

No 44.

A proposal relative to a marriage portion contained this clause, "all which we offer, providing you give a suitable meeting on your part." Found that this clause was a condition affecting both the declaratory and the promissory part of the offer, and not being performed, the offer was void.

1672. July 10.

SHAW *against* LAIRD of CLACKMANNAN.

THE deceased Laird of Sauchy being in great burden, did dispone his estate to Clackmannan who married his daughter, and to Tillihidy, and had from them a back-bond or reversion; but thereafter he did subscribe an inventory of his debts, for satisfying whereof this disposition was granted, which being above the worth of his estate, he did grant a discharge of the reversion; thereafter, George Shaw, his apparent heir, having married the daughter of Mr Murray, a minister in England, who had a great estate in Moray, and no sons, Clackmannan and the rest to whom the lands were disposed, wrote a letter to Mr Murray, bearing, that George and his spouse might be infeft in 3000 merks yearly, and that the lands would be worth 40 chalder of victual; and the coal worth L. 10,000 by year, and that the reversion of the estate would be very considerable, and that they should denude themselves of the estate upon payment of the debts; and the last clause of the letter is, 'All which we offer, providing you give a suitable meeting on your part.' The said George Shaw pursues Clackmannan who now has the whole right, to count and reckon for the rents of the land and coal, at the rental contained in the letter, and to denude himself upon satisfaction of the debts due after compt and reckoning. The defender *alleged* absolutor, Because this letter did only contain a friendly offer to have procured a fortune for the pursuer from his good-father, whereupon nothing followed; and the last clause in the letter bearing an express condition relative to the whole offer, not only is the offer ineffectual, because it was not accepted; but it being expressly conditional, it is void, the condition neither having been fulfilled, nor offered to be fulfilled. The pursuer *answered*, *imo*, That the last clause in the letter is no condition, but only a motive to induce Mr Murray to give a portion with his daughter, wherein the defenders have no interest, for they were to have their money, whatsoever the portion was, and shall yet have it. *2do*, Though that clause could import a condition, yet it can only relate to the promissory part of the letter to denude, but not to the declaratory part, bearing what the rent of the land and coal was; and it cannot be thought that when parties express the truth upon conditions, but that what they asserted is simply true, otherways it had been a cheat to deceive Mr Murray; and the pursuer, though but apparent heir, hath good interest to cause the defender compt and reckon, and to instruct that the apprisings whereto he hath right, are satisfied by intromission; and, as to the discharge of the reversion, it was unwarrantably elicited, and was in trust. The defender *replied*, That the condition is clearly annexed to the whole offer, seeing it bears, 'All which we offer,' which must relate to the whole; and, there is no doubt, but conditions may be annexed both to promises and declarations; for *non agebatur*, that the

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.