 206. *Harcarse,* (PRESCRIPTION.) *No* 773. *p.* 219.

*** *See* The case of Ker against Scot, *voce* ARRESTMENT, No 22. p. 690.; and *voce* COMPETENT, No 34. p. 2715., in which the principle of the above decision was recognized.

1711. *February* 9.

MR JAMES GRAHAM Advocate, *against* CAPTAINS JOHN M'QUEEN and WILLIAM DRUMMOND.

No 7.
Under apparent heirs, in act 24th Parl. 1661, are comprehended *nominatim* substitutes in bonds or other rights; so that the creditors of the institute are preferable to the creditors of the substitutes.

IN a competition betwixt Mr James Graham, as decerned executor *qua* creditor to Mrs Alison Fletcher, relict of John Graham, general post-master, and Captains M'Queen and Drummod, executors-creditors to Captain David Graham, for the sum of 1000 merks, which the Earl of Strathmore and his cautioner were obliged by bond 'to pay to Mrs Alison Fletcher, and failing of her by 'decease, to the said Captain David Graham, or to Mrs Alison's assignees what-'soever;'——THE LORDS preferred Mr James Graham to Captains M'Queen and Drummond, executors-creditors to Captain David Graham the substitute; and decerned the Earl and his cautioner to make payment to Mr James, he confirming before extract; reserving to Captains M'Queen and Drummond action of recourse against the representatives of Alison Fletcher, the institute and fiar of the bond, as accords; in respect the predecessor's creditors doing diligence within three years, are preferable to the creditors of the apparent heir, act 24th Parl. 1. sess. 1. C. II. whether in a real or moveable estate, under which heirs substitute are comprehended; for albeit substitutes *nominatim* are preferable to the heirs or executors of the institute, 18th January 1625, Wat *contra* Dobie *; 15th January 1630, Thomson *contra* Merkland†; such substitutes may be excluded by the institutes' creditors; seeing substitution or succession takes only place, after payment of the debt of the institute, who was fiar and proprietor, as in this case.

Fol. Dic. v. 1. *p.* 205. *Forbes, p.* 494.

No 8.
Creditors of a defunct are preferred before those of his heir. The heir cannot dispose the estate in prejudice of his

1747. *November* 26. WILLIAM TAYLOR *against* LORD BRACO.

ARCHIBALD GEDDES of Essel having died 29th August 1697, Andrew his son and heir apparenr sold the estate to Duff of Dipple, 26th of April 1698. The father and son had joined in a bond of borrowed money to John Taylor, for the sum of L. 800 Scots; and this claim lay over many years, but was saved from prescription by the minority of the creditor's representatives. William

* *Voce* SUBSTITUTE and CONDITIONAL INSTITUTE. † *Voce* HUSBAND and WIFE.

No 8.
predecessor's creditors for a year after the succession opens to him.

Taylor, grandson to the original creditor, made up a title to the bond, and insisted in a process against Lord Braco as representing Duff of Dipple, concluding a reduction of his right to the estate of Essel, founded on the last clause of the act 24th Parl. 1661, 'That no right or disposition made by the 'apparent heir, so far as may prejudice his predecessor's creditors, shall be va-'lid, unless it be made and granted a full year after the predecessor's death.'

It was *objected*, That the pursuer, in quoting the statute, has left out the most material words, which introduce a new prescription, by providing that the creditors, to have the benefit of the statute, must do diligence against the heir-apparent and also against the real estate, within three years after their debtor's death; therefore no creditor of the predecessor who has not done diligence against his estate within the time limited, can insist upon this act of Parliament nor upon any clause in it; as my Lord Stair, lib. 2. tit. 12. § 29, observes, where he says, 'that the diligence must be completed within three years, such 'as adjudication or apprising, by infeftment, or charge against the superior.' And it is the author's opinion, that this prescription runs as well against the creditors of the predecessor, where the heir-apparent has disponed within the year, as where he has not disponed at all.

