

APPROBATE AND REPROBATE.

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1566. July 14.      GEORGE WEIR *against* The L. of LIE.

ANENT the action to be pursued by George Weir against the L. of Lie, for delivering to the said George of his brother's son and pupil, to whom the said George was made tutor testamentar, and therefore the said George should have the keeping of the said pupil: It was *alleged*, by the said defender, that the said George should not have the keeping of the said pupil, because the Laird of Stonebyres, guidfir to the said pupil, obtained the gift, and the ward of the marriage of the lands of the said pupil, to him and his assigney, and made the Laird of Lie, defender, his assigney to the samen. It was *alleged*, by the said pursuer, that, long before the assignation, the Laird of Stonebyres made the said pupil assigney to the said ward and marriage. Whilk *allegeance* of the pursuer was given to his probation; and, to prove the whilk *allegeance*, the said George produced an nottar, to produce an instrument, to prove his intent. Whilk nottar produced an instrument, bearing in effect, that the said L. of Stonebyres made the said pupil assigney to his own ward and marriage; and thereafter it was contended, that the said Laird, of his gude, have the maintaining and guiding of the said pupil. It was *alleged*, by the said defender, that the instrument had proven his intent toward the keeping of the said pupil, by reason of the second clause contained in the said instrument. It was *alleged*, by the pursuer, that the second clause was false and feigned, and offered him to improve the samen, *omni modo quo ut de jure*. It was *alleged*, by the defender, that the said pursuer might not improve one part of the instrument, and affirm another part to be liell. Whilk *allegeance* of the defender was repelled by the LORDS; and found, by interlocutor, that the said pursuer might affirm one part of the said instrument to be true for proving his intent, and might improve another part of the same.

*Fol. Dic. v. 1. p. 48. Lethington, MS. p. 77.*

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1671. June 23.      LADY BALLAGAN *against* LORD DRUMLANRIG.

THE Lady Ballagan being, by her contract of marriage, provided to certain lands, and, amongst others, to the lands of Birks, the contract bears, that she accepts of the saids lands in full satisfaction of all further conjunct-fee, liferent, or terce: she was infest in the lands of Birks by her husband, but was not confirmed by the Lord Drumlanrig superior, of whom the lands held ward. The Lady

No 1.

Found that a party might lawfully approve and make use of one part of an instrument for proving his intent, and yet offer to improve another part of the same as false.

No 2.

A third party was allowed to approbate one clause of a writ in his favour, and reprobate the rest.

No 2.

pursues the tenants of Birks for mails and duties. Compearance is made for the Lord Drumlanrig, superior; who craves preference, because the lands are now, by ward, in his hands, by the death of the husband, and minority of the heir. And as for the lady's infeftment, it can have no effect against the ward, because it is not confirmed. It was *answered*, that the lands being ward, and less than the third part of the ward lands, holden of the Lord Drumlanrig, the Lady has right by law thereto, as her terce. It was *replied*, That, by her contract of marriage, she had accepted the lands provided therein, in satisfaction of her terce, which is the ordinary conception of a renunciation, as when a sum is accepted in satisfaction of any prior debt, it imports a renunciation and discharge of the prior debt, and an inhibition prior to the last bond will reduce any right thereupon: Neither can it be maintained as having an anterior cause by the former bonds; yea, any apprizing upon them would be void, because they are renounced. It was *answered* for the Lady, *1mo*, That there was here no formal renunciation or discharge of the terce, and the acceptance of lands for it, doth very well allow, that the land accepted may be bruik as terce, at least a terce of that land must be due, though no terce of other lands can be claimed: and albeit the clause in satisfaction, in personal rights, is commonly understood to renounce and extinguish the prior rights, unless they be reserved; yet it is not so in real rights; for if any person have many rights to lands, and doth thereafter accept a disposition of a part of the lands in satisfaction of all his interest, that does not renounce his former rights to that land, but he may defend himself with them all. So here, accepting of lands in satisfaction of a terce, does not renounce the terce, as to the lands accepted. *2do*, Albeit this clause could import the renouncing of all terce, that can never be extended to the benefit of the superior, nor can it be understood the contractor's mind, to exclude the wife from the terce, to make it accresce to the superior, in both their prejudices, because the husband, by the warrandice, must make out the jointure. *3tio*, Albeit the renunciation could be profitable to the superior, yet it being by this clause in the contract, the superior cannot question the lady's infeftment, which is the cause of the renunciation, but must adhere to the whole clause, *nam qui approbat non reprobat*. It was *answered*, That the common sense of this clause of acceptance does still import a full renunciation, neither can the intention or meaning of the parties import any thing, unless they had acted accordingly; for it had been easy for them to have said, but prejudice of the terce as to these lands; so that the terce being renounced, the renunciation is profitable to all parties having interest, because the right thereby renounced is simply extinct: Neither needs the superior approve the infeftment unconfirmed, by making use of the renunciation, for as there could be no pretence for that upon the naked clause, without any infeftment, so the meaning can only be, that if the clause had been perfected by a valid infeftment, he could not have quarrelled it.

THE LORDS preferred the superior, and found the acceptance a full renunciation of the terce, both as to the lands accepted and others. (*See Jus Tertii*.)

*Fol. Dic. v. I. p. 48. Stair, v. I. p. 739.*