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 infeftment has followed thereon or not.

Act. *Fleming* Alt. *Ro. Gordon.* Clerk, *Roberton.*
*Fol. Dic. v.* 1. *p.* 283. *Bruce, No* 112. *p.* 138.

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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.

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1770. *January* 20. JAMES BOYD *against* WILLIAM GIBB.

No 12.
In a process of exhibition *ad deliberandum* by a relation claiming under a remote ances-

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

No 12.
tor, a proof of propinquity is required.

very distant relation, it was incumbent on him to shew he had a title to insist, by bringing a clear proof of his propinquity as apparent heir to the predecessor, in whose right he meant to claim.

THE LORD ORDINARY allowed the pursuer to prove his being heir apparent to his predecessor libelled. And the pursuer having adduced as witness Agnes and Helen Boyd, his aunts, they were objected to as incompetent, 1*st*, On account of their relationship; 2*d*, As having given partial council and advice in the cause.

In support of the *first* objection, it was *maintained*, That it was an established point an aunt could not be adduced as a witness for her nephew or niece; such being, according to Lord Stair, *in loco parentum*, b. 4. t. 43. § 7.; Bankton, v. 2. p. 646.; 19th June 1713, Creditors of Ormiston *contra* Hamilton, *voce* WITNESS. In the case, Falconer, 16th June 1747, Gordon *contra* Gordon, IBIDEM, the objection to a witness that she was sister to the pursuer was not removed; though it was answered that she was daughter to the defender. The exception to the general rule that these were necessary witnesses, could not in this case be admitted; that exception related only to cases where, from the occult and private nature of the thing to be proved, there was a *penuria;* but, the view in which the pursuer regarded them as necessary witnesses, that they were the persons best acquainted with the point in dispute, evidently led to this consequence, that whenever a person was attempting to establish a falsehood, he should be allowed to adduce his nearest relation; as, in such a case, there would, no doubt, always be a *penuria testium.*

As to the *second* objection, it was said that they had interested themselves in the cause; had given information of what they knew; and had recommended or employed an agent to carry on the suit for the pursuer's behoof.

*Answered;* The strictness of the ancient practice, as to the rules of evidence, was now much relaxed; exceptions from the general rule had at all times been admitted when, from the nature of the case, there must necessarily be a *penuria testium;* and, according to Lord Stair, b. 4. t. 43. § 10. 'witnesses,' even collateral relations, 'should not be rejected, unless other unsuspected witnesses 'could be found.' Erskine, iv. 2. 22. laid down the same rule; and the exception had been carried so far, that in the proof of a clandestine marriage, even brothers and sisters were admitted. Bankton, v. 2. p. 647. § 15. 10.

The present was a case precisely of that nature, where the severity of the law should be relaxed; the pedigree and relationship of families, especially those of an inferior rank, were seldom attended to but by those of the family itself; so that, to exclude their testimony would be a denial of the only mean of proof. The nature of the case also admitted of favour; as, in order to prevent the estate from falling to the Crown as *ultimus hæres*, a very slender proof of propinquity would be required.

As to the *second* objection, the only information they had given was in answer to such enquiries as were always allowed to be made before leading a

proof; that they had not employed, but only recommended the agent; and, as to the alleged conversations with other witnesses, these were merely extra-judicial, and there was no proof that any of them had been thereby either instructed or influenced. No 12.

The deposition of these two witnesses having been sealed up, the LORD ORDINARY 'Repelled the objections, and ordained the seals to be taken off,' To which interlocutor, upon advising a petition and answers, the LORDS adhered.

Lord Ordinary, *Strichen.* For Boyd, *Lockhart.* For Gibb, *Macqueen.*
Clerk, *Campbell.*

*R. H.* *Fac. Col. No* 13. *p.* 29.

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1779. *January* 12. JOHN M'FARLANE *against* GEORGE BUCHANAN.

No 13.
In an exhibition *ad deliberandum*, a charter of adjudication and infeftment in favour of the defender in possession, are not sufficient to bar the pursuer from insisting for exhibition of the grounds of the charter.

DOUGALD M'FARLANE, proprietor of the lands of Wester Auchendinnan, died in 1730, and, soon after, several of his creditors led adjudications of these lands, *contra hæreditatem jacentem*, James M'Farlane, his apparent heir, having renounced to enter. Upon these adjudications, the creditors entered into possession, and granted a factory to George Buchanan, over the lands, for uplifting the rents. The right to all these adjudications came afterwards into the person of Buchanan; and, in 1761, he obtained a charter of adjudication and confirmation from the subject-superior, on which he was infeft. In 1777, John M'Farlane, the son of James, then deceased, as heir-apparent to his uncle Dougald in the lands of Auchendinnan, brought an action of exhibition, *ad deliberandum*, against Buchanan, concluding for exhibition of the adjudications, and whole other rights in his person, by which he possessed the lands. The defender produced his charter of adjudication and infeftment, and

*Pleaded* in defence against further exhibition; An action, *ad deliberandum*, from the nature of it, cannot reach farther than to the production of writings relative to subjects *in hæreditate jacente*. It is always a good defence against the exhibition, that the predecessors of the pursuer were denuded; Stair, B. 4. tit. 33. § 7.; Bankton, B. 3. tit. 5. § 7.; and so it was found by the Court, Bruce, February 7. 1680, Fount., No 22. p. 3998. In the present case, the titles produced, show that the lands in question are not *in hæreditate jacente*, but stand vested in the person of the defender. The pursuer's ancestor was denuded, or, what is equivalent, his *hæreditas jacens* was carried off, and the pursuer's right, as heir to his ancestors, barred, with respect to these lands, by the expiry of the legal of the adjudications, which were in the person of the defender, and by the heritable titles which he made up as a singular successor. The defender's charter and infeftment must first be set aside, before the right of apparency in these lands can open to the pursuer, and consequently, before he can have right to call for an exhibition of the adjudications, or other grounds of these titles.