No 73.

The genius of the law of Scotland rejects the testimony of witnesses in matters of importance, or where writing is essentially necessary, or usually adhibited. The only exception admitted is in bargains of moveables, for encouragement of commerce, where parties depend on mutual good faith; and writing is seldom adhibited. Here the line is drawn; and in other cases a proof by witnesses is inadmissible.

This is held to be a clear principle of the law, in questions of mandate, order, or direction; and is supported by an uniform tract of decisions.

A verbal submission is evidently a mandate, or commission to common friends to take away a difference, having indeed implied in it a promise to stand to their award; and, if one shall acknowledge, or depone, that he did submit, then, *ex bono et æquo*, he is bound to stand to the decreet-arbitral, but if he shall depone *negative*, then the decreet-arbitral being without warrant, necessarily falls to the ground.

The present question has already received the judgment of the Court, Ninian Home *contra* Scott, No 11. p. 8402. Home charged Scott upon a bond of 350 merks; Scott suspended upon this reason, that both parties referred the matter verbally to an arbiter, who had determined 220 merks to be paid in full. It was *answered*, That verbal submissions and decreets-arbitral are not binding; but either party may resile before writ be adhibited. 'THE LORDS found, that 'the reason of suspension was relevant to be proved thus; by the charger's 'oath, that he did submit; and, by the arbiter's oath, that he did accordingly 'determine.'

The pursuer objects to this decision, that it is not in point; because the party was alive, and his oath was resorted to; but it appears from the decision, that the Court, according to the form of process then prevalent, gave a particular interlocutor on the relevancy. It must therefore be held to be a decision on the general point of evidence in a question of this nature; and, as such, it has been received, and the point is now *tritissimi juris*.

'THE LORDS adhered to the ORDINARY's interlocutor, and found the pursuer 'liable in expenses.' See PROOF.

Act. *Cosmo Gordon.* Alt. *D. Dalrymple.* Clerk, *Campbell.*

Fol. Dic. v. 3. *p.* 396. *Fac. Col. No* 76. *p.* 184.

1773. *December* 15.

JOHN BUCHANAN *against* ANDREW BAIRD, EDGAR, BUCHANAN, and Others, Merchants in Glasgow.

No 74.
Possession for two years of a shop, in consequence of a verbal treaty with its owner, which he al-

THE point here was, if Baird and certain other persons were entitled to plead *locus pœnitentiæ*, in defence against an action instituted against them in May 1773, before the Magistrates of Glasgow, at the instance of Buchanan, as proprietor of a shop in that town, for the purpose of having them decreed to execute a five years lease of it, in terms of a verbal treaty in March 1771, between

No 74.
leged was for a five years lease, joined with payment of the rent for the time it was possessed, found not to exclude the right to resile.

him and Baird, for the behoof of a company of merchants in Glasgow, who did accordingly enter upon the possession of the shop at the term of Whitsunday ensuing, and regularly paid the rent, but now refused to stand to the bargain, as construed by him; and the question came before this Court, by a suspension of a sentence of the Magistrates given in favour of the landlord.

The suspenders, without precisely admitting the state of facts assumed by the charger, with regard to the length of the lease, confined their plea to the point of law, which the Lord Ordinary sustained.

Argued for the charger in a reclaiming petition, A more ungracious plea than that of the *locus pœnitentiæ* cannot well be figured. The foundation of this singular doctrine, in the law of Scotland, seems to be no other than a jealousy of parole evidence. Writs respecting heritable subjects are the most important of any. Verbal bargains may be misheard, misconstrued, or not accurately remembered by witnesses; and particularly, it cannot be certainly known whether the parties were serious. Hence, the law will not allow such bargains to be established by the testimony of witnesses. But, where the bargain is acknowledged, or offered to be proved by the oath of party, then as there can be no doubt that it was really and seriously entered into, there does not appear any reason, either from justice or expediency, for setting it aside, let what will be the subject of the bargain. It seems to be a mistake, that writing is strictly essential to bargains respecting heritage in our law. It is, indeed, the safest proof of the bargain, because it does not depend upon the lives of the parties, and therefore is the more usual, but it is not the only one. In the present case, the suspenders have never ventured to deny the bargain. Their acknowledgment, and in particular that of Baird, the person who took the shop in the month of March, in answer to a protest taken against him, is equivalent to a written proof of the bargain which therefore must be binding.

2*dly*, The bargain ought to be effectual upon another ground, viz, its having taken effect in part. It is admitted on all hands, that the *locus pœnitentiæ* is barred *rei interventu*, and, when matters are no longer entire, even where there is properly no *rei interventus*, 23d July 1674, Earl of Kinghorn, No 27. p. 8414. And there is a case more directly in point still, observed by Spottiswood in these words: " One having pursued another for the duties of certain lands set to the defender by the pursuer in tack, for the space of five years, it was alleged by the defender, that he possessed not the room that year he was pursued for, but had renounced his tack half a year before, which he might lawfully do, there having no writ intervened between the parties, but the tack being only verbal; yet, because he had possessed three years of the five, the LORDS found he could not renounce the other two years at his pleasure," 24th January 1629, No 8. p. 8400.

