

1677, *November 29.*—IN the foresaid action mentioned *supra*, [No. 520.] between John Haddow, and Somervell, and Inglis, decreet having been given forth against the said John, upon a circumduction of the term, for his not compearing to depone anent the delivery of the discharge; he presented a bill of suspension; which being debated before Reidfurd, and reported by him, the Lords reponed John Haddow again to his oath against the said decreet, because he was impeded *vi majore* and by the storm from coming in; and that the decreet was disconform to his oath, decerning him for more years than he had possessed, and for a greater duty than he had acknowledged by his oath, notwithstanding they offered to restrict it to the precise years and quantity mentioned in his oath.

Of this decreet we had also raised a reduction; and which being called by the order of the roll, and insisting that the defender might take a day to produce the decreet, it was ALLEGED, they would take no day, because it being a decreet *in foro contradictorio*, the defender is not bound to produce it, though he hath extracted it, but the pursuer is bound to extract it when it is a decreet *parte comparente* before the Lords, and to produce it himself. But after the Lords reponed John Haddow, we had no use for our reduction.

*Advocates' MS. No. 665, folio 309.*

1677. *Nov. and Dec.* OLIPHANT, &c. *against* HAMILTON of Wishaw.

*Nov. 30.*—HAMILTON of Wishaw's case was debated, viz. He acquires a right to some apprisings on Antonia Brown of Fordell's estate. She has right to redeem by law, and our act of Parliament 1621, (because she was then minor,) any time till she be twenty-five years old; and the legal does not expire against them till then, being yet *intra quadriennium utile*. John Oliphant, being another creditor of hers, apprises the legal reversion from her of Wishaw's apprising; and John dies, and leaves a child behind him minor. Antonia Brown becomes not only major, but her twenty-fifth, and *quadriennium utile*, expires. Oliphant's heir, the co-creditor, and other appriser, who is minor, uses an order of redemption against Wishaw; and when he comes to seek a declarator upon his order of redemption, Wishaw's defence was, that his order could not be declared for redeeming him, because before that order was used his legal was expired by A. Brown's majority, and arriving at twenty-five. ANSWERED,—Antonia was denuded of the reversion by Oliphant's comprising, and he stated in it; and, since his heir was minor, the legal could not expire against him neither, according to the sound principles of law in favours of minors.

The question was, if a co-creditor's minority stopped the statutory prescription of the ten years legal reversion in apprisings from expiring, as well as the minority of the debtor against whom it was led did.

*December 4th.*—The Lords advised this case, which is altogether new, and not formerly decided, *et omnes una voce, excepto* D. Castlehill, found the minority of co-creditors, or other singular successors to the minor, (who had apprised the minor's right it may be,) stopped the legal from expiring; though the act of Parliament 1621 seems only to mean the debtor's universal successors as heirs. However, this may hinder an apprising from expiring for forty years toge-

ther; and the decision surprised sundry. See the informations *ad longum*, in my folio law MS. C. See thir parties, 20th November, 1678, [volume fourth of this Work, p. 247.]

*Advocates' MS. No. 668, folio 309.*

---

1677. November 30. JOHN ANDERSONE *against* WILLIAM ANDERSONE, his Brother.

IN the count and reckoning pursued by John Andersone, baxter, against William Andersone, merchant, his brother, as executor confirmed to Robert Andersone, factor in Campheir, their brother, for making payment to him of an *annuum legatum* of 350 merks yearly, left by Robert to John in his testament;

William ALLEGED,—He could not pay it, because the inventory of the testament was exhausted by payment made to lawful creditors before his citation; and gave in the articles of his exoneration. Against some ALLEGED, they ought not to be allowed, because paid voluntarily without a sentence. ANSWERED, It was sufficient to exoner against a legatar, though it would not operate against a co-creditor. My Lord Pitmedden being auditor, found (which the Lords had also frequently decided *in presentia* before) that voluntary payment by an executor to creditors was sustainable, without necessity of a sentence, where it was only objected by a legatar.

Against another article, paid by him to a creditor, it was OBJECTED,—It could not be allowed; because it was offered to be proven, by the oath of the creditor to whom it was paid, and who grants the discharge of it, that the said debt was truly paid to him by the defunct in his own lifetime, and that this executor has only, to absorb the defunct's means, prevailed with him to renew the discharge in his name, and of a date posterior. ANSWERED,—The discharge is opposed, bearing the payment to have been made by the executor, and since the defunct's decease, and he abides at it as a true deed; and the creditor's interest now being extinct, he can no more depone to the executor's prejudice, than a cedent can do in prejudice of his assignee for onerous causes. See *2d December, 1683, Bayne and Young*, and the citations there.

The Lords found, (Pitmedden being reporter,) the creditor might be examined on the payment made to him by the defunct, and anent the executors giving them up the former discharges and taking new discharges or assignations to himself, providing the executor first depone that he knew when he paid them there was a tract of a correspondence and trade betwixt the defunct and these creditors; or else that John, the legatar prove it; and burdened John Andersone, the pursuer, with reporting the commission for taking the creditors' oaths, who lived in Holland and Zealand. This the Lords did the more clearly, that they suspected the ingenuity of this executor in this affair. See Menochius *de Arbitrariis Judicium*, lib. 2. centur. 1. cap. 91, 92, and 93. See statute 12, anno 7th Jacobi regis, anent tradesmen's books being probative in England for a year.

The Lords also (*referente Domino* Pitmedden) refused to allow compensation to John, the pursuer, upon Robert's count-book, wherein he had written, that his brother William was debtor to him in L.200 sterling; which the Lords found no