

1729. November 18. M'KENZIE and WYLIE *against* TROTTER.

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A possessor being pursued to remove from a house of which he had got a verbal tack from the pursuer, to last for nine years, *locus poenitentiae* was found competent to the pursuer, though the defender *pleaded*, that *res non erat integra*, in that the house being designed for a meeting-house, he had altered the partitions, and reared up pews to a considerable expense; but consideration of the expenses laid out on faith of the verbal agreement was reserved.—
See APPENDIX.

Fol. Dic. v. 1. p. 563.

1745. February 22. The DAUGHTERS of CHRISTIE *against* CHRISTIE.

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ALTHOUGH a promise, however absolute, to dispoſe lands or any other subject, which requires writ, may be resiled from before writ intervene; yet the case is different of a promise to ratify an informal disposition already granted; for, in that case, the action lies upon the informal deed, and the defender is *personali exceptione* barred from objecting the nullity.

And accordingly, a promise to ratify an informal disposition to land, was, in this case, found relevant by the oath of party.

Kilkerran, (PERSONAL EXCEPTION.) No 2. p. 382.

* * * D. Falconer reports this case.

GEORGE CHRISTIE, tenant in Kinglassy, having purchased the lands of Auchmuir, took the disposition to himself and his wife in liferent, and to George and William Christies, his sons, in fee, with a faculty to himself to dispose of the same, without consent of his sons.

Afterwards, having made another settlement on William, he disposed the lands of Auchmuir to George; but this disposition wanted witnesses, being wrote by William, who had wrote for some time in the town-clerk's chamber in Kirkcaldy, and contained this clause, "And if it shall happen the said George or William to die without heirs lawful of their body, both their provisions shall fall in to the survivor."

After the father's death, the brothers came to an agreement to implement their father's deed, notwithstanding any defect therein, but the writer of this contract was not designed.

Upon George the son's death, his three daughters pursued their uncle to denude of the half of Auchmuir; and he objecting the nullities in the deeds, was ordained to depone, Whether he agreed to subscribe the agreement be-

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tween his brother and him; and *2dly*, If he did not promise to implement his father's disposition. Accordingly, he deponed before a commissioner, That he had truly subscribed the agreement; and "That he knew his father's inclination was, that his brother should succeed in the whole lands, which he agreed to, and promised to implement and fulfil; but that he was assured that it was their father's inclination, that there should be a mutual tailzie made between him and his brother, of their estates, failing of heirs male of their bodies; and deponed, that he promised, and offered to renounce his right to the lands of Auchmuir, but upon condition of making the mutual tailzie."

THE LORDS, 12th January 1725, Found it proved that the defender promised to implement and fulfil his father's disposition or destination to his brother, notwithstanding of any informality therein, and not to quarrel or impugn the said nullity; as also, that he promised and offered to renounce his right to the lands in question; and found the quality adjected was extrinsick.

Upon a reclaiming petition, he was ordered to be examined before the two Ordinaries on the witnesses, before whom, in absence of the pursuer's procurator, he deponed, "That he never did promise to implement or fulfil his father's disposition, but allenary upon condition of the mutual tailzie."

Afterwards, he was ordained to be examined in presence, which never took effect, the cause being taken up on another medium, and he assoilzied without any regular alteration of the interlocutor in favour of the pursuers, who thereupon raised a reduction of this decret, and obtained an interlocutor 19th December 1744, opening it *ad hunc effectum*, to hear parties, how far the interlocutor 12th January 1725, ought to be altered or adhered into, upon the facts and circumstances alleged in the said decret, and the proceedings had in consequence of the reclaiming petition against the said interlocutor.

The matter coming thus to be disputed of new, it was *pleaded* for the pursuers, That the defender could not take advantage of the nullity in his father's deed, in regard he was the writer of it, and ought to have made it formal; and besides, was tied up by his own agreement to implement it, which he owned he had signed: This was evidence his father had no designs of a mutual tailzie between them, and also that he engaged to implement his father's destination.

2dly, He acknowledged his promise in his two oaths, and the quality adhibited by him was extrinsick: He deponed that he subscribed the agreement, promising to implement the disposition, and in it there was no such condition; he also owned he promised implement thereof; and the latter part of the oath did not necessarily imply that the quality was adjected at the time the promise was made.

Pleaded for the defender, both the deeds pursued on labour under such nullities as render them improbativ; and the pursuers cannot avail themselves of the first being wrote by him, since he is entirely ignorant in point of law, in so much as to have long entertained an opinion that his father's intention

of substituting them to one another, on failure of heirs male of their bodies, was properly expressed by the word heirs, as daughters were heiresses. The second deed being null itself, does not support the first, nor does it prove an agreement to implement it; so that nothing remains but his oath, the quality whereof, which is most true, is plainly intrinsick.

2dly, A promise to dispoise land is of no effect to found an action, because there is *locus poenitentiae* till it be reduced into writing.

Several decisions were cast up on both sides, how far a null deed was capable of homologation, or how far binding, where the party did not deny the subscription. For the pursuers, 17th February 1715, Sinclair of Freswick against Sinclair of Dunbeath, *voce* WRIT; 26th December 1695, Beattie against Lammie, *IBIDEM*; July 1716, Henderson against Balfour, *IBIDEM*; and the late case, Mr Robert Young *against* the Managers of the Meeting-house at Montrose, No 33. p. 6370., where it was objected that the letter pursued on was not holograph.

For the defender, 11th January 1711, Gordon against Macintosh, *voce* WRIT; 4th January 1710, Logie against Ferguson, *IBIDEM*; and 11th February 1634, Cassimbrow against Irvine, *IBIDEM*.

THE LORDS adhered to their interlocutor, 12th January 1725, and further repelled the objection founded on the *locus poenitentiae*. See QUALIFIED OATH.

See 19th December 1744, between the same parties, *voce* PROCESS.

Reporter, Lord Tinwall.

Act. W. Grant.

Alt. Lockhart.

Clerk, Kilpatrick.

D. Falconer, v. 1. p. 81.

1745. June 21.

MOODIE *against* MOODIE.

THE rule by which it is to be judged, whether *res* be *non integra*, so as to exclude the *locus poenitentiae*, was laid down to be this, that wherever any thing has happened on the faith of the verbal agreement, which cannot be recalled, and parties put in the same place as before, then *res* is understood not to be *integra*, and that there is no longer *locus poenitentiae*.

And by that rule it was, that in this case, where three sisters, Elizabeth, Agnes, and Ann Moodies, heirs portioners of Ardleckie, finding the lands could not be conveniently divided, had agreed to set them up to roup among themselves, and Ann the youngest sister, intending to be purchaser, had concerted with Agnes, that without regard to the price which the lands should yield at the roup, in case Ann should be preferred, Agnes should accept of 7000 merks as her third part, with a burden of the proportion of the eldest sister's *præcipuum*; and on the faith of this verbal agreement, Ann had made the highest offer, and been preferred; but Agnes refused to accept of the 7000 merks, in respect the concert being only verbal she might resile; the

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One of three heirs portioners having bought her predeceasing ancestor's estate at a roup, in consequence of a bargain with one of the others to accept of a certain sum as her share, that other was found not entitled to resile.