

No 28.

\*\* Spottiswood reports the same case :

MR ALEXANDER SWINTON, as apparent heir-male to his umquhil father and brother, pursued an exhibition against the Laird of Westnisbet, of all charters, sasines, &c. given to his father and brother, and their heirs-male, and sicklike of all bonds and obligations made by them to the defender, to the end that he might have inspection of them, and after that advise whether or not he would enter heir to them, after he had seen the burdens to undergo. *Alleged, imo,* The pursuer could not be heard to pursue as apparent heir-male, till first he shew that the infeftments granted to his father and brother were granted to them and their heirs-male; because albeit a general heir has that privilege to pursue as apparent heir for exhibition, yet an heir-male has it not, unless it be first verified that his predecessor was such a person as might have an heir-male. *Replied,* The evidents which should verify their infeftments to be taken to the heirs-male, are in the defender's hands, and he is calling for them. THE LORDS repelled this exception. *2do, Alleged,* The pursuer has no interest to pursue for bonds and obligations made by the defuncts to the defender, because they are neither his own proper evidents, nor yet common to him with the defender, in which two cases only exhibition can be sustained at a party's instance. *Replied,* He sought them only to be exhibited, to the effect he might know his predecessor's burdens, and since of the law he hath *annum deliberandi*, to advise if he will enter heir or not, he ought not to be excluded from the means by which he may come to the knowledge of his predecessor's estate, which is the only occasion wherefore that benefit is by the law given to apparent heirs.—THE LORDS repelled this exception likewise. *3tio, Alleged,* The Lady Westnisbet (who was convened as a haver) could not give her oath in prejudice of her husband. *Replied,* She, being convened as a haver, behoved to depone, let it work what it might.—THE LORDS repelled this allegiance also.

*Spottiswood, (EXHIBITION) p. 124.*

1661. November 19. & 20. TAILZIFER against FORRESTER and SORNBEG.

No 29.

Exhibition found relevant of all writs granted to the defunct, and of all obligations made by the defunct to his wife, children, and others in his family, at his death, but

PATRICK TAILZIFER, apparent heir to his brother Alexander Tailzifer of Redhouse, pursues his relict and her second husband, for exhibition of all writs made to her husband, and by her husband to any person or persons, to the effect he may advise whether he will be heir or not. It was *alleged*, That the defender was not obliged to exhibit writs made by the defunct, seeing they pertained not to the defunct; and, as he could not pursue exhibition of them, so his apparent heir cannot, and *nemo tenetur edere instrumenta* to his adversary; and, if that were sustained, no man would secure his charter chest, but might be forced to discover his weakness and secrets at pleasure, and many other in-

conveniencies might follow. It was *answered*, That the hazard of an heir being so great in Scotland, not having *beneficium inventarii*, it was reasonable that *ad deliberandum*, the apparent heir should see not only what belonged to the defunct, but what deeds the defunct had done, else he should never know, whether the heritage were profitable or not; especially considering, how wives, children, or servants, having power with the defunct, might clandestinely obtain rights, and keep them close till the apparent heir were served, by which he might be destroyed.

THE LORDS having seriously considered the matter, they sustained the exhibition for all writs made by the defunct to his wife, or any being in family the time of his decease, whereupon no infeftment followed before his death; but not for any whereupon infeftment followed: For they thought, that the infeftment being registrate, it was sufficient to give information to the apparent heir.

*Fol. Dic. v. 1. p. 284. Gilmour, No 8. p. 8.*

\* \* \* Stair reports the same case :

ALEXANDER TAILZIFER, as heir apparent to unquhile Tailzifer of Redhouse, pursues Mrs Margaret Forrester, his uncle's relict, and John Shaw of Sornebeg, her husband, for exhibition *ad deliberandum*, of all writs granted, not only to the defunct, but also granted by the defunct to his said relict, or any other person.—The defender *alleged, non relevat*, for writs granted by the defunct to the defender, or other persons; because, albeit the pursuer were entered heir, he had no interest for exhibition thereof, unless there were clauses in his favour therein, *et nemo tenetur edere instrumenta contra se*; and if this were sustained, it were the way to make patent all the charter-chests in Scotland, at the instance of apparent heirs, under pretence to deliberate, but in effect to pick quarrels, and find the weakness thereof.—The pursuer *answered, maxime relevat*; for seeing the law gives heirs the benefit of deliberation, they must have the necessary means thereof, by inspection, not only of the benefit, but also of the burden of the defunct, without which they cannot know *num sit damnosa hereditas*; especially in this case, against a relict, who probably might have had influence upon the defunct's husband to grant right to her that might evacuate the heritage. And in this case, the apparent heir had a more large interest to crave exhibition than the heir entered, who could only crave exhibition for delivery, transumpt, or registration, and so behaved to libel a peculiar interest; but the apparent heir's interest is only *ad deliberandum*; and therefore, the exhibition, as medium thereto, must reach to all whereupon he ought to deliberate, especially the defunct's debt; and albeit it be true, *nemo tenetur edere instrumenta contra se*, to found or give title to the pursuer's action, yet he having title by the law to crave inspection for deliberation, hath good interest;

No 29.  
exhibition of writs granted to strangers was refused. Exhibition refused of writs on which infeftment had past.

No 29.

yea, if he produce a title in himself, he may even force the defender to exhibit writs *ad probandum*, by an incident, as well as third parties, to whose writ he hath no right, save only to bear testimony for him.

THE LORDS having heard this case in their presence, because the point had been variously decided as to writs granted by defuncts, found the libel relevant, not only for all writs granted to the defunct, but also granted by the defunct, to his relict, bairns, or servants in his family at the time of his death, being such writs upon which no infeftment followed; for as to these, they thought the registers may give as much evidence as was sufficient to deliberate, and would not upon this ground open charter-chests for showing real rights; and the plurality carried, that even personal rights, granted to strangers, should not be produced *hoc modo*; several being of the opinion, that debts, discharges, and personal rights should be thus exhibited, in respect that heirs in Scotland were liable *simpliciter* for all the defunct's debts, and therefore should have inspection, as well of his debts as of his estate, as was found before between the Lairds of Swinton and West Nisbet, observed by Durie, 26th February 1633, No 28. p. 4005.

*Stair, v. I. p. 65.*

1664. November 12. GALBREATH *against* COLQUHOUN.

No 30.

A person producing an irredeemable disposition, was found not bound to produce the prior progress of writs, although in favour of the pursuers; but he was bound to make oath whether there was any tailzie in their favour

WALTER GALBREATH pursues an exhibition of all writs made by, or to his predecessors, *ad deliberandum*.—THE LORDS restricted the libel to writs made to the defunct or his predecessors, or by them to any person in their own family, or containing any clause in their favour; whereupon the defender having deponed, that he had in his hand a disposition of lands made by the pursuer's predecessors, irredeemably; and that he had his predecessor's progress of these lands, but that he thought there was no clause in any of these writs, in the pursuer, or his predecessors favour.

THE LORDS having considered the oath, ordained the defender to produce the disposition, denuding the pursuer's predecessors; and thought, that being produced simply, without condition or reversion, it liberated him from producing the pursuer's predecessor's progress, though made in their favour; but because the pursuer alleged, that in their predecessor's progress, there was a clause *de non alienando*, which would work in his favour, and that the oath was not positive, but that he thought, they ordained the defender to be examined if he had any tailzie.

*Stair, v. I. p. 224.*