1676. *November* 24. WILLIAM WEIR *against* The EARL of CALLANDER.

THE late Earl of Bramfoord, having granted a bond of 5000 merks to Patrick Ker his grandchild, by his daughter, married to the Laird of Fairnilie; he did pursue the Lady Forrester, and the Lady Fairnilie, as charged to enter heirs-portioners to their father; and likewise Edward Ruthven, son to the Lord and Lady Forrester, as he in whose favours the estate of the Earl of Bramfoord, which was forefaulted in one of the rescinded Parliaments, during the troubles, was restored and established by Act of Parliament; and, for preserving the Earl's memory, the said Edward was ordained to take the name of Ruthven; and thereby the said Earl's estate being conveyed to the said Edward, the same behoved to be understood with the burden of the Earl's debts: And the pursuer insisted against them all for payment. The Lady Fairnilie produced a renunciation. The pursuer insisted next against Edward Ruthven, and obtained a decreet, whereby the Lords found, That the settlement of the Earl of Bramfoord's estate, in the person of Edward Ruthven, not being merely a donation of a forefaulture, which is not subject to debts of the forefaulted person; but proceeding with consideration of the injustice and unwarrantableness of the forefaulture of the Earl, and that the name of the estate of the Earl, as being *nomen universitatis*, did comprehend his whole means, both real and personal, was to be understood to be liable to the burden of his debts; and therefore declared, That his estate might be affected by any real diligence for this debt. This being the express terms of the interlocutor, under the principal clerk's hand,—upon a debate *in præsentia* the decreet is extracted, not only bearing this declarator, but a conclusion against Edward to pay; and, in the decreet, the pursuer declares, That he passes from personal execution against Edward. Mr William Weir, advocate, as assignee, adjudges a part of the sums due by the Earl of Callander to Edward Ruthven, and the infeftments granted by the Earl for security thereof; and now pursues for mailles and duties. Of this decreet, and of the adjudication in consequence, there is reduction raised, and insisted on by the Earl and Edward; wherein Callander alleges, that he hath made payment to Edward Ruthven of part of the sums; and produces his discharge: which must not only liberate him, as having paid, *bona fide*, upon the Lords' decreet, before any diligence against him, but likewise on this ground, that he had raised a summons of double-poinding; and called Patrick Ker and Edward Ruthven. Whereupon Edward was preferred, and Patrick decerned not to trouble him; and therefore, by the Act of Parliament 1584, chap. 3, statuting, "That where any party is lawfully summoned in a double-poinding, and not compearing, or showing his right, he shall not be heard to reduce the decreet, nor be restored against the same, except he have a necessary cause of his absence; and the obtainer of the decreet shall only be obliged to answer, in the second instance, to the right which the party complaining shall produce, whether it be valid to bruik by at the time of his complaint and suit, and no otherwise; but shall be liable to no action for bygone profits, intromitted with by the obtainer of the decreet, from the obtaining thereof:" whereby Callander is secure, both as to what he hath paid, and Edward Ruthven as to what he hath intromitted with; albeit the decreet be in absence as to Patrick Ker.

It was ANSWERED, That Edward Ruthven being preferred, his preference accresces to Patrick Ker and Mr William Weir, his assignee deriving right from Edward by adjudication.

The Lords found, That the payment made by the Earl of Callander did secure him against both.

The next reason insisted on was, That the decreet at the instance of Patrick Ker against Edward Ruthven is null, and clearly disconform to the Lords' interlocutor produced, which is only declaratory, finding, That the estate of Bramfoord might be affected: And therefore the decreet is unwarrantable and null, and the adjudication thereupon falls in consequence.

It was ANSWERED, That the declarator being expressly for affecting of the estate, it could take no effect without a decreet for payment, *cognitionis causa;* for apprisings and adjudications bearing in payment and satisfaction, unless there be a decreet for payment, they cannot proceed; and therefore that member of the decreet, decerning Edward to pay, though it be expressed simply *quoad* real execution, and might have been unwarrantably extended to Edward's other estate, yet, being only extended to the estate of Bramfoord, *eatenus* it is valid; *et utile per inutile non vitiatur.* Likeas the Lords are accustomed to sustain the real executions of creditors though defective in some formalities, where material justice is observed, and no more formal right is excluded.

