

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.

THE LORDS, by their interlocutor the 14th day of July 1664, found that there being no decret of suspension extracted, the Lord Balmerinoch might resile and take up his disposition.

The creditors gave in a bill craving to be further heard; and *alleged*, That albeit in actions defenders may propone compensation or any other defence, and before extracting of the act may pass therefrom *rebus integris*, yet that holds not in suspensions where there is no litiscontestation, but the compensation is instantly verified by production of the right compensated by, whereby *ipso jure*, the proponing of the compensation extinguisheth both debts, and it was Balmerinoch's fault that he did not extract the decret of suspension, being an absolvitor in his own favours; *2do*, Though parties might resile before extract, yet that can only be *rebus integris*, but Balmerinoch cannot now resile when there is a supervenient act of Parliament, 'Discharging the execution of Sir William Dick's bond as being a public bond till the Parliament give order; for if Balmerinoch had resiled in time, Sir William would have recovered payment of that bond as he did of the other debtors therein; *3tio*, Albeit there were place to resile when a decret is pronounced, it could not hold in this case, because this right of Balmerinoch's was not only produced blank in the assignee's name, but the compensation was completed, either by agreement of the parties, or by sentence of the Judges who gave up the blank assignation to Mr Alexander Dick as factor for his father; and that it was in Mr Alexander's hand is acknowledged by William Downie's oath, and so cannot be taken out of his hand after the delivery thereof, albeit it came back to Balmerinoch's hand *viis et modis* without his consent; and William Downie by his oath acknowledgeth, that after the decret the blank disposition was produced by Mr Alexander Dick for obtaining a suspension against Sir John Smith, and was by order of the Lord Balmerinoch returned back to William Downie as clerk in the foresaid suspension, and that he had only warrant to give a sight of the disposition to the Lord Balmerinoch, upon whose letter William Downie delivered the same to James Gilmour and never got it back again; *4to*, The foresaid compensation was homologate and complete, in so far as the blank right being 400 merks short of that charge, Balmerinoch paid the same to Sir William Dick's factor, and accepted his discharge for completing the balance. It was *answered* for the Lord Balmerinoch, That there was neither produced a decret of suspension nor any minute thereof, that the oath of a clerk taken long after he was out of office could not make up the same, though the Lords *de recenti* will make up writs lost in clerks hands by their oaths and others, and that the Lord Balmerinoch was not advertised to give in interrogatories for examination of William Downie; and suppose the minute of the decret were produced, he might and did resile, and took up his disposition; and, it is beyond doubt, but that before extract, a new emergent reason of suspension might have been made use of against Sir William, viz. the act of Parliament, 'declaring that debt a public debt;' nei-

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ther was it Balmerinoch's fault that the decret of suspension was not extractd, for it being upon compensation, it was a liberation to either party, and it was equally their part to extract it, but the fault was in Sir William Dick who could not make use of that decret till he had performed his part, viz. 'till he had granted assignation to Balmerinoch against one of the subscribers of the bond for recovering the half of the double proportion paid by him, according to the order of the Judges at that time in relation to all these public bonds, and until the consent of the donatar to Sir William Dick's escheat had been obtained, and the arrestments purged laid on in Balmerinoch's hands;' upon which grounds there were distinct reasons of suspension, as appears by the bill at the signet; so that, albeit there had been a minute sustaining the compensation, it could only be conditional, all these things being performed by Sir William Dick, which never was done; and it being clear by William Downie's oath, that near the time of that minute Balmerinoch took up his disposition, Sir William might have insisted for a decret condemnator; and, albeit William Downie's oath bore, 'That the disposition was in Mr Alexander Dick's hand,' yet it noways bears 'to have been delivered to him, but that the process was 'lost, and that as soon as the disposition was found in Mr Alexander's hand it 'was returned by order of the Judges to William Downie's hand as clerk to 'the process,' so that now being Balmerinoch's evident, and in his hand produced by him, it cannot be taken from him but by writ or his oath, and by no witnesses, much less by one witness whose oath bears the manner how it came in Mr Alexander Dick's hands as aforesaid.

