

fect the lands by diligence ; and that the whole sum due by the bond charged upon should be paid to those creditors at the sight of Pitliver ; whereby the land might be disburdened, and he secured in the right thereof from all super-venient dangers.

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1676. November 24. MR WILLIAM WEIR *against* EDWARD RUTHVEN.

IN a double poiding, raised at the instance of the Earl of Callender, as debtor by bond to the deceased Earl of Bramford, and as troubled at the instance of the said Edward Ruthven ; as likewise at the instance of William Weir, as assignee by Patrick Ker, who was creditor to the Earl of Bramford, by bond granted to him for five thousand merks ; the Lords having ordained both parties to debate their interests upon the bill of suspension,—it was ALLEGED for the said Edward Ruthven, That he ought to be preferred, notwithstanding of any decret recovered against him at Patrick Ker's instance, for payment, and an adjudication thereupon, adjudging the sum now in question, and an arrestment at his instance, against the Earl of Callender ; because he not being apparent heir to the Earl of Bramford, but having succeeded to his estate by virtue of an Act of Parliament *in anno* 1672, no adjudication could be led against him, who was a singular successor ; neither could he be decerned to pay ; so that the said Robert could not lead an adjudication but upon the renunciation of the Lady Forrester and the Lady Fairnlie, who were the only apparent heirs of the Earl of Bramford ; that being the only way allowed by our law for adjudging any estate that stood in the person of the Earl of Bramford, who was debtor to the said Patrick.

It was ANSWERED and ALLEGED for the said Mr William Weir, as assignee by the said Patrick, That his author having pursued, by an ordinary way, the foresaid apparent heirs, as likewise the said Edward Ruthven, for payment ; the apparent heirs having renounced, the said Patrick was ordained to insist against Edward Ruthven ; who did defend himself upon the foresaid Act of Parliament, whereby the whole estate was settled in his person by the king and parliament ; and accordingly he did possess the land estate, and was declared to have right to all debts for which decret was recovered at the apparent heir's instance, as being served heir, or should be recovered upon depending actions, which were ordained to be followed in name of the said Edward : whereupon the Lords did then sustain action, *primo loco* against the said Edward ; and he having proponed an allegiance of payment, and succumbed in the probation, decret was given against him for payment ; but declaring him free of all personal execution, but only to take effect against the real estate of the Earl of Bramford ; and thereupon the said Patrick having adjudged the Earl of Callender's debt, he had taken a most lawful way to give him a title thereto ; and thereupon having arrested, he ought to be preferred, and Mr William Weir, as his assignee.

It was REPLIED, That the decret, in so far as the said Edward was decerned to make payment, was without any warrant, and surreptitiously taken out, not being personally liable, as said is ; and all adjudications being only against the representatives of debtors for not-payment, and upon their renunciation, as the decret was null, so the adjudication did fall *in consequentiam*, and they must of new pursue the apparent heirs, and lead an adjudication upon their renunciation.

It was DUPLIED, That the decret against Edward Ruthven, being *in foro contradictorio*, was opposed ; which could not be taken away but by a reduction : neither could he have any title to pursue the same ; seeing, if there was place yet to debate, could he requarrel this adjudication and decret ; whereupon it followed, there being no other legal way to the creditors to affect Bramford's estate, which being settled in the person of Edward Ruthven, could never be taken from him by adjudication from the apparent heirs, who had renounced, but by a real action against the said Edward ; and, as he could never defend in a declarator, so the only legal way was to adjudge from him.

The Lords were much divided in their opinion as to this dispute ; But, by the plurality of votes, it was carried that the decret was extracted, without any warrant bearing payment against the said Edward ; and so the adjudication led upon that ground was no valid title ; and, therefore, preferred him in the double pointing, until there was a new lawful title settled in the person of the said Patrick : Which seems hard ; there being a decret *in foro*, never questioned by reduction, and the said Edward being decerned to make payment with that quality, that it should be a ground to affect the Earl of Bramford's real estate : as likewise, that the apparent heirs having renounced, and the Lords, by their former decret, having found, That, notwithstanding of the Act of Parliament, the estate settled in the person of Edward Ruthven should be liable to all Bramford's creditors, it was all one to him, whether by adjudication or declarator, he had a title to arrest and pursue for this debt : and it was impossible, by an adjudication from the apparent heirs, to acquire a legal title ; seeing they could never be served heirs to that estate ; and the said Edward being justly decerned to make payment, as having a better right than the apparent heirs, when they were served, his right and title did accresce to the creditors, who, having qualified his payment, by restricting all execution against the estate of Bramford, wherewith he had intromitted, and so, in effect, constituted himself debtor, by letting a decret go against him, it was to put the parties to intricate troubles and expenses to find out a new way to get a legal title ; adjudications being now allowed by Act of Parliament against estates, and not upon the sole renunciation of apparent heirs.

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1676. December 21. ELIZABETH WALKER and her HUSBAND against ANDREW WALKER, Bailie of Anstruther.

IN a suspension of a decret of transferring, against Andrew Walker, as heir to his father, who was obliged, by contract of marriage, to pay the sum of 2000