No 33.

band, and they agree for 6000 merks, whereof Homer receives 1000 merks in hand, and the other 5000 merks is sealed up and consigned in a neutral person's hands till the disposition were signed by the said Homer and his wife, but they declined to subscribe, unless a reservation were insert to secure her against her father's debts. Maxwelton pursues them for implement. *Alleged*, This being a right of lands, it was no perfect consummate bargain till writ had followed thereon and been delivered, till which there was always *locus pœnitentiæ*. *Answered*, There could be no resiling here, because there was *rei interventus* by the delivery of the 1000 merks, and the consigning the rest, and which they offered to prove by the notar's instrument, and the depositions of the witnesses insert. *Replied*, Whatever may be pretended that *res* is not *integra* by Homer's accepting the 1000 merks in the first end, and in contemplation of this bargain, yet the consigning the rest of the money is no such consummation but it might be resiled from, and no instruments nor witnesses can prove such an agreement, else heritable rights might be disponed by witnesses; but the terms must be only proved by my writ or oath.——THE LORDS found the *rei interventus* took off the power of resiling, and that *res* was no more *integra* if he took the 1000 merks in part of the price; but found this could not be proven by witnesses, but only *scripto vel juramento* of Homer Maxwell, whether he took it in contemplation of this bargain or *quo alio nomine* he got it, or if he reserved to himself freedom to resile on reponing Maxwelton *cum omni causa*, and refunding his damage. The question was, on whom the loss of the annualrent of the consigned money should fall? For the consigners in the clerk of the bills hands, by order of a judge, are free of interest, yet such voluntary consignation as this *non sistit cursum usurarum*. See PROOF.

*Fol. Dic. v. 1. p. 563. Fountainhall, v. 1. p. 804.*

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1699. *December* 5. THOMSON *against* THOMSON.

No 34.
A man attempted to resile from a bargain of a house, after he had entered to possession. Found obliged to implement, although no writ had intervened.

WILLIAM THOMSON flesher in Kelso, pursues James Thomson merchant there, before the Bailie of Kelso, for payment of the price of a tenement he had sold him. James advocates the cause, on this reason, that the Bailie had committed iniquity in repelling this defence, that the bargain not being consummate by writ, there was *locus pœnitentiæ*, and he now resiles. *Answered*, It was justly repelled, in respect of this answer, that, in prosecution of the bargain, you had got the hail writs and evidents of the land, and the keys of the houses, and had entered into possession, and now kept it for a year and a half; as also, by virtue thereof, had entered into a transaction with the heritor of the neighbouring tenement for building a side wall thereto, which making a plain *rei interventus*, there is no more place for resiling; especially considering, that the delivery of the charter chest of Auchinleck of Balmanno to Sir Thomas Murray of Glendoick, was found a sufficient ground, by a late interlocutor, to examine the

commununers anent the eases, though there was no writ. The other party founded on decisions in Durie, 5th March 1628, M'Gill, *voce* WRIT; and the 5th of December 1628, Oliphant, No 7. p. 8400; and Stair, Montgomery of Skelmorly, No 25. p. 8411. where parties were allowed to resile, though some things were done in contemplation of the bargain, these being restored, and the parties redintegrate *in statu quo prius*.—THE LORDS here thought *res non erat integra* by the condescendence made, and that the Bailie had committed no iniquity, and were therefore for remitting it back. Some thought there was no such *rei interventus* here, but what could be easily passed from, by giving back the writs and keys, and purging the house of the servitude imposed; and which fell of itself as null, being constitute by one who had no right.

No 34.

*Fol. Dic. v. 1. p. 563. Fountainhall, v. 2. p. 70.*

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1700. *January* 31. LAIRD of INNES *against* The DUKE of GORDON.

No 35.
In an action at the instance of a wadsetter, it was objected, that the wadset was subscribed by the heritor only, not by the wadsetter.
The objection was repelled.

CROCERIG reported the Laird of Innes against the Duke of Gordon, being a pursuit for mails and duties upon a wadset of the lands of Enzie, given by the Marquis of Argyle, when heritor or donatar for L. 15,000, as a part of Lady Anna Gordon's tocher with the Lord Drummond in 1639. *Alleged*, 1*mo*, The contract of wadset is null, being only subscribed by the Marquis of Argyle, and not by Sir Robert Innes; and mutual contracts are not obligatory, except where both parties subscribe them, its definition being *duorum vel plurium in idem placitum consensus*, which consent is requisite *ad perfectionem contractus*. 2*do*, This Innes's retour is *ipso jure* null, bearing the lands to be holden of the King, whereas the wadset being base, it held of the Duke as come in place of Argyle, the donatar to the forfeiture, and so is by the wrong superior. *Answered* to the 1*st*, The practice of subscribing at that time was, that the one party signed the one double and gave it to the other party, and he did the like with his, as is to this day used in England; neither can the Duke quarrel this, seeing Innes is willing to adhere to and own all his obligements in the contract. And Durie observes, that the LORDS, on the 9th of February 1627, M'Duff *contra* M'Culloch, No 16. p. 8406. found a contract subscribed only by one of the parties might be registrate and charged on by the other, he offering to sign it; and as to the retour, it is a sentence of 15 sworn men, and must stand till it be reduced, especially seeing the Duke produces as yet no right.—THE LORDS repelled the dilators.

*Fol. Dic. v. 1. p. 564. Fountainhall, v. 2. p. 85.*