In answer to this it was *urged*, That the doing diligence by adjudication within three years, is a clause intended to regulate the preference between the predecessor's creditors, and those of the heir-apparent, which is not the present case. The prohibition to sell *intra annum deliberandi* is pure and absolute, and the predecessor's creditors are entitled to found upon it without necessity of any diligence. And to clear that this is the sense of the statute, the pursuer endeavoured to show, by stating first the defects of common law that were intended to be remedied by this statute; and next, by examining the remedies that were applied. With respect to the first, the defects which the legislature had in view are clearly exprest in the narrative: 'Our sovereign Lord, &c. tak-'ing into consideration, that apparent heirs, immediately after their predeces-'sor's death, do frequently dispone their estate in whole or in part, in prejudice 'of their predecessor's lawful creditors, before their death come to their know-'ledge, or before they can do lawful diligence against the said apparent heirs, 'and which disposition the said apparent heirs do often make before they be 'served heirs and infeft.' Here is an evil, and a great one. During the *annus deliberandi* an heir-apparent is protected from diligence, that he may have time for deliberating whether he will undertake the succession yea or not. It is neither just nor expedient, that, in the mean time, he should have liberty, by disposing of the predecessor's estate, to withdraw from the creditors the subject of their payment. The other evil complained of is, 'That heirs-apparent suf-'fer by collusion their predecessors' estates to be comprised or adjudged from 'them, for payment of their own proper debts, real or similate, without res-'pect to their predecessors' creditors; though in justice every man's estate

No 8. ' should be liable to his own debt, before the debt contracted by his heir-ap-
' parent.'

The evils here complained of are of different kinds, and accordingly different remedies are applied. The natural remedy to the former is above set forth, that no heir, for a year after his predecessor's death, shall be entitled to dispose of his predecessor's estate; and consequently that no man is secure to purchase from him within the year; at least that the purchaser must lay his account either to have the burden of the predecessor's whole debts, or to have the estate taken from him by the predecessor's creditors. The remedy to the latter is borrowed from the Roman law, *tit. de separationibus*, and, upon solid grounds in equity, gives a preference to the predecessor's creditors upon the predecessor's estate. Bus this preference is declared to subsist no longer than three years; after which period the creditors, whether of the predecessor or of the heir-apparent, shall be preferred according to their diligence. To this branch a limitation is introduced, and a most reasonable one, to give a security to the apparent heir's proper creditors, that, after attaching the estate by diligence, they be not for ever laid open to be beat out of possession by the predecessor's creditors; reserving always to the predecessor's creditors what preference they have obtained within the three years by the deed of the heir-apparent, or by force of diligence.

From this analysis it will be evident, that neither the words nor intendment of the statute can admit the construction given it by the defender. For, *1mo*, as to the letter of the law, it is express without any limitation, ' That no right ' or disposition made by the apparent heir, so far as it may prejudice his prede-
' cessor's creditors, shall be valid, unless granted a full year after the defunct's
' death.' And it is introduced with the proper narrative of its being unreasonable, ' that he should dispone thereupon immediately, or shortly after his
' predecessor's death, in prejudice of his predecessor's creditors, he having year and
' day to advise whether he will enter heir or not.' Here it will be observed, that the limitation upon the preference given the predecessor's creditors in competition with the heir's creditors, mentioned in the former part of the statute, is not here repeated; the words are simple and absolute; nor would it be in the power of judges to supply, were they even of opinion that the statute is so far defective.

2do, The intendment of the statute affords no ground to suppose that the limitation must reach both branches. The limitation in the first branch was introduced for the benefit of the apparent heir's creditors, and of them only, that they might not for ever remain unsecure. The second branch does not at all concern the apparent heir's creditors, who may charge him instantly to enter heir without affording him any time to deliberate. It often happens that an heir apparent has no creditors; and yet he may do great prejudice to his predecessor's creditors, by making private or collusive bargains within the year, sel-

ling an estate at an undervalue, and withdrawing the price, which in his pocket is not obvious to diligence. No 8.

