

for it is so craved, as being obliged to be paid to her behoof; the LORDS found, That this discharge, which was specially granted, of a special sum contracted for tocher to the said Margaret, with the general clause foresaid therein contained, did not extend to this sum now acclaimed, seeing the same was not specially discharged, as it ought to have been, if the discharge should extend thereto; for that sum was a debt, also principally owing as the tocher; and the tocher being only received and paid, and the general clause not extending to any sums which might fall to her by her sister's decease, nor no such thing treated on, nor mentioned among them the time of the discharge, it could not extend *ad non cogitata neque tractata*, except the conception thereof had been made more ample, to have comprehended the same; seeing the said general clause might subsist, and the said clause obligatory also remain in its own strength, in respect the said generality might be interpreted to extend to all other things, which the pursuer might seek from the defender by her father's decease, or from him as his heir or executor, or wherein he was particularly obliged to herself, and not to that which fell to her by accident of her sister's decease; for, if it could receive that extension, then, of the like reason, if any, or all the rest of the sisters should die hereafter, the pursuer would by the same discharge be excluded from all claim of her part of their portions; which were hard to extend it to casualties, not then in *rerum natura*, but which were uncertain, except the discharge had been specially conceived for all things, which might thereafter befall to her.

No 25.

Act. Russel.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. 1. p. 343. Durie, p. 673.

1670. January 27.

INNES against INNES.

In the action upon the bond of provision made by Patrick Innes to Robert his son, 24th July 1669, *voce* PROVISION TO HEIRS AND CHILDREN; wherein there was a substitution, that failing of him and the heirs of his own body, the same should fall to Janet and Margaret Inneses, the LORDS having found, That albeit Janet deceased before Robert, that her heirs should have right; it was of new *alleged*, That the heirs of Janet could have no right as being heirs to her; because she dying before Robert, had no right in her person, and consequently her heirs could have no right, nor be infeft in the annualrent granted by the Earl of Errol who was debtor, who could not pay that sum but by a valid renunciation of a person that could be infeft. THE LORDS found that the allegiance was not competent *hoc loco*; but reserved the same to be considered when the Earl of Errol should be decerned to pay the money contained in the real infeftment; yet, the question being rightly considered, it seems there will be a difficulty, seeing Janet was never infeft herself; and a general service, although it gave right to the substitution, which

No 26.

A general discharge of all bonds of provision, was found not to include a provision by substitution, of which there was only an apparency, *et de quo non fuit cogitatum.*

No 26.

was a right of apparençy, yet they could not be specially served nor infeft as heirs to Janet; neither could they be specially served heirs to Robert, who was never infeft, and had only right by a bond of provision; and therefore, it seems the renunciation behoved to be granted by the heir and eldest son of the father, who could only be specially infeft in that annualrent. But this was reserved to be considered as said is. Thereafter, in this process, compearance was made for Margaret, another sister who survived Robert, and craved the benefit of the substitution for her part and proportion. It was *alleged* for the tutrix and the heir, That she could have no part; because, by her contract of marriage, she discharged all that she could crave by the decease of her father, and particularly all bonds of provision made to her, which must comprehend this bond of provision granted to Robert, to which she was provided by a substitution, failing of him and his heirs. THE LORDS repelled the defence, and sustained her interest, notwithstanding that the discharge in the contract of marriage was so general; because she having other bonds of provision made to herself, and the time of the discharge, nor 15 years thereafter, she having no right in her person by virtue of the substitution but a naked right of apparençy *de quo non fuit cogitatum*, there being no mention thereof, or any assignation thereto, in case the right should fall to her by the death of Robert; and the discharge itself being granted only to the tutrix for her security, who could noways be liable to compt for that sum by virtue of the substitution; they found that it could not be included in the discharge of all bonds of provision.

*Fol. Dic. v. 1. p. 343. Gosford, MS. No 234. p. 94.*

No 27.

Renunciation of "all right and interest," found to extend only to all right the renouncer had, and not to any right he might succeed to.

1671. July 27. ROBERT BAILLIE *against* WILLIAM BAILLIE.

THE Laird of Lamingtoun having made a tailzie of his estate, wherein William Baillie, eldest son to his deceased eldest son, is in the first place, and to him is substituted Robert Baillie, Lamingtoun's second son, and the heirs of his body, reserving to the said Robert his liferent, from the fee of his heirs, in case they succeed; and, failing of Robert's heirs, to Mr William Baillie, Lamingtoun's brother's son; after Lamingtoun's death, there is a contract betwixt this Lamingtoun and Mr William Baillie on the one part, and Robert on the other, by which, Lamingtoun obliges himself to pay to Robert the sum of 600 merks during his life, and Robert renounces and dispones to Lamingtoun his portion-natural and bairns part of gear, and all bonds and provisions made to him by his father, and all right he has to the estate of Lamingtoun, or any part thereof, and that in favours of this Lamingtoun, and his good-sire's heirs-male, contained in his procuratory of resignation. Robert Baillie raises a declarator against Lamingtoun and Mr William Baillie, for declaring that this contract could not be extended to exclude him or his heirs from the right of tailzie in the estate of Lamingtoun, failing of this Laird and his heirs; and that it could