

process for count and reckoning, ought not to be sustained at the instance of an apparent heir, being only proper to one served heir, and that it was a novelty to sustain it otherways, the LORDS repelled the allegiance, and sustained process at the apparent heir's instance, for the effect foresaid.

No 18.  
der to determine, by the balance, whether to enter or not. See No 20.

Act. Craig.

Alt. Belsbes.

Clerk, Gibson.

Fol. Dic. v. 1. p. 285. Durie, p. 838.

1665. January 12.

STEIL against THOMAS.

CATHARINE STEIL, as apparent heir to her father and goodsire, pursues John Thomas for exhibition of the writs of certain tenements *ad deliberandum*. In which action there being a defence proponed, that her father and her goodsire were denuded, and the defender and his predecessors had possess the said tenements as heritors these 40 or 50 years bygone, the LORDS, before answer, ordained the defender to produce such writs as he had, to prove that they were denuded, and according to the ordinance the defender produced only some comprisings for very small sums; which sums, the comprisers and others having right from them, did receive, and were fully satisfied by their intromission before the legal expired, as was alleged. Likeas, the evidents pertaining to the pursuer's predecessors, were in the hands of Alexander Yule their uncle, and after his death John Meikle taylor meddled with them, from whom the defender without the pursuer's knowledge or consent received them.

No 19.  
In an exhibition *ad deliberandum*, the defender produced comprisings to show that the pursuer's predecessor was denuded. It was alleged they were paid. The Lords ordained the defender to exhibit, reserving his defence against delivery.

THE LORDS ordained the defender *ante omnia* to exhibit all such writs as he had concerning the tenements libelled, reserving all defences against the delivery.

Fol. Dic. v. 1. p. 284. Gilmour, No 123. p. 90.

1669. December 7.

WILLIAM HOGG against JOHN STRAITON.

ROBERT YOUNG having made a disposition of some tenements of lands to John Straiton, upon a back-bond, that he being satisfied and relieved of his cautioneries wherein he was or should be engaged for the said Robert, that his right should be null and void, the said Robert having subscribed an assignation in his own time blank, which was lying by him the time of his decease, his son and apparent heir did fill up Robert Young's name therein, who transferred the same in favours of William Hogg, who thereupon pursued a count and reckoning against Straiton, concluding to hear and see it found, that his right was null, it being satisfied by intromission. It was *alleged* for the defender, That

No 20.  
The Lords refused to sustain an action of count and reckoning, at the instance of an heir who raised the action, that upon a view how the balance stood,

No 20.  
he might de-  
termine whe-  
ther to enter  
or not. See  
No 18.

the translation made to the pursuer was to the behoof of the apparent heir, who had renounced to be heir to that same defender; and that that assignation being left blank by his father, it could be no title whereupon to pursue, it being filled up as said is. THE LORDS did sustain the defence to be proven by Hogg's oath, and the apparent heir's; notwithstanding it was *replied*, that the apparent heir might pursue a count and reckoning *ad deliberandum*, which the LORDS found he could not do in that case, without some right made to him, or that he were served heir, apparent heirs having only right *ad deliberandum* to pursue exhibitions.

*Fol. Dic. v. 1. p. 285. Gosford, MS. No 213. p. 86.*

No 21.  
Found as  
above.

1671. June 22.

LESLIES *against* JAFFRAY.

LESLIES pursue Alexander Jaffray and others for producing of writs, and counting anent a wadset right, as being satisfied by intromission; and that as apparent heirs, *ad deliberandum*.

THE LORDS refused to sustain the summons for count and reckoning, but only for exhibition; albeit there was a practise produced, observed by Durie on the 16th of March 1637, betwixt Hume and Hume of Blackadder, No 18. p. 3996; wherein count and reckoning was sustained at an apparent heir's instance, the custom having been ever since contrary, upon this ground, that no party should be troubled to count at the instance of those who, when the count was closed, cannot exoner them, and yet may put them to make *litis-contestatio* and probation in the cause.

*Fol. Dic. v. 1. p. 285. Stair, v. 1. p. 738.*

1680. February 7.

THOMAS BRUCE *against* JANET PETTY, and COCHRANE, her Husband.

No 22.

AN apparent heir pursues an exhibition *ad deliberandum*. THE LORDS sustain this defence against it, that the defunct had disposed the fee of the tenement irredeemably, and so the pursuer had no interest; though he alleged it was on death bed, the reduction whereof was reserved to him, and this defence was received *postconclusum in causa*.

*Fol. Dic. v. 1. p. 284. Fountainball, MS.*