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

Fountainhall, v. 1. *p.* 228.

1685. *January.*

No 24. LADY FINTRY and LADY MARY SCRIMZEOUR *against* EARL of LAUDERDALE.

An allegeance 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 allegeance 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, wa 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.

*** Sir P. Home reports the same case :

No 25.

THE Lady Yester, as apparent heir to the Duke of L. her father, and the Lord Yester her husband, having pursued an exhibition *ad deliberandum* against the Earl of Lauderdale and others, of all writs belonging to the Duke, and the defenders being willing to depone that they neither have had, or fraulently have put away the writs called for, since the intenting of the exhibition, *alleged* for the pursuer, that the defenders behoved likewise to depone if they did know where the writs were, and in whose hands they had been since the Duke's decease. *Answered*, That the defenders were not obliged to depone in any other terms than in the common stile of exhibitions, which was only whether they had, have, or fraudulently have put away since the intenting of the cause, and not upon their knowledge where the writs are, nor in whose hands they had been, seeing that is the part of witnesses, whereas they are called here as parties, and was so decided, the Creditors of Andrew Brysone against Brysone his son, No 19. p. 3977. where the Lords found that the defender ought not to depone upon his knowledge who had the writs called for. But he ought to depone, if, at any time before the citation, he had the same and fraudulently put them away, *quia pro possessore habetur qui dolo desiit possessere.* THE LORDS found the defence relevant, that the defenders were not obliged to depone upon their knowledge where the papers were, or in what hands they have been in since the Duke's decease, but in the common terms of an exhibition, if the defenders had, or have, or fraudulently have put away any papers since, and before the intenting of the cause.

Sir P. Home, MS. v. 2, *No* 739.

*** This case is also reported by Fountainhall :

IN an exhibition *ad deliberandum*, one of Yester's interrogatories being, if they had the papers called for before the citation, or had put them out of their hands, or know where they are now, or who has them? It was *alleged*, that the stile of exhibitions obliged to no more, but to depone if they had, have, or fraudulently have put away; and as to their knowledge where they are, that was only a proper interrogatory, if they were adduced as witnesses, but noways competent to be put to parties; and that the Lords had so decided, as recorded by Stair, 14th November 1662, Creditors of Bryson against his son, No 19. p. 3977. This point being reported by Balcasky, THE LORDS found Lauderdale not bound to answer that interrogatory, if he knew where they were?

Fountainhall, v. 1. *p.* 381.