It was ANSWERED, 1*mo.* That upon this mere declarator no execution could proceed, until a decreet *cognitionis causa*, for establishing the debt in some person *passivè*, had been obtained; which ought either to have been against the apparent heirs of the Earl of Bramfoord, according to the ordinary custom, when apparent heirs are charged to enter heirs: if they renounce they are assoilyied; and yet, before adjudication, they must necessarily proceed against the apparent heirs *cognitionis causa*, bearing their renunciation; and it is necessary, before adjudication, to have decreet against them for affecting *hæreditatem jacentem.* But in this case there is nothing libelled for a decreet *cognitionis causa*, either against the apparent heirs or against Edward; but a conclusion of payment extracted, without the least shadow or warrant. And there were also good reasons to sustain a decreet of payment given by the King of Spain, as by a clerk of the session without warrant, upon pretence that there is nothing against material justice, or that it may be restricted to that which agrees to material justice; *viz.* decerning only Edward to pay *cognitionis causa*, by affecting the estate of Bramfoord. So that nothing can be more palpably null than this conclusion in whole or in part, as not only *ultra petita*, but *sine libello*, and without any authority. And whatever the Lords may do in matters within their latitude, *ex arbitrio judicis et nobili officio*, yet, beyond question, that cannot be demanded in justice, but in favour; in which the Lords use to consider all the circumstances of the case, but have no motive to extend their favour in this case: this adjudication proceeding upon an assignation taken by an advocate *pendente processu;* and which is informed to be with great advantage, and who being all along advocate in the cause, first for the Earl of Callander, and then against him; and proceeding to adjudication upon a decreet so unwarrantable, wherein it may well be presumed that he hath been instrumental with the clerk to foist in the most material article in the decreet, without the Lords' warrant: so such practices should not be favoured, whatever favour may be shown to unskilful people proceeding *bona fide sine dolo;* and by which Mr William is only

put back to the legal course, wherein he will neither lose his debt, nor be prevented by any other; for there is no other adjudication but this.

The Lords found the reason of reduction relevant against that member of the decreet decerning payment; and, as to that point, found it null, and reduced the same; and the adjudication thereupon, in consequence.

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1676. *December* 5. LOWRIE *against* ANGUS.

[*See page* 208.]

THE process betwixt the parties being discussed, and observed upon the 14th day of November last, yet being heard and reported again, the charger ALLEGED that it was the custom of all provident skippers to have a pump-stelling covered with pitched canvas, to guard against the spouting of the pump; which was wanting in this ship, and therefore the damage sustained by the charger was through his fault: neither is there any cause condescended upon, whereby the ship or pump became leaky, which could not be foreseen at the loosing, conform to the former interlocutor; and, therefore, the charger craved his allegeance to be admitted to his probation; specially seeing the skipper's witnesses were to be his own seamen, and it would be of dangerous consequence if the spoiling of merchants' goods might be evacuated by such probations.

The Lords would prefer neither party to the probation; but, before answer to the relevancy, allowed either party to adduce witnesses, what the custom of skippers to secure their pumps was, and what was the cause of this pump's becoming leaky or spouting, or if there was any storm or stress of weather in the voyage.

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1676. *December* 13. JOHN INGLIS *against* The CREDITORS of EAST-BARNS.

IN a competition amongst the creditors of East-barns, Mr John Inglis craves preference, because he stands infeft by the common debtor, long before any other creditor.

It was ANSWERED, That his infeftment is base, and the other creditors are infeft upon apprisings, before any possession in his person.

It was REPLIED, That he produces discharges of four years' annualrent of his sum, before the common debtor's son's infeftment, from whom the creditors have apprised.

It was REPLIED, That this discharge can import no possession by his infeftment, which is conditional, That if he be not paid of the sums due to him, and relieved of his cautionary, he should enter to the possession of the lands; but this discharge is only of his annualrents by his debtor.

It was DUPLIED, That where there is no ground of simulation, a base infeftment is valid; especially being for warrandice or relief, whereby it can attain no possession till distress. *2do.* This discharge doth expressly relate to his infeftment of relief.