

No 26.

a process at the other party's instance against him, and that the other party was at liberty to pass from the decree-arbitral in his turn.

Fol. Dic. v. I. p. 597. Stair.

. This case is No 3. p. 607. *voce* APPROBATE and REPROBATE.

1711. July 19.

Dame HELINOR NICOLSON Lady GREENOCK *against* Sir JOHN SCHAW of Greenock.

No 27.

A bond granted by a husband to his wife, in respect of her disposing to their son the fee of her heritage found null *causa data non secuta*, because the disposition never being delivered nor judicially ratified, appeared cancelled in her custody after her husband's decease, and she was presumed to have cancelled it, altho' she offered to renew the disposition, which her son declined to accept of.

THE deceased Sir John Schaw of Greenock by his bond, August 19. 1700, narrating, That in respect Dame Helinor Nicolson his Lady, had, by a disposition of the same date, disposed to their son (now Sir John Schaw) the fee of her third part of the lands of Carnock and Plain; therefore he obliged him, his heirs and successors, to pay to her 8000 merks yearly during her lifetime, from the first Whitsunday or Martinmas after his decease; there was such a disposition signed by the Lady, with consent of her husband, in favours of their said son, dispensing with the not delivery thereof, in case the same should be found in the hands of either of them at their decease.

The Lady, after her husband's death, pursued Sir John Schaw her son, as heir to his father, to pay the 8000 merks for several years bygone, and in time coming during her lifetime.

Alleged for the defender; His father's obligation for the life-rent-annuity of 8000 merks, is of the nature of a mutual contract betwixt him and the pursuer, wherein she was to grant a valid disposition of the fee of a third part of Carnock and Plain to the defender, which appears not done; at least it doth not appear to have been either judicially ratified by her (which she was obliged to have done in the terms thereof), or to have been delivered to the defender; especially considering, that the clause dispensing with the not delivery, if found lying by either the pursuer or her husband, implies a power of resiling in either of them; and that the disposition was not delivered at the date thereof, and the not delivery dispensed with only in the event of its being found in the hands of either at their decease entire and uncanceled; again, the disposition appeared cancelled in the pursuer's custody since her husband's decease, whence law presumes that she cancelled it; because she might lawfully, and it was in her power to do it; consequently, the defender's father's bond is null, being granted *ob causam quæ secuta non est*, July 26. 1665, Brotherstones *contra* Ogle and Orrocks, *voce* PRESUMPTION; December 23. 1684, Lord Huntingtour *contra* Earl Lauderdale, No 42. p. 6387.

Replied for the pursuer; Her husband's bond is a clear obligation for oneous causes performed under no suspensive provision or condition, and doth imply nothing to be unperformed by the pursuer; it is no more a mutual oblige-

ment than a bond acknowledging the receipt of borrowed money, and obliging the granter to repay, can be called a mutual obligation. The disposition's being found cancelled in the Lady's hand, is no ground to presume that she did it; seeing that were to presume a delinquency contrary to the common rule of law. *2do*, The pursuer's cancelling the disposition, could not infer a nullity of the bargain, or restitution against the bond, but only a ground for reparation and damage if any were; which cannot be in this case, where the pursuer is willing and able to renew the cancelled disposition, and her condition is no worse now than when she granted the first.

Duplied for the defender; The pursuer, who hath done deeds inconsistent with the bond pursued on, cannot recur to it, but the defender must have the benefit to repudiate in his turn, 21st December 1680, Anderson *contra* Bruce, No 26. p. 9165. And the disposition, which was the onerous cause of the bond, being cancelled without the defender's fault, can never be made up without a new bargain, which he utterly declines to enter into.

THE LORDS found, That the pursuer's disposition of the fee of her third part of the lands of Carnock and Plain, which is the onerous cause of the bond pursued on, being found cancelled in her hands after her husband's decease and never ratified, it is presumed that she cancelled it; and therefore found that the bond is null *causa data non secuta*.

Fol. Dic. v. 4. p. 597. Forbes, p. 530.

*** See Shearer against Somerville, No 21. p. 4892., *voce* FRAUD.

1721. December.

MARION SELKRIG *against* JOHN SELKRIG her Son, and the CREDITORS of her Defunct Husband.

WILLIAM SELKRIG, in his contract of marriage with Marion Selkrig, obliges himself in contemplation of the future marriage, to provide the sum of 20,000 merks, and take the security thereof to himself and his future spouse in life-rent, and the children of the marriage in fee; on the other part, Marion Selkrig, in name of tocher-good, assigns and disposes to her future husband, a bond of provision, together with some houses in Glasgow, absolutely and irredeemably; and the disposition in the contract of marriage contains procuratory of resignation and precept of sasine, but which was never executed, nor infestment taken by the husband. The husband afterwards dying insolvent, and never having implemented his part of the contract, Marion Selkrig, the relict, insisted in a declarator against John Selkrig her son, and her husband's creditors, 'That her disposition contained in the contract of marriage cannot be effectual to her husband's heir or creditors, unless the mutual cause, viz. her life-rent provision be made good to her.'

No 28.

If, in consequence of a mutual obligation, a person disposes with a procuratory and precept, process is competent to stop infestment and obtain back the disposition, when the other party becomes insolvent without power to implement.