

1679. *January 29.* LORD TORPHICHEN *against* the HEIRS of ANDREW OSWALD.

THE Lord Torphichen having right to a comprising led both against the heir of line and the heir of provision of umquhile Andrew Oswald's second marriage, he pursues a declarator, that by the apprising he hath irredeemable right to the lands of Letham by the foresaid apprising which is now expired. It was *alleged* for the heir of provision, That the apprising could have no effect against the lands of Letham, in respect that there is an estate sufficient for this debt appraised from the heir of line, who must be first discust before any access against the heirs of provision. The pursuer *answered*, That he had discussed the heir of line in the apprising, which he was willing to dispoise to the heir of provision. It was *replied*, That the discussing of the heir of line is not by sentence or decret, but by putting the same to execution, that payment may be recovered thereby in whole or in part; and seeing the pursuer can condescend upon no impediment to be satisfied of his debt by the heir of line, and that it is offered to be proven that he is more worth than the sum pursued for;

THE LORDS found the same relevant.

*Fol. Dic. v. 1. p. 247. Stair, v. 2. p. 683.*

No 27.

A creditor having led an apprising against the heir of line, and offered to dispoise the apprising to the heir of provision; this was found not to be a discussion sufficient to give him access against the heir of provision, since he did not put the apprising to execution.

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S E C T. VII.

Whether an Heir, who has renounced, must be further Discussed.

1622. *January 26.* COWAN *against* MURRAY.

JOHN COWAN, burges of Stirling, having pursued ——— Murray, eldest son, and lawfully charged to enter heir to his father; and also in this same process, having pursued another son of a second marriage, who was provided to certain lands by the father, for payment of a debt owing by the father to the pursuer, the LORDS found no process against the eldest son of the second marriage, until the general heir were first discust; albeit it was *answered*, that the said general heir was called in this same process, and that the pursuer could not discuss him any further, seeing he being convened in the process, as charged to enter heir, he compeared, and offered to renounce to be heir; which the pursuer *alleged* ought to make his process to be sustained against the son of the second marriage, he being convened as heir of that marriage, upon the provision conceived in favours of the heirs of the second marriage: Which the LORDS would not sustain, until the general heir were fully discust, as said is.

No 28.

An heir of line having renounced, it was found that before process could be sustained against the heir of provision, the heir of line behoved to be fully discussed.

Act, ———.

Alt. *Nairn.*

Clerk, *Hay.*

*Fol. Dic. v. 1. p. 248. Durie, p. 10.*