

No 22.

writ, and the register in which it is found, was in order and patent, so that it was his own fault and neglect.

THE LORDS repelled the reasons of reduction, and adhered unto the decret, both as to the matter and form of it; but as to Gight's desire to be reponed upon present performance, Pittrichie enjoying the profits in the mean time; the LORDS inclined thereto; but because it did not appear whether Gight could now fulfil or not, they before answer, ordained Gight to condescend how he could fulfil, and how he did now come to the knowledge of the infestments of the teinds produced, and what diligence he did for searching for the same, and what hinderance he met with in not finding it.

*Eol. Dic. v. 1. p. 595. Stair, v. 2. p. 353.*

1676. February 11. TURNBULL against RUTHERFORD.

No 23.

A purchaser having demanded performance by an instrument after the term was come, this was not found to void the bargain, he not having insisted in a declarator, but performance there after was sustained.

By minute of contract, Rutherford is obliged to deliver to William Turnbull a disposition of the lands of Bankhead, subscribed by Bankhead and his spouse, and by the Laird of Gladstones his tutors and curators, before the first day of September 1673, to William Turnbull, and to enter him in possession of the lands at Whitsunday 1674, and to purge all incumbrances before that term; upon which Turnbull is obliged to pay 15,400 merks for the price at the said Whitsunday, the incumbrances being first purged; whereupon Bankhead having charged, Turnbull suspends on this reason, that the mutual cause was not performed, albeit the suspender by instrument did require the disposition, and a progress with purging the incumbrances, and that before the first day of September, which is the term contained in the minute. It was *answered*, That the charger made offer by instrument of a disposition, conform to the minute, with a progress of right, and to give the void possession, and that 40 days before Whitsunday, which was sufficient, albeit the term was the first day of September before, because the suspender had no prejudice, and therefore his instrument of requisition could not annul the minute, having no clause irritant, and where performance was offered without prejudice, likeas now the disposition and progress are produced. It was *replied* for the suspender, That he was not obliged to receive the disposition now, it not having been offered at the term appointed. *2do*, The disposition produced, by ocular inspection, appears to have had the first sheet taken off, and a new sheet put on, which is far cleaner than the rest of the sheets; and, therefore, it must be presumed that the disposition, when offered, was not then sufficient; and though it were now receivable, as it is not, because it may be quarrelled upon falshood, the first sheet not being subscribed of the date it bears, yet the lands having lien waste since Whitsunday 1674, the loss must lie upon the charger, with the suspender's damage by not getting the disposition before September 1673. *3tio*, The disposition is not conform to the minute, bearing it to be subscribed by Gladstones,

his tutors or curators; and it is only subscribed by his mother as tutrix, albeit there were five tutors nominated, whereof she is but one, and there was a *quorum* of them; so that unless they had all accepted, the tutory is void, and the acceptance of one is not sufficient; neither did the charger at the time of his offer instruct that the other tutor had refused. It was *duplicated*, That though many tutors be nominated with a *quorum*, yet any of them accepting is tutor, and preferable to tutors of law, or dative; because it is always presumed to be the will of the defunct to entrust any of the tutors he chuses, rather than any other; neither did the suspender at the time of the offer make any such objection, or else the charger would have cleared the same.

No 23.

THE LORDS found that the requisition of performance at the term in the minute, did not annul the minute, but that performance thereafter without detriment was sufficient, and found that one tutor accepting was sufficient, albeit there were more nominated with a *quorum*, seeing the rest refused; and having taken inspection of the disposition, they found the first sheet clearer and newer than the rest; but would not sustain the same 'for sufficient probation, but found it relevant to be proved by the charger's oath that the sheet was changed, to infer the renovation of the disposition, and that so the damage of the land lying waste should lie upon the charger.

*Fol. Dic. v. I. p. 595. Stair, v. 2. p. 414.*

1676. November 28.

CARMICHAEL against DEMPSTER.

CARMICHAEL, younger of Balmedie, having married the heritrix of Balbogie, she and her husband by contract with Dempster of Pitliver, dispone the estate of Balbogie to Pitliver, and both the husband and his father are obliged to cause her ratify the contract at her majority. Pitliver grants a bond to young Balmedie of L. 1000 Sterling, as a part of the price, which he assigns to his father, and he thereupon charges Pitliver, who gave in a bill of suspension, and the cause being ordained to be discussed upon the bill, Pitliver insisted on these reasons; *imo*, That this assignation charged on, was either granted or delivered on death-bed, and therefore could not secure the suspender to pay. It was *answered*, Death-bed is only a privilege competent to heirs, and it is not competent to the debtor who must pay, and will be liberated by payment made *bona fide*, though the assignation should be reduced. It was *replied*, That it being commonly known to the debtor, and the country, that the assignation was on death-bed, and if that were referred to his oath, he could not refuse it, and having now proponed it, he could not pretend payment *bona fide*; and for verifying of his reason, he did at first offer to prove it by the charger's oath. But now by a bill upon the 24th instant, he offered to prove it by witnesses, that the assignation was in the defunct's hands when he died. The charger *answered*, That he was tutor to the heir, for whom he did concur, and from whom

No 24.

The reciprocal obligations in a mutual contract having different terms of performance, the performance of the one was not found suspended until performance of the other.