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Answered; Were the pursuer insisting, in the right of his father, for the enjoyment of an heritable subject that had belonged to him, it might be maintained, that, before he could vindicate any such subject, it behoved him to connect himself with his father by a service; but that is by no means the case. His father had no interest in the mortified sum, further than that, during his life, he had the personal privilege, conferred upon him, of presenting a young girl to be maintained and educated in the hospital; and that the hospital, simply by the mortification, were bound to admit such girls as should be presented by him upon a vacancy; and, although the same privilege devolved upon his death to his eldest son, and upon his failure to the pursuer, yet neither the one nor the other could be said to enjoy it in the right of their father, but only in consequence of the deed of mortification granted by Mr Murray, which conferred that privilege upon Mr Joseph Cave's heirs and successors, after his death. The pursuer, by using his privilege, takes up no part of his father's succession, nor does he intermeddle with any thing that properly belonged to him. He only renders effectual the ends and purposes for which the mortification was made, and is therefore under no necessity of making up any sort of title. He must indeed show, to the satisfaction of the Hospital, that he is the person who was authorised, by the deed of mortification, to name the young girl for whose education and maintainance the charity was bestowed; but that he does sufficiently, when he proves that he is the lineal representative, or, in other words, the apparent heir of his father.

A right of patronage is very different from that which the pursuer claims; it is an heritable subject, in the most proper sense of the word, and is generally annexed to baronies and other tenements, when it passes by infeftment. It also gives right to emoluments, besides the power of presentation, especially to the tithes, (where there is no other titular), which are often very valuable; but the pursuer can reap no emolument, nor can he draw any profit from the privilege he now claims.

The Court found 'that the pursuer, being heir apparent to Joseph Cave, is entitled to present in terms of Mr Murray's mortification, without any service, and therefore decern in the declarator.'

Reporter, *Gardenston.* Act. *Wight.* Alt. *Ilay Campbell.* Clerk, *Kirkpatrick.*
Fol. Dic. v. 3. *p.* 259. *Fac. Col. No* 118. *p.* 318.

No 37.
Though the ancestor die in the most distant parts, no addition

1783. *November* 14. David Henderson *against* Robert Campbell.

Robert Campbell, residing in Ayrshire, was the heir of James Campbell, who died in the East Indies. Upwards of a year after his death, but several months less than one from the time when the news of it were received in this

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is to be made to the *annus deliberandi*, on account of the time elapsing between the the death and notice of it obtained by the heir.

country, Henderson, a creditor of Robert, obtained a decreet of adjudication against him, as charged to enter heir to James.

A judgment of the Sheriff, decerning in favour of the adjudger, in an action of removing from the lands adjudged, was, by bill advocation, brought under the review of the Court; the heir complaining, that he had been denied the benefit of the *annus deliberandi*.

The Lord Ordinary refused the bill of advocation.

The heir reclaimed to the Court, and

Pleaded; The heirs of persons who happen to die in the most distant parts of the world, are certainly not less entitled to the benefit in question, than those are whose ancestors have never stirred from home. But if, as has been done in this case, the *annus deliberandi* were to be computed prior to the time when notice of the predecessor's death shall have reached the heir, the consequence, equally unavoidable and unjust, must ever be, to deprive such heir, wholly or in part, of that most important privilege. There cannot be any foundation in law for so great an inconsistency. The *jus deliberandi*, borrowed from the Romans, is a part of our common law, and ought always to be understood according to its true spirit and meaning. In ordinary cases, no doubt, the proper method of computation is to begin from the predecessor's death; and in some statutes, as 1503, cap. 76. and 1540, cap. 106. this is of course recognised. Where, however, without sacrificing the privilege itself, such a computation becomes impossible, law cannot but concur with reason in adopting a different mode. Thus, in the case of posthumous heirs, the year is reckoned, not from the time of the ancestor's death, by which means the benefit might seldom have its effect, but from that of the children's birth, 28th February 1627, Livingstone against Fullerton, *voce* INDUCIÆ LEGALES. On the same principle, where several apparent heirs have happened to come in the place of one another, a full year, calculated from the period at which the succession devolved to them respectively, has been allowed to each, Bruce *contra* Earl of Southesk, *voce* HEIR CUM BENEFICIO. No reason appears, why a principle, so rational in itself, and so well established by precedent, ought in the present instance to be disregarded; especially as the question here concerns merely *probabilem causam litigandi*, to the effect of admitting the matter by advocation to a more perfect discussion.

Answered; The doctrine of 'charges to enter heir' is to be strictly limited by the terms of the statute of 1540, c. 106. which introduced that mode of proceeding. Now that enactment expressly mentions 'year and day after the 'decease of the father or predecessor.'

Besides, the relaxation or extension of the law contended for by the heir seems in itself altogether impracticable. For what an infinite number of periods for the deliberation of heirs would the Court have to devise, in order that those times might correspond to the endless diversity of the distances from this country to all the parts of the habitable earth?

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Replied; No argument from the strictness of interpretation, belonging to statutes that confer privileges, can militate against the heir. If the statute of 1540 introduced a privilege, it was not in favour of heirs, but in direct opposition to them; being in behalf of creditors alone, who formerly had no means of attaching the heritage of debtors whose heirs remained unentered. Nor is there any difficulty in ascertaining, either, in general, the time requisite to obtain information from any corner of the world, or the particular fact when such intelligence has been actually received; after which there is nothing farther to be required. It is not an infinite variety of different periods, but the single space of year and day, to which the attention of the Court will be called.

Observed on the Bench; It would be highly inexpedient and unjust, were the effect of the diligence of creditors to depend on the causual circumstance of the particular time necessary for communicating notice of the predecessor's death to the heir, whose place of residence may be unknown to the creditors.

THE COURT 'adhered to the interlocutor of the Lord Ordinary on the bills.'

Afterwards a reclaiming petition for the heir was refused, without answers.

Lord Ordinary, *Stonefield*. For Henderson, *G. Fergusson*. Alt. *Crosbie*, *M'Cormick*.

S. *Fac. Col. No* 120. *p.* 189.

1786. *August* 14. CHRISTIAN SUTHERLAND *against* JEAN SUTHERLAND.

No 38.
Inhibition used against an intermediate apparent heir, of no effect after the succesion is taken up by a subsequent heir serving to the predecessor last infeft.

AN apparent heir executed a deed in favour of Christian Sutherland, on which she used an inhibition against him. He afterward granted an obligation to Jean Sutherland.

On the death of the apparent heir, after being three years in possession, the person succeeding made up titles to the remoter predecessor. In a competition which followed, between the inhibiter and the other grantee, the former claimed a preference in virtue of that diligence; to which, as being directed against an heir who died in the state of apparency, the latter objected, and

Pleaded; Though an apparent heir has a title to the annual produce of the estate during his life, yet dying before service, he cannot transmit any right in the estate itself, which still remains *in hæreditate jacente* of the ancestor. All diligence, therefore, intended after his death to affect such estate, as having been his property, must be inept and void.

The statute of 1695, it is true, has made the person serving heir to a predecessor last infeft liable for the debts and deeds of interjected apparent heirs three years in possession. This, however, is no more than a personal obligation, through which alone, or as being thus creditors to the heir served, those of the intermediate apparent heirs have access to attach the estate; so that in this respect the statute has made no alteration of the common law.

Now, though inhibition may affect subjects to be afterwards acquired as well as those antecedently belonging to the party inhibited, the diligence in question