

take the disponent's name and arms; whereas, if the pursuer get the whole legacy, after the payment of debts, the defender will have no benefit by the disposition.

*Answered*, The pursuers, who are the defunct's aunts, are more favourable than the defender, who is a remote relation. *2do*, The disposition being burdened with the legacy, and an irritancy adjected in case it were not paid, that imports, that *in omnem eventum* the whole legacy was to be paid.

THE LORDS decerned for the whole legacy, and ordained the defender to pay or assign to the defunct's estate. But found not annualrent due for by-gones.

*Fol. Dic. v. 1. p. 427. Harcarse, (EXECUTRY.) No 480. p. 131.*

1729. February 20.

COUNTESS OF STRATHMORE and LADY KATHARINE COCHRAN *against* MARQUIS of CLIDESDALE and EARL of DUNDONALD.

JOHN Earl of Dundonald, by a bond of entail, made a total settlement of his estate to the heirs of tailzie therein expressed. Two days before subscribing this tailzie, he executed bonds of provision in favour of his daughters, and at the same time, made a will in relation to his moveables; which deeds, jointly taken, and in effect executed at the same time, and kept by him undelivered, made a total settlement of his estate, and shewed his firm intention that the lands should descend to his heirs of entail, and that the ladies, his daughters, should have nothing but their provisions. After the said Earl of Dundonald's death, it being discovered, That some of the lands contained in the tailzie had never been habily vested in the tailzier, but were still *in hereditate jacente* of a remote predecessor, the Lady Strathmore, and Lady Katharine Cochran, his two daughters, insisted in a declarator, That, as heirs of line to the said remote predecessor, they were entitled to serve themselves in these lands that remained yet in his *hereditas jacens*. This was opposed by the heir of tailzie, for whom it was pleaded, That they could not approbate and reprobate their father's will; if they accepted their bonds of provision they could not quarrel the tailzie; and if they quarrelled the tailzie, that they must renounce their provisions. *Answered*, The bonds are conceived simply, and absolutely without any condition; and the accepting thereof cannot cut them out of any other right, competent to them; That one cannot approbate and reprobate the same individual deed, which would be an inconsistency; but there is no inconsistency in one approbating a deed which the granter had power to make, and at the same time reprobating another deed which the granter had no power to make. *Replied*, Since the Earl of Dundonald granted these provisions to his daughters upon this very cause and consideration, That they were to have nothing else out of his estate; and since he burdened

No 39.

No 40.

A final settlement of entail, by which bonds of provision were granted, found to preclude the grantees from taking up as heirs, in prejudice of the entail, subjects accidentally omitted in the settlement, unless they would renounce their provisions.

No 40.

ed his heirs of tailzie with the payment thereof, upon this very cause and consideration, that they were to have the fund out of which these bonds were to be made effectual, it follows, That if the Ladies chuse to quarrel their father's settlement and obtain another provision out of his estate, the provisions must fall to the ground as *sine causa*. Found, That the bonds of provision and bond of tailzie are to be judged as of the same date, and as one total settlement, made by John Earl of Dundonald of his whole estate; and that the pursuers cannot have access to such of the lands contained in the said tailzie, as were in *hereditate jacente* of their grandfather, and provided to descend to the heirs of line, without quarrelling or impugning of the settlement made by their said father; and that therefore they are not entitled to claim both their bonds of provision, and likewise their succession to the said lands, which were in *hereditate jacente*, but that they are entitled to claim either the one or the other at their option.

*Fol. Dic. v. 1. p. 427.*

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S E C T. VIII.

Obligations, or Renunciations, granted upon an expectancy disappointed, or upon the supposition of a fund of payment of which the party is afterwards deprived.

1609. December 5.

BALLAGANE against SIR JOHN ARNOT.

No 41.

A bond granted by an apparent heir, during his father's sickness, for composition of his marriage, was sustained, tho' the marriage fell not, the father having recovered.

THE Laird of Ballagane, younger, alleging, that he was charged by Sir John Arnot, under the pain of horning, to pay to him 1000 merks, suspended, affirming, that if he was anyways debtor, or had given his bond for that sum, it was for the composition of his marriage, by the which, he being informed that his father was deadly sick, he had dealt with the treasurer, who having set down that composition, took the pursuer's bond for that sum of 1000 merks as borrowed money, and his father being convalesced, whereby the ward fell not, the bond was given without any true or lawful cause, and so he might lawfully repeat the sum *condictione, causa data causa non secuta*, especially seeing the signature was not past the seals, and the treasurer could not be charged with it. To this it was *answered*, That the bond was pure and simple, making no relation to any casualty or composition; and as, if he had received the composition in actual payment, the same cannot be repeated, because the treasurer will give double gifts of escheat which cannot be profitable to both the donatars, and will give infestments of recognition, gifts of non-entries, wards, marriages, liferents, and all other casualties *periculo petentis*, and will