

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.

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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.

Thus, where a tack was set to a tenant and his son, while under age, the tack was found effectual to the father against the granter, though the son did not subscribe it; because the faith of the father only appeared to have been followed, and the putting in the son's name to have been rather a concession to the father, than a stipulation by the granter of the tack.

Kilkerran, (MUTUAL CONTRACT.) No 1. p. 355.

1745. *January 8.*

HUNTER of Lochrenny *against* HUNTERS.

WILLIAM HUNTER of Townhead left his estate to Elizabeth and Margaret his two daughters, encumbered with several adjudications; which being acquired by Mr James Murray, minister of the gospel at Penpont, he pursued a declarator of expiration of the legal, in which it was *pleaded* for the heiresses, That the acquisition was made in trust for them, and he had promised to communicate the eases; and both these points being referred to his oath, he deponed ' he had purchased the adjudications at the desire of the defender's mother, but ' had not promised to communicate the eases.'

THE LORDS, 27th June 1730, " Found the defender might redeem betwixt and Martinmas then come a year;" whereupon they made offer under form of instrument, 11th November 1731, of a sum of money, which was refused, as being alleged short of what was due.

In these circumstances, Andrew Hunter of Lochrenny purchased Mr Murray's right, and agreed with the defenders to give them a sum of money for their reversion, and to relieve them of the expenses incurred in defending against Mr Murray since November then last; and accordingly a contract was drawn up, and signed 15th February 1732, by Lochrenny and Margaret Hunter, but not by Elizabeth, though it was by her husband.

The defenders executed a new contract, 21st December 1732, in the terms of the former; and Lochrenny refusing to accede thereto, they, by instrument 19th December 1733, offered him a disposition of the lands, and required him to implement his part of the agreement, which he refused, for this reason, that they had not implemented their part, by granting a disposition within the time limited, viz. June 1. 1732.

The declarator of expiration of the legal went on at his instance, in which he being likely to fail, had recourse to the agreement, and *insisted*, That the defenders could not oppose him in making up his title, but were obliged to give him a disposition for the sum stipulated.

THE LORD ORDINARY found, " That an offer of a valid disposition to the lands having been made by the defenders to the pursuer, to supply the defects of a former disposition; and he having refused to accept the same, and proceeded afterwards in his declarator of expiration of the legal; that such offer by

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A person objecting to a mutual contract, failure of implement by the other party, and on that account refusing to abide by it, it was found he could not afterwards recur to it, or found upon it, as obligatory on the other party.