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without calling the relict, Mr Hugh's wife, and the heir of the other daughter.

The said Rachel did also insist against Mr Hugh in an exhibition *ad deliberandum*, wherein the LORDS ordained the defender to depone upon all writs granted in favour of the defunct, or granted by him in favour of his wife, children, or other persons in his family, or in favour of any other, 'if they were 'retired and lying by the defunct the time of his decease,' because then they were his writs, and were equivalent to renunciations or discharges of the retired rights; but would not sustain the exhibition for writs made to strangers, and assigned to the defender, who is an apparent co-heir, upon presumption that they might have been retired by the defunct, unless it were proven that they were truly retired.

Fol. Dic. v. 1. *p.* 284. *Stair, v.* 2. *p.* 389.

1683. *January.* JEAN BUCHANAN *against* The MARQUIS of MONTROSE.

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MAJOR GRANT having got from the Laird of Buchanan a disposition of lands redeemable by the granter's heirs, and the charter-chest delivered to him, he disponed his right to the Marquis of Montrose, against whom Buchanan's daughter pursued an exhibition *ad deliberandum.*

Alleged for the defender, That the pursuer could have no inspection of papers but such as contained clauses in her favour, or were in the defunct's possession at his death, which the charter-chest was not.

THE LORDS, in respect that Grant's right was redeemable, found the charter-chest was the common evidence both for the right to Grant, and the reversion in favour of the pursuer; and therefore decerned.

Harcarse, (EXHIBITION.) *No* 486. *p.* 133.

1705. *November* 20. BUCHANAN *against* MARQUIS of MONTROSE.

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Exhibition found relevant of all writs granted by the defunct to persons in his family at his death, upon which infeftment had followed; but refused as to writs granted to strangers.

JANET BUCHANAN, daughter and apparent heir to John Buchanan of that Ilk, and Henry Buchanan of Leny her husband, pursue the Marquis of Montrose and others, in an exhibition *ad deliberandum*, of all writs either granted by or to her predecessors, for inspection, that she may deliberate whether to enter heir or not.—*Alleged*, 1*mo*, You have no interest to pursue, because the whole tract of the infeftments of the estate of Buchanan are all conceived in favour of the heirs male; and your father stood infeft as heir male; so you being only heir female have no claim; 2*do*, I cannot exhibit to you, because it is offered to be proven, that your father was totally and irredeemably denuded of the estate in favour of Major Grant, from whom the Marquis derives right; 3*tio*, An exhibition *ad deliberandum* gives only right to call for a sight of the writs granted to

their predecessors, and by them to their wives, children, and other relations *in familia*, but not to strangers; otherwise apparent heirs might open any man's charter-chest, and pry into the defects and weakness of their titles.—*Answered* to the first two, That it is not enough for the Marquis to offer to prove the rights run *hæredibus masculis*, or that her father was denuded, which is to seek terms; but he ought immediately to produce the writs that exclude her; and on production it will be found, that her father's disposition to Major Grant bears an express substitution, failing heirs male of his body, in her favour, and likewise a provision of L. 1000 Sterling to be paid to her; and she being thus substitute, the Major could not dispone it to the Marquis, to frustrate and evacuate her right of substitution. To the third it is *answered*, That there is indeed one decision marked by Gilmour, 20th November, and Stair, the 6th of December 1661, Tailzifer, No 29. p. 4006. where these exhibitions are restricted to writs granted to persons *in familia*; yet our practice, both before that decision and since, inclines to make no distinction whether they be *extra familiam* or in it, seeing the reason of the law is the same, that it is my interest to know not only what increases and augments the heritage, but also what diminishes and burdens it. How can I resolve to enter, unless I know whether the *hæreditas* be *damnosa* or *lucrosa?* and so it was decided, Durie, 26th February 1633, Swinton, No 28. p. 4005.; and Stair, Tit. HEIRS, § 1. and l. 4. tit. 33. thinks it too narrow to confine this action only to deeds granted to those *in familia*, and is not satisfied with the distinction; and the Roman law seems very plain, *l.* 5. *D. de jure delib.* 'Aristo scribit, hæredi instituto prætorem subvenire debere, iisque 'copiam instrumentorum inspiciendorum facere, ut deliberet an expediat nec 'ne hæreditatem agnoscere.'—*Replied*, Whatever burdens or qualities may be in the Laird of Buchanan her father's disposition to Major Grant, he has conveyed it simply in favour of the Marquis; and these clauses in her favour could not restrain Major Grant, the institute, there being no irritant resolutive clauses *de non alienando*, to bind him up from disponing for onerous causes; and if he has contravened or failed in performance of any obligements to her, his heirs may be liable in the warrandice; but the Marquis is not concerned. Some thought it fit, on this occasion offered, to determine what writs apparent heirs had an interest to call for, that the lieges might be ascertained in time coming, the decisions having been hitherto fluctuating. Others said there was less need of this now, seeing, by the late act of Parliament 1695, heirs can enter *cum beneficio inventarii*, as well as executors, and so were in no hazard, being liable only *secundum vires*; but the LORDS thought it reasonable the Marquis should instruct instantly how the lands run, if only to heirs male, and if her father was totally and fully denuded; and therefore ordained him, before answer, to produce the writs for clearing these two points.

