

SECT. IV.

Pacta Liberatoria.

1661. December 12. HELEN HEPBURN against HAMILTON of Orbiston.

HELEN HEPBURN, as executrix to her father, Humbie, pursues Sir James Hamilton of Orbiston, for payment of 1000 merks, due to her father by a bond. The defender *alleged absolvitor*, Because there being a bond of L. 10,000 granted by Belhaven, Humbie, Preston, and Orbiston, for the use of the late Duke of Hamilton, but there being nothing to instruct that it was the Duke's debt; yet there was a transaction with the Dutchess of Hamilton for a lesser sum, whereof Belhaven, Preston, and the defender, had paid their part; by which transaction, the pursuer's tutrix and overseer did agree to quit this bond, in respect that her father was acquitted of any share of the bond of L. 10,000. The pursuer *answered*, *imo*, That the defence ought to be repelled, because, being but a verbal agreement, before writ was subscribed, either party might resile. *2do*, The transaction cannot be instructed, there being no writ, and witnesses are not competent; neither can the tutrix's oath prove against the pupil. The defender *answered* to the first, that the transaction being *pactum liberatorium*, it required no writ, and so there was not *locus poenitentiae*; and as to the probation of the transaction, though tutor's oath of knowledge of any debt of the pupil's predecessors will not prove against the pupil, because the tutor is *singularis testis*, and not *in officio*, but a tutor's oath, as to deeds done by himself *in officio*, would sufficiently prove the same.

THE LORDS thought there was not *locus poenitentiae* from the transaction, though but verbal; but as to the manner of probation, they ordained the tutrix and overseer's oaths to be taken, *ex officio*. See PROOF.

Fol. Dic. v. i. p. 564. Stair, v. i. p. 67.

1666. February 8. KER against HUNTER and TENANTS of Cambo.

THE tenants of Cambo raised a double pouding against Ker, and Hunter, both being infest in annualrents, base, where the last base infestment within a month of the former, being clad with possession by a decret of pouding the ground, a year after both, and no diligence on the first;

THE LORDS preferred the last infestment, as first clad with possession.

It was further *alleged*, that this annualrenter had accepted a part of the land in satisfaction of his annualrent. It was *answered*, that there was writ

No 53.

Pacta liberatoria are effectual without writ, so there is no *locus poenitentiae*.

No 54.

Found in conformity with the above.

No 54. there required, viz. a renunciation of the rest, and till that was done, *est locus poenitentiae*.

THE LORDS considering the case, found, that if the promise were only to restrict the annualrent to a part of the land burdened therewith, it was *pactum liberatorium*, and there was not *locus poenitentiae*; but if it was a promise to accept other lands, or the property of a part of the lands burdened, there was *locus poenitentiae* till the mutual rights were subscribed, whereby the one party disposed the property, and the other the annualrent.

Fol. Dic. v. 1. p. 564. Stair, v. 1. p. 352.

1670. January 8.

SCOT against MURRAY.

No 55.

IN a process betwixt Scott and Murray, a husband having granted a tack of his wife's liferent lands, and the wife having promised, after his death, never to quarrel that tack, yet thereafter insisting against the tenants, who *alleged* upon the said promise; it was *answered*, that it being but a verbal promise, not in writ, it can be no more effectual than if it had been a verbal tack, which is only effectual for a year, and thereafter, the setter may resile. It was *answered*, that there is a tack by the husband for several years, and the wife's promise never to quarrel it needs no solemnity in writ, but is valid, as *pactum de non petendo*, or *de non repugnando*.

THE LORDS found the wife's promise effectual, and that she might not resile during the years of the tack.

Fol. Dic. v. 1. p. 564. Stair, v. 1. p. 660.

* * * Gosford reports this case.

IN a removing pursued at Jean Scot's instance, against the Tenants of Broomholm, there was a defence proposed for John Murray, heritor, that there being a tack of the said lands set by her husband, she, as liferentrix of these lands, promised never to quarrel the same after the death of her husband. It was *replied*, that the promise being only verbal, could be no more obligatory but for one year, seeing it could operate no more than if she herself had set a verbal tack for many years, which in law could be only obligatory for one. THE LORDS, notwithstanding, did sustain the defence, and found, that a promise made by a liferenter not to quarrel a written and subscribed tack, made by the heritor for several years to run, was obligatory, and being accessory to a principal tack set by the heritor, did prejudice her as to her temporal right of liferent during the whole years of the tack, and was far different from the case where an heritor or liferenter had set lands by a verbal promise or tack without writ, which, by our law, could only be valid for one year.

Gosford; MS. No 224. p. 90.