

sidered the depositions of the witnesses adduced by the pursuer, and the qualifications insisted on for her, they find that the defender's contrectation and away taking of the writs libelled is not proven, and therefore assoilzie the defender from this summons, and declare that he has right to the sums contained in the two assignations and translation produced; and, in respect of the bond granted by the pursuer and her cautioner at her giving up of the said writs, decern her and her cautioner to make payment to the defender, Andrew Alexander, of the sums assigned to him by the foresaid assignations and translation. And having advised the debate, with the letters produced from either party, they find the letters obligatory upon the Lady, to secure the fee of the lands of Kingcraigie to the pursuer, and decern accordingly.

Upon a bill given in by the Lady, representing, that Andrew, by several letters, had rejected and repudiated her offers, and had been ungrateful, the LORDS, on the 25th of July, recommended to the Justice-Clerk and Mersington to endeavour to settle the parties; and appointed both parties to attend them at such diets as they shall appoint; and, in the mean time, stop extracting of the two decreets above mentioned.—The Lady having kept up this deliverance, of purpose to cast off this Session, Andrew gave in a bill on the 26th of July, which the Lords having heard, they ordained the Lady Kinglassie's procurators to reproduce her petition, and to come to the Clerks-chamber, where the letters are, and to pitch upon those letters which she founds upon, that the same may be brought in to the Lords this afternoon to be advised, with certification if they failzie herein, the Lords will ordain the petitioner's decret to be extracted.

*Fountainball, v. I. p 446, 482, & 512.*

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

1687. *February*.—FOUND, that the sending of a letter, wherein the writer's full resolution was to dispone to the receiver thereof, did not hinder *locum poenitentiae*, in respect the letter contained no obligation to dispone.

*Harcarse, (LOCUS POENITENTIAE.) No 676. p. 192.*

1697. *December 23.*

SIR ROBERT LAWRIE of Maxwelton *against* MARION CRAICK, and HOMER MAXWELL he Husband.

MERSINGTON reported Sir Robert Lawrie of Maxwelton *against* Marion Craick, and Homer Maxwell her husband. Sir Robert having acquired the lands of Stuarton, pertaining to the said Marion Craick's father, and she having an adjudication thereupon, he enters into communing with Homer Maxwell her hus-

No 33.  
A sale of lands found to stand, although writ had not intervened, a part of the price having been paid.

No 33.

band, and they agree for 6000 merks, whereof Homer receives 1000 merks in hand, and the other 5000 merks is sealed up and consigned in a neutral person's hands till the disposition were signed by the said Homer and his wife, but they declined to subscribe, unless a reservation were insert to secure her against her father's debts. Maxwellton pursues them for implement. *Alleged*, This being a right of lands, it was no perfect consummate bargain till writ had followed thereon and been delivered, till which there was always *locus poenitentiae*. *Answered*, There could be no resiling here, because there was *rei interventus* by the delivery of the 1000 merks, and the consigning the rest, and which they offered to prove by the notar's instrument, and the depositions of the witnesses insert. *Replied*, Whatever may be pretended that *res* is not *integra* by Homer's accepting the 1000 merks in the first end, and in contemplation of this bargain, yet the consigning the rest of the money is no such consummation but it might be resiled from, and no instruments nor witnesses can prove such an agreement, else heritable rights might be disposed by witnesses; but the terms must be only proved by my writ or oath.—THE LORDS found the *rei interventus* took off the power of resiling, and that *res* was no more *integra* if he took the 1000 merks in part of the price; but found this could not be proven by witnesses, but only *scripto vel juramento* of Homer Maxwell, whether he took it in contemplation of this bargain or *quo alio nomine* he got it, or if he reserved to himself freedom to resile on reponing Maxwellton *cum omni causa*, and refunding his damage. The question was, on whom the loss of the annualrent of the consigned money should fall? For the consigners in the clerk of the bills hands, by order of a judge, are free of interest, yet such voluntary consignment as this *non sistit cursum usurarum*. See PROOF.

*Fol. Dic. v. 1. p. 563. Fountainhall, v. 1. p. 804.*

1699. December 5.

THOMSON against THOMSON.

No 34.

A man attempted to resile from a bargain of a house, after he had entered to possession. Found obliged to implement, although no writ had intervened.

WILLIAM THOMSON flesher in Kelso, pursues James Thomson merchant there, before the Bailie of Kelso, for payment of the price of a tenement he had sold him. James advocates the cause, on this reason, that the Bailie had committed iniquity in repelling this defence, that the bargain not being consummate by writ, there was *locus poenitentiae*, and he now resiles. *Answered*, It was justly repelled, in respect of this answer, that, in prosecution of the bargain, you had got the hail writs and evidents of the land, and the keys of the houses, and had entered into possession, and now kept it for a year and a half; as also, by virtue thereof, had entered into a transaction with the heritor of the neighbouring tenement for building a side wall thereto, which making a plain *rei interventus*, there is no more place for resiling; especially considering, that the delivery of the charter chest of Auchinleck of Balmanno to Sir Thomas Murray of Glen-doick, was found a sufficient ground, by a late interlocutor, to examine the