

1663. *January 28.*SIR ROBERT MONTGOMERIE of Skelmorlie *against* JOHN BROWN.

SIR ROBERT MONTGOMERIE pursues John Brown, for perfecting a bargain agreed upon in word betwixt them, where Sir Robert was to dispoise the right of an apprizing of the lands of Fordel, for which John was to pay 10,000 merks; after which verbal agreement, John Brown wrote a letter to Sir Robert, in relation to the bargain, bearing, that he was afraid not to get the money at the time agreed upon; and then bearing the said words, all I can say now is, I am not to pass from what was spoken betwixt you and me.—The defender *alleged*, That this being a communing in word, anent an heritable right, *est locus poenitentiae*, there being yet neither minute, disposition, or other security subscribed; and as to the letter, it was not to be respected, because it was no minute; and mentioned, that the writer was not fully resolved, that he would be able to provide the money, and keep the bargain. As for the word signifying, that he would not pass therefrom, it did but express his present resolution, and was not obligatory; and though they were, so long as Sir Robert might resile, notwithstanding of the letter, John Brown might also resile.—It was *answered* for the pursuer, That his libel stood most relevant, because there is only *locus poenitentiae* when there is no writ; but if any party oblige himself to stand to a former communing, his own voluntary deed has unquestionably obliged him, unless the other did resile; and the obligation is as valid in a missive letter as the most solemn bond. Neither are words, ‘I am not to pass,’ to be interpreted to signify a resolution, but being *in materia obligatoria*, must signify an obligation, otherwise all minutes must be void, and are ordinarily expressed in such terms, as are to do, or shall do such things; and whereas there were several practices produced, finding *locum poenitentiae* in such cases, though there were earnest, and though there were possession, and a letter whereby the resiler designed another party by the lands dispoised, yet there was no obligation in writ, as in this letter; and likewise John Brown paid 3000 merks of the price, albeit he took a bond of borrowed money till things were perfected, and got the keys of the houses.

THE LORDS found there was yet place to resile, and therefore assoilzied.

*Fol. Dic. v. 1. p. 562. Stair, v. 1. p. 163.*

\* \* Gilmour reports this case:

SIR ROBERT MONTGOMERIE of Skermorlie and John Brown being comprisers of the estate of Fordel, they, to save questions and processes betwixt themselves, did enter in agreement; and before the Lords Tarbot and Stair did agree, that Sir Robert should dispoise to John his comprising, being the first, for payment making of a considerable part of the sums therein contained, at two terms, and that in so far as may concern the said lands of Fordel, the rest of the estate,

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In a verbal transaction for lands, the one party wrote to the other: I am afraid of not getting money, but ‘am determined not to pass from the bargain.’ There was still *locus poenitentiae*.

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and the comprising thereof to be reserved to Skermorlie for security of the remanent sums contained in his apprising. According to this verbal agreement before and after the first term of payment, the said James Brown writes several missive letters to Skermorlie, showing him the difficulty to get money, but that he was using his best endeavours; offers him readily to deliver a part, and to give him security for the rest; and says in his letter, that he was not to pass from any thing agreed upon betwixt them; besides, that he had received the keys and the possession of the house, and had settled with the Bishop of Dunkeld for the feu-duties, whereupon Skermorlie pursues John to hold bargain, and to complete it in writ.—It was *alleged*, That before bargains be ended in writ, which of necessity must have writ, or are appointed to have writ, *locus est poenitentiae*; and the defender, upon reasonable considerations, passes from his bargain, being content that Skermorlie may enjoy the benefit of his first comprising, as accords, &c.—It was *answered*, That where a party is obliged by writ, or by subscribed articles, condescends to make a bargain, or where *res non est integra*; in either of these cases *poenitentia* has no place. *Ita est*, The defender has obliged himself by writ, in so far as he declares by his letter, he is not to pass from any thing agreed upon, which is as if he had said I shall end the bargain agreed upon, and as much as if articles had been subscribed for making a bargain; neither is *res integra*, in respect of the tradition of the keys and possession of the house, and of John satisfying the superior as to the feu-duties.—It was *replied*, That these words in the letters, ‘ he is not to pass,’ import no obligation, but an expression of his intention at that time, and that he did not then intend to pass from it, which cannot take away his liberty before subscribing of writs; and it were unreasonable that the defender should be tied to a bargain where the pursuer is not, who may resile or not resile, though the defender had a purpose to hold it. And as to the receiving of the keys and paying of the feu-duties, it can import nothing, but that then he intended to hold bargain; and which keys he might receive to try what accommodation he might have, in case the bargain were ended; and he might have paid the feu-duties as a compriser, where the pursuer has no prejudice. There were diverse practics alleged for the defender, namely, *anno* 1646, betwixt Lochtor and Mr William Moir, which did not every way hold\*.

THE LORDS assoilzied, and found that the defender had *locum poenitentiae, me maxime contradicente*.

I have known it often found, where one of the parties bound himself by a minute, and the other not; the other, diverse years after, has recovered the minute out of the hands of a third party haver, and has caused the subscriber fulfil the same, though till then he did never declare his mind, whether he would hold bargain or not.

*Gilmour, No 74. p. 54.*

\* Examine General List of Names.