

his tutors or curators; and it is only subscribed by his mother as tutrix, albeit there were five tutors nominated, whereof she is but one, and there was a *quorum* of them; so that unless they had all accepted, the tutory is void, and the acceptance of one is not sufficient; neither did the charger at the time of his offer instruct that the other tutor had refused. It was *duplicated*, That though many tutors be nominated with a *quorum*, yet any of them accepting is tutor, and preferable to tutors of law, or dative; because it is always presumed to be the will of the defunct to entrust any of the tutors he chuses, rather than any other; neither did the suspender at the time of the offer make any such objection, or else the charger would have cleared the same.

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THE LORDS found that the requisition of performance at the term in the minute, did not annul the minute, but that performance thereafter without detriment was sufficient, and found that one tutor accepting was sufficient, albeit there were more nominated with a *quorum*, seeing the rest refused; and having taken inspection of the disposition, they found the first sheet clearer and newer than the rest; but would not sustain the same 'for sufficient probation, but found it relevant to be proved by the charger's oath that the sheet was changed, to infer the renovation of the disposition, and that so the damage of the land lying waste should lie upon the charger.

Fol. Dic. v. 1. p. 595. Stair, v. 2. p. 414.

1676. November 28.

CARMICHAEL against DEMPSTER.

CARMICHAEL, younger of Balmedie, having married the heritrix of Balbogie, she and her husband by contract with Dempster of Pitliver, dispone the estate of Balbogie to Pitliver, and both the husband and his father are obliged to cause her ratify the contract at her majority. Pitliver grants a bond to young Balmedie of L. 1000 Sterling, as a part of the price, which he assigns to his father, and he thereupon charges Pitliver, who gave in a bill of suspension, and the cause being ordained to be discussed upon the bill, Pitliver insisted on these reasons; *imo*, That this assignation charged on, was either granted or delivered on death-bed, and therefore could not secure the suspender to pay. It was *answered*, Death-bed is only a privilege competent to heirs, and it is not competent to the debtor who must pay, and will be liberated by payment made *bona fide*, though the assignation should be reduced. It was *replied*, That it being commonly known to the debtor, and the country, that the assignation was on death-bed, and if that were referred to his oath, he could not refuse it, and having now proponed it, he could not pretend payment *bona fide*; and for verifying of his reason, he did at first offer to prove it by the charger's oath. But now by a bill upon the 24th instant, he offered to prove it by witnesses, that the assignation was in the defunct's hands when he died. The charger *answered*, That he was tutor to the heir, for whom he did concur, and from whom

No 24.

The reciprocal obligations in a mutual contract having different terms of performance, the performance of the one was not found suspended until performance of the other.

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the suspender only could be in hazard: The suspender *answered*, That the heir was not entered, but if the charger would enter, and concur for him, he would pass from that reason.

THE LORDS sustained the reason on death-bed in favours of the debtor, and found that the assignation being in the son's hands on death-bed, amongst persons so conjunct as father and son, it was not sufficient to infer the not delivery thereof; and therefore found it only probable *scripto vel juramento*, and would not sustain the tutor's concurrence, unless he entered the apparent heir.

The suspender further *alleged*, That this bond being granted for a part of the price of the land, the disposition whereof is the mutual cause of the contract, the assignee cannot urge payment of the price, till the mutual cause be performed, viz. the ratification of the heritrix, who may reduce the disposition upon minority; and if the child die unentered, Balmedie being but a liferent-er, the disposition will be evacuated without any recourse upon warrandice. It was *answered*, That though the cedent were charged, yet he could not be suspended till the heritrix ratify, as being a part of the mutual cause; for though in mutual contracts, both parts should be performed alike, yet where the obligations on the other part are without delay, and upon the other part bear expressly, a term or delay, it must necessarily import a passing from that exception, as here the bond is presently payable; but the obligation to cause the heritrix ratify after her majority, is not performable till her majority.

THE LORDS found the answer relevant, that the mutual obligation having an express term not come, could not stop the execution of the bond, which is presently payable.

Fol. Dic. v. 1. p. 595. Stair, v. 2. p. 469.

1677. July 13.

The LADY DAIRSIE *against* The LAIRD and His CREDITORS.

No 25.
A husband and wife being, by a contract, each entitled to an alimentary provision, that provided to the wife was found to belong to her exclusively, although the husband's, by mismanagement of the estate, had failed.

BY contract betwixt the Laird and Lady Dairsie and their eldest son, the estate was disposed to the eldest son, with the burden of the debts, and with an alimentary annuity to the Laird, and another to the Lady, who had lived for some time a-part; whereupon the son was infest, and for implement of his obligation to his mother, he procured an assignation to her in liferent to the annualrent of 17000 merks from the Earl of Southesk, and to himself in fee; whereupon Southesk gives in a bill of suspension on double pointing; and the cause being ordained to be discussed on the bill, it was *alleged* for the Laird, That this assignation being granted in favours of his wife, did accresce to him *jure mariti*. It was *answered*, *imo*, That albeit all moveable rights fall to the husband *jure mariti*, except abuilziements, yet it hath this exception, that if a third party do freely provide any thing to a wife for her aliment, excluding her