

No 36. be perfected and delivered; and by our law, the decisions are clear, 5th March 1628, M'Gill *contra* Edmiston, *voce* WRIT, and Campbell *contra* Douglass, No. 63. p. 8470.; 3dly, We shall add the authority of two piercing Lawyers, *viz.* Stair, B. I. Tit. 9. § 9. and Dirleton, *voce* *Locus Pœnitentiæ*. *Answered*, That nothing can more contradict that fidelity which should be in trade, than upon emergent advantages not foreseen at the time to overturn bargains; *nihil tam fidei humanæ convenit quam quæ placuerunt servari, et in re mercatoria grave est fidem fallere*; and here was a complete bargain, the five guineas being the *pretium* given for my choice and election of the *merx*; and there needed no writ upon it, more than in vendition and setting of shares of ships; and it is only in bargains of importance that writ is required. THE LORDS found the *rei interventus* sufficiently completed this set, by Graham's delivery of the five guineas, and Corbet's taking them; and therefore found Corbet liable, and repelled his defence of *locus pœnitentiæ*.

Fountainball, v. 2. p. 452.

1709. December 23.

GEORGE LOCKHART of Carnwath *against* JOHN BAILLIE of Walston.

No 37.
A missive of sale signed by both parties was not delivered by one of them; yet the sale was found complete, and no *locus pœnitentiæ*.

AT a treaty of agreement betwixt John Baillie of Walston and John Hamilton writer to the signet, about the sale of Walston's estate to George Lockhart of Carnwath, a minute of sale being drawn up, signed by Walston, and given to John Hamilton, upon his obligation to procure some prestations from Carnwath, and to cause him subscribe the minute under the pain of L. 500 Sterling; and Carnwath having signed and got up the minute from Mr Hamilton, he thereupon charged Walston to implement the same; who suspended and repeated a reduction upon this ground, that he resiled from the bargain, and there was *locus pœnitentiæ*, in so far as, 1mo, The minute charged on is no delivered evident, the charger not having received it from Walston, but from only John Hamilton, who had no warrant to give it up to him, but only to procure his subscription to it. And it were unreasonable, that Walston should be bound to Carnwath by that copy of the minute now in his hand, before he were equally bound to Walston by delivering another signed double to him; till which time the bargain was incomplete, and might be resiled from by Walston; as Carnwath might have shaken himself loose of it, by throwing the signed minute in the fire, or cancelling his subscription. For to sustain such an unwarrantable delivery by a mandatar, *qui excessit fines mandati*, would open a door to all manner of fraud; at which rate it should be in the power of any mercenary agent, to surrender his client's bonds to his debtors; 2do, The price of the lands was not clearly determined by the minute, which bears only '21 years purchase of the free money and victual rent payable out of the lands, conform as the same shall be proven to have paid at the suspender's father's de-

* cease, or his own entry, counting the chalder of victual at ——— the chalder; which blank in the minute could not be filled up without consent of both parties; and contracts of sale are never understood to be perfected while the price is left uncertain, which is then only certain, when *certa quantitas exprimitur, vel de quo constat per relationem ad rem certam.* 3tio, The prestations on Carnwath's part, contained in Mr Hamilton's obligation to Walston, are *pacta ex incontinenti adjecta*, the obligation being of the same date with the minute, and expressly relative thereto; and while these things are unperformed by Carnwath, the bargain is still open uncompleted.

Answered for the charger; *imo*, When a subscribed writ is once out of the granter's hands, and in the hands of a third party, who delivers it to him in whose favours it is conceived; law presumes that he had a mandate or commission for delivering of it, unless the contrary be proved by writ or oath of the receiver. The pretended inconvenience to Walston, by Carnwath's being sole master of the minute, did not hinder the bargain to be completed; yea, the the minute in his hand was a common evident for both; upon which Carnwath could not sue without performing his part; and for recovery thereof or an extract, action was competent to Walston; and had Carnwath destroyed it, the tenor might have been made up against him by his oath, and other habile methods of proving tenors. It is no paradox in law, that a debtor becomes free upon getting up his bond from the creditor's trustee, who had counteracted his trust; for no man gives trust without running hazard by the trustee's proving unfaithful. 2do, The reason founded on the blank in the minute, and uncertainty of the price, is of no weight; for the price was determined before Walston signed the minute, to 21 times the value of the yearly product of the subject sold. And the taking an obligation from Hamilton the trustee under a penalty to procure Carnwath's subscription to the minute, did as fully empower him to fill up the blank, and liquidate the value of nine or ten chalders of victual, the rest of the rent of being paid in money; as the having of the minute empowered him to deliver it; and *ita est*, that the blank was filled up before the minute was delivered to Carnwath; so that the principle of the common law, that *emptio non est perfecta* before adjusting of the price is misapplied, the price here being fully determined before delivery of the minute. 3tio, The prestations that Mr Hamilton engaged Carnwath should perform, cannot be reckoned *pacta ex incontinenti adjecta* to the sale; because not undertaken by Carnwath the purchaser, but only by Mr Hamilton, as taking burden for him. Nor doth Carnwath's not performing these conditions, (suppose he were liable for them) annul the bargain, but only afford action to Walston against him to perform. Besides, Carnwath is ready to perform his part of the minute; upon Walston's performing what is incumbent upon him, which is to satisfy the desire of the charge by granting a valid disposition in the terms of the minute.

