

No 210. 1699. June 8. ORD'S RELICT *against* JOHN LUTEFOOT.

A disposition granted by a defunct, in favour of a party, had been borrowed up from the Commissary Clerk by that party, and by him renounced in favour of the heir, when he received a sum of money. He was considered to have accepted the disposition, which being with the burden of debts, he was found liable for them.

AGNES INNES, relict of Laurence Ord, William Oliphant merchant in Edinburgh, and John Doull, writer there, as creditors to the said Laurence, pursue John Lutefoot, writer to the signet, as he who accepted a disposition from the said Laurence Ord of his whole estate, with the burden of his whole debts and legacies, in so far as Laurence's papers being, after his death, by warrant of the Commissaries; sequestrated at the Creditors' desire, the said John Lutefoot had borrowed up that disposition, which was lying with the rest, and had entered into a transaction with Christian Ord, Laurence's only daughter, and William Graham her husband, and renounced the said disposition in their favour, on their paying him 2200 merks as a reward.—*Alleged* for John Lutefoot, That he was so far from accepting of that disposition, or doing any deed importing a homologation of the same, that he had expressly repudiated it, and declared he would have no benefit of the same, in so far as he had renounced it in favour of the said Laurence's heir; and she being served heir, the creditors had no prejudice, for she and her husband would be liable; and he did not transact rashly, but by the advice of lawyers; and the gratuity given him was no price for his renunciation, but expressly given for the many services he had done to Laurence, the defunct.—*Answered*, He taking up the disposition from the Commissary-clerk, and never returning it, was a clear acceptance; and his renunciation being *in favorem*, and not simple, can never liberate him; and though he depones in his oath, that the gratuity was merely for his services, yet *res ipsa loquitur* that it was for the renunciation; and her being served heir imports nothing, seeing she has done it *cum beneficio inventarii* on the late act of Parliament; so the whole is but a contrivance to defraud creditors, and John Lutefoot may recur against her for his relief.—THE LORDS found his acceptance sufficiently proved, and therefore found him liable, and decerned; especially *res* not being *integra* to the creditors, who were damnified by it, and that his disposition was burdened with the debts.

*Fol. Dic. v. 2. p. 39. Fountainball, v. 2. p. 50.*

1737. December 21. MONTGOMERIE *against* MONTGOMERIE.

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ONE disposed a tenement to a stranger, with this provision, 'That the disponee, by accepting of the disposition, should be bound to pay a yearly annuity to the granter's heir.' In a process for payment of the annuity, the defence was, That he had not as yet resolved, whether he would accept of the disposition, and there is no law obliging him to accept within a limited time.—*Answered*, This is implied in the nature of the thing. It would be unreasonable to bring the pursuer under the necessity of entering heir, and subjecting him-

self to all the predecessor's debts, in the view of carrying a subject, which might be taken from him the next day by the dispoñee; and it would be as unreasonable for the dispoñee to stand silent, and neither touch the rents himself, nor allow them to be touched by the pursuer.—THE LORDS found the defender must either accept or repudiate. See APPENDIX.

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*Fol. Dic. v. 2. p. 38.*

1736. February 19.

ALEXANDER MACBRAIR *against* GRIZEL and ANN MAITLANDS.

THE deceased George Maitland of Eccles having five daughters, granted different bonds of provision to them for 5000 merks each, payable at his death, in full of all succession they could have in his heritable estate, &c.; containing clauses dispensing with the not delivery.

In the 1702 he died, leaving behind him a son, who also died soon thereafter; whereupon the daughters entered into a transaction with Dr Maitland their uncle, *anno* 1703, whereby they assigned to him their bonds of provision; in consideration whereof, he gave each of them his bond for the like sums; in the right of which, and of others which had been conveyed to him, he adjudged the estate of Eccles, *anno* 1706.

After this, he granted an obligation to his nieces; wherein he "bound himself to free them of their father's debts, they always granting renunciations to enter heirs to their predecessors in his favours, when required.

The Doctor obtained possession of the estate, in virtue of his adjudication; and, after his death, the said Alexander Macbrair, as having right to an old process of compt and reckoning against George Maitland and others, transferred it not only against the Doctor's heir, but likewise against the daughters as representing the said George Maitland; and a proof of the passive titles having been granted, when the same came to be advised, the LORDS found them not proved, so as to make the daughters universally liable. But, from the above state of the facts, this question occurred, Whether or not they were liable *in valorem* of the sums received from their uncle?

The defence offered for them was; That they could not be liable; as they had not received payment out of any of their father's effects, conform to the decision 5th July 1666, Laurence Scot, No 50. p. 9694.

To which the pursuer *answered*; That it was hard the debtor's estate should be carried off by a contrivance betwixt the heir-male and the heirs of line; the first of whom pretending he was not liable, as his only right to the estate was in virtue of singular titles; and, with respect to the daughters, that they had not meddled therewith. But, when it is considered that Dr Maitland, as their assignee, has carried off the estate upon an adjudication, chiefly founded on their bonds of provision, they surely must be held as lucrative successors, as

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Bonds of provision granted to daughters, which they assigned to the heir-male, who granted them his own bonds, and a ljudged the estate on theirs, found not to subject them in payment of their father's debts.