No 50.

1672. *July* 24. EDINGTON *against* HOME.

A REDUCTION and improbation was sustained at the instance of an heir, though he was not entered at the time of the citation.

Fol. Dic. v. 2. *p.* 303. *Stair.*

*** This case is No 459. p. 11292. *voce* PRESCRIPTION.

*** A contrary decision is reported by Harcarse, November 1687, Earl of Airly against Pitliver, No 74. p. 6666. *voce* IMPROBATION.

No 51.

A decree, though defective in probation, sustained, in respect there was an apprising thereon.

1674. *January* 9. WAUCHOPE *against* Major BIGGER.

JOHN WAUCHOPE having right to an apprising of the lands of Hill, led against two of the six heirs-portioners of Mr David Anderson of Hill, and an adjudication against four of them who renounced; Major Bigger having a disposition of the same lands from the heir-male, in whose favour, by Mr David Anderson's contract of marriage, the daughters were obliged to renounce for L. 20,000, and having established the title of the heir-male in his person; there were mutual reductions betwixt John Wauchope and the Major, wherein the Major did reduce the adjudication against the four daughters, who renounced, as being posterior to his right and diligence. Now Wauchope insists upon the apprising against two of the daughters as heirs-portioners, who renounced not, which is prior to the Major's right and diligence; and albeit he hath the first infeftment, and that Wauchope hath neither infeftment nor charge, so that the Major's right is the first effectual diligence, yet Wauchope's apprising must come in therewith *pari passu* by the act of Parliament 1661, as not only being within year and day of it, but before it. 2*do*, Albeit the Major's disposition and adjudication have been sustained as proceeding upon an onerous cause, instructed only by his own oath, yet the cause is not adequate to the worth of the land, and therefore, by the act of Parliament 1621, against bankrupts annulling rights, not being for an onerous cause and adequate price, it is competent to Wauchope, being an anterior creditor, to purge and satisfy the sums truly due to the Major, and thereby to reduce his right. It was *answered* for the Major, That this apprising founded on ought to be reduced, because it proceeds upon a null decreet, obtained at the instance of Mr David Anderson's relict, against her own daughters, as heirs of line, for the yearly annualrent provided to her by her contract of marriage, and for the aliment of the daughters, and yet there is nothing adduced in the decreet to prove that she did aliment them, or the time of the aliment. 2*do*, The aliment is most exorbitant, being L. 300 for each of four young children yearly, whereas the whole means of the

six was only L. 20,000, without annualrent, till such an age, the heir-male alimenting them till that age; so that the aliment of the whole six behoved to be less than their annualrent, and yet the aliment of the four is made equivalent to the annualrent of the portion of the whole six. 3*tio*, It is offered to be proved that the mother had agreed to accept of 700 merks for the aliment of the four. 4*to*, This apprising was satisfied by John Wauchope's intromission with the mails and duties of the whole lands for many years. It was *replied* for Wauchope, That the decreet whereupon his apprising proceeded was valid, even as to the aliment, because the heirs of line compeared and proponed defences without denying the quantities libelled, which exonered the pursuer from probation thereof; but, if need be, he offers to astruct the decreet by probation, that the mother alimented them during the time decerned; and as for the quantity, being *in arbitrio judicis*, and done by the Lords, it cannot now be questioned, and the promise to aliment for 700 merks was competent and omitted; and as to the satisfaction by intromission, the apprising being but of a third part, viz. the right of two of the six heirs-portioners, and the adjudication being of two third parts, albeit the adjudication be reduced, yet Wauchope having brooked thereby *bona fide*, a sa colourable title, he is liberated from the bygones by the decreet of reduction. It was *replied* for the Major, That want of probation is an unquestionable nullity of any decreet, being an essential requisite thereof, so that at best it could be but turned into a libel; and any subsequent probation cannot be drawn back to the date of the first decreet to validate the apprising following thereupon; and albeit the proponing of defences, which necessarily imports the verity of the libel, as lawful poinding in a spuilzie, which acknowledgeth intromission, do instruct the libel without further probation, yet no other defences have that effect, much less the dilatory defences in this decreet; but the simple silence proponing no peremptors, doth never instruct the libel, or give ground to astruct it as valid *a principio*. It was *duplied*, That the turning a decreet into a libel, or astructing thereof by subsequent probation, or simple reduction, are *in arbitrio judicis*, and the Lords follow any of them, as they see the circumstances require; for where creditors have proceeded to apprisings or adjudications, though the decreets whereupon they proceeded should be suspended, or reductions thereof raised, the Lords do ever sustain the real diligence, in so far as the decreets are astructed, unless there arose then an exorbitant legal advantage, as the expiring of the legal, &c. in which case they proceed *strictissimo jure*. It was *triplied*, That albeit the Lords do sometimes allow decreets to be astructed by subsequent probation in favour of creditors against their own debtors, yet not against third parties, singular successors, who have done more exact diligence.

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THE LORDS found, That albeit the decreet whereupon this apprising proceeded was defective in probation as to the aliment, and that no defence acknowledging the libel was proponed, yet being the ground of an apprising, they sustained the same, in so far as it should be astructed, there being no hazard;

No 51. thereby of the expiring of the legal, albeit the debate was betwixt two singular successors, as they remember they had done before, betwixt Mr William Kintore, who had adjudged, and John Boyd, who had apprised the estate of Burncastle, (*See* APPENDIX); considering that, in most apprisings or adjudications, nullities may be found, which would be abundantly sufficient against any legal advantage, but not against the just interest of creditors: They did also sustain the allegeance of agreement with the relict for 700 merks for the aliment, albeit it was omitted in the first instance, seeing the decreet was defective; and though they should fail in proving thereof, declared they would modify the aliment to a lesser quantity; and found Wauchope's intromission, as to a third part thereof, was unquestionably to be imputed in satisfaction of this apprising, which was of the interest of two of the six heirs-portioners; but resolved to hear the parties as to the rest of the intromission.

Fol. Dic. v. 2. p. 306. Stair, v. 1. p. 250.

1676. *July* 21. HAY *against* Earl of TWEEDDALE.

No 52.

PROCESS was sustained at the instance of an heir of a marriage, he making up his service *cum processu.*

Fol. Dic. v. 2. p. 303. Stair.

*** This case is No 21, p. 12857. *voce* PROVISION TO HEIRS AND CHILDREN.

1676. *November* 28. KER *against* KER.

No 53.

IT being *alleged* against a donatar, That a debt pursued for was heritable *quoad fiscum*, and *replied*, That the pursuer had right thereto as executor-creditor; the LORDS sustained process upon that title though supervenient, the testament being confirmed after intenting the cause.

Fol. Dic. v. 2. p. 305. Stair. Dirleton. Gosford.

*** Stair's report of this case is No 102. p. 3926. *voce* EXECUTOR, and Dirleton and Gosford's are No 4. p. 9253. *voce* NEAREST OF KIN.

1678. *July* 19. POWRIE FOTHERINGHAM *against* MARQUISS of DOUGLAS.

No 54.

AN adjudication found invalid because the ground of it was a gift of non-entry, which ought first to have been declared before it was a liquid debt, and it was still undeclared.

Fol. Dic. v. 2. p. 307. Fountainhall, MS.