

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 disponee; and it would be as unreasonable for the disponee 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.

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much as if their father had disposed part of his estate to them. And, if this was not sustained, it would be easy to evade that passive title altogether; for a father had no more to do but grant a bond to his apparent heir, who may transmit it to a third party, and he again adjudge; by which means neither the one nor the other could be reached.

In the *next* place, it is obvious, that the intention of parties was, That the Doctor should have the estate, and his nieces, who had a right thereto, should renounce; which implied a vendition or conveyance in his favours; therefore they ought to be liable to the extent of the sums received, which they may very properly be said to have received out of their father's fortune; seeing the onerous cause thereof was their renouncing to be heirs to him in their uncle's favours, whenever he should think proper to require them.

With regard to the decision quoted for the defenders, it does not apply to this case; in so far as the heirs of line there had no right whatsoever to their predecessor's estate, the same being specially provided to heirs-male; therefore, what was given to them was a mere gratuity. But here, as the daughters had an undoubted right, what they received was no gratuity, but a transaction, in consequence of which they gave up what they had a title to claim.

*Replied* for the daughters; It is a new doctrine to plead, That a bond of provision to a daughter was a *præceptio hereditatis*, or that she could be liable *in valorem*, without proving that payment had been made out of her father's effects; seeing it is only in that case the creditor's fund of payment would be impaired; therefore the pursuer has no title directly to attack them. If, indeed, the regular method is followed, he ought to constitute his debt against the apparent heirs, and thereon adjudge, whereby he will be entitled to compete with or challenge the rights of other creditors, who, if they set up these bonds in competition, he may insist to have them reduced or set aside.

As to the gloss put upon the Doctor's obligation, making it equal to an actual conveyance, there can be nothing more unnatural; seeing the plain meaning thereof, as appears from the whole contexture of it, is, that, in regard the daughters had got nothing out of their father's fortune, and that the Doctor was in possession of it for payment of debts above the value, he, by way of gratuity to his nieces, bound himself to relieve them of their father's debts, they always renouncing to be heirs, when charged by any of his creditors. Besides, there is no evidence that they ever accepted of the obligation, or upon that account were obliged to renounce their father's succession. Nor is the answer to the decision of any weight; as the *ratio decidendi* is allenarly founded on this principle, That the creditors were not prejudged by the renunciation, agreeable to which the defenders agree this question should be determined.

THE LORDS found the daughter not liable *in valorem* of the sums contained in their bonds of provision, in regard they got not payment thereof out of their father's estate.