

## S E C T. II.

*Locus poenitentiae* until the Writ be perfected.

1583. June.

THAINE against CANT.

THERE was one called Thaine, that pursued one Cant, the spouse of umquhile Colonel Balfour, for delivering of a tack and assedation made by form of contract to the said pursuer. It was *alleged* by the defender, That the said tack ought not to be delivered, because the said tack and assedation was made contracting for her part liferent, and her son pupil, as fiar, and his tutor for his interest; and true it was, that neither her son, as fiar, nor his tutor, had subscribed the same, it ought not to be delivered *prout de jure C. De fid. instrum. L. 17. nam contractus non aliter vires sumunt nisi in mundum fuerint recepti et subscriptionibus partium confirmati*, and into that time that they be perfected, and *summa manus* be imposed unto them *locus est poenitentiae*; and so the said tack ought in no manner of way to be delivered. To this was *answered*, That the defender ought not to be heard to allege that the tack was imperfected, because she had ended it, subscribed and perfected for her part; and as to the pupil and his tutor, during her lifetime, they could have no interest, because she was liferenter of the lands, which were set in tack and assedation *et utile per inutile non debuit vitiari*.—THE LORDS found by interlocutor, that in respect the said tack was imperfected and unsubscribed by all the hail parties contained thereintill, that the same should not be delivered *licet nannulli dominorum fuerunt in contraria opinione*.

*Fol. Dic. v. 1. p. 561. Colvil, MS. p. 365.*

1626. December 16.

BYRES against JOHNSTON.

JAMES JOHNSTON having subscribed a letter of alienation of some lands to John Byres of Cotes, which letter was delivered by the said James to Mr Francis Hay writer, to the behoof the said John Byres, to the effect that charters might be formed thereupon in favours of the said John; and after the said charters were written out, the said James having come to the said Mr Francis, and borrowed from him the said letter of disposition, to the effect he might confer the same with the charters, promising to re-deliver the same; and that diverse times since, the said James promised to the said John to re-deliver the same, and to fulfil the whole conditions thereof; the said John Byres pursues the said

VOL. XX.

46 X

No 14.

A contract was made between a liferentrix, her son, and his tutor, on the one part, and a third party on the other. Though she subscribed, and was in possession, found null even as to her, not being subscribed by the tutor.

No 15.

A bond of alienation was subscribed and delivered to a writer for behoof of the purchaser. It was got back by the seller under promise to return it. Found there was still *locus poenitentiae*.

No 15.

James for re-delivery thereof, and refers the summons, being of this tenor above written, to his oath. This summons was not found relevant by the LORDS, notwithstanding of the whole particular circumstances and points above written therein contained, seeing it was not libelled therein, that the foresaid letter of alienation was either delivered to the pursuer's self, or to the said Mr Francis Hay, to be delivered by him to the pursuer; albeit it bore, that the bond was subscribed by the defender, and delivered to the writer, to the behoof of the pursuer, and to form charters thereupon in his favours, and thereafter borrowed out to confer with the charters, upon promise to render the same back again. And albeit the summons bore promise made by the defender diverse times since, to re-deliver the same and to fulfil it, yet all this was not relevant, except the same bore the bond to have become the pursuer's evident, by delivery thereof to himself, or to some other to be delivered to him; which not being libelled, nor yet replied, the LORDS found, that the defender might resile from the bargain, and that he was not obliged to stand to the same, seeing it was not perfected by tradition, as was necessary to the perfection thereof, and the promise since to perfect was sicklike not obligatory, seeing the defender had place to repent; for as the pursuer might upon his part resile from the bargain if he pleased, there being nothing extant which could compel him to pay the price thereof, seeing the letter of alienation granted the receipt of the money and price thereof from the pursuer, albeit in effect the same was not paid, but granted paid on trust, so the like liberty ought to be permitted to the defender to resile. This is conform to the civil law, where *licet pœnitere, nec est emptio ante confectionem scripturæ, ubi in scriptis facienda est*, yet it appears, that if the money had been delivered, *non erat locus pœnitentiæ*. See PROOF.—WRIT.

Act. — — .

Alt. *Hope et Belshes.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 561. Durie, p. 247.*

No 16.

1627. *February 9.*M'DUFF *against* M'CULLOCH.

IN a suspension betwixt M'Duff *contra* M'Culloch, against a contract registered in the books of an inferior Judge, by the consent of a procurator, for one of the parties contractors, the other party neither having subscribed the contract, nor yet being registered for him;—the LORDS nevertheless sustained the registration, and charges raised against him, for whom consent was given, the other party comparing instantly in this judgment before the Lords, and subscribing the contract, and consenting that execution be granted against him, sicklike as if it had been also registered against him *ab initio*.

Act. *Nicolson.*Alt. *Belshes.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 561. Durie, p. 270.*