No 4. profitable in law; likeas thereafter all the parties authors of the said disposition, and receivers of the bond, containing the said clause, had discharged the same, and all the whole heads thereof, to the pursuer, except the L. Moriston, whereby the same became extinct, as if it had never been made, seeing she was not contractor; which reply was repelled; for the LORDS found, that seeing the said bond was registrated, and so made public, the same could not thereafter validly be discharged without the consent, and express deed of that person in whose favours the clause was conceived; likeas the whole persons to whom the same was made, and who disponed the teinds to the pursuer had not at all discharged the same; for if it might have been validly discharged wihtout consent of the third person, (as it was not found) yet all their consents behoved to have been given thereto; and seeing Moriston's consent was not adhibited, who survived long after the discharge, and which is now impossible to be had, he being now deceased, therefore the discharge was not respected, to derogate to the said third person.

Act. *Stuart & Nicolson.* Alt. *Advocatus & Belches.* Clerk, *Gibson.*
Durie, p. 720.

1676. *June* 8. IRVING *against* FORBES.

No 5. Found in conformity with Wood against Moncur, No 1. p. 7719.

—— IRVING pursues the Laird of Tolquhon for payment of a bond granted by Tolquhon, his godsire, as principal, William Forbes, his father, who was then young Laird of Tolquhon, and another Forbes, as cautioners; he insisted first against the cautioner, who is alive, who *alleged* absolvitor, because the pursuer had granted a bond in favours of Irving of Fedderet, wherein he had declared this cautioner free of this bond. It was *answered*, 1*mo*, That the defender had no right by that clauss, unless the bond had been delivered to him, or at least accepted by Fedderet; and it was offered to be proved by Fedderet's oath, and the witnesses insert, that this bond was never accepted by Fedderet, nor delivered to him, nor to any by his warrant. The pursuer *replied*, That this clause being in his favours, though a third party, it could only be taken away by his oath, for no man is obliged to prove the delivery or acceptance of a writ, if it be out of the subscriber's hand, unless the contrary be proved by his oath in whose favours the writ is.

THE LORDS found that this clause, though in a writ betwixt two other parties, was valid in favours of this third party, and that the not delivery or acceptance thereof, was only probable by his oath.

The pursuer did next insist against Tolquhon as representing his father, the other cautioner, who *alleged* that this bond bore not to be subscribed by his father, whose name was William Forbes; but this being only an extract of the

No 5.

bond registrated in *anno* 1649, which bore *sic subscribitur* Patrick Forbes of Thainstoun, and offered to prove that there was one Patrick Forbes in Thainstoun at that time, the principal bond being lost with the registers. It was *answered*, That the pursuer's father was ordinarily designed of Thainstoun, and was so designed in the body of the bond, and his ordinary subscription was W. Forbes, which W. is very like a P., and which is very like another subscription produced. And for further adminiculation, produced a horning against young Tolquhon in his own lifetime, and offered to prove, that his money was arrested upon this bond, and a decreet for making such forthcoming against him, and whereupon a part was paid.

THE LORDS ordained these writs to be produced, and the surviving cautioner to be examined *ex officio*, upon this point.

The pursuer *insisted* against Tolquhon, as vitious intromitter with his father's goods, who *alleged* absolvitor from vitious intromission, because he was executor confirmed before intenting of this cause. The pursuer *answered*, That he was vitious intromitter, in so far as he had fraudfully omitted things intromitted with by him, and had not confirmed the same.

THE LORDS repelled the allegeance, and refused super-intromission, but by confirmation *ad omissa*, and by way of action, and that the *quot* might not be lost, according to their ordinary custom. See PROOF.

Fol. Dic. v. 1. *p.* 511. *Stair, v.* 2. *p.* 424.

*** Dirleton reports this case :

IN the case, Irving *contra* Forbes, it was debated among the LORDS, whether a person should be liable, as vitious intromitter, notwithstanding that it was *replied*, That he was was confirmed executor; and *answered*, That as to super-intromission, beyond what was confirmed, he was liable as intromitter.

It was asserted by the President and some others, That it was the custom and daily practicque, that notwithstanding of super-intromission even before the confirmation, the executors ought not to be liable, but *secundum vires*; and that a dative *ad omissa* may be taken; yet others were positive of the opinion, that a person, intromitting with more than is confirmed, was liable as vitious intromitter; seeing it could not be denied, but he was intromitter; and he could not plead, nor pretend to be executor, as to what was not confirmed; and if there were no confirmation he would without question be liable as intromitter; and the confirmation ought not to put him in better case; seeing notwithstanding of the same, as to super-intromission, he is not only intromitter without warrant, and so vitious, but is perjured; having made faith, the time of the confirmation, that nothing was omitted; and it is hard that a custom, contrary to the principles of law, and to the opinion of Hope and other lawyers, should be obtruded; unless, upon a debate *in præsentia*, there be a decision, which may be the foundation of a custom. See PASSIVE TITLE.

Dirleton, No 354. *p.* 169.