

No 37. LORDS repelled the objection against the witness, and found it no nullity, though he was a subscribing witness to the minute, being chosen by mutual consent, and more of Walston's acquaintance than Carnwath's.

Fountainball, v. 2. p. 545. & 561.

1710. December 13.

JOSEPH YOUNG, Merchant in Edinburgh *against* HENRY NISBET of Dean.

No 38. JOSEPH YOUNG having charged the Laird of Dean, upon a decret obtained against him before the Sheriffs of Edinburgh, to make payment to Joseph, of L. 147 : 14 : 9d. ; Dean suspended upon this ground, that L. 106 must be deducted, for which he had got credit from the charger by his missive letter dated in May 1706, bearing, That there remained L. 57 : 10s. of balance of the sum contained in the decret due by the suspender, after giving him credit for all that was paid by him to the charger, and taking off L. 106 due to the suspender by Captain Richardson ; and that the charger intreated the suspender to pay the said balance, and let him have Captain Richardson's papers with a right thereto. Upon which the suspender, 22d September last, offered these papers to the charger, with a right thereto under form of instrument ; which instrument bears, that the charger acknowledged the suspender's having made such an offer in due time.

Replied for the charger ; He had good reason to refuse to accept a right to Captain Richardson's debt 22d September last ; his circumstances being then far altered to the worse from what they were at the date of the charger's letter. And where a right is to be perfected in writ, there is a *locus poenitentiae*, till the terms be agreed on, and the writ extended, subscribed and delivered ; *2do*, The instrument taken by the suspender cannot prove that prior and timeous offers were made of the papers, and a right thereto ; seeing the assertion of a notary cannot prove the emission of words or expressions at that time, far less what past at other times, before which he had no warrant to assert, but the suspender's telling him it was so.

Duplied for the suspender ; Albeit in verbal communings, requiring to be perfected in writ, either party is allowed to resile, till that be done ; yet here the suspender's granting a right by translation of Smeaton's debt, and Mr Young's accepting thereof by his subsequent missive letter, did fully complete the bargain, and exclude all pretence of resiling ; *2do*, Though in competition of heritable rights, sasine (without the warrant thereof produced) is not sustained ; yet in this case, where there is a protestation by one party against another, about something to be done by either, the notary by his office is common trustee for both, and obliged faithfully to insert in his instrument what is required by the one, and the other's answer thereto ; and to furnish both with extracts when required.

THE LORDS found, that the suspender having subscribed a right of Smeaton's debt to the charger, and he having accepted thereof by his missive letter, there was no *locus poenitentiae*, and found the letters orderly proceeded only for the balance of L. 57 : 10s. ; the suspender always proving by the notary and instrumentary witnesses, that the charger had acknowledged by his answer to the suspender's protest, that the offer of Captain Richardson's papers, and a right thereto, was made *debito tempore*.

Forbes, p. 449.

No 38.

1724. July 23.

The YORK-BUILDINGS COMPANY *against* MR. JAMES BAILLIE, Writer to the Signet, and ANDREW THOMSON.

MR WALKER of Santfoord, and the two defenders, made a proposal to take a lease of certain lands from the Company, which was agreed to by Mr Streachy their manager, who was to set the lands to these three gentlemen equally among them, their heirs or assignees; and they were to become bound conjunctly and severally for the tack duty.

After the terms were thus settled, but before the tacks were extended or signed, Mr Walker went to take a farther view of the lands, and to enquire into the condition of the tenants; and in his absence three duplicates of the tack were wrote out, and signed by Messrs Baillie and Thomson, together with Mr Streachy, but were left in the hands of Mr Campbell, who was writer and doer for the Company, till such time as Mr Walker should likewise sign.

The view which Mr Walker had taken of the estate, so far possessed him with a dislike of the bargain, that upon his return he refused to sign the tacks, which Mr Streachy formally required him to do; upon which Messrs Baillie and Thomson protested that they might be free.

The Company brought an action against Baillie and Thomson for implement of the tack; for whom it was *pleaded* in defence, That they had *locus poenitentiae*, since all the parties who were designed to be concerned had not signed the tacks; that, as the bargain was entered into upon the prospect of Mr Walker's being joint partner, and who, upon account of his knowledge in such matters, was to have managed for them, so the contract was not complete till such time as he should sign; for which end, the copies were left in the writer's hands, and not exchanged, and since Mr Walker declined to hold the bargain, they ought to be free, in the same manner as the Company would be, should they claim it, because the set was made upon the faith of having three tacksmen bound to them, and no less security could bind them; which appeared to have been Mr Streachy's sentiments of the matter, from his having required Mr Walker, under form of instrument, to accede to the tack.

No 39.
Three parties proposed to take a lease, and the terms were settled. In the absence of one of them, two signed the lease. The other refused. The two now wished to re-sile. Found, that the deed being incomplete, there was *locus poenitentiae*.