

1708. July 14.

JAMES GRAHAM, Brother to the Laird of Dougalston, *against* JAMES CORBET
Merchant in Glasgow.

No 36.

A person accepted some guineas upon a set for stating the price of shares in the African Company, and allowing the giver his choice, who made his option. This held to be *rei interventus* to cut off the benefit of *locus poenitentiae*, though the assignments to these shares were not perfected and delivered.

JAMES GRAHAM and James Corbet, having each of them L. 300 shares in the African Company, they entered into a bargain, whereby Mr Corbet being allowed to set these shares by putting a price upon them, Mr Graham gave him five guineas to let him have the choice, either to take Mr Corbet's share, or part with his own to him, at the rate he, Mr Corbet, should put upon them. Corbet having rated each share at L. 42 : 10, (which was the principal sum advanced), James Graham declared his option to accept of Mr Corbet's three shares at the price set upon them. Mr Corbet did, notwithstanding, thereafter uplift his own shares from the Commissioners of the equivalent, which occasioned James Graham to pursue him for payment and damages.

Alleged for the defender; Since the bargain required to be perfected by assignments, there was *locus poenitentiae* till that solemnity of writ was used, and the writs delivered; which was urged from the common law, *L. 17. C. De Fide Instrumentorum*; the opinion of the Doctors, and our own law and practice, as observed by the Lord Stair, B. 1. T. 9. § 9; and Dirleton in his Questions, under the word *Locus Poenitentiae*.

Replied for the pursuer; This benefit of *locus poenitentiae* competent by our law, holds not in *re mercatoria*, as the buying a share in a trading company, which must be regulated by, the laws of nations and commerce, which allow not parties to resile in such a case; but dictate, that *nihil tam congruum fidei humanæ, quam ea quæ inter contrabentes placuerunt servare, L. 1. D. De pactis*; and *grave est fidem fallere, L. 1. D. De pecunia constituta*. 2. Here was not simply a contract of vendition or sale, but an agreement by way of set, where *eo momento* a price was given for the choice, the defender tacitly renounced the privilege of resiling, and became bound precisely to implement. A person who upon the exchange of London, Holland, or other trading nations, (where shares in bank, and particular trading companies are daily transacted and sold) should object this *locus poenitentiae*, upon the rising of such stocks, (which in two hours time will alter considerably), would be hissed off the Exchange, as both a fool and unfair trader. 3. Our law allows the benefit of *locus poenitentiae* only in matters of heritage, and others of great moment.

Duplied for the defender; The subject in question was not properly *res mercatoria*, more than any other piece of private property; for the company was dissolved, and the proprietors drew all their shares. 2. Nor doth it alter the case, that the bargain was made by way of set; a set of its own nature being a sale, with the addition only of an option or choice, which was an accessory to the principal contract, or a circumstance introducing the sale. The defender's receiving the five guineas as the premium of the pursuer's option, could

not hinder him to pass from the principal incomplete contract of sale, upon restitution of the guineas, more than a seller in a case where writ is pactioned to intervene, upon re-delivery of a considerable earnest-penny given in part of the price, would be cut off from resiling before the writ is perfected and delivered. 3. It appears from the decisions, March 5th 1628, McGill *contra* Edmonston, *voce* WRIT; Campbell *contra* Douglas, No. 63. p. 8470.; Lawson *contra* Auchinleck, No. 12. p. 8402. that *locus poenitentiae* is allowed with us even in mercantile business.

Tripled for the pursuer; The cited decisions do not meet the case; and even that betwixt Lawson and Auchinleck, which seems the most pat, there was no *rei interventus*, but only an earnest-penny given after celebrating the bargain; whereas here *res intervenit in ipso contractu*, which put Mr Corbet under an obligation to transfer.

THE LORDS found, that there having been *rei interventus* by the defender's accepting of five guineas, upon a set for stating the price, and allowing the pursuer his choice; and the pursuer having accordingly made his choice, the exception of *locus poenitentiae* is not competent.

Fol. Dic. v. i. p. 563. Forbes, p. 263.

