

and without putting either of them to prove, they assoilyied both; and found, that such delicts and slanders *mutua compensatione tolluntur*.

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1693. *January 25.*

ROTHES *against* CAMPBELL.

THE Countess of Rothes, and the Lord Haddington, her son, against Thomas Campbell, Deacon of the Fleshers, in Edinburgh, for summarily removing, at Candlemas next, from the Park of Holyrood-house, whereof he had a tack, and gave it over, complaining he was a loser; and now being set to Alexander Ramsay, he refuses to remove.

ALLEGED, He was not bound *hoc ordine* to answer upon a bill *per modum simplicis quærelæ* without a formal process and citation, not being a member of the Session.

ANSWERED, This was the King's Park, and he had *dolore* given it over, and on printed programs they had roused and set it to another, and so were liable in warrandice, and the case required summary dispatch.

The Lords refused to oblige him to answer in this manner; but thought the Countess could pursue him before the Sheriff of Edinburgh, and soon obtain a decret against him, on her proving his overgiving.

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1693. *January 25.*

DAVID CALLANDER *against* GIB.

DAVID CALLANDER, servant in the Exchequer, against Gib. The Lords found it was a clear bargain and transaction, whereby Gib took his hazard of an heir, and was in *omnem eventum* to pay 1000 merks, whether the gift proved effectual or not; and that it was *emptio spei*, and a bargain *per aversionem et jactus retis*, whereby Gib took the right *talis qualis*; and as he had the prospect of gain, so also he undertook the hazard. Some of the Lords were for sustaining those defences as relevant to assoilyie Gib, that he intimated to David Callander, before his expeding of the gift, to desist and forbear, in regard there was an heir appearing, and offering to serve heir to Neil, whose gift of *ultimus hæres* they were taking. Others were for trying that point of fact before answer; but the plurality determined against it, in regard by a clause in the contract, obliging them to concur if any heir should appear, it seemed that case was under view and provided for. Some moved to supersede execution for the 1000 merks, till the event of the reduction raised of the heir's service on the head, that he had no contingency of blood to the defunct.

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