

to renounce, that he might adjudge the lands, *quia confusione tollitur obligatio*, he being both creditor and debtor; and this pursuit being an indirect way to burden the lands, in prejudice of the heir of tailyie, substituted to him, by an adjudication or comprising, ought not to be sustained.

It was REPLIED, That Brown of Inglistoun, albeit he was nominated heir of tailyie, yet he had never accepted thereof, by taking infestment or possession; and, being a lawful creditor, ought to have the benefit of law against apparent heirs, either to cause them make payment, or to renounce, until he should enter heir; after which they might pursue for their relief.

The Lords did sustain the pursuit, notwithstanding of the defence, in respect that Inglistoun was never entered heir; but withal declared, that if ever he or his heirs should be heirs of tailyie to the said estate, that then the comprising or adjudication upon this debt should be burdened with the whole provisions of the tailyie; so that any other heir-substitute in the tailyie should enjoy the lands free of the adjudication or comprising for this debt.

Page 309.

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1673. February 11. The LAIRD of ROWALLAN *against* LAWSONE of KERMURE, The EARL MORTON, and OTHERS.

IN the forementioned action, the 22d November 1671, in obedience of the Lords' ordinance therein mentioned, that Rowallan should produce such adminicles as might fortify the executions of the summons of improbation, he did produce his father's and goodsire's infestments of the lands controverted, *in anno* 1630, with these several summonses of improbation, raised and signeted within six days after his father's service: as likewise an assignation made by his father to him of the said action of reduction and improbation, bearing expressly the said summons and executions thereof; and offered to make faith, that he truly received the same as they are now made use of in process; by all which he urged, that seeing, by the act of prescription, all diligence as to preceding actions did prescribe *in anno* 1630, and that the said summons could only have been raised and executed to prevent the hazard of prescription, and that the executions were applicable to these summonses; therefore, that the arguments adduced against them being but presumptions, could not be regarded to take from him the benefit of this action.

It was ANSWERED, That the executions not being special, as was before alleged, and being on a schedule apart, and the messengers and witnesses being all dead, these adminicles were not sufficient; especially seeing the summons libelled was against the Earl of Morton, and all others having interest; whereas the executions did not bear any other persons to have been cited.

The Lords did sustain the adminicles to fortify that the executions were applicable to the summons alleged, upon Rowallan giving his oath that he truly received the same, with the assignation from his father; and that he never knew or heard that the same was made up; unless that the defenders could allege and prove, that there were other actions intended or summons, executed at old Rowallan's instance against the Earl of Morton, to which the execution in question might be applicable.

Page 313.