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There was another defence proponed in this cause, that *quoad* writs *in publica custodia*, they were not bound to exhibit such, but only to condescend on their date. Stair, *loc. cit.* seems to think this a good exception; but others are of o-

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pinion, that apparent heirs are bound to go to no registers to search their predecessors writs, but the havers are bound to produce them for inspection.

See Stair, 22d December 1675, Maxwell *contra* Maxwell, No 32. p. 4009. where the Lords seem to have some regard to that distinction of those *in familia* and strangers.

1706. *January* 16.—THE LORDS advised the debate mentioned 20th November 1705, betwixt Janet Buchanan and Leny her husband, and the Marquis of Montrose; and as to the writs specially called for or containing clauses conceived in her favour, the LORDS decerned the Marquis to exhibit them; they were also clear as to all writs granted to the Lairds of Buchanan, the pursuer's predecessors, and also as to all granted by them to wives, bairns, or servants, *in familia;* but the great question lay as to writs granted by them to third parties, and strangers *extra familiam*; seeing this was *edere instrumenta contra se*, and to open charter-chests and propal their defects, and teach them to raise reductions and improbations; especially seeing they had other remedies to secure themselves, either by serving heirs *cum beneficio inventarii*, conform to the new act of Parliament 1695, or by granting bond whereon adjudication is led; either of which ways will procure him inspection of all writs; and by a tract of decisions since the Restoration in 1661, the Lords have always denied exhibition of writs granted to strangers, as appears by the decisions lately adduced *supra;* to which may be added, 12th November 1664, Galbreath *contra* Colquhoun, No 30. p. 4008.—It was *contended* by the apparent heir, That to deny her this was to make the benefit of deliberation wholly elusory and ineffectual; for *quorsum et cui bono* shall I seek inspection, if I cannot see the debts, burdens, and incumbrances to which I subject myself if I enter? and these I can never know, unless writs granted by my ancestors to third parties be exhibited to me; for *quando aliquid conceditur, ea omnia concessa videntur sine quibus id quod concessum est expediri non potest, l. 2. D. de jurisdict.* and though it is to be done *civiliter et sine damno alterius;* but every inconvenience cannot deprive him of his natural right and privilege; and these common rules, like march-stones, are not to be removed upon every misapprehension and notion.——THE LORDS, by a plurality of seven against six, found the Marquis not obliged to produce any writs granted by the Laird of Buchanan, the pursuer's father, to strangers; and thought they were warranted so to find, by a tract of decisions running that way this 40 years bygone. *See* the decision marked by President Gilmour, 12th January 1665, Steil *contra* Thomas, No 19. p. 3997.; and *Loix civiles selon leur ordre naturelle, Tit.* Of the right of Deliberation.—It was further *urged* for apparent heirs, That any man to whose probation a point is admitted, can open another's charter-chest by a diligence, and make him both depone and exhibit.—But it was *answered,* This was only a single paper called for *in modum probationis*, and was not an universal inconvenience; and was founded on that ge-

neral law of natural equity, that mankind, by the rules of society, stand bound to contribute all they can to the detecting, clearing, and discovering of the truth. ——THE LORDS finding their decisions fluctuating in this point, resolved to fix a rule for the future, but so as apparent heirs might be as little vexatious to purchasers and creditors as was consistent with their privilege in law.

