

these sentences, and before her payment ; and, seeing other creditors and legators have been more diligent, and this pursuer has been negligent, his negligence ought not to be prejudicial to her, but to himself ; so that he ought to pursue and repeat from the legators, and not she ; likeas she took caution from the legators to make the sums paid to them forthcoming, in case any other debts should break out for which she might be distressed ; to which caution she is content to assign this creditor ; and which ought to be found enough to exoner her, and to impose a necessity upon this pursuer to convene the said legators :—The Lords found that part of the allegiance not relevant to exoner the executrix anent her payment to the legators, albeit done by virtue of sentences ; but found that this pursuer should be paid as a creditor, and that the executrix ought to repeat that which she had paid to the legators from them, and that the creditor should not be astricted, nor urged to that repetition, because the executrix was his direct party ; for the testament could not be exhausted but by the debts ; and that legacies are not to be paid but if there be superplus of the free gear, *deductis debitis*. But, because this appeared to be hard to the executrix, who walked *bona fide*, and paid nothing but by virtue of sentences which she could not stay, this debt not being known, which might be imputed to this pursuer's own negligence ;—therefore the Lords ordained this to be delayed until the parties and their procurators should be inquired if they had any practiques to allege either *pro* or *contra* to this decision. But the civil law is, *in terminis*, opposite to the same ; for, in l. *scimus*, sect. “ *Et si præfatam,*” c. *de Jure Deliberandi*, it is clearly determined, that the heir (that is, to us, the executor,) who pays to the creditors who first convene him, or to the legators, is exonerated of all other creditors who thereafter come to trouble him, where the inventory is exhausted by the first payment of these, whether they be creditors or legators who first come ; and the heir can never be further troubled by any of them, albeit the creditor last coming was anterior to the other who is paid : and these other creditors have only action of repetition from the creditors paid, or from the legators paid, to compel them to refund to him, as in law they best may ; but nowise to impeach or molest the heir, who has once paid the whole inventory to the creditors or legators who first came ; neither can the buyer from the heir be convened for that which the heir sold to him, and the price whereof he converted to these creditors' or legators' use, so paid by him. How this express law agrees with our practise, it is well to be considered, and the equity and reason thereof.

Scot, Clerk. *Vid.* 25th July 1634, Matheson.

Page 739.

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1634. December 12. Ross against WILLIAM DICK and HUME of HEUGH.

In a reduction of a contract, and some other special writs called for, following upon that contract, of the lands of Heugh, made to the said William Dick by the said Hume of Heugh, as done since an inhibition executed by the said \_\_\_\_\_ Ross, pursuer, who was creditor to the said good-man of Heugh ; where, in the said summons of reduction, the defenders were called by a general clause, to produce, not only the said special writs particularly called for, but

also all and whatsoever other writs concerning the said lands made by the said debtor to the defender, since the said inhibition :—which clause being quarrelled by the defender, that it could not be sustained ; seeing, by action of reduction, nothing can be called to be produced, or reduced, but only special writs expressly and particularly condescended upon ; for these general clauses, albeit they be sustained in improbations, yet have never been sustained, nor ever can be, in reductions, to reduce writs for not production, not specially called for. This exception was repelled, and the certification of the general clause sustained and granted ; for the Lords reduced all writs not produced, which were made since the inhibition of the lands libelled, to the defender by the debtor ; so that the time was special in the date of the writs, *viz.* since the inhibition, which was produced ; and the subject was special, *viz.* the lands libelled ; and the persons were special, *viz.* by the debtor to this defender. Therefore the general clause being so qualified, was sustained.

*Act. Advocatus. Alt. Stuart. Scot, Clerk. Vid. 18th January 1637, E. Hume. Page 741.*

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1634. *December 19. CAMPBEL against CHALMBERS.*

A TUTOR pursuing the mother of his pupil, for delivery of the pupil, her son, to him, in whose keeping the pupil was ever since his father's decease ; the said pupil, now at the time of this pursuit, being divers years beyond the years of infancy ; and the mother compearing, and alleging that he had chosen curators, and producing the act of curatory ; to which defence the curators adhered ; and alleging, that, in respect thereof, the said act of curatory being standing, that the tutor's office ceased, and was expired, and so had no interest to pursue for delivery of the bairn ; and the tutor answering, that that act was fraudfully done, seeing he offered to prove that his office was not expired, and that the bairn was still within the years of pupillarity, so that his tutory yet lasts, and that he was still under the danger of administration ; and the defender duplying, that the act of curatory standing, the curators had the charge ay and while the act of curatory were reduced ;—the Lords repelled that allegiance, and found the tutor's reply relevant, *viz.* that the bairn was yet within 14 years of age, and so within the years of pupillarity, so that his tutory (that being proven,) yet continued ; and that he had reason to pursue for delivery of the pupil, and that he had no reason to reduce the act of curatory, the defender never alleging that the bairn was past the years of tutory : for the bairn, being proven to be yet within the years of tutory, he needed never to reduce the act of curatory, the length of which process might endure while his office were expired ; and the danger of the not administration of his office, in the meantime, might tend to his prejudice.

*Act. Gibson. Alt. Miller. Scot, Clerk. Page 742.*

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1635. *January 23. PATRICK MUG against CAMPBELL.*

PATRICK Mug, for the sum of 500 merks, having comprised his debtor's lands,