

the same writer and witnesses, it was a part of the contract of alienation, unless they would ascribe the same to another cause, and that the bond being granted for the price of land, with an obligation of warrandice, the King's donatar or any having right from him were liable *in quantum* the gift might extend to for payment of those burdens which the bastard was obliged to purge, or otherwise that the defender have retention of the sums contained in the bond, seeing that the King or his donatar of *ultimus hæres* are liable to the defunct's debts, to whom the King succeeds as *ultimus hæres*, as well as any other heirs who succeed to their predecessors, and in that only there is a difference betwixt them, that the King or his donatar are only liable *secundum vires*, or the value of the estate.

No 60.

Gosford, MS. No 353. p. 171.

1673. February 7.

MURDOCH against DICK.

IN a contract of marriage betwixt Sir Andrew Dick and Bessie Morison his spouse, the said Bessie *nomine dotis* obliged herself to resign certain tenements in Edinburgh in favours of Sir Andrew and her in conjunct-fee, and the heirs of the marriage, which failing, to his heirs; but resignation was never made, nor Sir Andrew infest; Sir Andrew hath now infest William his son, as heir to his mother in the tenements, and hath disposed his right thereto, by the contract of marriage, to James Murdoch, who now pursues the said William Dick, as heir to his mother, to denude himself conform to a contract; who *alleged* that the obligation to denude being a mutual contract of marriage, his mother, if she were alive, or he as her heir, are not obliged to perform, until the mutual cause of the contract on the husband's part be performed, viz. the employing of the sums therein expressed for the heirs of the marriage, which is neither done, nor is prestable by the insolvency of Sir Andrew and his father Sir William the contractors. It was *answered* for the pursuer, That he being an assignee, and singular successor for an onerous cause, was not obliged to fulfil his cedent's obligations, nor in a capacity so to do; but the defender ought to pursue the contractors therefor. *2do*, Sir Andrew was not obliged to employ the sums, but Sir William his father, whom he represents not. It was *replied*, That whoever was obliged, the contract proceeding upon mutual causes, the one ought not to be performed, if the other fail; especially where it is neither performed nor doth appear to be prestable by diligence against the contractors.

THE LORDS found the defender not obliged as heir to denude himself of these tenements; unless the employment of the money for the heirs of the marriage were prestable.

Fol. Dic. v. 1. p. 598. Stair, v. 2. p. 169.

\* \* A similar decision was pronounced in the case of a donatar of escheat, 13th December 1672, Lord Lyon against Feuars of Balveny, No 12. p. 5076. *voce* GIFT OF ESCHEAT.

No 61.

An assignee was found not to have right to crave implement of a contract, without performing the mutual cause.