

No 27. in terms of an obligation, to receive him a kindly tenant, and was not by words of the present time.

Act. ———.

Alt. *Hart.*Clerk, *Hay.**Durie, p. 474.*

1734. *January 17.* SINCLAIR *against* SINCLAIR.

No 28.

A PERSON who had right to lands by disposition, containing procuratory and precept, without infeftment, granted a personal obligation to convey the same to one, and thereafter the disposition was adjudged by another. The creditor in the personal obligation *pleaded* preference upon this *medium*, That an obligation to assign a personal right, is a virtual assignation, by which the common author was denuded before leading the adjudication, according to the brocard, that a personal conveyance denudes of a personal right. On the other hand, it was *pleaded*, That an obligation to grant a right may be equivalent to the right itself, where the question is with the obligant, but never can be in competition with third parties, especially where the right to be granted is a procuratory or precept, an obligation to grant which will be no warrant for infeftment. THE LORDS found, That the obligation to convey the disposition in question, did not transmit the same, but that it did remain in the debtor's person, subject to the posterior diligence of creditors.—*See APPENDIX.*

Fol. Dic. v. 2. p. 17.

1737. *January 26.*

No 29.

Sir JAMES DALRYMPLE of Hailes *against* HEBBURN of Binston.

IN the year 1629, the parson of Prestonhall granted a tack of teinds, expiring in February 1728. In the end of the tack there is an obligation upon the granter and his successors, parsons of the said parish, after the ish of the present tack, to renew the same in favour of the tacksman and his heirs, for the like number of years, and the like tack-duty. The question was, If this obligation to renew was real and good against singular successors in the right to the teinds, so as to defend the tacksman and his heirs against the patron, who obtained right to the said teinds, in virtue of the act 1693, before any possession could be had upon the said obligation? It was *pleaded* for the tacksman; The obligation to renew is of the nature of a prorogation, which is a real right, and this must have been the meaning of parties; for, considered as a personal obligation, it could have no effect beyond the granter's life, seeing he could not bind his successor in office. *Answered* for the patron, Had the lands fallen below the tack-duty, there was no obligation upon the tacksman to continue in possession, and pay the tack-duty, after expiration of the tack in 1728. This obligation, then, can never be

understood the same with a tack, or a prorogation of a tack, since it is not so much as a mutual contract.—THE LORDS found the obligation not effectual against a singular successor.—*See APPENDIX.*

Fol. Dic. v. 2. p. 17.

No 29.

1749. January 18.

MERCERS *against* MERCERS and JAMIESON.

THOMAS MERCER, Depute Commissary Clerk of Edinburgh, was thrice married, to Sarah Baird, Anna Smart, and Elizabeth Jamieson, by each of whom he had issue; and by his contract with Anna Smart, he became bound to settle 12,000 merks of his own money, together with 6000 merks received of tocher, on himself and spouse, in conjunct fee and liferent, and on the heirs and bairns of the marriage in fee, to whom also he bound the whole conquest; 'providing, that the bond of provision granted, or to be granted to Thomas, Laurence, and Sarah Mercers, his three children of his former marriage, for the sum of 6000 merks, bearing annualrent, was and should be free and forthcoming to the said three children, out of the first and readiest of what stock the said Thomas Mercer had already acquired, or should happen to acquire, and should be in satisfaction to them of all that they, or either of them, could ask, claim, or crave, by or through the decease of the said Thomas, their father, any manner of way, heritable or moveable, whensoever the same, at the pleasure of God, should happen, except there were no children procreated betwixt the said parties; and failing of them, or any of them, by decease, the deceiver's part to fall, accresce, or pertain to the bairn, one or more, to be procreated betwixt the said Thomas Mercer and the said Anna Smart, equally and proportionally amongst them.'

Jean, the only child of Anna Smart, was married, and, with concurrence of her husband, entered into a submission with her father, upon her claim on her mother's contract of marriage, and particularly on the substitution in her favour, to the shares of two of the children of the first marriage, deceased without issue; and a decret-arbitral was pronounced.

Thomas Mercer younger, predeceased his father, leaving children; and Thomas Mercer elder, left, at his death, considerable effects to Elizabeth Jamieson and her children; whereupon the children of Thomas younger pursued them for 2000 merks, provided to their father by the contract betwixt Thomas elder and Sarah Smart.

Answered, There is in that contract no obligation in their favour, but only a provision, that a bond granted or to be granted, should be free and forthcoming to them, and no such bond was ever granted.

THE LORD ORDINARY, 9th June 1748, "in consideration of the whole circumstances of the case, repelled the defences pleaded for the defenders, and found them liable to the pursuers for the principal sum and annualrents libelled."

No 30.

A contract of marriage, settling the conquest, with exception of a bond, granted or to be granted to the husband's children of a former marriage, found to give them a right, tho' no bond was ever granted.