

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.

No 28.

It was *objected* by the Creditors and Heir ; Were they insisting against the relict for performance, the defence would be good, that she was not bound, unless the prestations on the other side were also performed ; for such is the condition of mutual obligations : But the creditors have no claim against the relict, she has already made an ample conveyance to her husband by procuratories and precepts ; and having taken herself to her personal action against her husband, she stands upon the same footing with any other of his onerous creditors, and can plead preference only, if she is *prior* in diligence.

Answered for the pursuer ; The transaction stands still upon the footing of mutual obligations ; the subject of the disposition, is still in her person ; she remains proprietor ; her husband never having done any thing upon his disposition, to complete the conveyance ; and, as he never was invested, she never was divested. All, therefore, the pursuer craves, is to retain her own subject till she be secured in her liferent, which was the mutual cause.

“ THE LORDS found, That the disposition cannot be effectual to the heir or creditors, unless the pursuer’s liferent be made good to her.”

. The like was found betwixt Martin and Lothian, July 1724, where a wife having assigned to her husband in the contract of marriage, the sum of 4000 merks in name of to her ; the LORDS, “ in regard the prestations on the husband’s part were the mutual cause of the pursuer’s assigning to him her portion, and that the husband, by reason of his insolvency, was incapable to fulfil these prestations ; therefore found and declared, that the wife had a preference to all her husband’s creditors, in so far as concerned such part of her portion as remained unlifted, for her security.

Fol. Dic. v. 1. p. 597. Rem. Dec. v. 1. No 29. p. 61.

No 29.

1729. July 26.

DRUMMOND *against* CREDITORS OF DAES.

FAILURE of performance in a mutual contract, implies no irritancy, nor is any ground for voiding the contract, but only for damages ; and therefore the *mora* is still purgeable.—See APPENDIX.

Fol. Dic. v. 1. p. 595.

No 30.

1738. November 8.

HAMILTON *against* SMITH.

IN mutual contracts entered into between one person on one side, and two on the other, the one signing is not bound, unless the two on the other side both also sign, because the faith of both was followed ; unless it may appear from circumstances, that the faith only of one of the two, and who signs, was followed.