

1674. November 12.

GORDON against PITSLIGO.

No 28.

MR THOMAS GORDON and his father pursued the Lord Pitsligo, upon a promise to enter them to certain lands, which they had acquired, holden of him.

It was *alleged*, That if there was such promise, it was to be performed in writ, by a charter to be granted by the defender; and there is *locus poenitentiae* until the charter be subscribed. It was *answered*, That the promise was referred to the defender's oath; and albeit there is *locus poenitentiae* in *synalagmis*, and contracts; yet where there is a positive promise to give or do any thing, the same being verified, ought to be fulfilled; and there is no *locus poenitentiae* upon pretence that it should be fulfilled in writ.

THE LORDS repelled the allegiance in respect of the answer foresaid.

Reporter, *Newbyth*.

Clerk, *Monro*.

*Fol. Dic. v. 1. p. 562. Dirleton, No 192. p. 82.*

\* \* \* Stair reports this case:

1674. December 1.—MR JAMES GORDON having bought the lands of Boughlie held of the Lord Pitsligo, who being present at the bargain, promised to receive the buyer *gratis*; and having disposed his right to Mr Thomas Gordon, he pursues Pitsligo to receive him conform to his promise. The defender *alleged* absolutor, because this being a promise requiring writ to its accomplishment, the promiser hath *locum poenitentiae*, and doth resile. It was *answered*, *imo*, That albeit law hath allowed a power to resile in matters requiring writ, before it be adhibited, yet that is only in the case of bargains where there are mutual performances, in which the law indulges that time to resile, which cannot be extended to a gratuitous promise without any mutual performance; *2do*, Parties can only resile *re integra*, which holds not here; for this promise having been made the time of the bargain, without it the buyer would not have proceeded to give such a rate, and would have taken bond of a sum of money of the seller; that thereupon he might have appraised, and compelled the superior to enter him.

THE LORDS repelled the defence in respect of the reply, that the matter was not entire.

*Stair, v. 2. p. 286.*

\* \* \* This case is also reported by Gosford:

1674. December 2.—IN a pursuit at Mr Thomas Gordon's instance against the Lord Pitsligo, as superior of the lands of Buphleys, for entering him his vassal *gratis*, and subscribing a charter for that effect, conform to his promise solemnly made the time of the bargain, at which the Lord Pitsligo was present, and did induce the pursuer to make the bargain upon that consideration; and, accordingly, the

No 28. minute was presently drawn up and subscribed, as was offered to be proved by the writer and witnesses present at the perfecting of the bargain ; it was *alleged* for Pitsligo, That any such alleged promise was not obligatory, unless he had been obliged in writ ; because, in all obligations and contracts for disposing of lands and heritable rights, there is always *locus poenitentiae*, and the disponent may resile at any time before he subscribe the minute or contract ; neither can any alleged promise be proven by witnesses and comuners. It was *replied*, That the Lord Pitsligo being only superior of the lands, and not being obliged to dispoise the superiority, but only to enter a vassal to hold of himself, he having promised to do the same *gratis*, could never resile, except the bargain betwixt the buyer and seller had taken no effect. THE LORDS did sustain the pursuit founded upon the promise ; and found, that the principal bargain having taken effect, there was not *locus poenitentiae* in this place ; but declared, that Pitsligo's promise was only probable by his own oath, and not by witnesses.

Gesford, MS. No 717. p. 433.

\* \* \* See Park against University of Glasgow, 10th December 1675, No. 28. p. 2535. *voce* COMMUNITY.

1674. December 9.

LORD BALMERINOCHE *against* The TENANTS of North Berwick, and CREDITORS of Sir WILLIAM DICK.

No 29.

A party attempted to resile, and take back a disposition, although he had suspended a charge, on the ground of compensation, thereby seeming to acknowledge the transaction. Found, that, as the decree of suspension had not been extracted, he might resile.

THE Lord Balmerinoch having acquired right from Sir John Smith to a wadset he had upon North Berwick, in so far as might extend to 39,000 merks of the principal sum of the wadset, he took his disposition thereto from Sir John Smith, blank in the name of the assignee, and filled up therein the name of James Gilmour his servant, and in his name pursued the tenants of North Berwick for mails and duties upon the infertment. In which process, the creditors of Sir William Dick, to whom the lands of North Berwick and others were disposed for satisfying their debt, did compare for their interest, and *alleged* absolvitor, because they had declarator depending against the Lord Balmerinoch and James Gilmour, for declaring that the disposition now filled up in the name of James Gilmour, was originally blank in the assignee's name, and the Lord Balmerinoch having been charged upon a decret obtained against him as heir to his father, for payment of a double proportion of a bond granted by umquhile Balmerinoch and several other noblemen in *anno* 1639, did raise suspension upon compensation upon the foresaid blank assignation, upon which suspension there was pronounced a decret of suspension in *anno* 1653, 'suspending the letters and sustaining compensation,' so this right is extinct by the compensation, the verity of which allegiance was instructed by the oath of William Downie then clerk.