

No 41.  
infer a pas-  
sive title or  
not.

A process of count and reckoning was pursued against him, wherein a proof before answer of the eases got was allowed; but the defender dying before the proof was taken, a transference was pursued against his heir.

To which it being objected, That no transference could proceed *intra annum deliberandi*, the ORDINARY, after advising with the LORDS, "found, That the heir is not obliged to answer within the *annus deliberandi* to any suit as representing his father, and therefore refused to transfer."

Against which the pursuer reclaimed, and urged, That as the defender could suffer no prejudice by the transference, so even the proof formerly allowed should be allowed to proceed, as that would infer no passive title; and if there was any doubt, he was willing to consent that nothing to be done in the proof *intra annum* should infer a passive title; and gave this reason for his anxiety, that the proof of the eases depended upon the testimonies of certain aged witnesses, whereof two had already lately died.

"THE LORDS refused the petition." They were of opinion, That within the year no step can be taken against the heir, whether his appearance would infer a passive title or not.

*Fol. Dic. v. 3. p. 316. Kilkerran, (ANNUS DELIBERANDI.) No 1. p. 28.*

No 42.  
The objec-  
tion, That  
diligence was  
*intra annum  
deliberandi*,  
not personal  
to the heir,  
but compe-  
tent also to  
creditors.

1757. December 23. EDWARD SUMMERS against SIMSON and GARDNER.

ON the 23d March 1751, Thomas Summers died considerably in debt, leaving a daughter Margaret, and his wife with child, who, on the 23d October thereafter, was delivered of a posthumous son, named Thomas.

On the 28th January 1752, Simson, one of the creditors of Thomas Summers the father, took decret of constitution against Thomas the son, as charged to enter heir to his father, and on the 16th June 1752, decret of adjudication. Thomas the son died in August 1752.

In a competition betwixt the creditors of Thomas Summers, it was objected by Edward Summers, one of them, to this diligence, That it had been taken *intra annum deliberandi*.

*Answered* for Simson, The objection was never made by Thomas Summers, the son, to the diligence. The objection was personal to the heir himself; and if he did not make it, no competing creditor could found upon it.

*Replied* for Edward Summers; By the nullity of the two decreets, there was a *jus quæsitum* to him, which the failure of the heir to object, could not disappoint. The objection, That decret was taken *intra annum deliberandi*, is known to make the defender as much free from the effects of the decret, as the objection, That a bond wanted writer and witnesses names, is known to make him free from the effect of the bond. In the last case, a creditor can ob-

A person left a daughter, and his wife pregnant, who brought forth a posthumous son. This son died a few months after his birth. Found that in computing the *annus deliberandi*, the time between the father's death and the birth of the son was not to be reckoned.

ject to the bond, though the defender did not ; and in the other case, he ought to be allowed to object to the decret, though the defender neglected to do it.

The objection of minority and lesion, or on the head of interdiction, appear to be abundantly personal ; yet the creditors of a minor, or of an interdicted person, may make use of these objections for themselves, bring a reduction on them, and turn the fruits of them to their own account. The objection of death-bed is, from our old law-books, and the nature of the thing, as personal as can well be conceived ; and yet it is competent to the creditors of the heir to reduce *ex capite lecti* ; Creditors of Balmerino *contra* Lady Coupar, No 25. p. 3203. And from the analogy of law in many other cases, the bent of it appears to be, to give creditors the power, not only of affecting every right in their debtor, but likewise of pleading, each for himself, every relevant ground of challenge which the debtor could have pleaded.

With regard to the present species of objection, if the validity of it was made to depend on the heir's proponing or not proponing it, this would be giving a power to the heir, and not to the law, to unhinge interests, and create preferences. Or even, though the heir was not partial, yet chance preferences might happen, altogether contrary to equity. Every one knows, that he ought not to attack the heir for a year, and that adjudications within year and day of each other are equal ; trusting to this, a creditor might not use his adjudication till the end of the second year, and during the first, another creditor has proceeded : If it was deemed that the objection was only personal to the heir, then it might happen, that by the heir's neglecting to use it, a creditor might be cut out altogether, who had conformed himself exactly to the known procedure of law.

“ THE LORDS found Simson's adjudication null, as *intra annum deliberandi*.”

In this competition it appeared, that Gardner, another creditor, had, on the 9th of May 1753, taken decret of constitution against Margaret Summers, as charged to enter heir to her father, and on the 7th of August thereafter adjudged.

*Objected* by Edward Summers to this diligence, It was taken *intra annum deliberandi* of the year which Margaret had, after the death of her brother Thomas the son.

*Answered* for Gardner, That adding together the time betwixt the death of Thomas the father, and the birth of Thomas the son, when Margaret was heir ; and the time betwixt the death of Thomas the son, and the date of the diligence, when she likewise was heir ; she had more than a year to deliberate.

Immediately after the death of any person, the *annus deliberandi* must run every moment against some person or other ; and as it is an established point,

No 42. That it does not run against a child *in utero*, it must have been running against Margaret the daughter.

“ THE LORDS found Gardner’s adjudication void, as *intra annum*.”

For Edward Summers, *J. Dalrymple*. For Simson and Gardner, *Macqueen*.  
*J. D.* *Fol. Dic. v. 3. p. 317.* *Fac. Col. No 76. p. 131.*

*Induciæ Legales* in warning to remove.—See REMOVING.

See EXECUTION.

See APPENDIX.