

No 31. the defenders, and refusal by the pursuer, did liberate the defenders from the transaction."

Pleaded in a reclaiming bill for Lochrenny; That the contract had been validly executed, and was therefore binding, there being two duplicates of the same instrument, one or other of which was duly signed by all parties; that it was corroborated by the instrument taken by the defenders against him, wherein they protest not to be free, but for damages through his not implement; that if he should prevail in his declarator, it might be proponed against him, and he would, notwithstanding any such decret, be obliged to pay the agreed sum, and therefore ought to have the benefit of the agreement.

2dly, The contract at least is probative of what is there set forth, to wit, that he acquired the adjudications at their sight, which implies their consent, and the natural consequence of this is, that either they should not impugn the adjudications, or if they take from him the land, they should refund him what he truly paid, which appears by the disposition from Mr Murray to him.

Answered; The contract was never binding, the first deed being not signed by Elizabeth Hunter, as the other was not by Lochrenny; the two papers were of different dates, and not duplicates of the same deed, but the one intended to supply the defect of the other, which he not being bound before would not accept of. The requisition was plainly intended to bring the matter to a certainty; and he having chosen to be quit of the bargain, so are the defenders.

2dly, The clause therein narrating his having at their sight acquired right to the adjudications, by disposition from Mr Murray, can be of no consequence, since their only concern was to receive the price of the reversion, and they were willing to let him word the ratification, which they were to give him of his rights, in as ample manner as he pleased; but this was only on the view of the contract's subsisting; and, if he will now affirm his first purchase from Mr Murray, to have been for the behoof of the defenders, he must load himself with the imputation of infidelity, in setting up the pretence of an expired legal against them.

THE LORDS adhered.

Alt. *A. Macdowall.*

Act. *Ferguson,*

Clerk, *Murray.*

D. Falconer, v. 1. p. 43.

No 32.

When one party becomes unable to perform, the other has an action to be declared free.

1747 December 9.

CREDITORS of JORDANHILL against The VISCOUNT of GARNOCK.

IN 1708, John, first Viscount of Garnock, who stood infeft in his estate under a strict entail made by his grandfather in 1662, but not registered in the register of tailzies, entered into a minute of agreement with Laurence Crawford of Jordanhill for disposing to him against Martinmas then next, the forty-shill.

ling land of Knightswood, part of the barony of Drumry in Dunbartonshire; for which cause Jordanhill became bound to pay 19 years purchase, and to thirle his lands of Jordanhill to the Viscount's mill of Drumry; but all this while the minute had not been implemented, the Viscount, and his son after him, continued to possess; and though Jordanhill, in the son's minority, obtained decree for implementing, and thereon adjudged, yet no payment or consignation was made of the price, nor did he thirle his lands to the mill of Drumry, which was now become impracticable, as the mill was sold away from the family for payment of debt, under authority of an act of Parliament.

In these circumstances, the Creditors of Jordanhill, now pursuing a sale of the estate of Jordanhill, comprehended the lands of Knightswood, being willing to pay the price; and the present Viscount of Garnock being made a party, repeated a reduction of the minute; and the question was, Whether action now lay against him for implement of the foresaid contract.

As to which, the LORDS were generally of opinion, that a purchaser by a minute not implemented in the seller's time, is neither purchaser nor creditor in the sense of the exception in the act 1685: That when the act 1685 saves creditors and purchasers, it means only creditors who have advanced their money, which they must either lose, or recover it out of the tailzied estate; and purchasers who have paid the price, and who therefore are in the same situation with creditors as to the price paid, but not purchasers who stand only *in nudis finibus contractus*, and who, though creditors in warrandice, are to lose no money when they do not prevail; for as to these, the obligation on the heir by the minute to implement cannot prevail over the obligation he is under by the tailzie not to implement; yet the LORDS, who avoid determining general points, when there is no necessity for it, did not specifically determine this point, being of opinion, that now after so long a time, and through Jordanhill's omission to implement his part, while it was practicable, there lay no action to his creditors against the Viscount, and therefore pronounced an interlocutor in the following general terms:

" Found, That the Creditors could not now insist for implement of the minute; and therefore sustained the reasons of reduction, and decerned."

Fol. Dic. v. 4. p. 16. Kilkerran, (MUTUAL CONTRACT.) No 4. p. 358.

* * D. Falconer reports this case:

SIR JOHN CRAWFURD of Kilbirny, 1662, entailed his estate, with irritant and resolute clauses, which were inserted in the sasine of Margaret his daughter and heir of tailzie, and she dying 1680, was succeeded by her son John, Viscount of Garnock, who was infeft 'secundum formam et tenorem priorum infeofamentorum dict. terrarum, et sub et ex provisionibus et conditionibus in iisdem contentis;' and 1708, obliged himself to dispoise the lands of Knightswood, part of the entailed estate, with real warrandice on the remainder, for

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19 years purchase and L. 10 Scots of feu-duty, and for the purchaser his thirling his estate of Jordanhill, &c. to the Viscount of Garnock's mill; and on this minute, Jordanhill took a decret against Garnock, and thereupon adjudged, but without paying any part of the price, nor did he ever enter on the possession of the lands.

A process was brought by the Creditors of John, to have it found their debts might be recovered out of the estate, notwithstanding its being entailed, as the irritant and resolute clauses were not contained in his infestment; and a decret was obtained of that import 1736, affirmed by the House of Peers 1740, whereupon the heir of tailzie obtained an act of Parliament for selling part of the estate.

Jordanhill becoming bankrupt, his Creditors raised a sale of his estate, comprehending therein the lands of Knightswood; whereupon the Viscount of Garnock insisted in a reduction of the minute, as being entered into by an heir of tailzie, who was incapable to dispone.

Answered; By act of Parliament 1685, the deeds of heirs of tailzie are effectual in favour of onerous creditors, unless the clauses irritant be inserted in their infestments, and the creditors do not only insist upon the minute, but upon their author's adjudication, as the statute is expressly in favour of apprisers and adjudgers, and other singular successors.

Replied; Jordanhill is not entitled to the privileges of an onerous creditor, as he did not implement the minute, by paying the price; neither can the adjudication better the case, which, if adverted to, ought not to have passed without payment or consignment of the money, especially considering the Viscount has, by authority of an act of Parliament, sold his mill before this process; so that the thirling the estate of Jordanhill thereto, which was part of the agreed price, cannot now be implemented to his benefit.

THE LORDS found the pursuer could not now be compelled to fulfil the minute, and therefore sustained the reasons of reduction.

Reporter, *Tinwald.*Act. *W. Grant.*Alt. *Lockhart.*Clerk, *Hall.**D. Falconer, v. 1. No 220. p. 304.*

No 33.

A marriage contract was extended, binding the bridegroom, with a cautioner, to repay the tocher to the wife, in case of her

1748. July 15.

JOHNSTON *against* ARMSTRONG.

By contract of marriage betwixt Archibald Johnston in Carnwath and Margaret Armstrong, sister to Christopher Armstrong in Waterhead, the said Christopher, and Christopher Armstrong of Howdale, became bound to pay to the intended husband L. 10 Sterling, with interest during not payment, in name of tocher, which he became bound to repay to the wife, in case of her surviving him; and it being agreed that he should procure George Johnston of Whiteknow to bind as cautioner for him in this prestation, the contract was extended