

Javit: THE LORDS found this allegiance relevant for liberation of the defender for so many debts as were decerned against him, and paid by him after decret, and whereof the terms of payment were then past, being all done before he was executor decerned, albeit the decreets were obtained, and payment made by the defender, after intenting of this pursuer's cause, against him as intromitter, seeing he denied any intromission before the time of his being decerned executor; after which, the LORDS found, notwithstanding of the prior pursuit of this party, he then having no intromission, he might provide for his own relief by the said confirmation of himself as a creditor, and then lawfully intromit, which subsequent intromission could not be a ground to produce this action. But the LORDS found, if the pursuer would astrict himself to prove, that the defender intromitted before the confirmation, they would prefer him, and that being proved, that he behoved to pay the pursuer's debt, as vicious intromitter, which was not purged by the subsequent confirmation; and this was so found, albeit it was or might have been alleged, that after this pursuer's intenting of the pursuit, the party defender could do nothing in his prejudice to make his action worse to him, and better to himself, specially by a deed voluntary of his own, (as this confirmation was) except this pursuer had been lawfully cited thereto, *cum lite pendente nihil sit innovandum*, which was not respected; and as for the other debts obtained, registered against the defender as said is, albeit the terms of payment were past, and decret of registration obtained before his confirmation, yet seeing they were not paid by the defender also, before the confirmation, the LORDS would not sustain the allegiance for these debts, in respect of the pursuer's action intended before, as said is; but I conceive not the reason of this difference betwixt the debts paid and unpaid, decreets being given, and the terms being past, which makes all in a like case, for the cautioner seeking relief. See July 14. 1626. Smith *contra* Gray, *voce* PASSIVE TITLE.

A&t. Primrose.

Alt. Morat.

Clerk, Hay.

Durie, p. 541. & 546.

1663. January 29. MARGARET EDGAR *against* JOHN MURRAY.

MARGARET EDGAR having charged John Murray, as cautioner for the umquhile Viscount of Stormont, he suspends and offers him to prove by her oath, that she transacted with him to accept a decret against the principal to free him. The charger *answered*, that she being a wife clad with a husband, could not swear in his prejudice. The suspender *replied*, that before her marriage, he had raised a pursuit, and cited her to see it found and declared, he was free of cautionry, in respect of the said transaction, and so the matter being litigi-

No 3. ous, her marrying during the dependence cannot exclude him from his oath, but must work against her husband, who is only *juri mariti* a legal assignee.

THE LORDS found this relevant.

Fol. Dic. v. I. p. 552. Stair, v. I. p. 164.

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Found, that in regard *pendente lite nihil est innovandum*, the defender could not put the pursuer in a worse condition, by assigning his right *pendente processu*, to a person against whom a reply was not competent, which would have been competent against the cedent.

1666. July 14. WILLIAM SHARP against ANDREW BROWN.

WILLIAM SHARP having apprised from Robert Halyburton certain tenements in the Canongate, whereof the said Robert had a right of wadset redeemable for 1600 merks from Andrew Brown, from whom the right of wadset did flow, and who had right to the said tenements by virtue of an apprising led at his instance against David Glen, in *anno* 1649, for payment of 1600 merks, addebted by the said David to him; the said William Sharp being infeft in the said lands, obtains decret of mails and duties against the tenants; which being suspended, and compearance was made for Alexander Barns, as heir to James Barns, who stood infeft in the said tenement long before the said Andrew Brown his apprising, who thereupon craved to be preferred, against which right, several allegiances were formerly proponed, but in respect of the surcease of justice, no decret followed, but several parts of the process were lost, and thereby the pursuer was necessitated to pursue a new pursuit against the present possessor; which being advocated, and compearance made for the same Alexander Barns, it was *alleged*, no respect could be had thereto; but the pursuer ought to be preferred, because it was offered to be proved by Alexander Barns's oath, that the sums of money for which he had the infeftment of the said tenements were satisfied by the common debtor; to which it was *answered*, that compearance is now made for the children of James Wright, in whose favours the said Alexander Barns is denuded by disposition, and consequently his oath cannot prejudice him. To which it was *replied*, that this pursuit being intented long ago, and compearance being made for the said Alexander Barns, and exception of payment being referred to his oath, and that the same was made by the common debtor, for evicting whereof, Glen, the common debtor, had obtained a blank assignation from the said Barns, and filled up the children of James Wright, their names, of purpose to prejudice the pursuer of his allegiance, which the said Alexander Barns could not do, and *pendente lite* innovate the state of the process. THE LORDS found, that *lite pendente nihil erat innovandum*, and that the cedent, Alexander Barns, could not put the pursuer in a worse condition, by assigning his right to the bairns of James Wright.

Fol. Dic. v. I. p. 551. Newbyth, MS. p. 74.