

the mutual cause ceased where there was a legal bar and impediment to the performance, by an expired apprising.

The Lords considered who was in possession of the lands ; and, finding they were liferented, they repelled Clairden's defence and reason of reduction : and found him liable, unless he instructed some distress, or preferable right, totally exclusive of his ; or that the superior had obtained certification against their writs ; or that there was some plain nullity or defect in his wife's right ; in any of which cases they would allow him to be further heard.

It was also ALLEGED,—That James Sinclair's author being no party-contractor, he could not found on this clause. But the Lords found, That *acquirere possumus etiam per alios ; et, ubi id agitur*, the parties-contractors can neither alter, discharge, nor innovate the same. *Vol. II. Page 144.*

1702. February 11. SAMUEL MACLELLAN against THOMSON of DENINNO.

SAMUEL Maclellan, merchant in Edinburgh, against Thomson of Deninno. Samuel, as executor to Patrick Thomson, pursued James Thomson, brother to the said Patrick, for payment of £18,678, conform to an account ; and he having deceased *medio tempore*, and Patrick Thomson, his nephew, succeeding to him in the lands of Deninno, Samuel transfers the process against him for constituting the debt ; and he being forced to flee out of Scotland, on account of a slaughter, Colonel Erskine takes the gift of his escheat for the behoof of his children, and of Margaret Lumisden his lady, and compares in the process, craving the account may be restricted to what James Thomson had in his lifetime upon oath acknowledged.

ANSWERED,—You have no interest to stop the constitution of the debt ; for the defender, being conscious of the justice thereof, has, by a docket at the foot of the account, acknowledged the same, and consented that decret pass against him therefore, and discharges any advocates to appear in the contrary.

REPLIED,—The donatar has sufficient interest, if he see unjust debts accumulate to burden the subject of the escheat, to appear and oppose the same ; and there was never any more circumvened than this poor man, to the ruin both of himself, his lady, and children : for, besides his signing to the whole account, whereof many of the articles are false, he has also given a bond for 40,000 merks to Samuel Maclellan, his brother-in-law, whereupon to adjudge his estate ; and there were such evidences of his facility, prodigality, and levity, that there were sufficient grounds for the Lords judicially to interdict him ; which not only may be done upon a process of declarator and cognition, but likewise *incidenter* ; where it arises in another process, the Lords have done it *ex proprio motu*.

It was thought, where a man confessed a debt under his hand, and renounced all defences, discharging any to appear in the contrary, the Lords could not refuse a decret, and that constitutions of debts could not be stopt on pretence of circumvention and imposition ; therefore they decerned here, but declared they would reserve all *contra executionem*, and take these grounds then to consideration ; and, if they saw cause, they would grant a judicial interdiction.

*Vol. II. Page 145.*