

1628. June 19. M'CULLOCH *against* MARSHALL.

No 2.

Although a summons upon a charge to enter heir was raised before the 40 days were run; yet as it was not executed till they were expired, it was sustained.

IN a transferring, David M'Culloch against Marshal and Robert Reid, the defender being convened as lawfully charged to enter heir to his father, and Robert Reid who was a creditor to the said defender's father, compearing for his interest, and *alleging* that the pursuer's summons should not be sustained, because it was executed before the expiring of 40 days after the out-running of year and day after the decease of the defunct, the common debtor; whereas not only year and day, but also 40 days after expiring of the year should pass before any party can intent action against any person as charged to enter heir; this allegiance was repelled; for the summons was not executed till year and day after the defunct's decease, which they found sufficient, and there needed not that 40 days more should pass before the summons; and the 106th act, James V. *anno* 1540, 7th Parl. is meant of comprisings and executions of sentences, and not of charges to enter heir, whereupon pursuits are raised; and the 76th act, 6th Parl. James IV. hath nothing to do with these citations; and by act of the sederunt books it is statute, That in such cases summons may be executed after expiring of year and day, after the defunct's decease, and no sooner; and that no more time needs to run; and that the charge to enter heir may be executed before the expiring of that year, but no summons executed within that time; and this act of Session touches summoning of parties, and charging of parties to enter heir for that end; whereas the acts of Parliament concerns only executions upon comprisings, and nothing of pursuits, and actions or summons.

By the practice of old, an heir to a defunct, albeit entered heir to him, could not have been pursued for the defunct's debts by his creditors, before year and day was expired after the defunct's decease; for the executor was answerable to the creditor within that space, and after the year the heir might be pursued, conform to the 76 act, Parl. 6th, James IV.; but now it is doubted by some, who are of opinion, that albeit any who is charged to enter heir cannot be pursued before the expiring of year and day, as is noted in the last practick, yet they think, where the person is entered heir actually, *eo casu*, that he may be pursued within the year, if he be retoured or seased as heir within the year; seeing they think that by his own deed in his entering heir, he hath prejudged himself of that delay of pursuit which the law gives, and which benefit they think only given to them who are charged to enter heirs, and not to them who have entered. Others are of opinion, that if an heir enter heir within year and day, he may be convened after he is entered, before the expiring of the year, where the debt is heritable; but where the debt is moveable, he cannot be convened within the year, albeit he be entered heir. The act of Parliament fore-

said would appear to free the heir, albeit entered heir, from all pursuit from any debt, heritable or moveable before the year expire, and after the year gives the heir relief against the executor, even in moveable debts, which doth affect properly the heritage and the heir, and not the executors, for so will the words of the act import ; but I am of the mind that the LORDS have now these many years bypast been in use, to find process against the heir within the year, where he was entered before ; and it hath been so decided divers times, as is noted, 29th June 1624, Haliday *contra* Edgar, Durie, p. 131. See INDUCIÆ LEGALES.

Act. Foulis. Alt. ———. Clerk, Gibson.

Durie, p. 376.

No 2.

1629. November 25. DICKSON *against* KER.

AN adjudication, without a spécial charge, was sustained in a competition, though the debtor was not infest, he being served heir in special, and having also charged the superior to infest him. See No 1. p. 169.

Fol. Dic. v. 1. p. 131. Durie, p. 469.

No 3.

1635. November 13. DICKSON of Headrig *against* A DONATAR.

THE gift of ward and marriage being gifted and pursued for, by a donatar against ——— Dickson, apparent of Headrig, apparent heir to that prior first apparent heir of that umquhile deceased vassal, who died tenant to the King ; for the action was not pursued against the apparent heir of the vassal, in his own lifetime ; but the apparent heir, whose marriage was gifted, being deceased before any action was intended against him upon that gift, the action was intended against his brother, who was the next apparent heir upon that gift, for that first apparent heir's marriage, who was deceased, and whose marriage was gifted before he died, and not for the marriage of the defender, who was then apparent heir himself, in respect of the other's decease ; and after the intending of this pursuit, this other apparent heir, who was defender, being deceased since the intending of the cause, and the process being transferred in the next apparent heir, and after transferring being insisted upon against him, not for his own marriage, but for the marriage of the first apparent heir, as said is ; in this process, it being *alleged*, That the same could not be sustained against the apparent heir, either of the vassal, or of that apparent heir whose marriage was sought, except the defender were called, either as heir entered to that apparent heir, or as charged to enter heir to him ; for he *alleged*, That this action ought to be considered otherwise than if the vassal's apparent heir were pursued for his own marriage, in which case he being the apparent heir who was convened, it sufficeth ; but in this case, the apparent heir's marriage being craved after his decease, some ought to be called to represent him ; seeing it was craved as a debt

No 4.
There is no necessity for a general charge to enter heir, in a process for the avail of marriage pursued against the ground. A charge is necessary only where it is meant to make the heir personally liable.