

SECT. IV.

Pacta Liberatoria.

1661. December 12. HELEN HEPBURN against HAMILTON of Orbiston.

HELEN HEPBURN, as executrix to her father, Humbie, pursues Sir James Hamilton of Orbiston, for payment of 1000 merks, due to her father by a bond. The defender *alleged absolvitor*, Because there being a bond of L. 10,000 granted by Belhaven, Humbie, Preston, and Orbiston, for the use of the late Duke of Hamilton, but there being nothing to instruct that it was the Duke's debt; yet there was a transaction with the Dutchess of Hamilton for a lesser sum, whereof Belhaven, Preston, and the defender, had paid their part; by which transaction, the pursuer's tutrix and overseer did agree to quit this bond, in respect that her father was acquitted of any share of the bond of L. 10,000. The pursuer *answered*, *imo*, That the defence ought to be repelled, because, being but a verbal agreement, before writ was subscribed, either party might resile. *2do*, The transaction cannot be instructed, there being no writ, and witnesses are not competent; neither can the tutrix's oath prove against the pupil. The defender *answered* to the first, that the transaction being *pactum liberatorium*, it required no writ, and so there was not *locus poenitentiae*; and as to the probation of the transaction, though tutor's oath of knowledge of any debt of the pupil's predecessors will not prove against the pupil, because the tutor is *singularis testis*, and not *in officio*, but a tutor's oath, as to deeds done by himself *in officio*, would sufficiently prove the same.

THE LORDS thought there was not *locus poenitentiae* from the transaction, though but verbal; but as to the manner of probation, they ordained the tutrix and overseer's oaths to be taken, *ex officio*. See PROOF.

Fol. Dic. v. i. p. 564. Stair, v. i. p. 67.

1666. February 8. KER against HUNTER and TENANTS of Cambo.

THE tenants of Cambo raised a double pouding against Ker, and Hunter, both being infest in annualrents, base, where the last base infestment within a month of the former, being clad with possession by a decret of pouding the ground, a year after both, and no diligence on the first;

THE LORDS preferred the last infestment, as first clad with possession.

It was further *alleged*, that this annualrenter had accepted a part of the land in satisfaction of his annualrent. It was *answered*, that there was writ

No 53.

Pacta liberatoria are effectual without writ, so there is no *locus poenitentiae*.

No 54.

Found in conformity with the above.