

No 10.

have been agreed upon, for entry to the ground, and labouring the same during the alleged space convened upon; and they found, That albeit the pursuer had bigged barns and byres to the tenant, for his use of labouring, that yet there was no prejudice to the master, seeing they would serve for any other tenant that should enter; neither was it a considerable prejudice, that the tenant entered not at Whitsunday to the grass, as the defender would have inferred. But because the pursuer restricted his summons to the fulfilling of that part of the alternative, alleged condescended upon, viz. either to enter to the land, and keep the tack agreed upon, or else to pay him a year's duty of the land, if he entered not;—THE LORDS sustained that part, viz. for payment of the said years duty, if he liked not to enter to the land; for the which the LORDS found, That the defender could not be heard to resile and pass from that promise, if the same was proven; and therefore the LORDS sustained the action therefor, to be proven by defender's oath, whereanent the LORDS found the defender had no place of repentance.—See PENALTY.

Clerk, Gibson.

Fol. Dic. v. 1. p. 560. Durie, p. 852.

No 11.

1671. February 7.

NINIAN HOME *against* FRANCIS SCOT.

NINIAN HOME having charged Francis Scot upon a bond of 550 merks, he suspends on this reason, That both parties having referred the matter verbally to an arbiter, he had determined 200 merks to be paid for all, whereupon Hume had pursued. It was *answered*, That verbal submissions and decreets-arbitral are not binding, but either party may resile before writ be adhibited.

THE LORDS found the reason was relevant to be proven thus, by the charger's oath that he did submit, and by the arbiters oaths that they did accordingly determine.—See PROOF.

Fol. Dic. v. 1. p. 560. Stair, v. 1. p. 716.

1699. June 28.

GEORGE LAWSON, Treasurer of Edinburgh, *against* JAMES AUCHINLECK, Chirurgeon Apothecary there.

No 12.

Two parties
exchanged
their shares
in two public
companies.
Earnest was
given, but no
transfer sub-

CROGERIG reported George Lawson, Treasurer of Edinburgh, against James Auchinleck, chirurgeon apothecary there. They had entered into a bargain by way of set, whereby George exchanged some shares he had in the paper manufactory and African Company, with some shares James had in the Bank, and thereon a guinea of earnest was given. James being pursued on this transaction before the Bailies of Edinburgh, he was decerned to implement and ad-

here thereto. He raises suspension and reduction, on this reason, that such agreements are only completed by writ, and till that be interposed there is *locus poenitentiae*, and now he resiled, seeing the transfers of these excambed shares were not as yet subscribed. *Answered*, In such bargains as these, by the custom of nations, there was no more required but the set, and they were binding from the date; and Benevenuto, Stracha, and other lawyers who write *de sponsonibus mercatorum* prove it to be the custom of all the trading towns in Italy. *Replied*, Though these sponsons be frequent among merchants, yet writ is necessary to their perfection and consummation; they cannot bind till the same intervene, this being a contract *qui re perficitur*; and if this were good law, then if lands were excambed by a set, their property should be conveyed before the dispositions were subscribed and delivered, which were absurd. THE LORDS thought the resiling ungenerous, but could not subvert the principle of law, whereby there is *locus poenitentiae* ay till subscribing of papers; but thought he should be reponed *cum omni causa*, and not only his guinea returned, but all his damages likewise paid, through not adhering to the bargain; but reduced the Bailie's decret as iniquitous.

Fol. Dic. v. 1. p. 561. Fountainball, v. 2. p. 55.

1750. January 12. KINCAID of that Ilk against STIRLING of Glorat.

SIR JAMES STIRLING of Glorat built a mill for dressing lint, on the river of Glassart, resting one end of his dam for collecting the water on the opposite ground belonging to James Kincaid of that ilk, which he alleged he had done by the consent, at least by the tacit approbation of Kincaid, in as far as he had informed him of his intentions, in case Kincaid was not to build a mill himself, which he had not disapproved of; and that the mill was built, and the dam made in his view, at least in the view of his family, he himself being keeping the house, and instruments lent from his house for that purpose, and that he had sent his lint to be dressed at the mill.

Kincaid afterwards built a mill himself, for serving which he had occasion to make some alterations in a former dam belonging to him, higher than Sir James's, and to divert part of a burn which used to fall into the water betwixt their dams; whereupon mutual declarators were pursued, the purport of Kincaid's being, that Sir James could not rest the end of his dam-dyke upon his ground; which the LORDS, 23d November 1749, found.

Pleaded in a reclaiming bill; It is acknowledged that writ is necessary to create a servitude, so as to make it real on the ground; but Kincaid having, either expressly, or *rebus ipsis et factis*, consented, ought to be debarred by a personal objection from hindering the use of this; especially as in consequence of his acquiescence, Sir James has been led into considerable expenses, which else will be lost.

No 12.
scribed. *Locus poenitentiae* admitted, upon returning earnest, and paying damages.

No 13.
A person consenting to a servitude on his land, may resile till obliged by writ.