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Fol. Dic. v. 1. *p.* 284. *Fountainhall, v.* 2. *p.* 292. & 313.

*** Dalrymple reports the same case:

THE Lady Leny, as apparent heir of tailzie to John Buchanan of Leny, her father, pursues exhibition *ad deliberandum* against the Marquis of Montrose, and others, calling for exhibition of a tailzie made by her father in favours of Major Grant, containing a substitution in her favours failing heirs of the Major's body, which has happened, and likewise a reversion, and all other writs conceived in favours of the pursuer or her predecessor, or made and granted by her predecessor in favours of whatsoever person or persons; she insists for exhibiting all writs granted by her predecessors to whom she may enter heir.

The defender *alleged;* That exhibitions *ad deliberandum* are not sustained for writs made by the predecessor, unless the same were in favours of wives or children *in familia,* which has been frequently decided by the course of many years; as particularly 6th December 1661, Telfer *contra* Forrester, and Shaw of Sornbeg, No 29. p. 4006; and 12th November 1664, Galbraith *contra* Colquhoun, No 30. p. 4008; and 22d December 1675, Maxwell *contra* Maxwell, No 32. p. 4009; and accordingly since, the practice has continued in the outer house, and the general apprehension of the nation, that apparent heirs have no further interest than is allowed by the foresaid tract of decisions.

The pursuer *answered;* That exhibition *ad deliberandum* was introduced by the civil law for the apparent heir's information of the condition of the heritage, whether it was *lucrosa* or *damnosa,* before he should be obliged to enter, which could not be understood, unless inspection were allowed of all documents that might make a debt to burden the heritage, as well as what might be the value of the heritage itself if unburdened; for the profit or damage arises from the balance, and, without a full inspection, the privilege introduced in favours of apparent heirs would be of no benefit to them. And as the pursuer's claim is well founded in the reason of the law, so it has been the ancient practice, as was found 26th February 1633, the Laird of Swinton *contra* West-Nisbet, No 28. p. 4005; where the very question now debated was determined in favours of the apparent heir; and as to later decisions, and especially the first of the 6th December 1661, No 29. p. 4006. it is there remarked, that the Lords were divided in the matter, and my Lord Stair's opinion, who remarks the decision, seems to be in the contrary; and if the reasons expressed in the debate be well considered, they are more pregnant for the apparent heir; and this decision such

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as it was, gave the occasion to the decisions that followed after, which yet amounted not to that number as are sufficient to introduce a rule contrary to the true import and design of the privilege and action allowed to apparent heirs; and when it is said that the practice of the outer-house hath been uniform since, that is denied; for though there appear no debate *in præsentia* about that question since the 1661, yet the practice in the outer-house has been various, and the foresaid practiques have been against the opinion of many lawyers.

It was *replied;* This action is not introduced by any positive statute, nor is there any express text for the foresaid extension in the civil law; and however it may be profitable or desirable for apparent heirs, yet there is also a just regard to be had to creditors and the diligence they may have used, that they may not be obliged to open their charter-chests to apparent heirs, who pursue more to pry into the defects that may be discovered, than for information; and in this particular case, the defender has been in possession of the estate of Buchanan, by virtue of his debts and diligences, for the space of 24 years; and it were hard that he should be obliged to lay all open to an apparent heir; and if this apparent heir should die, nothing could liberate from the like inconvenience at the instance of the next and every succeeding apparent heir. And as to the decision 1633, it is single; and there is a speciality too, that it is within year and day, and there may be other specialties which are not remarked; but the later decisions are more than are commonly observed upon the same subject; and the first of them was upon a hearing *in præsentia*, allowed of purpose to make a rule in that case, which had not been formerly cleared; and though the Lords were divided in the decision, it is sufficient the case was determined by the plurality, which did not only determine the Bench in that particular case, but in the succeeding cases that occurred, where there appears no vestige of different sentiments; and it is much safer for the nation that an uniform rule be observed, although it may be doubtful, and the Lords divided about it in the beginning, than to leave such cases arbitrary by receding from a practice so long received.