And to make the intendment of the statute still more clear, it may be observed, that the first branch supposes the estate to remain with the heir. 'Declares, that the creditors of the defunct shall be preferred to the creditors of 'the apparent heir in time coming, as to the defunct's estate, provided the defunct's creditors do diligence against the apparent heir, and the real estate belonging to the defunct, within three years after the defunct's death.' Now a limitation upon the predecessor's creditors attaching the estate in the person of the heir, that their preference shall not subsist longer than three years, can never be constructed to regulate a quite different case where the estate is sold and does not remain with the heir.

And *lastly*, had any such thing been intended by the statute, as to secure a purchaser after three years, who buys from the apparent heir during the *annus deliberandi*, the limitation must have been a very different one from what is in the former part of the statute. It must have been in these terms, 'that no declarator or reduction at the instance of the defunct's creditors shall be competent after three years against the purchaser.' And as no such limitation is mentioned, it is clear that no favour was intended for a man who purchases *prohibente lege*; as indeed there ought to be none.

To sum up all in a few words, the statute, in the *first* place, supposing the estate to remain with the heir apparent, affords the predecessor's creditors three years to obtain to themselves a preference upon the estate. 2*do*, It absolutely prohibits alienations within the *annus deliberandi*. And 3*tio*, If the estate be sold immediately after elapsing of the *annus deliberandi*, whatever preference equity may award to the predecessor's creditors before those of the heir apparent upon the price, it is certain they have no remedy against the purchaser.

As to the citation from Lord Stair above mentioned, it will be evident at the first glance, that his meaning is not to limit within three years the reduction competent to the defunct's creditors against the purchaser who buys *intra annum deliberandi*. Talking of the preference given to the defunct's creditors in competition with the heir's creditors, he observes justly, that the real diligence must be completed within the three years. Then he goes on shortly to hint, that heirs cannot dispose of their predecessors' estates *intra annum deliberandi*, and concludes with this passage, 'Therefore this preference of the defunct's 'creditors prescribes in three years, or rather in two years; because, within 'the year of deliberation they cannot pursue unless the heir enter or immix.' This passage relates obviously to the preference given to the predecessor's creditors in competition with those of the heir, and not to the restraint heirs are put under during the *annus deliberandi*, though mentioned in the immediate foregoing clause, which must be considered in some measure as a parenthesis. And it is not uncommon with this author to introduce a hint of one subject in the middle of another, which, in regularity of composition, would do better

No 8. apart. But his Lordship explains this matter more distinctly in another passage, p. 466, at the head, 'This preference of the diligence of the defunct's credi-'tors, to the diligence of the heir's proper creditors, is only, if the same be 'complete in three years after the defunct's death, wherein the *annus deliber-'andi* is contained: but in that year the heir can make no valid voluntary dis-'position.'

'THE LORDS found the reason of reduction relevant and proven.'

Fol. Dic. v. 3. p. 166. Rem. Dec. v. 2. No 86. p. 142.

*** The same case is reported by D. Falconer:

ARCHIBALD GEDDES of Essel was debtor to John Taylor in Overbridge L. 800 Scots by bond, and dying 29th August 1697, was succeeded by Andrew his son, who, 26th August 1698, within the year of deliberation, and in the state of apparency, disponed the estate to William Duff of Dipple.

William Taylor, writer in Edinburgh, as representing John, raised a reduction of this disposition against the Lord Braco, Dipple's heir, upon act 24th, Parl. 1st, Charles II. as being granted by an apparent heir within the year.

Answered; There is no reduction competent upon this act, unless the predecessor's creditor have done diligence within three years, and that either in the case of a voluntary disposition by the heir, or of diligence led upon his debt, as says Stair, b. 2. tit. 12. § 29. 'By the said statute, dispositions by heirs, or 'apparent heirs, of their predecessor's estate, are declared not to be valid in 'prejudice of the predecessor's creditors, unless made a full year after the de-'funct's death; therefore this preference prescribes in three years, or rather 'two years, because within the year of deliberation creditors cannot pursue.'