No 37.

THE LORDS found, that the minute of agreement charged on, being signed by both parties; and in Carnwath's hands, was a complete minute and bargain, and there was no *locus poenitentiae*; and therefore repelled the whole reasons of suspension and reduction.

Forbes, p. 374.

* * Fountainhall reports this case :

1709. *December 25.*—JOHN BAILLIE of Walston, by a minute of sale in June last, sells his lands of Walston to George Lockhart of Carnwath, at twenty-one years purchase, at the rental the lands paid when his father died; and Walston being charged to implement and grant a disposition in terms of the minute, he suspends, and raises reduction on these reasons; *imo*, That though a clear minute may be obligatory, yet where a heap and shoal of questions and debates will arise in the interpretation and extension thereof, law has allowed either party room to resile ay till it be perfected; but here infinite controversies will arise on the rental, and the determination of the price, so that law will never fetter a man into such a blind indefinite bargain; and thus the common law gives relief, § 1. *Instit. De empt. et vendit. Poenitentiae locus est donec instrumenta completiones suas acceperint, et fuerint omnibus partibus absoluta.* And the *l. 17. C. De fide instrum.* says the same; which our decision in 1663^x Montgomery, No. 25. p. 8411. has exactly followed; and Dirleton, in his *Doubts and Questions, voce Locus Poenitentiae*, inclines to the same opinion. *Answered*, If we have any fixed principle in our law, that of minutes being as obligatory as extended writs, is one; and the case cited no ways concerns or infringes it; for there it was expressly pactioned that the parties were at freedom till all was perfected. THE LORDS repelled this first defence. Then Walston repeated his *second* reason of suspension and reduction, that it was never a delivered evident, nor interchanged, seeing he offers to prove by Carnwath's oath, that he did not receive it from Walston, but from one John Hamilton, the writer of it, who had no power to deliver it; and so it was found, as Durie observes, *Byres contra Johnston*, No. 15. p. 8405. *Answered*, The minute being now in Carnwath's hands, it cannot be taken out of it but by his writ or oath; and he acknowledges he got it from Hamilton, but proves by an obligation under Walston's hand to the said John that he fully empowered him to deliver it, for he engages to give him half a year's purchase of the lands if he accomplish the bargain. And as to interchanging and delivery, my Lord Stair assures us it is not requisite in mutual contracts or minutes, *B. 1. T. 7. § 14.* and was so decided, 30th June 1625, *Crawford contra Vallances, voce PROOF.* THE LORDS repelled this reason likewise. Walston's *3d* reason was, That the minute and bargain was incomplete, because the price was not determined, and a blank left as to the yearly value of the victual-rent; and those defects being *in substantialibus* vitiate the whole, as is clear from *D. Tit. De empt. vendit. Quamdiu pretium incertum et indefinitum est, emptio est imperfecta, nec nulla nascitur obligatio.* *Answered*, That the price was sufficiently as-

certained; for it was at 21 years purchase, and the price was liquidated in one of the minutes, (though it stood blank in the other) at L. 100 the chalder, which was a very competent adequate price; and though the total price was not summed till the rental was constituted, yet law reputes these things certain *quæ non morantur obligationem*, but are liquidated *per relationem ad aliud*, as here it is bought at the rental it paid when Walston's father died, about fifteen years ago. THE LORDS repelled the third reason. Walston *alleged* in the *fourth* place, That he had a reversion granted him to redeem his lands any time within twenty-one years at the price now paid; and so he could redeem within a month or two, *et frustra petis quod mox es restitutus*. *Answered*, The tenor of the reversion is mightily mistaken; for it cannot be exercised till the twenty-one years be run, and then it must be with his own money, and at the rental the lands shall then pay, with consideration of any improvements or meliorations made upon the land *medio tempore*; and reversions being *strictissimi juris*, must be taken in the precise terms in which they are granted, and admit of no extension. THE LORDS also repelled this reason, and found Walston obliged to implement and extend the minute in the terms of his obligation.

