

defender should bear witness to the truth, but that he should be willing to compt at such a rental, whether it was more or less than the true rental, which he would have been obliged to do if Mr Murray had accepted the offer, and performed the condition; and the defender's kindly offer then, for the recovery of the estate of Sauchy to his good-brother not being accepted, cannot now be made use of to his prejudice, nor doth it import that the discharge of the reversion was in trust; so that the pursuer having no interest, but the lands being irredeemable, not only by expired apprisings, but by his father's disposition and discharge of the reversion, the pursuer cannot, upon that letter, or any other ground, force him to compt, whatever the rent of the land or coal may be.

THE LORDS having interposed with Clackmannan to give reasonable satisfaction to the pursuer, his good-brother, if the lands were worth more than the sums that were upon it; but finding that they could gain no ground that way, and that the sums were like to be greater then the value of the land, they returned to give answer *in jure*, and found that the said last clause was a condition affecting both the declaratory and promissory part of the letter, and not being performed, that the offer was void, and therefore assoilzied.

*Fol. Dic. v. 1. p. 192. Stair, v. 2. p. 96.*

1697. January 20.

HUTCHESON of Scotstoun and his LADY, *against* DRUMMOND of Invermay.

I REPORTED Hutcheson of Scotstoun and his Lady against Drummond of Invermay, (for payment of 2000 merks contained in a bond granted by Stuart of Rossyth, to Walter Stuart his cousin, and assigned by him to Scotstoun,) as he who had received right to the estate of Rossyth, with the burden of all his debts.—*Alleged*, The bond bears its own dittay in its bosom; for it is clogged with two conditions and qualities; the first that it shall be void and null, if Walter die without heirs of his own body before the sum be uplifted; the second is, that *esto* it be paid, yet if Walter die without bairns, and leave as much estate as will pay this bond, then the same is to return again to Rossyth, his heirs and successors; and Invermay subsumed, that Walter deceased without heirs, and the sum being unlifted, the obligation became void by the first clause.—*Answered* for Scotstoun, That it must be held as uplifted, because Walter did *omne quod in se erat* to raise it; for he pursued Invermay for payment, and he advocating the process, Walter died before discussing, and assigned it; so *stetit per* Invermay, that it was not lifted, and being *ejus culpa, non debet lucrari*.—*Replied*, This process was only for constitution of the debt against Inver-

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A bond contained this clause, "that it should be void, if the creditor died without heirs of his own body, before the sum was uplifted." Found that an action for payment showing the intention to uplift, purified the condition.

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may *passive*.—THE LORDS found his pursuing sufficiently declared his purpose and intention to uplift it; and being delayed by Invermay, it was equivalent as if he had uplifted, so it fell not under the first clause; and *quoad* the second, (to whom it should return in case he died without heirs of his own body,) it was contended it behoved to return to Invermay, who was the heir of tailzie. —THE LORDS found it belonged to Lady Scotstoun, who was Rossyth's lineal heir of blood; and that the heir of tailzie was only heir in a particular subject. —Then the debate arose, if the bygone annualrents could be compensated with the aliment he received in Rossyth's family; and though it was alleged he had that as a servant, and no aliment is due *inter majores* without a paction; yet the LORDS, considering the nature of this gratuitous bond, and that *debitor non presumitur donare*, they found the annualrent compensible with the aliment.—The third point was, if his intromissions with Rossyth's victual and money rent, proven by receipts under his hand, were sufficient to make him comptable to this effect, that they may compense against Scotstoun, his assignee; who *alleged*, That he never having a commission from any of the Lairds of Rossyth, as their Chamberlain, nor any written factory, what he received of the rents was only as their servant, and he is so designed in some of the receipts produced; and this intromission has been upon their verbal orders, and immediately delivered to them, and instantly compted for *de die in diem*, and so cannot make him liable, else it might ruin all the servants in Scotland.—*Answered*, Whether he had a commission in writ or not, *non refert*, for a *negotiorum gestor* will be liable to compt conform to his receipts; and though it be *in re antiqua*, yet he ought either to have a discharge, or else some stated accompt, to clear that these intromissions for which he gave receipts, came to his master's use.—THE LORDS thought the point of a general preparative, and therefore resolved to hear it in their own presence. See 17th Nov. 1665, Howison against Cockburn, *voce* PRESUMPTION; and 25th Nov. 1671, Irving against Falconer, *IBIDEM*.

After a hearing, the LORDS found any intromissions in this case could not exhaust nor compense the bond, but might ascribe in payment of his annualrents.

*Fol. Dic. v. I. p. 191. Fountainball, v. I. p. 758.*