Replied; The act gives remedy in two cases; it prefers the defunct's creditors to the heirs, providing they do timeous diligence; and it annuls voluntary dispositions within the year to their prejudice, whether they do diligence or not, as is distinctly explained by Stair, b. 3. tit. 5. § 23. 'This preference of the di-'ligence of the defunct's creditors to the diligence of the heir's proper credi-'tors, is only if the same be complete in three years after the defunct's death, 'wherein the *annus deliberandi* is contained, but in that year he can make no 'valid voluntary disposition.' The other cited passage relates to the preference of creditors, not to the incapacity laid upon the heir, of granting voluntary deeds, though mentioned in the immediately preceding sentence, which therefore must be looked upon as a parenthesis.

Observed on the Bench; That if diligence were done, the defunct's creditor would be preferred to a disponee without the year, as a creditor of the heir's, and therefore it was to no purpose to forbid dispositions within the year, unless they were null, whether diligence were done or not; and this case was decided, and is observed by Lord Castlehill in his Practicques, tit. ALIENATION, No 181. as is related by Lord Harcarse in a note after decision 144. viz. Arniston against Ballenden, *voce* HEIR APPARENT.

THE LORDS, 26th November, 'found the reasons of reduction relevant and proven.' No 8.

Pleaded in a reclaiming bill; The disposition by Andrew Geddes contained a procuratory for making up titles in his person, and procuring him infeft in the estate disponed, which was afterwards accordingly done, from which time only the purchaser's right was effectual, as flowing from a person infeft; whereas the statute relates only to dispositions from apparent heirs, which must be made good by adjudication.

THE LORDS refused the bill.

Reporter, *Drummore.* Act. *J. Graham, sen. et R. Craigie.* Alt. *H. Home.*
Clerk, *Kirkpatrick.*

D. Falconer, v. 1. *No* 219. *p.* 303.

*** Lord Kilkerran also reports the same case:

ANDREW GEDDES younger of Essel, as principal, and his father, Archibald Geddes of Essel, as cautioner, granted bond for L. 800 to John Taylor in 1689, which bond was preserved from prescription by diligence and minorities.

Archibald Geddes, the father, died in August 1697, and in March thereafter, Andrew, the principal debtor, and apparent heir, disponed the lands of Essel to William Duff of Dipple.

Of this disposition William Taylor, now having right to the said bond, pursues reduction as null upon the 24th act, Parliament 1661, having been granted by the apparent heir within the year; and the LORDS 'found the reason of reduction relevant and proven.'

The question turned upon the construction of the act of Parliament, whereby it was *pleaded* for the defender, That there lay no challenge to the creditors of the defunct, unless they had done complete diligence within three years of the defunct's death. But the LORDS were of opinion, that though, where the heir gives a disposition after the year, the creditors of the defunct cannot plead a preference, unless they have done complete diligence within three years; yet, where the disposition is granted within the year, the creditors of the defunct have no occasion to plead a preference, but are entitled to plead the statutory nullity of the disposition, though they have done no diligence; and notice was taken from the Bench of a remarkable notandum subjoined by Harcarse to his decision, (Arniston against Ballenden, *voce* HEIR APPARENT,) in the following words: "The defunct's creditors doing diligence within the three years, are preferable, even where the heir *dispones after the year*, otherwise the heir's creditors would have more advantage by a voluntary disposition, than they could have by legal diligence, which were absurd; but a disposition within the year would be postponed to the defunct's creditors, though they do no diligence within the three years, such dispositions being prohibited, in so far as they prejudge the defunct's creditors, where no diligence or time is limited or required." Castlehill's Practicks, tit. ALIENATION, No 81.

Kilkerran, (CREDITORS OF A DEFUNCT.) *No* 1. *p.* 150.