THE LORDS, before answer, did allow either party to adduce witnesses and all other evidences, to instruct whether there was a minute of decret of suspension; whether the blank disposition was delivered up by Mr Alexander Dick of consent, or by order of the Judges; and if it was in the hands of Mr Alexander Dick, and how it came therein, and how it returned therefrom to Balmerinoch; and if there was such a discharge of 400merks to complete the compensation; upon which Sir John Smith, Sir James Stuart, Mr John More, who had been servant to Sir Andrew Dick, James Brown who had been servant to William Downie, James Chambers who had been advocate for Balmerinoch, were examined; and as to the having of the discharge of 400 merks, the Lord Balmerinoch and the Master of Balmerinoch were often examined and many other persons, and the dispute was ended the last winter session, and a day appointed for advising it in the end of the session, but was not gotten done; and, in the summer session, the advocates for the creditors having left the house, the creditors got several delays to fit themselves with advocates. And now it was *alleged* for them, That they were willing to take up the defence proponed upon their declarator, and suffer the Lord Balmerinoch to take sentence in which they would be absent, which they might well do, seeing there was no act of litiscontestation upon their defence, but an act before answer. It was *answered*, That there was first an act of litiscontestation upon the 14th of July 1664, and thereafter upon the

creditors' application, an act before answer upon both processes; so that according to the Lords' constant custom, they have ever sustained acts before answer, as acts of litiscontestation; the difference only being, that in acts before answer, neither party hath the sole probation, but there is a conjunct probation which cannot be in the ordinary terms of litiscontestation, which is cleared by an act of sederunt, after which no new probation can be adduced, and after probation no party can be allowed to take up their processes.

THE LORDS found that the creditors could not take up their process in this state of the process.

The creditors further *alleged*, That though they had not recovered the discharge of 400 merks, which would clear the consent of parties to the compensation, yet they had a probation of the tenor thereof depending, and craved that the process might not be advised till the same were closed.

THE LORDS proceeded to advise the cause, and found that it was not proven that the blank disposition was delivered to any person for Sir William Dick, either by authority of the Judges or consent of parties, and that the having of the discharge of 400 merks was not proven; and therefore they adhered to their former interlocutors of the 14th of July 1664, finding, that seeing there was no decret extracted, that the Lord Balmerinoch might resile from the compensation and take up his disposition; and therefore repelled the defence and decerned, reserving to the creditors their action of probation of the tenor of the foresaid discharge; and in case they recovered the same, or proved the tenor thereof, reserving any declarator or other processes to be found thereupon, as accords of the law.

Stair, v. 2. p. 289.

* * * Dirleton reports this case :

1674. *December 13.*—THE deceased Sir William Dick having charged the Lord Balmerinoch for payment of a great sum of money due by a bond granted by his father and diverse other noblemen, who were actors in the late times, and did borrow the said sums for the use of the public (as they called it;) and the said Lord Balmerinoch having suspended upon diverse reasons, and also upon a reason of compensation founded upon a bond granted by the said Sir William to Sir John Smith; whereupon the said Sir John had a right to the lands of North Berwick, and had assigned and disposed the said debt and right in favour of the Lord Balmerinoch, by a disposition and assignation blank in the name of the assignee; and no decret being extracted upon the said process, and the act of Parliament anent public debts, that no execution should be for the same, having intervened;

The Lord Balmerinoch having filled up the said assignation in the name of James Gilmour, did intent, in his name, a process for mails and duties against the tenants of North Berwick.

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The Creditors of the said Sir William Dick pretending right to the said lands by diverse infeftments, did compare in the said process, and *alleged*, that the said right whereupon the pursuit was founded, was extinct and satisfied, in so far as the said Lord Balmerinoch had founded a reason of compensation upon the same against Sir William Dick, which was sustained; and whereupon there was a minute of a decret suspending the letters against Sir William Dick for the debt abovementioned; and that the said assignation granted by Sir John Smith had been given up to Sir William Dick or his son Sir Andrew as their evident, for exonerating the said Sir William of the debt compensated upon.

