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. No 41.

2*dly*, A promise to dispone land is of no effect to found an action, because there is *locus pœnitentiæ* 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, Cassimbro against Irvine, IBIDEM.

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

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1745. *June* 21. MOODIE *against* MOODIE.

No 42.
One of three heirs portioners having bought her prececessor'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.

THE rule by which it is to be judged, whether *res* be *non integra*, so as to exclude the *locus pœnitentiæ*, 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 pœnitentiæ*.

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

No 42. LORDS found, " That there was here no *locus pœnitentiæ*, and that the defender was bound to accept of the 7000 merks, with deduction of the third of the *praecipuum*.

*Fol. Dic. v.* 3. *p.* 395. *Kilkerran*, (LOCUS POENITENTIAE.) *No* 1. *p.* 340.

*** D. Falconer reports this case.

ELIZABETH, Ann and Agnes Moodies, the daughters and heirs portioners of John Moodie of Ardleckie, came to an agreement, that the estate should belong to the one of them who should be the highest offerer at a roup amongst themselves, and the price be equally divided, allowing first a certain *præcipuum* to Elizabeth, as the value of the mansion-house, &c.

It was *alleged*, Ann and Agnes had made a verbal contract, that, to encourage Ann to bid for the lands against Elizabeth, Agnes should accept of 7000 merks for her share, whether the price of the purchase were higher or lower.

Ann accordingly bought the estate, and offering to pay Agnes with 7000 merks, she refused, and *pleaded*, that in bargains of buying of land, there was *locus pœnitentiae* till the compact were completed by writing.

*Pleaded* for Ann, There can be no *locus pœnitentiæ*, where *res non est integra;* and here the purchaser was induced by this bargain to give more than otherwise she would have done.

THE LORDS, 21st June, " found there was no *locus pœnitentiæ*."

*Pleaded* in a reclaiming bill, That, by the terms of the libel raised by Ann, the agreement was said to have been notwithstanding of the articles of roup, which implied it to have been subsequent to them; and this which was the only thing that had the appearance of relevancy, as any prior paction was passed from by signing the articles, the petitioner absolutely denied.

A paction prior to the articles, being neither directly acknowledged, nor absolutely denied by this petition; the LORDS adhered in determining the relevancy.

Reporter, *Lord Dun.* Act. *Lockhart.* Alt. *Ferguson.* Clerk, *Hall.*

*D. Falconer, v.* 1. *p.* 113.

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1748. *November* 23.

SIR JAMES FERGUSON of Kilkerran *against* BENJAMIN PATERSON.

No 43.
A promise in writing to dispone land, is binding in law.

BENJAMIN PATERSON wanting to purchase the debts due by his father, and thereby get into possession of his father's estate of Glentig, prevailed upon Sir James Ferguson of Kilkerran to desist from purchasing the same, upon a promise to convey to Sir James the pendicle of Duchary, part of the said estate, which lies interwoven with Sir James's property. This agreement was executed