

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

No 30.

No 31.

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.

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.