

found orderly proceeded, the said Anthony assigns the decret of suspension to Helen Hamilton, who having charged *de novo*; and the Executors *defending* upon the former reason, and with them the Earl of Kincardine, albeit he was not charged, nor no decret recovered against him, yet the LORDS found he had good interest to compear and suspend the decret upon reason of payment; and which reason being instantly verified, they would now receive, notwithstanding there were terms taken in the former decret to produce the same, and were circumduced; it being against law and reason, that payment being once made, it should be again sought; especially seeing the time of recovering of the former debts Helen Hamilton was ordained to find caution to warrant the-executors at all hands, in case any thing were found to be paid.

*Newbyth, MS. p. 3.*

No 40.

1665. January 6. ——— against EDMISTOUN of Carden.

EDMISTOUN of Carden being pursued by a Creditor of his father's, as lucrative successor to his father, by accepting of a disposition of his father's lands, after contracting of the pursuer's debt, *alleged*, Absolvitor, because, being pursued before by another creditor of his father's, he did then allege, that his disposition was not lucrative, but for a cause onerous, equivalent to the worth of the land which he proved, by instructing the rental and rate of the land at the time of the disposition by witnesses, and the sums undertaken for it by writ, whereupon he was assoilzied, and can never be again convened upon that ground; *nam obest exceptio rei judicate*; for if he had been condemned as lucrative successor, upon the other creditors' probation, it would now have proved against him, and therefore, his being assoilzied must be profitable to him against others, unless collusion were alleged and instructed. The pursuer *answered*, That this absolvitor was *res inter alios acta*; and albeit a condemnator would have been effectual against the defender, *non sequitur*, that an absolvitor should also be effectual for him; because he was called to that condemnator, but this creditor was not at all called to the absolvitor. *2do*, Even in a condemnator, if the defender had omitted any thing that he might have alleged in the one case, competent and omitted would not hinder him to propone the same against another creditor. Therefore, the defender can only repeat the grounds of that absolvitor; which, if he do, the pursuer will allege, that whereas, in the absolvitor, the defender was admitted to prove the rental, the pursuer omitted to crave the benefit of probation, which he would have gotten; and this pursuer offers him to prove, that whereas the rental was proved to be but 18 chalders of victual, the true rental was worth 30 chalders. *3tio*, A part of the onerous cause was the portion of the defunct's children, which would not prejudice the pursuer, being an anterior creditor.

No 41.

A party was sued as lucrative successor, and assoilzied on proving an onerous cause. This found not to affect another creditor suing on the same grounds.

No 41.

THE LORDS found, That the absolvitor could not prejudice this pursuer, as to these points omitted, and that it could not have effect *inter alios*, except it had been *in re antiqua*, where the witness had died; that in that case, the testimonies out of the former process might be repeated; but as to the rental, the LORDS would not give the pursuer the sole probation, being so lubrick a point, as not only what it paid, but what the lands were worth, and it might have paid; and ordained witnesses to be examined *binc inde*; and found, that the bairns' portions not being paid *bona fide*, before the intending of this cause, could not prejudice the creditor; but ordained the defender to suspend on double poinding against the pursuer and the bairns; but in regard of so much ground in the matter, they declared they would not sustain the passive title to make him successor universal, but only as to the just price, and the cause onerous.

*Fol. Dic. v. 2. p. 352. Stair, v. 1. p. 245.*

1665. February 24.

Dame ELIZABETH DOUGLAS, and Sir ROBERT SINCLAIR of Longformacus, *against*  
LAIRD of WEDDERBURN.

No 42.

One being dishabilitated by Parliament without citation or crime, and being rehabilitated, not *ex gratia*, but of justice, a gift of his forfeited estate found to fall of consequence, without citation of the donatar.

THE Lady Longformacus, as heir to her goodsire, William Douglas of Eveling, who was donatar to the escheat and liferent of John Stewart of Coldingham, pursues the Laird of Wedderburn, for the teinds of his lands, which teinds pertained to the Abbots of Coldingham. The defender *alleged*, Absolvitor, because he has tack to run, flowing from the Earl of Hume, who was infest in the Lordship of Coldingham, and before that was Commendator thereof, by his Majesty. *2do*, John Stewart had ratified all rights flowing from the Earl of Hume, and consequently this tack, after which the donatar of his escheat could not challenge the same, for the ratification is equivalent, as if the tack were granted by the ratifier. The pursuer *answered*, That the defence upon the tack, and the Earl of Hume's right, ought to be repelled, because the Earl of Hume's right is reduced by the Parliament 1621, on this consideration, that the Earl of Bothwell being Commendator of Coldingham, had demitted the same in his Majesty's hands, whereupon the said John Stewart, his son, was provided by the King, Commendator of Coldingham; and thereafter, the Earl of Bothwell being forfaulted, the said John, and his other children, were dishabilitated, and declared incapable to bruik and enjoy his land and heritage, or to succeed to any person within this realm, by sentence of Parliament; whereupon the King provided the Earl of Hume to be Commendator of Coldingham; and thereafter, on the Earl's own resignation, infest him therein, in an erected Lordship, and thereafter, in the Parliament 1621, the King and estates, upon express consideration, that John Stewart was an infant,