

No 31.

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

the Lady's coffer; he raised a declarator, upon these grounds, that it may be found and declared, that the Lady should discharge the reservation, and renounce the liferent, and disburden the lands of all debts. *Alleged* for the defender, That she being proprietor of the lands, and there being no obligation upon her to grant the foresaid disposition to the pursuer, nor any onerous cause for granting thereof, it cannot be understood, that, by writing these letters, she intended to denude herself of her right, otherways than in the terms of the disposition; and a discharge of renunciations and reservations of liferent and reversions, being such important and solemn writs, which have a particular form and stile, they cannot be understood to be done by missive letters, but there is always *locus poenitentiae*; as was decided the 18th January 1683, Skelmorly against Brown, No 25. p. 8411, where the LORDS found, that a party writing a letter that he would stand to a bargain, and receive the keys of the house accordingly, notwithstanding allowed to receive, and that there was *locus poenitentiae*; and is just the case as if a father should write to a son, or a friend to another, to induce them to be diligent in their studies, to do some right thing for their own good, that they would settle lands, or a part of their estate upon them by a donation, such a letter could not be obligatory, unless the disposition were actually granted or delivered to the party; nor could such letters convey the property of the lands, or other heritable rights; and the words, that she should infest him in the lands, and that none could wrong him of the same, doth not import a discharge of the reversions or reservations contained in the disposition, nor is it conceived in obligatory terms; and the words, that none could wrong him, cannot be applied to the Lady herself, nor prejudge her of any right that was in her own person, but only to third parties who could not wrong him, if she gave him right to the lands. And these words in the other letter, that she had assigned him to as much money as would free the land, and that she had promised that she should not redeem the same, not being conceived in obligatory terms, and being only relative to their letters, it does not oblige, unless the other letters were produced. And that letter, by which she writes that he should have the lands of Kingcraigie, otherways she would sell them, is a clear evidence that she still reserved a power to dispose of the lands as she thought fit. And the letters can import no more but only that she had a design to settle the lands upon the pursuer; as in the case when a party grants an obligation to make a tailzie of his estate to certain heirs of tailzie, yet, notwithstanding, he may alter the tailzie, and dispose of the lands as he pleases, unless he were obliged not to alter the tailzie. Much more may a party who only signifies their design by a letter to dispoise lands, alter their design at any time before the rights be actually granted. As also, the letters were affected with provisions and conditions which were not performed, such as if that he should come home and settle in Scotland, which he never did before he was bankrupt, and forced out of France by his creditors: As also, he did not only reject the said offers the Lady made him in the said letters, by declaring he

No 32. was not satisfied, but also by several letters, (written by him to Mr James Alexander, his brother, and others); after the Lady's letters to him, he writes, that he had sent her a renunciation of the lands of Kingcraigie, and empowers the person to whom he writes to intimate so much to the Lady.—THE LORDS found, that, notwithstanding of the letters, and of the verbal promise, there is yet *locus poenitentiae*; and remitted to one of their own number to hear the parties in so far as the disposition is onerous. But, in July 1688, the LORDS having reconsidered the debate, with the letters produced for either party, they found the letters obligatory on the Lady to secure the fee of the lands of Kingcraigie to the pursuer, and decerned accordingly.

*Fol. Dic. v. 1. p. 562. Sir P. Home, MS. v. 2. No 883.*

\* \* \* Fountainhall reports this case :

1687. February 8.—ANDREW ALEXANDER, late factor at Rochell, against The Old Lady Kinglassie. This is a pursuit to dispoise Kingcraigie to him, upon her letters promising to do it if he would return from Rochell.—THE LORDS, on Edmonston's report, found, on advising the missive letter, that, notwithstanding thereof, and the verbal promises, there was yet *locus poenitentiae*; and remitted to the Lord Reporter to hear the parties, how far the disposition is onerous.—By a former interlocutor, the LORDS had found she could not resile.

1687. November 25.—Andrew Alexander's action *contra* the Lady Kinglassie was again debated. He founded upon her missive letters, promising to renounce her liferent, and discharge the reversion of the lands of Kinglassie, which she had dispoised to him, if he would come from Rochell. *Alleged*, The Lords had already found, (*supra* 8th February 1687,) that there was *locus poenitentiae*, and that in law missives were not the *habilis modus* to convey heritage; though moveables might be so transmitted, being *utrius a partibus vilis momenti*, but not lands; and that there behoved to be formal and registrate renunciations; and Stair observes that in Montgomery, No 25. p. 8411, one was allowed to resile, though there were obligatory letters. *Answered* for him; Purposes and resolutions do not bind; *propositum in mente retentum nihil operatur*; but engagements may arise from letters; and here formal renunciations were unnecessary, not having to do with third parties, but only with the granter; and though offers do not bind till acceptance, yet he never repudiated or did any deed to infer his not acceptance, or to forfeit it by ingratitude.

1688. July 20.—The case of Andrew Alexander against the Lady Kinglassie mentioned 25th November 1687, being advised, the LORDS now find the letters written by the Lady obligatory on her, and that she must dispoise Kingcraigie to him, reserving her own liferent; and find his ingratitude, whereon she founded her revocation, nor proven, or that he stole up these bonds and assignations from her. The formal words of the interlocutor are; THE LORDS having con-

sidered the depositions of the witnesses adduced by the pursuer, and the qualifications insisted on for her, they find that the defender's contrectation and away taking of the writs libelled is not proven, and therefore assoilzie the defender from this summons, and declare that he has right to the sums contained in the two assignations and translation produced; and, in respect of the bond granted by the pursuer and her cautioner at her giving up of the said writs, decern her and her cautioner to make payment to the defender, Andrew Alexander, of the sums assigned to him by the foresaid assignations and translation. And having advised the debate, with the letters produced from either party, they find the letters obligatory upon the Lady, to secure the fee of the lands of Kingcraigie to the pursuer, and decern accordingly.

Upon a bill given in by the Lady, representing, that Andrew, by several letters, had rejected and repudiated her offers, and had been ungrateful, the LORDS, on the 25th of July, recommended to the Justice-Clerk and Mersington to endeavour to settle the parties; and appointed both parties to attend them at such diets as they shall appoint; and, in the mean time, stop extracting of the two decreets above mentioned.—The Lady having kept up this deliverance, of purpose to cast off this Session, Andrew gave in a bill on the 26th of July, which the Lords having heard, they ordained the Lady Kinglassie's procurators to reproduce her petition, and to come to the Clerks-chamber, where the letters are, and to pitch upon those letters which she founds upon, that the same may be brought in to the Lords this afternoon to be advised, with certification if they failzie herein, the Lords will ordain the petitioner's decret to be extracted.

*Fountainball, v. I. p 446, 482, & 512.*

\* \* This case is also reported by Harcarse :

1687. *February*.—FOUND, that the sending of a letter, wherein the writer's full resolution was to dispone to the receiver thereof, did not hinder *locum poenitentiae*, in respect the letter contained no obligation to dispone.

*Harcarse, (LOCUS POENITENTIAE.) No 676. p. 192.*

1697. *December 23.*

SIR ROBERT LAWRIE of Maxwelton *against* MARION CRAICK, and HOMER MAXWELL he Husband.

MERSINGTON reported Sir Robert Lawrie of Maxwelton *against* Marion Craick, and Homer Maxwell her husband. Sir Robert having acquired the lands of Stuarton, pertaining to the said Marion Craick's father, and she having an adjudication thereupon, he enters into communing with Homer Maxwell her hus-

No 33.  
A sale of lands found to stand, although writ had not intervened, a part of the price having been paid.