It was *duplied;* That the opinion of all writers on the civil law is uniform in this case, and there is no hurt to oblige parties to exhibit their writs, which is a common benefit allowed to any party for proving his allegeance. In a process, all havers of writs are bound to exhibit what may prove the point admitted, though he should open his charter chest; and albeit the parties pursuers have no interest in the writ called for, further than to instruct his allegeance, yea even the parties in processes will be bound to exhibit writs for proving against themselves, without referring any part of the cause to their oaths.

It was *triplied;* That the exhibition of writs on diligence is only for clearing a particular point, one or more; and it does not happen that charter-chests are opened that way, nor is the design to expiscate defects. But further there is an uniform immemorial practice founded upon an absolute necessity of expe-

diting processes; whereas, in the other case, there is no law nor practice, but many decisions in the contrary.

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'THE LORDS found the defender was not bound to exhibit writs granted by the defunct in favours of strangers not *in familia*; and, by the reasoning amongst the Lords, it did appear that the decisions since the 1661 year of God determined the plurality.'

Dalrymple, No 72. p. 92.

*** This case is also reported by Forbes:

IN an exhibition *ad deliberandum* at the instance of Janet Buchanan, as apparent heir to John Buchanan of that Ilk, her father, and to her grand-father and great grand-father, with concourse of her husband, against the Marquis of Montrose, and some of his friends and doers, she called for all writs conceived in favours of these her predecessors, or granted by them importing a burden upon, or clauses in favours of the heir; and specially a disposition granted by her father to Major George Grant, containing a tailzie, reversion and other clauses in favours of herself, together with some dispositions and conveyances by the Major, to the deceased James Marquis of Montrose, and adjudications of the estate.

Answered for the defenders; The right and space to deliberate being only a pretorian warrant indulged as a courtesy by the civil law to apparent heirs, that they *sine damno alterius* might within a year *post delatam hæreditatem* get inspection of their predecessors' writs, which otherways they could not touch or meddle with without incurring a behaviour or passive title; by our custom an exhibition *ad deliberandum* doth only take place where the pursuer or his predecessor had either right or possession, at least by legal presumption. That is, all writs granted to the predecessors, or granted by them to persons *in familia*, and not to strangers, fall under an exhibition *ad deliberandum*; December 6th 1661, Telfer *contra* Sornberg, No 29. p. 4006; December 22d 1675, Maxwell *contra* Maxwell, No 32. p. 4009. Because, law allows men to keep their own evidents as close as they please, *et non edere contra se* merely to serve another's conveniency. And the Lords are so tender of opening charter-chests at random, that they sustain absolute dispositions by the defunct to exclude all further exhibition as to the subject disponed; and never ordain count-books to be exhibited in process without necessity, and then all the leaves are sealed or locked wherein the pursuer has no particular interest. The reason of the distinction betwixt rights to persons *in familia*, and to strangers is, because writs granted to those *in familia* seem in a manner to be in the defunct's custody and are mostly granted *intuitu mortis*, without any onerous cause, or perhaps without a dispensation as to the not delivery.

