

served heirs ; and it was of a public concernment, because there was no more place to deliberate where behaviour was clear and proved, *et non refert an actu vel animo*, they declared themselves heirs ; and if they might lawfully intromit within the year, and yet not be liable to process, they might retire off the country with a full hand before decret could be recovered against them. It was *duplied*, That it was against our law and practice, that apparent heirs could be pursued until after year and day ; and Sir Thomas Hope in his Treatise, having expressly stated that case, hath given his judgment, that upon the passive titles apparent heirs could not be pursued till after year and day ; and the reason of his judgment is, that if it were otherways sustained, then intromission and behaviour depending upon probation and the pursuer should fail, the LORDS would necessarily find that they had done wrong. THE LORDS did seriously consider the case, and found that an apparent heir actually intromitting and behaving himself as heir, might be pursued within year and day, as effectually as if he had been served heir, and that thereby he had renounced the benefit of *annus deliberandi* ; and if the pursuer should prove it, it was most just he should not be delayed ; and albeit he should succumb, the apparent heir could have no prejudice until he were of new pursued ; and for Hope's opinion they had no regard thereto, as being an error, and so repelled the defence and duply, and sustained the summons in respect of the reply.

No 32.

Gosford, MS. No 952. p. 631.

1684. *January.* JAMES OGILVIE *against* MR CHARLES HUME of Aytoun.

IN the reduction of a disposition of tailzie, with a conclusion of declarator, pursued against the apparent heir of tailzie *ex capite inhibitionis*, executed against the defunct before the disposition ; the defender *alleged* no process, because the *annus deliberandi* was yet current.

No 33.

*Answered* ; That such processes having no personal conclusion, may be insisted in within the year of deliberation ; and the defender could have no prejudice by a simple reduction of the right, which he might take off by purging the inhibition.

*Replied* ; It is unreasonable to pursue an apparent heir *intra annum deliberandi* ; for that he may have competent defences, which he dares not propone for fear of incurring a behaviour, which would cut off the benefit of deliberation.

THE LORDS found the defender's allegiance and reply relevant to sist the process against him till expiring of the *annus deliberandi* ; and that the summons bearing the day of compearance within the year, could not be insisted in after the year.

*Fol. Dic. v. 1. p. 468. Harsarse, (AIRES GESTO AND PASSIVE TITLES.)*

*No 46. p. 10.*