

No 28.

It was *objected* by the Creditors and Heir ; Were they insisting against the relict for performance, the defence would be good, that she was not bound, unless the prestations on the other side were also performed ; for such is the condition of mutual obligations : But the creditors have no claim against the relict, she has already made an ample conveyance to her husband by procuratories and precepts ; and having taken herself to her personal action against her husband, she stands upon the same footing with any other of his onerous creditors, and can plead preference only, if she is *prior* in diligence.

Answered for the pursuer ; The transaction stands still upon the footing of mutual obligations ; the subject of the disposition, is still in her person ; she remains proprietor ; her husband never having done any thing upon his disposition, to complete the conveyance ; and, as he never was invested, she never was divested. All, therefore, the pursuer craves, is to retain her own subject till she be secured in her liferent, which was the mutual cause.

“ THE LORDS found, That the disposition cannot be effectual to the heir or creditors, unless the pursuer’s liferent be made good to her.”

. The like was found betwixt Martin and Lothian, July 1724, where a wife having assigned to her husband in the contract of marriage, the sum of 4000 merks in name of to her ; the LORDS, “ in regard the prestations on the husband’s part were the mutual cause of the pursuer’s assigning to him her portion, and that the husband, by reason of his insolvency, was incapable to fulfil these prestations ; therefore found and declared, that the wife had a preference to all her husband’s creditors, in so far as concerned such part of her portion as remained unlifted, for her security.

Fol. Dic. v. 1. p. 597. Rem. Dec. v. 1. No 29. p. 61.

No 29.

1729. July 26.

DRUMMOND *against* CREDITORS OF DAES.

FAILURE of performance in a mutual contract, implies no irritancy, nor is any ground for voiding the contract, but only for damages ; and therefore the *mora* is still purgeable.—See APPENDIX.

Fol. Dic. v. 1. p. 595.

No 30.

1738. November 8.

HAMILTON *against* SMITH.

IN mutual contracts entered into between one person on one side, and two on the other, the one signing is not bound, unless the two on the other side both also sign, because the faith of both was followed ; unless it may appear from circumstances, that the faith only of one of the two, and who signs, was followed.