

to Lothian, granted to him a bond and disposition, under reversion, over Blackbriggs, for a certain sum, Lothian giving a relative missive, whereby he became bound to pay off a debt affecting the said lands, partly owing by Morton the elder.

An action was brought, at the instance of Bell, as trustee for James Kirkland and others, creditors of Morton the elder, concluding, that Lothian's right to the lands should be reduced, in so far as the pursuers are hurt thereby, founding on both clauses of the act 1661. c. 24. But the first branch was not thought applicable to the *species facti*; and the judgment went upon the second.

To the competence of the challenge on the second branch of the act, *objected* by the defender; The law gives no preference to the creditors of a defunct, in competition with the creditors of an apparent heir, as to the defunct's estate, unless they use diligence against it within the space of three years from his death. In default of which, the creditors of the apparent heir have an equal, and may acquire a preferable right to them, either by the diligence of the law, or the act of the heir; which, though done within the three years, and, of consequence, reducible, if the creditors of the defunct use diligence within that time, yet, if the three years are suffered to elapse, these diligences and securities will become valid and effectual.

*Answered*; The second clause of the act, by which the heir is prohibited to sell within the year, is pure and absolute, and the limitation applies only to the first clause of the act. This very question was determined, in the case Taylor *contra* Lord Braco, 26th November 1747, No 8. p. 3128. where the Court decerned in the reduction of the Noble Lord's right to an estate, solely upon the last clause of the act 1661; for it was not so much as alleged that any diligence was used within the three years.

THE LORDS sustained the reasons of reduction of the bond and disposition, as being granted by Morton, the younger, *intra annum deliberandi*. But, as the defender, if this point should be given against him, had prayed a reservation of all claims competent to him, against the estate of Morton, elder, by virtue of the debts due to him, and securities taken in consequence thereof, the Court remitted to the Ordinary to hear parties on that and some other points.

Act. J. Boswell.

Alt. Crosbie.

Clerk, Tait.

Fol. Dic. v. 3. p. 166. Fac. Col. No 63. p. 153.

1780. June 14. MAGISTRATES OF AYR *against* QUINTIN MACADAM.

CAMPBELL was debtor to the burgh of Ayr. Within the year after his death, his heir made up titles, and sold lands which belonged to him. More than three years thereafter, but within forty years, the Magistrates of Ayr, for effectuating payment of the debt due to the burgh, brought a process against

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are entitled to reduce deeds granted by his apparent heir, *intra annum deliberandi*, to their prejudice, on the second clause of the act 1661, c. 24. although these creditors should have used no diligence within the three years from his death.

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Action for setting aside rights granted by an heir within the year after

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the predecessor's death, endures for forty years. The second clause of the act 1661, c. 24. is not confined to rights granted by heirs in a state of apparen-  
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Macadam the purchaser, for setting aside the sale, upon the clause of the statute 1661, c. 24.

The defences *insisted* on by the purchaser were, *1st*, That the action of reduction, not having been commenced within three years after the ancestor's death, was not now competent; and, *2dly*, That the enactment only affected alienations made by heirs when in a state of apparen-  
 cy.

For the arguments on the first point, Taylor *contra* Lord Braco, No 8. p. 3128.

On the second point

The defender *pleaded*; The statute founded on, being of a correctory nature, and creating nullities in the titles of landed property, which are undiscoverable from the public records, ought to receive a strict interpretation. It is entitled, 'An act concerning apparent heirs.' The preamble sets forth, 'That apparent heirs, immediately after their ancestor's death, frequently dis-  
 ' pone their estate, in whole or in part, to the prejudice of their predecessor's  
 ' creditors.' The hardship thereby imposed on the ancestor's creditors is said to arise 'their not having it in their power to pursue the heir within the year,' which is not applicable to the case where the heir has completed his titles by service. And the enacting clause provides, 'that no disposition made by the  
 ' said apparent heir shall be valid, unless made a full year after the defunct's  
 ' death.'

*Answered*; This statute affects, in the *first* place, diligence by the creditors of the heir, which undoubtedly may take place whether he make up titles by service or not; and, *2dly*, voluntary deeds of alienation by the heir. The title of the statute is general; and as in the first part it must be understood to extend to diligence done against the predecessor's estate after the heir is served, it must in the second be equally applicable to alienations made by heirs in that predicament.

There are in the statute itself expressions which clearly show this to have been the intention of the legislature. Thus it is said, 'that apparent heirs do  
 ' often, before they are served, make dispositions of their predecessor's estate.' And the reason given for the different periods fixed in the first clause is, 'that  
 ' it would be unjust that the apparent heir, *after he is served, and retoured, and*  
 ' *infest, respective*, should, for the full space of three years, be bound up from  
 ' making rights and alienations of his predecessor's estate.'

But the defender's argument is not only contradicted by the words of the statute, but is totally adverse to its spirit. As a service may be completed by an heir, in some cases, in fifteen days after the ancestor's death, and in all cases within a period greatly short of a year; the duration of this privilege would in this manner be measured, not by the time prescribed in the statute, but by the diligence used by the heir in making up his titles.

' THE LORDS repelled the defences.'

Lord Ordinary, *Gardenston*. Act. *G. Fergusson*. Alt. *Rae*. Clerk, *Tait*.

*Fol. Dic. v. 3. p. 166. Fac. Col. No 110. p. 206.*