No 74.

Lastly, the suspenders renounced the *locus pœnitentiæ*, subsequent to the bargain with the charger. The charger, upon offers for a lease of his shop, which would have been fully more acceptable to him than the terms of the bargain with the suspenders, told them, that they might be off if they pleased; but they declared they were determined to adhere to the bargain. In consequence of which, the charger, not thinking himself at liberty to resile from the bargain with the suspenders, refused these offers. It is submitted, whether matters could be considered as any longer entire after this. But, at any rate, it was clearly a renouncing of the *locus pœnitentiæ*.

Answered, The law of Scotland has been remarkably attentive to all bargains respecting heritage. It requires writing as essential to their constitution; and, whatever may have passed between the parties, either of them is at liberty to resile until the bargain be fully completed by writing, executed in terms of law. This rule holds not only in bargains of sale, but also in bargains relative to tacks or leases, with this single exception, that a tack for one year may be entered into, without writing; and that a verbal tack, though granted for several years, is obligatory on both parties but for one. Stair, b. 2. tit. 9. § 4. Bankton, b. 2. tit. 9. § 5. Erskine, b. 3. tit. 2. § 2.

The suspenders' argument, that the *locus poenitentiæ*, allowed in verbal bargains, respecting heritage, is founded upon a jealousy of parole evidence, will not avail them. Law must be fixed and permanent, and applicable to general cases. And it is of no moment, that, in a particular case, it may be supposed that the reasons upon which the general rule or principle has been laid down, do not precisely occur. To put it in the power of judges to lay aside such general principles, would be in effect to render the law altogether uncertain.

The law has required certain solemnities in the execution of written obligations, without which they are not binding upon the contracting parties; nor can the defect be supplied either by a reference to oath, or by an acknowledgment that the obligation was fairly expressed in the writing. An agreement concerning heritage may be executed in the form of mutual missives; but, in that case, both missives must be probative, otherwise either party may resile, Mackenzie and Lawson *against* Park, November 15. 1764, No 47. p. 8449.

2dly, In this case, there has been no *rei interventus* to make the bargain a bit more effectual or binding than it was from the beginning. All that has happened is, that the suspenders entered into possession, and continued that possession for the space of two years; and, if mere possession were to have effect to bind the parties to a verbal lease for a number of years, it would follow of course, that writing was not necessary to the constitution of any tack whatever. In a case that occurred in the year 1729, Mackenzie and Wylie against Trotter, No 40. p. 8437., this defence of *res non erat integra* was repelled, in a process of removing from a house, of which the tenant had got

a verbal tack for nine years, although the house, being designed for a meeting-house, the tenant had altered the partitions, and reared up pews at a considerable expence. There the tenant had actually laid out his money upon the faith of his being allowed to possess the house for nine years. But here the charger cannot say he has laid out any thing, or has been put to any expense whatever; and, as he has got timeous intimation that the suspenders were not to continue in the possession of his shop after Whitsunday last, he had it in his power to have let it again to a new tenant at that term. No 74.

The old decision observed from Spottiswood, was totally departed from in the subsequent cases that came before the Court, and is perfectly inconsistent with the ideas of every author who has written upon the law of Scotland for a century back; and since the decision, 16th July 1636, Keith, No 9. p. 8400., it has been constantly understood, that a verbal bargain could only be binding for one year.

Again, as to Baird's acknowledgement of the bargain, as being equivalent to a written proof of it, this plea merits no answer. It is not because the bargain has been disputed, but because it has not been properly executed, that the suspenders are not bound to stand to it. And, as to the renouncing the *locus poenitentiæ*, by the declaration of the suspenders, that they were determined to adhere to the bargain, there is not the least evidence of it; and, even though it were proved in the clearest manner, it would afford no relevancy. The *locus poenitentiæ* obtains, even though one of the parties should write to the other, that he was not to pass from the bargain; for such words can only serve to express the party's present intention, and, at the same time, cannot possibly bind him to whom the letter is directed; and so it was expressly found, 28th January 1663, Montgomery against Brown, No 25. p. 8411.

The judgment pronounced was: "Find the *locus poenitentiæ* is still competent to the suspenders; and, therefore, that they are not bound to fulfil the five year's verbal set founded on by the charger; but remit to the Ordinary to hear parties further upon any claim of damages competent to the charger, on account of the conduct of the suspenders."

And by a subsequent judgment on this point, the Court "found the suspenders liable for the rent of the shop, from Whitsunday 1773, to Whitsunsunday 1744, and the expenses of process since the remit."

Act. *Rolland.* Alt. *Wight.* Clerk, *Campbell.*

Fol. Dic. v. 3. *p.* 396. *Fac. Col. No* 95. *p.* 239.