

No 5.

*Replied* for the defender, That it appeared from the contract, that the pursuer was obliged to denude himself of the fee in the most express terms, having bound himself 'to infest the wife and heir-male in liferent and fee of the lands; 'to grant, subscribe, and deliver to them sufficient charters containing precepts 'of sasine, upon his own proper charges; to warrant the infestments and lands 'to be good, sufficient, and free from all prior infestments, inhibitions, adjudications, &c. at all hands and against all deadly. He assigned them to the mails 'and duties of the lands after his own decease, and to the whole writs, evidents, 'and securities of them.' From the whole tenor of which contract it was plain that the father only reserved his liferent. To allege that in this case it could not properly be said that there was an heir, since the father was still alive, was nothing but a quibble; for the marriage being dissolved, and a son existing, it most certainly and undoubtedly appeared who was the heir-male of the marriage. That it was a duty incumbent on the grandfather to see his grandson get justice, and to prevent the dilapidation of the estate, before he could be obliged to perform his reciprocal part of the contract.

THE LORDS found, That Mr Sutherland ought to resign the lands in favour of himself, and, failing of him, in favour of his son *nominatim* in fee, with absolute warrandice and assignation to mails and duties, as mentioned in the contract, before payment of the remainder of the tocher.

Act. Alex. Hay.

Alt. Jo. Forbes.

Reporter, Lord Polton.

Clerk, Gibson.

*Edgar, p. 20.*

1731. July 16. DALZIEL of Binns *against* CREDITORS of FALCONER.

No 6.

A PURCHASER of a land estate having taken the disposition in name of a trustee, who granted back-bond, declaring the trust, and obliging himself to denude; and the trustee having thereafter advanced several sums to the purchaser, brought at last a declarator against the purchaser's creditors, concluding, that he was not bound to denude until he should be satisfied of his debts. The creditors *answered*, Whatever might be said, were they insisting upon the back-bond to oblige him to denude, the pursuer in the present situation of affairs, had no hold of the estate, to force payment: The creditors had the possession derived to them from their debtor; and, for a title, they wanted none from the pursuer: A simple declarator of trust, which the trustee could not oppose, was as good to them as a conveyance from the trustee. THE LORDS assoilzied from the declarator.—*See* APPENDIX.

*Fol. Dic. v. 1. p. 594.*