It was *answered*, That there was no decret in that process of suspension against Sir William Dick; and as to the said pretended minute it was not produced. And whereas it was desired, that William Downie, who was clerk for the time, should be examined upon oath concerning the said minute, and the giving up the said assignation to Sir William Dick or his sons; it was *urged*, That the minutes and acts of process could not be made up by witnesses, *Et non creditur clerico nisi quatenus constat ex actis*; and, *2do*, That there neither was nor could be a decret in the said process, in respect the said suspension was upon other reasons that were relevant; and compensation being in effect satisfaction and the last exception, the said reasons ought to have been first discussed, *viz.* that there were diverse arrestments at the instance of creditors which should have been purged; and that Sir William had assigned the debt whereupon he had charged, and the assignation was intimate; so that the suspender could not be *in tuto* to pay, unless the consent of the assignee were obtained, and that the said Sir William was at the horn and his escheat gifted, and that the donatar did not concur nor consent; *3tio*, Though there could have been a decret, and the arrestments had been purged, and the assignee and donatar consented; yet the same not being extracted, the suspender might pass from his reason of compensation, seeing *res* was *integra* before extracting; and the suspender may eik and verify any other reason that is emergent: And there had arisen a most relevant reason and defence to him upon the said act of Parliament anent public debts; of which he ought to have and may plead the benefit, in regard acts of litiscontestation and decreets are judicial transactions and contracts; and as, in other contracts, there is *locus poenitentiae* before they be perfected in writ, so in acts and decreets, before they be extracted, parties are not concluded; as *verb. g.* even after litiscontestation before the same be extracted, a defence may be proponed; and in declarators concerning clauses irritant, though parties will not be admitted to purge after sentence, yet before extracting they will be heard; and even by the common law, albeit *ubi res transit in rem judicatam, sententia non retractatur ex instrumentis noviter repertis*, yet before extracting of the same, if writs be found which will elide the pursuer's libel, they will be received.

It was *answered* for the Creditors; That, in this case, *res* was not *integra*, because the suspender had so far acquiesced, that in effect he had paid the debt;

compensation being equivalent; and if, before extracting, he had made actual payment, there would have been no necessity of extracting the same; and in this case, not only there was *solutio ipso jure*, in respect of the said compensation sustained, but *de facto* the Lord Balmerinoch had paid 3 or 400 merks in satisfaction of the debt charged for, the compensation being so far short; and the creditors had intented exhibition of a discharge granted by Sir William Dick to the said Lord Balmerinoch, of the foresaid sum of 400 merks, and a declarator, that, in respect of the said compensation, the said right granted by the said Sir John Smith was extinct.

THE LORDS, at the desire of the said creditors, having examined diverse persons anent the said minute, and the giving up of the said assignation, and anent the having of the said discharge, granted by Sir William Dick to Balmerinoch, the creditors at length did pass from their compearance. And now the cause being again advised, the LORDS did adhere to their former interlocutor in *anno* 1664, and did find, that, before extracting, Balmerinoch might pass from his reason of compensation; and decerned in the said process at Balmerinoch's instance against the Tenants of North Berwick; reserving to the creditors their action of exhibition and declarator, as accords.

Dirleton, No 203. p. 90.

1681. July 15.

CAMPBELL *against* MOIR.

Found; there was no *locus pœnitentiæ* after an oath was interposed.

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

*** This case is No 19. p. 4889. *voce* FRAUD.

1684. March.

HOME *against* HOME of Polwart.

By a minute of contract betwixt the Earl of Home, and Sir Patrick Home of Polwart, the Earl having granted power to Polwart to collect the teinds of certain lands within the parochin of Greenlaw, Eccles, and Edrum, for which Polwart was obliged to pay to the Earl 900 merks yearly, which being assigned to Jean Home, and she having pursued Polwart for payment, it was *alleged* for the defender, That the minute was null, and could not oblige him, seeing it was not subscribed by him, but only by the Earl; as also, that he did possess the teinds of Greenlaw by virtue of a tack from the parson of Greenlaw, which was preferable, and would have excluded any right he had from the Earl to these teinds; so that the defender was necessitated, for his own security, to take a tack from the parson. *Answered*, That albeit the minute of contract was not subscribed by the defender, yet seeing he possest by virtue of that minute, and

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A tack of tithes, though subscribed by only one of the parties, was sustained, the other party having entered to possession.