1707. *December* 23. PRINGLE *against* JOHNSTON.

No 35.
It is a good defence against exhibition that the writs called for are registered in the books of Session, the defender condescending on the dates of the registration. This defence was not sustained as to writs registered in Chancery, or in the books of inferior courts.

MARGARET and Mary Pringles, daughters to John Pringle of Woodhead, pursue Robert Johnston of Straiton, in an exhibition of papers *ad deliberandum* before the Sheriff, and obtain a decreet, which he suspends on this reason, he was not bound to exhibit them, because they were registrate, and in *publica custodia*; and he condescended on their dates, and they might extract them. Likeas, they were common evidents to them both, and he had greater interest in them than they; and Stair, *lib.* 4. *tit.* 33. affirms, that this is a good defence against *deliberandums*. *Answered*, It was not competent now after a decreet, and however the condescendence on the date of a registration was sufficient in a reduction, yet it had not yet taken place in such exhibitions. THE LORDS sustained the defence as to any writs registrate in the Session-books in Edinburgh, but not as to writs in the Chancery, or inferior courts, and ordained the condescendence *quoad* these to be taken in; and though it looked too contentious to put the parties to so much unnecessary expense in extracting, yet the defenders having an interest in the papers did much influence the decision.

Fol. Dic. v. 1. *p.* 285. *Fountainhall, v.* 2. *p.* 406.

1715. *June* 30. SPARK *against* BARCLAY.

No 36.

DEFENDERS, though strangers, were ordained to exhibit all writs in their hands granted to or by the pursuer's predecessors.

Defenders must exhibit all writs in their hands, whether infeftment has followed or not.

Fol. Dic. v. 1. *p.* 284. *Bruce.*

*** *See* this case, No 10, p. 3988.

1756. *November* 30.
JOHN VINING HERON *against* PATRICK HERONS elder and younger of that Ilk.

No 37.
In an exhibition *ad deliberandum*, found incompetent to require a general production of 'all rights, 'debts, or 'diligences, 'profitable or 'hurtful to 'the pursuer.'

IN an exhibition *ad deliberandum* at the instance of an apparent heir-male, the Lord Ordinary pronounced the following interlocutor: 'Finds that the 'pursuer, as apparent heir-male, is entitled to call for production of all writs 'granted to, or conceived in favours of his predecessors, of or concerning the 'lands libelled, and of all grounds of debt contracted by them, in favour of 'third parties; and generally, of all rights, debts, and diligences which may 'be either profitable or hurtful to the pursuer, as heir-male and of provision

No 37. 'foresaid.' With respect to the writs particularly described, the defenders acquiesced. But in a reclaiming petition to the Court, they objected against the general clause at the end, because the plain consequence of it was to oblige the defenders either to exhibit their whole writings, or to depone upon their judgement of the import and tendency, which is too delicate a matter in point of conscience to be imposed upon any man. To support their objection, the defenders gave the history of this process as follows: The purpose of this action is to afford to the apparent heir means of knowing the situation and circumstances of his predecessor, in order that he may judge with some certainty whether it be proper for him to accept of the succession, yea or no. But as this action, beneficial to the heir apparent, may be troublesome to others, the Court has been always attentive to circumscribe it within due bounds. By the ancient practice, the exhibition was restricted to the titles of the estate in which the pursuer was heir apparent; and to deeds granted by the predecessor to his wife, children, or others in his family at the time of his death, upon which infeftment had not followed. Exhibition was not allowed of infeftments, because the pursuer might have sufficient light from the records. Deeds granted to strangers were not brought under this process; because these, it was thought, were not necessary for the deliberation. Such was the rule observed during the last century, as will appear from the following decisions, 6th December 1661, Tailfer *contra* Shaw, No 29, p. 4006; 22d December 1675, Maxwell *contra* Maxwell, No 32, p. 4009; and Buchanan *contra* Marquis of Montrose, *anno* 1706, No 34, p. 4010; where the Lords resolving to fix a rule that might make this process as little vexatious to creditors and purchasers as is consistent with the privilege of deliberation, found the Marquis not obliged to produce any writs granted by the pursuer's predecessors to strangers, or to persons not *in familia*.

Experience showing that these limits were too narrow, the privilege of deliberation was enlarged by later decisions. In the case, 30th June 1715, Spark *contra* Barclay, No 10, p. 3988, the defenders were decerned to exhibit all writs in their hands, granted by or to the pursuer's predecestors, whether compleated by infeftment or not. And this has been a rule since that time, in exhibitions especially at the instance of heirs of line, who are liable universally and without relief to all the debts of their predecessors. So far this privilege has been carried; and indeed it cannot be carried one step further, without impinging upon the foregoing principle which is sacred, namely, That facts only are the proper subject-matter of oaths, and that no man is bound to depone upon opinion.

'THE LORDS accordingly altered the interlocutor as to the general clause at the end, appointing the same to be left out.'

Sel. Dec. No 119, *p.* 170.

See APPENDIX.