

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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No 29.

No 30.

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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.