

pains, yet Mr John should have the fifth part. Which seems hard ; his charges and pains being the cause of the obligation.

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1676. November 21. ELIZABETH SMITH *against* JANET MORISONE.

MR James Smith, minister at Errol, having left in legacy, to the said Elizabeth, his sister, a yearly annuity, during her lifetime, of forty pounds Scots ; Mr John Herbertson, who was his executor, gave bond for payment thereof ; whereupon the said Elizabeth did pursue Janet Morisone, his relict, as executrix, for payment of all bygones, and in time coming.

It was ALLEGED, That she could not be liable. 1st. Because she was executrix-creditrrix, by virtue of her contract of marriage. 2d. Her husband having died at the horn, she had the gift of his escheat without a back-bond ; and so was not liable to any other creditor.

It was REPLIED to the *first*, That she had intromitted with much more than what was due to her by her contract of marriage, and so was liable for all farther intromission to other creditors.

It was REPLIED to the *second*, That, being executrix, and having intromitted by virtue of that title, *ipso facto* she did constitute herself debtor thereby ; and any new gift of escheat could not defend her, because it was only impetrated *animo fraudandi creditorum* ; and she, having constituted herself debtor, by confirmation, was liable in law as successor, and representing her husband.

The Lords repelled the first defence, and found her liable to count, notwithstanding she was executrix-creditrrix, for all farther intromission which did exceed her own debt ; but, as to the second, they did argue much amongst themselves, and without determining that point of law, if she could make use of the gift of escheat, they did find, that if she gave a back-bond, she was liable ; and albeit she gave none, yet, by virtue of an act in Exchequer, ordaining that all donatars getting gifts for their own debts, should be liable to their creditors, they did find her liable to count, as said is : but it is thought that she was liable upon that head, that she was confirmed, and had intromitted with much more than would satisfy her debt ; and so, in law, had constituted herself debtor, before the gift.

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1676. November 23. SIR DAVID CARMICHELL of BALMUDIE *against* MR JOHN DEMPSTER of PITLIVER.

SIR David, as assignee by his son David Carmichell, to a bond granted to him by Pitliver, for the sum of eighteen thousand merks, having charged for pay-

ment, upon a bill of suspension presented by Pitliver, the cause was ordained to be discussed upon the bill. The first reason was, That the assignation was an undelivered evident, during David the cedent's lifetime, but was deposited upon certain conditions ; and albeit it had been delivered, it could give no right to Sir David, because it was subscribed upon deathbed ; and the bond, being heritable, secluding executors, did fall to the heir, and could not be assigned upon deathbed to his prejudice ; which was offered to be proven by the writer and witnesses inserted. The second reason was, that the bond charged upon being of the date of the contract of marriage, and in contemplation thereof, whereby the lands of Balbougie and Luthrie, which fell to Euphemia Dempster, as heir to her father and goodsire, as likewise, Pitliver having right to the sum of twenty thousand pounds, to which the foresaid Euphemia would be liable, as heir foresaid, it was agreed that the said Euphemia, and the heirs of the marriage, should have the undoubted right of the lands of Luthrie, free of all debts ; and besides, Pitliver should pay in tocher the sum of eighteen thousand merks, for which he gave his bond : and, on the other part, the said David was to dispoise to Pitliver the lands of Balbougie, and he, and his father Sir David, were obliged to cause the said Euphemia, in case she survived the husband, and the heirs of the marriage, at their majority, to ratify the disposition of Balbougie, and to liberate him of all debts that could affect the same ; and the said David being now dead, and there being an heir of the marriage, who is a young child, Sir David cannot charge for payment of this sum, until he cause serve the said child heir to his father, and cause him ratify the said disposition, the sum charged for being the price of the lands : especially seeing, if the heir of the marriage should die minor, and the heirs of tailyie to the son should succeed to David's estate, they might plead that they were not liable to the warrandice ; and no relief could be had of Sir David, who is a naked liferenter, and might die before the young child could attain to be major.

It was ANSWERED to the first, That the assignation being now in Sir David's possession, could not be taken away as an undelivered evident but by his oath or writ : and, as being subscribed on deathbed, it could not be quarrelled, but by the heir intending a reduction ; which can never be done, Sir David being served his tutor, who will never authorise him ; so that it is *jus tertii* to the debtor to pay to Sir David, who was liable, as tutor, to count to the pupil.

The Lords, as to the first reason, found, That the subscribing on deathbed, and not delivering, was only probable by Sir David's oath ; but ordained the writer and witnesses should be present when he deponed upon all the interrogatories put to him, for which they granted diligence. As to the second reason, having compared the contract of marriage and bond, and finding them to be of one date, and that truly it was granted in contemplation of the lands of Balbougie ; as likewise, finding that the time of payment in the bond was not delayed until the disposition should be ratified by the heirs of the marriage, or until they be majors, or served heirs ; Therefore they decerned the said sum to be paid to Sir David, in case it were not proven that his assignation was on deathbed : but likewise finding, that the said lands might be liable to all the said Euphemia's father's debts, and goodsire's, and so might be evicted by the creditors ; against which he could have no relief, for the reasons foresaid, but against the liferenter ; They ordained that Pitliver should condescend upon such creditors as might af-

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.