

1678. February 22. DRUMMOND against STUART.

SIR ALEXANDER BRUCE of Broomhall being donatar to the marriage of Innernytie, did pursue for the avail thereof, and did obtain a decret for 25,000 merks for the single avail, with a reservation to insist for making up the double avail as accords, which he did assign to Drummond of Machanie, who now insists for the remainder, to make up the double avail, and alleges that he having contracted in marriage with Innernytie's sister, his goodfather forced him either to quit the marriage or 5,000 merks of the tocher, and accordingly he quit the 5,000 merks, and to be repaired took this assignation. The defender *alleged* absolutor, because, *imo*, The double avail is only due in case of the vassal's contempt refusing a suitable marriage offered by a superior; and though the single avail be favourable, yet the double avail is penal and odious, and therefore all formalities must be strictly observed, and the matter must proceed *optima fide*; but here the instrument of requisition is not sufficient, bearing the offer of a wife, and an interview, and requiring the vassal to appoint a time for the interview and marriage, and the vassal having appointed a day for the interview, but refused to appoint a day for the marriage till the interview was past, therefore the superior named a day for the marriage, which was an unreasonable precipitation. *2do*, The requisition was captious and fraudulent, because the vassal was marriageable several years before, and never required till his marriage was agreed in all points, and the day thereof appointed, so that he was not free, and it was no contempt of the superior to refuse another wife. *3tio*, The woman offered was then under promise or agreement of marriage with a ribbon-weaver. The pursuer *answered*, That the requisition was sufficient, and did never require two instruments but one, for both interview and marriage; and seeing the vassal appointed the day of interview, and refused to appoint the marriage, the superior might justly appoint the same, but the vassal did not keep the day appointed for the interview himself. To the *second*, *Non relevat*, for though there had been a contract of marriage subscribed, it could not prejudice the superior, and there was *locus pœnitentiæ*, the vassal might re-sile; and if a contract of a marriage could prejudice the superior, a double avail could never be obtained; and repeated the same answer to the *third* defense.

THE LORDS found the instrument of requisition sufficient, but found that the vassal having continued marriageable for a long time unrequired, and having agreed in marriage as to all the points of the contract of marriage, and appointed a day to solemnize the marriage shortly after the agreement, his refusal was not contempt, though there was no contract subscribed, it being the custom now to subscribe at the time of the marriage; and found the other defense relevant, that the woman was under promise or agreement of marriage, and allowed the comuners in the marriages to prove in both cases.

*Fol. Dic. v. 1. p. 568. Stair, v. 2. p. 618.*