

can demand implement of the other, till he himself perform or fulfill
 Stair Lib. 3. Tit. 10. S. 16. Thus an obligation to dispose ^{of a certain piece} of a
 mutual Contract, was found not to carry the Right of the Tithe in Favour
 of a singular Successor, unless he would either pay the Price, or prove it to
 be paid; notwithstanding of 40 Years Possession by Virtue of the Contract
 9 Feb. 1704 E. Galloway contra Mc Guffock of Ruoco. Because an obli-
 gation to dispose is no Disposition, nor can make a Title for Prescription,
 more than a Bond to grant a Charter and Seisin, can supply these: The
 same being neither a Decree nor a complete Right. Further, whoever
 founds upon a mutual Contract either by Way of Action or Exception,
 must say that that the counter Part of it is satisfied. But Payment
 of the Price in this case not being instructed the Party in whose Fa-
 vour the ~~original~~ obligation to dispose is conceived cannot exclude the
 grantor or any representing him, upon the common Ground of frustra-
 petis quod mox est restitutus. It was alleged for the Person having Right
 to the obligation to dispose, that s. He as a singular Successor was not
 bound for the Price, which was his Author's Debt 2. The Party oblig-
 ed to dispose assigned the Price, and the Assigny pursued for it which argu-
 ed that the Cedent looked upon himself as deprived of the Right of the Tithe
 3. The obligation to pay the Price was prescribed, and Prescription had
 the same Effect as Payment 4. If the obligation to dispose had been
 contracted by the Grantor & divesting himself of the Tithe in Favour
 of another the Contract clothed with Possession would have excluded the
 cedent, who could not have founded upon the not Payment of the Price,
 being jus tertij to him. But all these Defences were repelled. Because
 s. Qui agit ex contractu debet prius implere contractum. 2. It is not a
 Way of Contract has two Remedies, viz. Either they can pursue for the
 Price, or recover the Thing it self by Virtue of their own Title, unless
 the other can make appear, that the Price is paid, or Security accepted for
 it. 3. One Party's obligation in a mutual Contract cannot prescribe, while
 the other doth stand. For as an Exception cannot prescribe so long as
 the Action is current: So neither can a Reply so long as the Exception
 is competent. The Power of disposing and Interest to receive the Price
 as well as the Right of the Tithe and obligation to pay, might indeed
 divide, the one going to the Heir, and the other to Executors: But that is not
 sufficient to make them separately prescribe, or the one prescribe and the
 other subsist. For Parts of a Contract are thus far inseparably
 connected that implement of the one cannot be sought without perfor-
 mance of the other. Where a Husband stands obliged in his Contract of
 Marriage to provide his Wife to a certain jointure, and she on the other
 Part assigns to him her Portion, or disposes to him her Land wherein
 he

he never took Infeftment, and the Husband hath not performed the
 Prestation on his Part, and by his Insolvency be incapable to do it: The Dis-
 position cannot be made effectual to the Husband's Heir or Creditors, unless
 the mutual Cause viz. the Wife's Assignent Provision be made good to her
 Decemb. 1725 Maryon Selkraig contra John Selkraig her Son and
 the Creditors of her Husband. And she will have Preference to all her
 Husband's Creditors for her Security in so far as concerns such Part of
 her Portion as remains unimplicated July 1724 Martin contra Lathian
 Year the Defender in an Action of Forthcoming having deponed deponente
 adversarie, that Part of a Sum promised by him in Tack to the Pursuer's
 Debtor was unpaid, but the said Debtor promised to secure the Tack with
 so much of his own Money upon Land to be assigned by his Wife the De-
 ponent's Daughter: The Lords found the Deponent not obliged to make
 what was resting of the Tack forthcoming, but might retain it till
 his Daughter was secured in her Assignent according to the Terms of the Mar-
 riage Agreement 2 Feb. 1724 Dagan contra Dalziel. In Respect his
 Data the only Mean of Proof to the Arrestor, being so intrinsically quali-
 fied, was considered as a Minute of a Contract of Marriage. And in the Case
 of such mutual Obligations, as the Performance of the one grows out of Per-
 formance of the other: So the ones Non Performance affords an Excep-
 tion and a ground of Retention to the other Party ready to perform, a-
 gainst him who fails or craws back 10 January 1682 Creditors of Selker
 contra Campour 10 January 1704 Hutcheson contra Creditors and Heir of
 her Son in Law. The obligation of one of the Parties in a mutual Contract
 being impossible, the other Party was declared free from performing his
 Part, albeit in Lieu of what was impossible in forma specifica, the Equi-
 valent was offered 20 July 1675 Maitland contra L. Gright. Because the
 Breve Locum facti impossibilis supplet damnum et interesse, holds
 not in mutual Contracts but only in simple Obligations. Nor is an Assigny
 charging or pursuing upon a mutual Contract in any better Case than
 his Cedent would have been cupis pure utitur whom he claims under
 Stair Lib. For if the Cedent's Backbond apart would affect the Assigny,
 much more should his obligation in the same Contract do it. In a Contract
 of Marriage an Heir's having obliged herself to dispose Lands to her Hus-
 band his Heirs and Assignys nomine dotis, that obligation was found not to
 take Effect in Favour of the Husband's Assigny for an onerous Cause, unless
 it did appear that the mutual Cause of the Contract on the Part of the Husband
 was performed, or prestable 7 Feb. 1673. Dieh contra Murdoch. And the Do-
 natary of Escheat, was found to have Right to the Price of Lands due by
 a Contract, albeit the Debtor had not performed his Part of the Contract Hope
 Maj. Pratt. Tit. Cessio honor. Balfour contra Futhie where there was No-
 thing alleged of the Insolvency of the Cedent: Yet a Donatary pursuing
 for the Price of Lands was found not to have Access thereto, till the Feuars
 obtained