

It was then *alleged*, That the legitimation denuded and excluded, the King not only giving power to the bastard to make testament, but to dispoise of his heritable rights, even on death-bed. It was *answered*, That whatever the stile of such gifts be, they are never extended to heritable rights, but only to a faculty to make testament, which bastards want by the law: but if the bastard made no testament, and did exhaust his moveables by universal or particular legacies, the executor nominate could only have the third, which follows the office, and the King would have the rest of the inventory not exhausted. *2dly*, All general declarators being summary, these debates are only competent in the special declarator.

THE LORDS repelled the defence *hoc loco*, and reserved the same to the special declarator.

Fol. Dic. v. 1. p. 177. Stair, v. 1. p. 609.

No 87.

1673. February 3.

RIDDOCH against STUART.

JOHN RIDDOCH, as apparent heir to his good-sire, pursues an exhibition *ad deliberandum*, against Robert Stuart, who having proponed a defence, that the good-sire was denuded by a disposition in favours of the defender's author, and that he was obliged to produce no further than that disposition; that defence was repelled in respect of this reply, That the defender's author being the good-sire's second son, all rights made to him without exception ought to be exhibit, albeit real rights made to strangers were not to be exhibit *ad deliberandum*, under that pretence, to open all men's charter-chests. The defender now further *alleged*, That the pursuer could not now deliberate, because he had immixt himself by disposing the heritage.

THE LORDS refused to sustain this allegiance against the exhibition, unless it were instantly verified, and would not suffer a course of probation to run to stop an exhibition only *ad deliberandum*.

Fol. Dic. v. 1. p. 177. Stair, v. 2. p. 164.

No 88.

An exhibition *ad deliberandum*, pursued by an apparent heir, was sustained notwithstanding the defender offered to prove behaviour, unless the defence were instantly verified; for, the Lords will not allow a course of probation to stop an action of this nature.

1685. November.

NISBETS against SMITHS.

MR. ALEXANDER HERRIOT having granted a disposition of his lands of Brockhouse, to Agnes Nisbet his wife, and she having pursued Isobel and Esther Smiths, as representing the said Mr. Alexander their uncle, upon the passive titles, for fulfilling of the disposition; *alleged* for the defenders, That they could not be obliged to fulfil, because the disposition was granted by the said Mr. Alexander upon death-bed, upon which they had raised a reduction, which they now repeated. *Answered*, That the pursuer being in course of diligence for completing of her right, it cannot be stopt upon any such reduction, where-

No 89.

A disposition of lands being granted without procuratory or precept; in a process against the heirs of the granter, for fulfilling the obligation

No 89.
contained in
the dis-
position, to
grant procu-
ratory and
precept, the
defence that
the deed was
granted on
death bed,
was found not
competent *in
hoc statu*, but
reserved till
reduction.

of the reasons must abide probation ; as in the case of an adjudication upon the late act of Parliament, which will not be stopt upon any defence consisting *in facto*, that abides probation, unless the same be instantly verified ; but all other defences are reserved *contra executionem*, and the defenders have no prejudice ; for, if they prevail in the reduction, then the pursuer's diligence falls in consequence. THE LORDS repelled the defence, and decerned the defender to fulfil the disposition. But declared the obedience to the sentence should not prejudice the defenders in case they prevail in their reduction.

Fol. Dic. v. 1. p. 177. Sir P. Home, v. 2. No 725.

S E C T. XXI.

In Competition, Pleas are receiveable by Exception, which otherwise would be Competent only by Reduction.

No 90.
The Lords
preferred a
public infest-
ment, though
posterior, to
a private one
clothed with
possession,
because that
which was
public pro-
ceeded on a
contract of
marriage,
and inhibition
executed
thereupon,
before the
other party
was infest and
had obtained
possession ;
and this was
sustained by
way of excep-
tion, in a
pointing of
the ground
at the in-
stance of the
private in-
fefter, with-
out any ne-
cessity found
for the inhi-
biter to re-
duce.

1626. March 3.

LAW against LA. BALGONY.

LAW in Kirkaldy pursuing the Lady Balgony for pointing of the ground for an annualrent, wherein the pursuer was infest, to be holden of the L. Balgony, and which infestment was clad with possession diverse years, before the year for which the action was pursued ; the defender *alleged*, That he was infest by a public infestment, following upon a comprising ; which infestment and comprising, albeit it was posterior to the pursuer's right, yet the same depended upon a contract of marriage, whereby the author of the pursuer's right was obliged to provide the bairns of that marriage to a certain sum of money ; upon the which contract, inhibition was served at the instance of the Laird of Dury, father to the Lady Balgony, who was a special contractor with the L. of Balgony in that contract of marriage, and which inhibition was executed before the granting of the infestment by the L. of Balgony to the pursuer ; for not fulfilling of the which condition of the said contract by the L. Balgony, he being now deceased, the lands controverted desired to be pointed, were comprised by the eldest son of that marriage, in whose favours the said contract, anent the provision of the sums therein contained, was conceived, and upon which comprising he was publicly infest ; so the said comprising and infestment public, albeit posterior to the pursuer's right, ought to be drawn back to the said contract of marriage, in respect of the nature thereof, and favour by the law due to the same ; and in respect of the said inhibition before the pursuer's right, especially seeing now by virtue of the said public infestment the defender was in posses-