Replied for the pursuer; Exhibition *ad deliberandum* being called *jus deliberandi*, is not a matter of mere civility or courtesy; unless under that notion

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we comprehend law itself, the bond and tie of civil society. The title of the action is the interest of blood and apparency of succession, and the design of it to facilitate the transmission of heritage, that an heir apparent might not be put upon the hard lock of rashly either passing from an *hæreditas lucrosa*, or subjecting himself to vast debts by entering to an overburdened estate. Now whether *hæreditas* be *damnosa* or *lucrosa* can appear by no other means than an exhibition of writs granted by the defunct which might affect the heir if entered in his person or estate, that the defunct's effects and debts may be balanced. And no creditor or other party can pretend prejudice, since in an action of this nature there is no certification against writs not fraudulently supprest or abstracted. Yea, the benefit of deliberation, *interest*, not only 'defunctorum ut habeant successores, et viventium ne precipitentur quamdiu juste deliberant,' l. 6. ff. de Interrogationibus in jure faciendis; but Gothofred observes upon the l. 5. ff. de jure deliberandi, that 'deliberandi tempus in creditorum et hæredum favorem introductum est. Voet, in his Comment, in Pandect. Tit. de jure deliberandi, N. 6., and the author of 'Les Loix civiles dans leur ordre naturelle, Par. 2. Tit. 2.; and other lawyers are of opinion, that creditors must produce the grounds of their debts in an exhibition *ad deliberandum*. And so the Lords decided, February 26, 1633, Laird of Swintoun against Laird of Westnisbet, No 28, p. 4005. The exhibition *ad deliberandum* was not, by the Roman law confined to a year: For as Voet *ibid.* observes, 'Uti facultas 'adeundi totis triginta durat annis; ita quoque deliberandi jus ipsi cohærens 'hæreditatis delatione.' True, by the Roman law, any person having interest could oblige the heir to enter, who being required might have got time to deliberate, which was confined to a year, if sought from the Emperor himself; and to nine months, if from a Magistrate. A hundred days was the shortest space that used to be indulged to the heir, of which there is some vestige in our custom, where an heir even after fifty years may be charged to enter, who then has forty days to deliberate; which forty days deliberation we seem to have borrowed from the French practice. But all this is nothing to the purpose; seeing, by our custom, exhibitions *ad deliberandum* are stinted to no time. The brocard, *Nemo tenetur edere instrumenta contra se*, is as impertinently applied; for in actions *ad deliberandum* the rights of creditors are not quarelled; nor is there any personal conclusion against them except for inspection, which ought to be granted. Because, *aditio hæreditatis est quasi contractus*, whereby the heir is presumed to contract with the creditors of the defunct, or others to whom he may be *passive* liable, and the *jus deliberandi* is the previous communing: Now in all communings it is but reasonable the parties see one another's rights, and understand the conditions upon which they transact. Besides, the maxim *de non edendo contra se* takes very little place with us; nor did it in the civil law hinder exhibitions *ad deliberandum*. As to the decision 1661, it is somewhat differently marked by my Lord Stair and Gilmour, and

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the former did not agree to it. Again, it is more an opinion than a decision. As to that in the year 1675, it doth not meet the case, for the action there was a reduction and improbation at the instance of a co-heir, that was incompatible with an exhibition *ad deliberandum*. The instance of compt-books exhibited for clearing any point, where the Lords are cautious not to suffer the party craving inspection to be curious beyoud his true interest, cannot be applied to the present case; because compt-books contain the secrets of a man's whole affairs, with relation to all sorts of men; whereas this process concerns only writs granted to one particular person, and is as restricted as a compt-book produced with a lock or seal upon some of the leaves. No good reason can be assigned why rights granted to persons *in familia* should rather be exhibited, than those in favours of strangers; seeing the heir may more easily come to the knowledge of the former than of the latter, and may more safely trust the discretion of relations, than strangers. But then have not persons *in familia* as good right to their writs, as strangers have to such as are granted to them? And is not the heir equally liable to both; and though the case of creditors *extra familiam* be more favourable in competitions, than that of creditors *in familia*, they have the same privilege as to actions against them at the instance of the heir, who is as much bound to the one, as to the other. It is altogether precarious to allege, that writs in favours of persons *in familia* are understood to be more in the granter's power; and what signifies the granter's power after his decease, when exhibitions *ad deliberandum* commence. So that what the pursuer craves is founded in law and equity, and no more than is granted every day to mere strangers by way of diligence for proving points admitted to their probation.

