

1683. *March.* YESTER *against* LAUDERDALE and Others.

IN an exhibition *ad deliberandum*, at the instance of the Lady Yester, as heir of line to the Duke of Lauderdale, against my Lord Lauderdale and others, wherein she called for the writs of lands and bonds due to the defunct ;

*Alleged* for the defenders ; That the defunct had tailzied all his lands, not disposed to the Dutchess, to my Lord Lauderdale and my Lord Maitland, and had, by a testament, made the Dutchess his executor and universal legatar, so that the pursuer has nothing to enter heir to ; and therefore needs not deliberate about entering.

*Answered* ; The disposition of tailzie not being acknowledged by my Lord Lauderdale and Maitland, nor infestment taken thereon, nor the defence proponed for them, it cannot be obtruded by any other. *2do*, Seeing the pursuer may enter heir of line by a general service, it concerns her to know what moveable estate there is, seeing she will get relief of the moveable debts.

THE LORDS found the disposition of tailzie was sufficient against the exhibition of the writs of the tailzied lands, though no infestment followed ; and that my Lord Lauderdale might propone the defence *intra annum deliberandi*, without the danger of behaviour as heir ; and found, that the pursuer ought to have inspection of the bonds, or of the inventory of the testament, if it was given up by the defunct himself, and assigned a term to exhibit ; declaring, that the defenders, upon production of the disposition of tailzie and testament, should be obliged to produce no further, unless these were quarrelled.

1684 *February*.—Thereafter the Lords found, that now the *annus deliberandi* being expired, the disposition of tailzie must be owned, by the heirs, under the hazard of a passive title, or by some of his creditors, if any had adjudged the same ; and found the nomination in the testament, though not confirmed, might hinder the apparent heir to get inspection of the moveable bonds.

*Fol. Dic. v. 1. p. 283. Harcarse, (EXHIBITION) No 482, p. 132.*

\*\*\* Fountainhall reports the same case :

THE Earl of Tweedale, Lord and Lady Yester, their exhibition *ad deliberandum* against the Dutchess of Lauderdale and the Earl thereof, being reported ; THE LORDS found the Duke of Lauderdale's tailzie, though no infestment be yet taken thereon, sufficient to exclude the necessity of any farther production for inspection ; as also that the said late Duke's disposition of Leidington, &c. to the Dutchess, cuts off Lady Yester's title of apparent heir of line to her father, or of calling for any further production *quoad* these lands ; and for her renunciation, if it was general, of her very hability and capacity to succeed, of the *spes successionis*, then found it debarred her from pursuing *ad deliberandum*,

No 23.

Found the reverse of Ayton against Ayton, No 17. p. 3995.

No 23. but if it related to the jewels or other particulars only, then found it did not exclude her from this action.'

*Fountainball, v. 1. p. 228.*

1685. *January.*

No 24.

LADY FINTRY and LADY MARY SCRIMZEOUR *against* EARL OF LAUDERDALE.

An allegiance founded on an expired comprising against the pursuer's brother, is not sufficient to exclude an exhibition *ad deliberandum*, as apparent heir to his father, grandfather, and other predecessors, unless the comprising had been led against the brother as heir, or lawfully charged to enter heir to his predecessors.

THE Lady Fintry and Lady Mary Scrimzeour, as heirs of line to the late Earl of Dundee their brother, and to their father and grandfather, having pursued an exhibition *ad deliberandum* against the Earl of Lauderdale, and particularly for exhibiting the writs and evidents of certain houses and tenements in Dundee, Innerkeithing, Castlaidhill, and others that were not contained in the tailzie of the estate of Dundee, *alleged* for the defender; That he could not be obliged to exhibit the writs, because he had right to the lands by virtue of expired apprisings against the pursuer's predecessors, by which they were denuded of the property of the lands. *Answered*, That the defence was not competent against exhibition, but only against delivery, and an apparent heir may crave inspection even of expired apprisings, seeing they may be quarrelled upon nullities, or satisfied within the legal. And there were several lands belonging to the estate of Dundee, wherein the late Earl their brother was not infeft, but only their father and grandfather, to which the pursuers, as heirs of line to their predecessors, will have right. THE LORDS found that the allegiance founded upon the expired apprisings against the pursuers' brother was not sufficient to exclude exhibition at the pursuers' instance, as apparent heirs to their father and grandfather and others their predecessors, unless the apprisings were led against their brother as heir, or lawfully charged to enter heir to their predecessors, and therefore assigned a day to the defender to produce the apprisings and other writs upon oath.

*Fol. Dic. v. 1. p. 284. Sir Pat. Home, MS. v. 2. No 680.*

No 25.

1685. *December.* LORD YESTER *against* LORD LAUDERDALE.

FOUND that the defender in a common exhibition, without a declarator, was not obliged to depone if he had the writs called for before citation, and what he did with them, so as the LORDS might judge if he put them away fraudulently; but that the defender might, according to the old style, depone that he did not put them away fraudulently, without deponing if he had them before citation. But now the act of sederunt regulates the matter.

*Fol. Dic. v. 1. p. 284. Harcarse, No 484, p. 133.*