

1739. February 1. BEIZLY against NAPIER.

WHERE an executor was nominated, with power (which the office implies) to intromit with the whole money and effects of the defunct, with this clause subjoined, ' And I hereby debar and seclude all others from any right or interest ' in my said executry ;' in respect of the secluding clause, which was considered as virtually the same as if the executor had been appointed universal legatary, it was found that the testament conveyed the whole effects to the executor.

No 6.

*Kilkerran, (LEGACY.) No 1. p. 326.*

1749. January 17. PRENTISES against MALCOLMS.

JOHN MALCOLM of Grange, by a post-nuptial contract of marriage betwixt him and Katharine Prentis his wife, narrating a former contract which was lost, settled on her the liferent of these lands ; afterwards he granted her an obligation for L. 1,000 Sterling ; providing that, by her acceptance thereof, she should be bound to renounce the provisions in the contract ; and after that he, with her consent, sold Grange, and bought the lands of Sillybabie, which he took to himself and spouse in conjunct fee and liferent.

On Mr Malcolm's death, his relict applied to a lawyer for advice, whether her taking infestment on the lands of Sillybabie would not exclude her from making choice of the L. 1,000, and having got an answer that it would not, applied to the seller for a precept, as the disposition to her husband and her wanted that clause ; took infestment, and shortly died, without having uplifted either any part of her liferent, or of the interest of the L. 1,000.

Her executors pursued Mr Malcolm's representatives for the L. 1,000 of which they pretended to make election ; pleading, that when *legatum optionis* is left, and the legatar does not chuse in his life, that faculty is competent to his heir, § 23. *Inst. De legatis*. And here the relict made no option, her infestment being only intended to give a preference, in case she should afterwards chuse the liferent, as her intention was clear from the advice she sought and received for that purpose.

*Answered,* Here is no *legatum optionis*, but she being vested in the right of liferent, a sum is given her, on condition of her renouncing it, which she did not ; on the contrary, the infestment was taking her to it.

"THE LORDS found, that the pursuers had no right to insist in this action."

Reporter, *Dun.*

Aet. *R. Craigie.*

Alt. *Lockhart.*

*Fol. Dic. v. 3. p. 307. D. Falconer, v. 2. No 42. p. 39.*

No 7.

A husband granted to his wife a liferent upon his estate, and afterwards granted to her an obligation for a certain sum, provided she should renounce the liferent. At the husband's death she not only did not renounce, but obtained herself infest in the liferent lands, imagining that she did not thereby preclude herself from chusing either to accept the liferent or the obligation. She died without receiving any part of the liferent or of the provision, but it was found, that by taking infestment she had made choice of the liferent.