

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 poinding, 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.

Page 585.

---

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

merks to the said Elizabeth, and some other children of a second marriage, upon this reason,—That the charger, and the rest of the children, were confirmed executors to their father, and an inventory given up by their own mother, exceeding the provisions contained in the contract; so that, *intus habent*, and the debt being moveable, they ought to relieve the heir, if he should pay the same.

It was ANSWERED, That the pursuer, and the rest of the children of that marriage, being but very young, and some of them infants, the mother's confirmation, who was not their tutor, nor had any authority, could never prejudge them; unless they had homologated the same, by receiving by count and payment from their mother of her intromission: whereas they were so far from taking that course, that they did pursue a transferring against the suspender, and obtained decret so soon as they came to years.

The Lords did find the letters orderly proceeded, notwithstanding of the reason of suspension; and that the mother, not being tutrix, her deed could not prejudge the infants; unless she had satisfied them out of her intromission, or that they had homologated her confirmation: but found it just that the executors should purge all intromission, and assign the suspender, as heir to his father, to pursue his intromitters with his goods, for his relief.

Page 622.

---

1676. December 22. DAME JEAN LESSLY and her CHILDREN *against* SIR JOHN LESSLY of NEWTOUN.

SIR John Lessly, being party-contractor in his sister's contract of marriage with Sir Andrew Dick, and at whose instance diligence might be done for the provision of his sister in liferent, and the heirs of the marriage in fee, for eighty-five thousand merks,—being pursued for not doing of diligence against Sir William and Sir Andrew Dick, for securing the said provision, but only by using horning in the year 1652, which was never registered until after they had disposed their estate in favours of their creditors; as likewise, the said Sir John, having gotten a right from the said Sir Andrew to several debts, for his sister and her children, their security, he did grant back-bond, whereby he became obliged to use his utmost diligence, or lend his name whensoever he should be required, or to denude himself to any trustee for doing thereof; Sir John having intented process, that he might be declared free of all these obligations to do diligence, and of denuding himself, he being willing to do the same to whatsoever person they shall condescend upon.

It being ALLEGED for the said Dame Jean and her children, That he had omitted to do exact diligence, being a trustee for his own sister and her children,—the Lords, by their interlocutor, 28th June 1676, before answer, did ordain that the Lady and her children should give in a particular condescence of omissions and commissions; and it being referred to Sir John's oath that he had the whole instructions, *viz.* the contract of marriage, and the grounds of the debt assigned, and that he was required to make use thereof, and do diligence, he having deponed *negative*.