

No 10.
Found as
above.

1715. June 30. ISABEL SPARK *against* BARCLAY of Ury and Others.

IN an action of exhibition *ad deliberandum* at the instance of the said Isabel Spark against Ury and others, the ORDINARY having ordained them to exhibit all writs granted to or by the pursuer's predecessors, except those on which infestment had followed, the dates of whose registrations they were ordained to condescend on, the defenders reclaimed on these grounds :

Imo, That, as the privilege was at first granted for encouragement of apparent heirs, so when they once behave as heir, (as in the present case) the design of the privilege ceases, and *sublata causa tollitur effectus*, and if *privilegia* be *strictissime interpretanda* in general, much more here, where the privilege is contrary to the common course of law, and tends to diminish another's right ; for, in an exhibition *ad deliberandum*, (contrary to the nature of all other exhibitions) without qualifying that they have any direct interest, or that they can be in the least benefited thereby, apparent heirs may force any man to open his charter chest, and expose his papers. *2do*, The Lord Stair, *Lib. 4. tit. 33. § 7.* says, That it will be a good defence in this action to say, that the pursuer is already actually entered and has no place for deliberation ; but behaviour is equivalent to actual entering ; and that it excludes the benefit of deliberation appears from *Voet. ad tit. ff. de jur. delib.* where he says, *denegatur tamen ulterior deliberandi facultas, si probari possit hæredem jam adivisse, aut pro hærede se gessisse, cum non possit desinere esse hæres qui semel hæres factus est.* *3tio*, By our constant practice, apparent heirs can call for no writs, except those that are in favours of persons in the defunct's own family (which the defenders are not in the present case) as was found 6th December 1661, Forrester *contra* Tailfer, No 29. p. 4006. ; which is yet more fully cleared by a late decision, 10th June 1706, Buchanans. *contra* Marquis of Montrose, No 34. p. 4010., where after a full debate, the LORDS solemnly decided and declared, that finding that former decisions had varied in this point, they resolved to fix such a rule for the future, as apparent heirs might be as little vexatious as was consistent with the legal privileges ; and therefore found the Marquis not obliged to produce any writs granted by the pursuer's predecessors, to strangers, or persons not in *familia*.

Replied for the pursuers to the *first* and *second*, That though behaviour be a passive title competent to creditors, yet it is not relevant against this action ; for, if it were so, defenders would always propone such defences ; yet it is certain they were never sustained, which is expressly said by the Lord Stair in the above cited tit. § 5. And the reason is, that it might be very prejudicial both to the heir, who could not enter until he had inspection, and to the creditors, seeing during a course of probation, the estate would be neglected. And therefore, as is observed by the Lord Stair in that place, no other passive title, but being actually entered, is a relevant defence against this action ; and, as to the

authority of Voet, it cannot be opposed to what is already mentioned, specially in point of our form. Besides, that *gestio pro herede* by the civil law, is not only a passive but an active title, and equivalent to actual entry; for with them an heir *adit hæreditatem, non solum preferendo se hæredem esse, sed etiam si facto aliquo tandem voluntatem declaraverit*. To the *third replied*, That seeing law gives apparent heirs this benefit, they ought also to have the necessary means thereof, by inspection, not only of the benefit, but also of the burden that may affect their predecessor's estate, that so they may deliberate; and this end can never be attained, unless all writs which may infer a liquid ground of debt be produced. And it must be acknowledged, that ordinarily the greatest part of any man's debts are owing to persons out of the family; nor can there any reason be assigned of the difference, since the heir, if he enter, will be equally liable to both debts *extra* and *intra familiam*. And so the LORDS, by the current of decisions, have sustained this action against persons out of the family, as well those within it.

No 10.

THE LORDS adhered to the Ordinary's interlocutor, with this alteration, that they found the defenders, though not being in *familia defuncti*, ought to exhibit all writs in their hands, whether infestment has followed thereon or not.

Act. Fleming

Alt. Ro. Gordon.

Clerk, Robertson.

Fol. Dic. v. 1. p. 283. Bruce, No 112. p. 138.

1721. January.

RICHARDSON against LIVINGSTON.

No 11.

AN adjudication being led *contra hæreditatem jacentem* upon the apparent heir's renunciation, it was *argued*, That the apparent heir afterwards resolving to enter, could not have exhibition *ad deliberandum* against the adjudger, because the renunciation was a virtual approbation of the adjudger's diligence. *Answered*, There is no presumption when one renounces, that he does it in any other view than to save himself from being liable; and, when he afterwards proposes to enter, there is the same reason he have an exhibition *ad deliberandum* against the adjudger as any other. THE LORDS refused the action *ad deliberandum* in this case. See APPENDIX.

Fol. Dic. v. 1. p. 283.

1770. January 20.

JAMES BOYD against WILLIAM GIBB.

No 12.

JAMES BOYD intending a challenge of Gibb's right to the estate of Pitkindie, brought a process of exhibition *ad deliberandum*; when it was *objected*, That though an apparent heir was entitled to bring such an action without any proof as to his relationship, yet as, according to the pursuer's own theory, he was a

In a process of exhibition *ad deliberandum* by a relation claiming under a remote ances-