* * * Fountainhall reports this case:

JAMES GRAHAM, brother to Dougalston, and James Corbet merchant in Glasgow, having equal shares in the African Company, when there was little hopes of recovering that money, they entered into a bargain of set who should have one another's share; and Graham gives Corbet five guineas, that he may have the option either to take Mr Corbet's share, or to part with his own to him at the rate and price Mr Corbet should put upon them. Corbet thinking there was hazard in it, set the principal sum as the price on both their shares. Graham accepts to take Corbet's share at that rate, but some weeks after, the Parliament having declared, that the proprietors of the African stock should not only draw their principal sums, but their annualrents to the day of the commencement of the Union, on the 1st of May 1707; and the equivalent being sent to Edinburgh, Corbet, without regard to the bargain, comes to Edinburgh and uplifts his money. Mr Graham pursues him for implement, and to pay him the whole he had received from the Commissioners of the equivalent. Corbet *alleges*, It was never a completed bargain, but you Graham kept yourself loose and in suspence, till you saw it came to an account beyond expectation, and then you grasped at it, but must succumb; for this being a transaction that required writ, till it was interposed, there was always *locus poenitentiae*, and now I have resiled, and taken up what was my own; and this agreeable to all law; *imo*, To the Roman constitution, as appears by *l. 17. C. De fide instrument.* where, in all bargains requiring writ, each party is free till the same

No 36.

be perfected and delivered; and by our law, the decisions are clear, 5th March 1628, M'Gill *contra* Edmiston, *voce* WRIT, and Campbell *contra* Douglass, No. 63. p. 8470.; 3dly, We shall add the authority of two piercing Lawyers, *viz.* Stair, B. I. Tit. 9. § 9. and Dirleton, *voce* *Locus Pœnitentiæ*. *Answered*, That nothing can more contradict that fidelity which should be in trade, than upon emergent advantages not foreseen at the time to overturn bargains; *nihil tam fidei humanæ convenit quam quæ placuerunt servari, et in re mercatoria grave est fidem fallere*; and here was a complete bargain, the five guineas being the *pretium* given for my choice and election of the *merx*; and there needed no writ upon it, more than in vendition and setting of shares of ships; and it is only in bargains of importance that writ is required. THE LORDS found the *rei interventus* sufficiently completed this set, by Graham's delivery of the five guineas, and Corbet's taking them; and therefore found Corbet liable, and repelled his defence of *locus pœnitentiæ*.

Fountainball, v. 2. p. 452.

1709. December 23.

GEORGE LOCKHART of Carnwath *against* JOHN BAILLIE of Walston.

No 37.
A missive of sale signed by both parties was not delivered by one of them; yet the sale was found complete, and no *locus pœnitentiæ*.

AT a treaty of agreement betwixt John Baillie of Walston and John Hamilton writer to the signet, about the sale of Walston's estate to George Lockhart of Carnwath, a minute of sale being drawn up, signed by Walston, and given to John Hamilton, upon his obligation to procure some prestations from Carnwath, and to cause him subscribe the minute under the pain of L. 500 Sterling; and Carnwath having signed and got up the minute from Mr Hamilton, he thereupon charged Walston to implement the same; who suspended and repeated a reduction upon this ground, that he resiled from the bargain, and there was *locus pœnitentiæ*, in so far as, 1mo, The minute charged on is no delivered evident, the charger not having received it from Walston, but from only John Hamilton, who had no warrant to give it up to him, but only to procure his subscription to it. And it were unreasonable, that Walston should be bound to Carnwath by that copy of the minute now in his hand, before he were equally bound to Walston by delivering another signed double to him; till which time the bargain was incomplete, and might be resiled from by Walston; as Carnwath might have shaken himself loose of it, by throwing the signed minute in the fire, or cancelling his subscription. For to sustain such an unwarrantable delivery by a mandatar, *qui excessit fines mandati*, would open a door to all manner of fraud; at which rate it should be in the power of any mercenary agent, to surrender his client's bonds to his debtors; 2do, The price of the lands was not clearly determined by the minute, which bears only '21 years purchase of the free money and victual rent payable out of the lands, conform as the same shall be proven to have paid at the suspender's father's de-