

1670. July 13.

ANNA RAITH and JOHN WAUCHOPE of Edmonstone *against* WOLMET and MAJOR BIGGAR.

No 21.
Where one party becomes incapable to perform, the other may have it declared, that he ought to be free of the bargain.

IN *anno* 1641, there was a minute of contract betwixt umquhile Wolmet, James, and Mr James Raiths of Edmonstone, and their spouses, whereby a marriage was contracted betwixt James Edmonstone, Wolmet's son, and Mr James Raith's eldest daughter, and in case of the decease of either of these two, the next son and next daughter to make a perpetual friendship; in contemplation of which marriage, the said James Raith, and Mr James Raith his son, were obliged to pay 10,000 pounds of portion to Wolmet himself, and to lend another sum, for redeeming of a wadset upon the estate, which being done, Wolmet was obliged to infest his son, and to provide 800 merks of jointure to his good-daughter. Raith's eldest daughter dies, and the said James Edmonstone, Wolmet's eldest son, marries Raith's second daughter, but there was no contract or consent of her parents, and they having lived seven years together, James died without children, and Raith's third daughter is married to John Wauchope, Niddry's son, and Raith's estate provided to her; whereupon they, to liberate Raith's heirs and estate of the L. 10,000 contained in the contract, raised declarator, that the minute was null and void, on two grounds; *1mo*, Because there was no marriage following by consent of the parents, conform to the minute; *2do*, Because Raith's obligation to pay the tocher, was to Wolmet himself, and for his mutual obligation, of infesting his son, and providing a jointure, which neither was, nor can be done, Major Biggar now standing in the full right of Wolmet's estate, and no person to represent Wolmet. The defenders *alleged* absolutor from the *first* ground, because there was a marriage conform to the minute; and albeit Raith did not consent, yet being obliged, he had no just ground to dissent; and to the *second* ground, seeing there was no clause irritant in the minute, albeit the obligations therein were mutual causes of each other, it might be declared, that neither party should be obliged to fulfil, till the other fulfilled their part, but could not annul the minute.

THE LORDS found, that seeing Wolmet was in no capacity to perform his part, that the heirs and estate of Raith were free of their part, providing that the pursuer who is assignee to the liferent right of the said James Edmonstone his wife should discharge the said liferent, and declare that it should never burden Wolmet's heirs or estate.

Fol. Dic. v. p. 1. 595. Stair, v. 1. p. 694.

* * Gosford reports this case :

IN a declarator of nullity, pursued at the said Anna and her husband's instance, against Major Biggar and his wife, and the rest of the daughters of Wolmet, to hear and see it found, that a minute of contract of marriage, made in *anno* 1641 was void and null *super hoc medio*, that by the said minute the said Anna Raith's good-sire was bound to pay in tocher the sum of L. 10,000 to Wolmet's eldest son, who should be married with the eldest daughter of James Edmonstone, fiar of Edmonstone, or, failing of her by decease, to any other of his daughters ; as likewise to advance upon good security other L. 10,000 for relief of a wadset granted to James Loch, and all other real burdens upon the estate, to the effect that Edmonstone's daughter, who was to be married, and the heirs of the marriage, might be provided to the estate free of all burden ; which never having been performed in Wolmet and Edmonstone's lifetime, and it being now imprestable by the heirs of Wolmet, whose estate was settled in the person of Major Biggar, as a singular successor, and that Wolmet's son did not marry that daughter, who was first designed, but on the contrary, without the father or good-sire's consent, did take away another daughter, and was clandestinely married ;—it was *alleged* by the defenders, That the minute of contract, besides the provisions of tocher to be paid by Edmonstone, and of the fee of the estate of Wolmet to be secured to his eldest son and his wife, and the heirs of the marriage, the said minute contained likewise provisions made by Wolmet with consent of his Lady to the rest of the children besides the heir, wherein the pursuer was not concerned, the minute could not be declared null at the pursuer's instance, as to the whole heads and clauses thereof. THE LORDS found the defence relevant, and refused to declare the minute null in itself, but decerned only that it should not be obligatory against the heirs of Edmonstone, as to any obligation upon his part, seeing Wolmet and his heirs neither had, nor were now in a possibility to perform the conditions on their part, and so found that Edmonstone's obligation was only null, as being *causa data causa non secuta*.

Gosford, MS. No 301. p. 131.

1671. June 14.

LADY WOOLMET and DANKEITH her Spouse *against* MAJOR BIGGAR.

JEAN DOUGLAS Lady Woolmet being by her contract of marriage infest in the half of the lands of Woolmet, did with her husband consent to a wadset of the whole lands for 28,000 merks, wherein there is a back-back setting the lands and coal to her husband and her the longest liver of them two for pay-

No 22.

Effects of mutual prestations in a contract of marriage, debated, but not determined.