REPLIED,---The disparity is obvious; for the last sheet bore a clause of relief by the principal to him, which necessarily inferred his being cautioner; whereas, here, the clauses in the last sheet give neither light nor clearing as to those in the first.

The Lords doubted much what to make of it; but, remembering there are commonly two doubles of contracts matrimonial, they granted Freugh a diligence for recovery of the other principal, to the effect they might see if there was any discrepancy betwixt them, from comparing them together.

At last, the Lords, on sundry specialties convincing them that there was no alteration in the first sheet, repelled the nullity of not sidescribing in this case.

Vol. II. Page 142.

1702. *February 5.* SIR WILLIAM STUART of CASTLEMILK *against* The DUKE and DUCHESS of HAMILTON.

SIR William Stuart of Castlemilk pursues for maills and duties of the lands of Coats, formerly belonging to Minto.

ALLEGED, For the Duke and Duchess of Hamilton,—Absolvitor, because there was a communing which came to a final agreement. Sir William was to dispone these lands to the Duke and Duchess on certain conditions of paying a price and alimenting the former heritor, which was accordingly done.

ANSWERED,—This being a bargain of lands, it required writ to its solemnity and perfection, till which was adhibited there was *locus pœnitentiæ*; and he now resiles. And for any performance made, it was not to Castlemilk, but to Stuart of Minto, and was not in contemplation or prosecution of this bargain; but the Duchess had been in use to aliment Minto before that, and so can never be ascribed to the bargain. And communings were ever ambulatory till they were fixed in writ; as has been found by a tract of decisions, *5th December* 1628, *Oliphant* against *Monorgan; 29th January* 1630, *Laurie* against *Keir; 16th July* 1636, *Keith* against *Tenants; 15th July* 1637, *Skene*; and *28th January* 1663, *Montgomery* against *Brown*; and sicklike in 1685: in all which cases place was found for resiling.

REPLIED,—That is true where there is not *rei interventus*, and something done in implement of the bargain; for then *res non est amplius integra*, and so *cessat locus pœnitentiæ*; as was found *1st December* 1674, *Gordon* against *Pitsligo*.

DUPLIED,—Pitsligo's case was only a simple promise to enter a vassal gratis, which differs far from emption, vendition, and other mutual contracts, where each party is to perform something *hinc inde*; and though one has performed their part, yet that does not tie the other to observance till writ has intervened; only they must restore what they have got.

The Lords finding the bargain was referred to Castlemilk's oath, they ordained him to depone anent the terms, before they should determine the relevancy, whether there was such a *rei interventus* here as hindered him from resiling though there was no writ upon it.

Vol. II. Page 143.