

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 possess 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.

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deduced a valuation therefrom before the commission of the kirk, and made payment of the tack duty for some years, he ought still to be liable for the tack duty; and he having acknowledged the Earl's right, by entering into possession by virtue of that minute, he could not invert his possession, and ascribe the same to any supervenient right that he acquired from the parson of Greenlaw, in prejudice of the Earl, the pursuer's cedent, unless the teinds had been evicted from him by the parson by legal diligence, and the Earl's right reduced.—THE LORDS sustained the minute, albeit not subscribed by the defender; and found, that his making use of the minute, and his entering into possession by virtue of the same, it supplied the want of his subscription; and that he could not invert his possession in prejudice of the Earl by any supervenient tack that he had acquired from the Parson of Greenlaw to these lands.

Fol. Dic. v. 1. p. 564. Sir P. Home, MS. v. 1. No 592.

1687. February. ALEXANDER against LADY KINGGLASSIE.

No 32.

A lady disposed her estate to her nephew, with a power of redemption. In a pursuit against her to renounce that power, upon her letters promising to do so if the pursuer would return from France to Scotland, the Lords found, there was no *locus poenitentiae*.

THE Lady Kinglassie having granted a disposition, to Andrew Alexander her nephew, of the lands of Kingcraigie, reserving her liferent, and power to burden and affect the lands with what sums she pleased, and to redeem the same from him at any time during her life, *et etiam in articulo mortis*, upon payment of three pounds Scots; which disposition she retained by her, but writes several letters to him, bearing, that she had sent and infest him in the lands, and that she had assigned him to as much money as would make the land free; and, because it was redeemable, she gave him her promise that she should never redeem it from him, nor from his heirs to be gotten of his body; which promise she counted as good as her subscription. And, by another letter, she writes, that she had infest him in the lands; and offers him, if he would come home, and live at home in Scotland, to denude herself of the liferent, and set him down free in it without burden; and, by another letter, she writes, that he might have Kingcraigie free, otherways she would sell it, for Halyards would buy it; and, by another letter, that she was to go to Fife and infest him in the lands, and registrate the sasine, and then the world could not wrong him of it. As also, the Lady having formerly granted a disposition to the pursuer without any reservation or reversion, and delivered it to Magnus Aytoun for the pursuer's behoof, and thereafter called for it back again, and granted this disposition with these reservations; and the first disposition was granted in consideration that the pursuer's mother being heir portioner with the defender, her sister, who having gotten the hail estate, she did, upon that account, dispose the said lands of Kingcraigie to the pursuer; which, albeit this cause was not exprest, yet it was the consideration of the defender's granting of the disposition; and the said Andrew Alexander having taken the disposition out of