1710. February 1.—IN the case mentioned *supra* at the 23d December 1709, betwixt Baillie of Walston and Lockhart of Carnwath, it was further *alleged*, That the minute of sale was null, being only subscribed by two witnesses, whereof one of them being infamous *infamia juris*, he was no witness in law, viz. Francis Garden of Midstrath, in so far as there was a decreet of improbation of a bond of thirlage obtained by Ross of Tullisnaught in 1687 against him, finding him accessory to the forgery, and ordaining it to be cancelled, and so was inhabile by the 80th act of Parliament 1579, requiring all writs to be subscribed before famous witnesses. *Answered*, Though this objection might operate against him if he were adduced to swear in a judicial process for proving some matter of facts, yet to this hour such an allegiance was never proponed against an instrumentary witness to a paper, where their subscription attests nothing but the verity of the party's subscription; and against such, no exception lies, though they be domestic servants, children *in familia*, or pupils, none of which would be admitted to depone in judgment; for they being chosen by mutual consent of both parties, cannot be afterwards quarrelled. And what condition would men be in, if they behoved to search and examine the lives and conversations of the witnesses they adhibit to their transactions, if at any time they have been pursued or convicted for any crime? How uneasy and impracticable would this render all business? But there is no necessity of any such trial here, for Midstrath was none of Carnwath's chusing, yea, not so much as known to him, but one of Walston's comrades, and it were fraudulent in him to object against a witness used by himself; and the act of Parliament cited is misapplied, for it is only speaking of witnesses to notorial subscriptions, and even in that case habit and repute would be sufficient. THE

- No 37. LORDS repelled the objection against the witness, and found it no nullity, though he was a subscribing witness to the minute, being chosen by mutual consent, and more of Walston's acquaintance than Carnwath's.

Fountainball, v. 2. p. 545. & 561.

1710. December 13.

JOSEPH YOUNG, Merchant in Edinburgh *against* HENRY NISBET of Dean.

- No 38. JOSEPH YOUNG having charged the Laird of Dean, upon a decret obtained against him before the Sheriffs of Edinburgh, to make payment to Joseph, of L. 147 : 14 : 9d. ; Dean suspended upon this ground, that L. 106 must be deducted, for which he had got credit from the charger by his missive letter dated in May 1706, bearing, That there remained L. 57 : 10s. of balance of the sum contained in the decret due by the suspender, after giving him credit for all that was paid by him to the charger, and taking off L. 106 due to the suspender by Captain Richardson ; and that the charger intreated the suspender to pay the said balance, and let him have Captain Richardson's papers with a right thereto. Upon which the suspender, 22d September last, offered these papers to the charger, with a right thereto under form of instrument ; which instrument bears, that the charger acknowledged the suspender's having made such an offer in due time.

Replied for the charger ; He had good reason to refuse to accept a right to Captain Richardson's debt 22d September last ; his circumstances being then far altered to the worse from what they were at the date of the charger's letter. And where a right is to be perfected in writ, there is a *locus poenitentiae*, till the terms be agreed on, and the writ extended, subscribed and delivered ; *2do*, The instrument taken by the suspender cannot prove that prior and timeous offers were made of the papers, and a right thereto ; seeing the assertion of a notary cannot prove the emission of words or expressions at that time, far less what past at other times, before which he had no warrant to assert, but the suspender's telling him it was so.

Duplied for the suspender ; Albeit in verbal communings, requiring to be perfected in writ, either party is allowed to resile, till that be done ; yet here the suspender's granting a right by translation of Smeaton's debt, and Mr Young's accepting thereof by his subsequent missive letter, did fully complete the bargain, and exclude all pretence of resiling ; *2do*, Though in competition of heritable rights, sasine (without the warrant thereof produced) is not sustained ; yet in this case, where there is a protestation by one party against another, about something to be done by either, the notary by his office is common trustee for both, and obliged faithfully to insert in his instrument what is required by the one, and the other's answer thereto ; and to furnish both with extracts when required.