

No 65.

1682. *November.* CORSBURN *against* POLLOCK.

POLLOCK, Maxwell, and Corsburn having verbally agreed to take a tack of some rents belonging to the Duchess of Lennox, and that Pollock should go to London for procuring thereof, who having gone and taken the tack wholly to himself, Corsburn raised a process for the half of the tack-duty; for that he was diverted by the said agreement from prosecuting the designs he had of getting the tack to himself.

Allegd for the defender, That there was *locus poenitentiae*, no writ having intervened.

Answered, *Res* was not *integra*, seeing the pursuer could not now procure the tack for himself, which at first he stood as fair for as Pollock.

THE LORDS found there was no *locus poenitentiae*, and ordained the defender to depone anent the terms of the agreement. The like was found formerly in a cause between Mr John Campbell and Dr Moore, No 30. p. 8421. See FRAUD.

Harcarse, (LOCUS POENITENTIAE.) No 674. p. 191.

No 66.

1685. *January 2.* GRAHAME and ERSKINE *against* BURN.

A TENANT of my Lord Panmuir's enters into a contract of marriage with a woman called ———, under a penalty; and afterwards he deserts the bargain, and refuses to accomplish it. She pursues him for the 200 merks of penalty, at least for damage and interest, in so far as she was put to expense in entertaining his friends, and taking off bridal cloaths, &c.—THE LORDS, though they found *matrimonia debent esse libera*, and that there is *locus poenitentiae*; yet, under that pretence, one ought not to be damnified, therefore they admitted her expense to probation; and she having proved, that she was put to L. 80 Scots of charges *eo nomine*, the LORDS, at the advising for that expense, and for her loss of the market, modified L. 100 against him, in regard especially that he could give no rational ground why he gave over the bargain. This decision seems equitable, though it be new.

Fol. Dic. v. 1. p. 565. Fountainhall, v. 1. p. 328.

No 67.

1703. *February 20.* WATT *against* STEWART.

Even after
arles, a man
was allowed
to give up
a house
he had taken,
having done
so 40 days

MR ADAM WATT pursues John Stewart glover in Edinburgh, for a house-mail. His defence was, That as I took your house in March to enter at the Whitsunday after, so I gave it over to you by way of instrument *de recenti*, more than 40 days before the term, and that, by the general custom within the town of Edinburgh, such over-givings have been sustained as legal; and there

was *locus poenitentiae*, all the penalty being loss of the arles; and being before the 40 days, the landlord has time enough to set his house.—*Answered*, No such custom proved; besides, it is most unequal and irrational for the tenant to have liberty to resile, and not the locator or setter; why should he be bound, and the other loose? and this contract of location conduction being once perfected, there should be no *locus poenitentiae*.—*Replied*, Tenants in possession may give over any time, providing there be 40 days yet to the term, and why may not an intrant tenant do the same?—THE LORDS sustained the overgiving, in respect of the custom, though it be an evident hardship upon landlords; but some of the LORDS moved, that further trial should be taken anent the universality of the custom, which was affirmed to lie just on the contrary side.

Fol. Dic. v. 1. p. 564. Fountainball, v. 2. p. 181.

1715. January 21.

WILLIAM YOUNG in Alloa, against MARGARET IRVINE, and JOHN ANDERSON, her Husband.

A CONTRACT of marriage, in common form, having past betwixt the said parties, (the woman being *in familia* of her father) and a penalty of L. 100 Scots adjected thereto; the woman nevertheless marries another person, whereupon the man insists for the penalty against her and her husband.

Answered, That this contract imported no more but a resolution, which, *re integra*, may be receded from; specially since *matrimonia debent esse libera*; 2do, She being a child *in familia*, the contract was *contra bonos mores*; 3tio, No diligence is competent here for implementing the principal contract, far less then for the penalty, since *accessorium sequitur suum principale*.

Replied, 1mo, That the contract was an actual obligation to solemnize, and the penalty comes in place of performance, to which the pursuer has right *nomine damni*, and *nemini admittendum est consilium mutare in alterius prejudicium*; 2do, The contract bears, that she is obliged to marry with consent of her parents; 3tio, In the like case, Jamieson *contra* Sheriff, 14th December 1708, *voce* WRIT, the Lords decerned for the penalty.

Duplied, That since *res* is still *integra*, no penalty in such a case can be insisted for, since that were to act *in fraudem legis*; 2do, As to the decision founded on, there was no decision as to the contract itself, but only as to the designation of the writer and witnesses, as is evident from the case.

THE LORDS found the answers and duply relevant to elide the libel and reply, and therefore assoilzied the defenders.

Clerk, Robertson.

Fol. Dic. v. 1. p. 565. Bruce, v. 1. No 35. p. 44.

No 67.

before the term. This in consequence of an alleged practice.

No 68.

Found, that no marriage having followed, after a contract of marriage had been executed, there was *locus poenitentiae*, and no penalty exigible.