Duplied for the defender; If it be a good defence against exhibition *ad deliberandum* of writs granted to predecessors, that they were denuded in the defender's favours, *multo minus* can exhibition be allowed of writs granted by predecessors to himself, wherein he has the like interest. 'Tis in vain to pretend that the exhibition craved is innocent and innoxious, being only to the effect of deliberation; for the exposing of the defender's papers may be prejudicial to him, in furnishing occasions whereupon his rights may be quarrelled; and a promiscuous exhibition might be made use of by apparent heirs, in order to discover the weakness of mens rights without any design to enter. Nor can the defender have a *res judicata* against one who has no fixed interest or title; for one apparent heir having got exhibition may lye by and make place for another, and so forth one may succeed to another to the defender's endless vexation. Nor is an extraordinary remedy of opening charter chests to be allowed when the pursuer might have attained the pretended design in an ordinary way, by entering *cum beneficio inventarii*, or by causing all to exhibit in a reduction upon an adjudication; and consequently the refusal to produce is not to be imputed to the consciousness of defects, but the reasonable desire of being free of groundless pleas by an ultimate decision. As to the decision 1633, it has

No 34. certainly had some speciality; and perhaps the Lords then so decided, for that the exhibition was pursued *intra annum*; whereas the pursuer has been twenty-four years in thinking upon the commencement of this action, which argues that her design is rather *ad expiscandum*, than *ad deliberandum*; and therefore should be discouraged. Whatever was my Lord Stair's opinion in the year 1661, he was over-ruled by the plurality, whose opinion was again expressly confirmed in the year 1675, by refusing exhibition of bond; and most justly; it being still evident that I may *uti juri meo*, and refuse exhibition of bonds granted to me where no interest but inspection is pretended, which no doubt may be dangerous where legal diligence hath proceeded upon these bonds. An apparent heir in a process *ad deliberandum* is not in the case of a contractor with creditors, but is only when entered a *quasi* contractor, and therefore may well be refused such an unlimited exhibition, that is not like the exhibition of a particular writ, which any party may have an interest to seek for probation.

Triplied for the pursuer; Inspection wounds no man's right, and heirs ought not to be frighted from the benefit of succession by covered claims and debts; for if these are defective or lame, or not founded in material justice, they deserve not the protection of law; and if not, they may be looked into. It is a very sophism and precarious to pretend, that no exhibition can be granted where the defunct was denuded by an absolute disposition, and the obligation in a bond is a right as absolute; for even an absolute disposition must be exhibited to prevent the trouble of exhibiting a progress of the subject disponed; and *multo magis* a bond, which affects the heir, whereas a disposition does not. As to the inconveniencies of allowing such an ample exhibition, they do not balance the reason and end of the *jus deliberandi.* As to the allegeance, that heirs have other means to obtain exhibition, by suffering an adjudication to be led against themselves; or by serving *cum beneficio inventarii*; it were strange that the Lords should encourage heirs to enter by boutgates. Is not an adjudication led by an apparent heir less favourable, as commonly made use of to cover his fraud, than a desire fairly to enter, and less effectual for discovering the condition of the heritage? Does not action upon an adjudication expose a creditor to more hazard, than a naked exhibition for inspection? Or have services by inventory been such an advantage to creditors as to force heirs deliberating upon the expedient? Certainly it cannot be asserted. Besides, the pursuer could not enter *cum beneficio inventarii*, she being left an infant by her father, who died long before the act introducing that privilege.

THE LORDS finding that former decisions had varied in this point, resolved to fix such a rule for the future, as apparent heirs might be as little vexatious to creditors and purchasers, as is consistent with the legal privilege. And therefore found the Marquis not obliged to produce any writs granted by the pursuer's predecessors to strangers, or persons not *in familia.*

Forbes, p. 68.