

ADJUDICATION *contra hæreditatem jacentem.*

1626. December 20.

— against Scot.

IN an action, at the instance of _____, creditor to umquhile Scot of Bonytown, against one Scot; as lawfully charged to enter heir to the defunct, for registration of a bond; the defender compearing, and offering to renounce to be heir; whereupon, the pursuer desired sentence to be given against him, *cognitionis causa*, to the effect he might seek adjudication, as use is, in such cases: Compeared in this process, another creditor of the said Scot of Bonytown; and alleged, that this sentence, upon the defender's renunciation to be heir, could not proceed in the pursuer's favours; thereby to seek adjudication of the defunct's lands in his prejudice; seeing he offered to prove, that the defender had behaved himself as heir to the defunct, by intromitting with his father's lands and goods; and so could not renounce to be heir to him. This allegiance was repelled, seeing when this creditor should pursue this defender for his debt, he might insist against him, or qualify him to be heir; as he might best do of the law, which could be no hindrance to this pursuer, to prosecute all lawful diligence competent to him of the law, upon the defender's renunciation to be heir; for this diligence of pursuit, moved by the pursuer, *qui sibi vigilavit*, could not be stayed by this allegiance of this creditor, who had not provided himself, so as to seek and use the like diligence for recovering of his debt.

This decision was followed January 22. 1629; Mr. Frederick Carmichael *against* the Laird of Kinraig and his creditors, in this same manner as is here marked.

Act.

Alt. Burnet.

Clerk, Gibson.

Fol. Dic. v. 1. p. 3. Durie p. 249.

1528. March 14.

CAIRNCROSS *against* LORD DRUMLANRIG.

ROBERT CAIRNCROSS charged Jean and Marion Scots, to enter heirs to their father William; and upon their renunciation, he craved adjudication of a tenement of land in Hawick, pertaining to umquhile William.—Compeared the Lord Drumlanrig, and *alleged*, That he was heritably infeft in the barony of Hawick, whereof the town was a part; and therefore, unless the pursuer would verify, that the said William was infeft in the tenement holden of him, it could

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No 1.

A creditor was allowed adjudication *cognitionis causa*, upon an apparent heir's renunciation, altho' another creditor offered to prove, that the apparent heir had behaved as heir.

No 2.

In a process of adjudication *contra hæreditatem jacentem*, the pursuer found not obliged to instruct his title, but the decree passed, *salvo jure*.

No 2.

not be adjudged to pertain to the pursuer.—*Replied*, That the right which stood in William Scot's person, behoved to be adjudged to pertain to him; and he decerned to be infest in the same manner that William was.—THE LORDS repelled the exception, without prejudice to Drumlanrig's right, *prout de jure*.

Spottiswood, (ADJUDICATION) p. 9.

1629. February 26.

No 3.

In an adjudication *contra hereditatem jacentem*, a single summons without continuation is sufficient.

IN an action of adjudication, to hear the debtor's heirship goods be decerned, to be declared to pertain to the creditor, against a party, who being convened before, as lawfully charged to enter heir to the debtor, for payment of the debt, had renounced; this action, it was found, needed no continuation, being accessory to the preceding decret obtained, wherein the defender had renounced: For here no party was convened for delivery of the heirship, but only adjudication craved of the right, to be declared to belong to this creditor, which was, only to put the creditor in the heir's place. (*See Stair's Inst. p. 419.*)

Durie, p. 439.

Clerk, *Hay*.

1638. December 19.

CORSER *against* DURIE.

No 4.

An adjudication upon a renunciation carries all by-gones, arising after the common debtor's death, altho' moveable; this *ex necessitate*, there being no other method of affecting such a subject.

IN an adjudication, umquhile William Durie of Newtown, being debtor by his bond, to one Corser in Dysart, of a sum of money; which, being desired to be regiftrate against Durie, his son, and his tutors and curators, as lawfully charged to enter heir to his father; who, renouncing to be heir; upon this renunciation, Corser the creditor, intended action, against this son of his debtor, of adjudication, for adjudging of the right of the lands of Newtown, which pertained to his umquhile father; and whereof he was in possession at the time of his decease; to this pursuer; and consequently, that this defender should be decerned to pay to the pursuer, the mails and duties of the lands intromitted with by him, and his tutors and curators, of all years since the decease of his father, so far as would satisfy this pursuer's debt. And the defender alleging, that this form of summons and process, ought not to be sustained, being far against the practice used in the like cases: For *first*, the pursuer ought to pursue to hear his debtor's right adjudged; which, being once adjudged, then he might competently, upon that right so adjudged, pursue for the mails and duties thereof; but to pursue for the same, before he had the right established in his person, and before it were tried if that right were of that nature, which might produce an action for the duties of these lands; and that sentences were given first thereon; it never has been heard; for adjudication is a process for executing of a sentence, and resembles in this point a comprising; and the intending of a process of comprising, or denouncing to comprise, before the comprising were expedite, and to-