

*Alleged* for my Lord Yester; The pursuer may constitute his relief as accords against the heir of line, and adjudge in common form; but to declare the apprising affectable for his relief, is to go out of the common road of diligence; *2do*, Such a conclusion cannot be indulged, unless the grounds of debt had been libelled and produced; seeing a right cannot be declared affectable with a *nonens*; and the pursuer might as well carry on an adjudication, or pursue a forthcoming, without producing his debt.

No 311.

*Alleged* for Barns; The process as to him is sleeping, not having been insisted in for a whole year after it was called by course of the roll; and therefore must be wakened.

*Replied* for the pursuer; *imo*, There is no necessity to libel or produce the debts in this process, which concludes not payment, but only that the apprising belonging to the Duke should be declared affectable by his debts; *2do*, The process was kept waking against Barns by the continued prosecution against the Lord Yester upon the same active title, libel, and grounds of debt; against whom it was necessary for the pursuer to insist *primo loco*, to remove all prejudicial exceptions against his title; as in an action against heirs of line and tailzie, the latter could not pretend that the process *quoad* him could sleep during the time of insisting against the heir of line who must be first discussed.

*Duplied* for Barns; *Perinde est* whether different parties be called in one, or in separate summonses, where the conclusions are different. The reason why a process doth not sleep against an heir of provision, while the creditor is discussing the lineal heir, is, because the action resolves in a competition betwixt these, which of them should be liable to the debt; whereas there is no such thing in this case, and therefore the parallel doth not hold.

The Lords declared the apprising affectable for the pursuer's relief of the Duke of Lauderdale's debts; and found that the process is sleeping as to Barns.

*Fol. Dic. v. 2. p. 202. Forbes, p. 393.*

1775. July 21.

LOGAN against HOWATSON.

An action in an inferior court found not to sleep while lying at *avisandum* before the Judge, though for a longer space than a year.

No 312.

*Fac. Col.*

\* \* This case is No 15. p. 10492. *voce* PLANTING and INCLOSING.