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 opponed, 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 Judicum*, 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

sufficient probation. See a note from Mascardus, *De Probationibus*, conclus. 977, *et seq.* verbo *Liber*, how far merchants' books prove against third parties; and of the qualifications requisite to make them instruct and constitute a debt. The Lords also found this legacy was not alimentary, nor priviledged so as to have any preference to be deducted before the other legacies, notwithstanding of sundry particulars condescended on why it should have preference, (which see in the informations;) but the Lords brought it only in *pari passu* with the rest.

Item, A debate arose upon one of the receipts produced, acknowledging payment from William, the executor, but thus qualified, "Out of the cash of the bank of Midlebrugh," which was contended to have been Robert's own money. ANSWERED, The allegeance was weak and frivolous. See this, and many other points and articles, discussed and determined in this count and reckoning, in the informations beside me. See Stair's Decisions, 17*th January*, 1662, *Andrew Willage;* but especially 20*th November*, 1662, *Wardlaw* and *Gray*. *Vide elegantem Legem* 7. C. *De Probationibus*. Mascardus *de Probationibus*, conclus. 977.

On the 24th of January, 1678, another point went to interlocutor, viz. whether William Andersone, the executor, ought not to have the third of the dead's part, for executing the office, since he was not a descendant of the defunct's body, and so *quadantenus* a stranger; especially the retention being craved not against a creditor, but only a legatar; and since, conform to the act of Parliament in 1617, he was content to allow any legacy left him in the fore-end thereof. Yet the Lords found he was not a stranger executor, and so ought to have no third.

What was Robert Andersone's wife's share in his moveables, (which was given up as an article of exoneration,) the Lords ordained the custom of Zealand therein to be proven by the declaration of the supreme judges there; and that Robert had a free estate, *scripto*, by his count-books, or otherwise; and found, that *nomina debitorum* followed his domicil, and so, albeit they lay in Scotland, the relict had right to a third, or other proportion thereof.

Advocates' MS. No. 669, *folio* 310.

[See the subsequent part of the report of this case, Dictionary, p. 11509.]

1677. *July* 27. The EARL OF WINTON *against* The MARQUIS OF DOUGLAS.

IN the former session there being a point taken to interlocutor, in the count and reckoning at the Earl of Winton's instance against the Marquis of Douglas, the Lords found the disposition made by the Earl of Angus to Dundonald, mentioning the wadsets, real rights, and other incumbrances on the estate of Paisley, amounting to L.108,770, did not prove the said incumbrances *per se;* but ordained the Marquis to prove them *aliunde*, by producing these wadsets and other creditors' rights, and gave him an incident for that effect: notwithstanding it was alleged for the Marquis, that since the said disposition was made use of for instructing of the charge, the same also might be made use of for instructing the incumbrances; which the Lords repelled, 1*mo*, Because no writ proves *pro scribente*. 2*do*, If the disposition had affirmed that the haill price of L.162,000 was exhausted by real debts, that narration could not have frustrated Winton's relief.

Advocates' MS. No. 670, *folio* 310.