

1671. June 20.

ALEXANDER ALEXANDER *against* LORD SALTOUN.

No 60.

A donatar of bastardy pursuing for the price of lands sold by the defunct, was found obliged to implement the mutual cause.

THE Earl of Haddington having obtained a gift of bastardy, and *ultimus hæres*, of umquhile William Gray, Provost of Aberdeen, did assign the same to Alexander Alexander, with a process thereupon, against the Lord Saltoun, for payment of 5000 merks due by him by bond, to the said umquhile William Gray. The defender *alleged*, That this bond being granted for the price of land bought by him for the bastard, and of the same date with the contract of alienation thereof; there was a back-bond also of the same date, by which the said William Gray was not only obliged in warrandice, but also to procure himself infest, holden of the Earl of Mar, to purge an inhibition at the instance of — Ramsay, and to procure a right of an apprising, at the instance of the Lord Newbyth. The pursuer *answered*, That the King or his donatar was not obliged to fulfil these obligations of the bastard, which were not liquid nor special. It was *answered*, That the gift of bastardy, or *ultimus hæres*, not falling to the King by forfeiture, or any delinquence, but by deficiency of the bastard's heir, the donatar was in no better case, as to the fulfilling of these obligations, than the bastard or his heir would be, if they were pursuing upon the bond, who could not seek payment till the obligations in the alienation, or back-bond, which were the causes of this bond, were fulfilled.

Which the LORDS found relevant, as to the special obligations of obtaining infestment, and purging the inhibition and apprising, but not as to the general obligation of warrandice, wherein no distress was alleged.

Fol. Dic. v. 1. p. 598. Stair, v. 1. p. 735.

* * * Gosford reports this case :

— as having right by assignation from the Earl of Haddington, who had a gift of *ultimus hæres* and bastardy of William Gray, Bailie of Aberdeen, and thereby to a bond granted to the said William by the Lord Saltoun, for the sum of , did pursue for payment of the sum contained in the bond. It was *alleged* for the defender that he ought to have compensation or retention of that sum, because the bond being granted in contemplation of a disposition of lands, which the said William was obliged to warrant, and to purge all real burdens, the said lands were affected with infestments and inhibitions equivalent to the said sum. It was *replied*, That the bond pursued upon was for borrowed money, and could not be compensated upon any obligation of warrandice which was not liquid, neither could that warrandice meet the King's donatar, or pursuer, who had right from him, where the debt was neither constituted against the defunct bastard, nor made liquid. THE LORDS did sustain the defence, notwithstanding of the reply; and found, that the bond being of that same date with the disposition of the land, and written and subscribed by

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.