

was *locus poenitentiae*, all the penalty being loss of the arles; and being before the 40 days, the landlord has time enough to set his house.—*Answered*, No such custom proved; besides, it is most unequal and irrational for the tenant to have liberty to resile, and not the locator or setter; why should he be bound, and the other loose? and this contract of location conduction being once perfected, there should be no *locus poenitentiae*.—*Replied*, Tenants in possession may give over any time, providing there be 40 days yet to the term, and why may not an intrant tenant do the same?—THE LORDS sustained the overgiving, in respect of the custom, though it be an evident hardship upon landlords; but some of the LORDS moved, that further trial should be taken anent the universality of the custom, which was affirmed to lie just on the contrary side.

*Fol. Dic. v. 1. p. 564. Fountainball, v. 2. p. 181.*

1715. January 21.

WILLIAM YOUNG in Alloa, against MARGARET IRVINE, and JOHN ANDERSON, her Husband.

A CONTRACT of marriage, in common form, having past betwixt the said parties, (the woman being *in familia* of her father) and a penalty of L. 100 Scots adjected thereto; the woman nevertheless marries another person, whereupon the man insists for the penalty against her and her husband.

*Answered*, That this contract imported no more but a resolution, which, *re integra*, may be receded from; specially since *matrimonia debent esse libera*; 2do, She being a child *in familia*, the contract was *contra bonos mores*; 3tio, No diligence is competent here for implementing the principal contract, far less then for the penalty, since *accessorium sequitur suum principale*.

*Replied*, 1mo, That the contract was an actual obligation to solemnize, and the penalty comes in place of performance, to which the pursuer has right *nomine damni*, and *nemini admittendum est consilium mutare in alterius prejudicium*; 2do, The contract bears, that she is obliged to marry with consent of her parents; 3tio, In the like case, Jamieson *contra* Sheriff, 14th December 1708, *voce* WRIT, the Lords decerned for the penalty.

*Duplied*, That since *res* is still *integra*, no penalty in such a case can be insisted for, since that were to act *in fraudem legis*; 2do, As to the decision founded on, there was no decision as to the contract itself, but only as to the designation of the writer and witnesses, as is evident from the case.

THE LORDS found the answers and duply relevant to elide the libel and reply, and therefore assoilzied the defenders.

Clerk, Robertson.

*Fol. Dic. v. 1. p. 565. Bruce, v. 1. No 35. p. 44.*

No 67.

before the term. This in consequence of an alleged practice.

No 68.

Found, that no marriage having followed, after a contract of marriage had been executed, there was *locus poenitentiae*, and no penalty exigible.