No 238. By virtue of this tack, the tenant entered into the possession, and, without taking the benefit of the break, paid his rent during the Earl's life. But being charged at the instance of the present Earl and his curators, for the crops 1739 and 1740, he suspended on account of the damages he had sustained by the Earl's not having inclosed the lands, as he was bound, which he valued at L. 100 Scots yearly. And, at discussing, on 2d July 1741, the LORD ORDINARY, "In respect the tenant had possessed the ground from the year 1730, notwithstanding his being free at the end of the first seven years, and had made no requisition to have the ground inclosed, but paid up his rent, in terms of the tack; repelled the reason of suspension, and found the letters orderly proceeded; but, in regard the suspender does now insist to have the ground inclosed, found that the charger ought forthwith to inclose the same."

Against this interlocutor the suspender reclaimed; and, on advising petition and answers, on the 26th of November 1746, it appeared that the charger had obeyed the Ordinary's appointment for inclosing the ground; and, as to bygones, no regard was had to what was pleaded by the suspender, that, *esto* he had made no requisition, the Earl was liable; for, though where a particular day is fixed for performance, dies interpellat pro homine; and though quod sine die debetur, presenti die debetur, so that presenti die peti potest, yet till requisition is made, dies non venit. But all the question was, How far he could be allowed to prove by witnesses, that he had required the late Earl, which he averred he had done?

As to which, the rule was agreed to be, that wherever requisition is necessary, if there be no instrument taken on it, it can no otherways be proved than by the writ or oath of party; agreeable to what we have in Stair's Instit. tit. Accessory Obligations. Nevertheless, it was doubted, whether, in this case, there might not be an exception on account of the rusticity of the party; and, therefore, he was, before answer, "Ordained to give in a condescendence of the time when such requisition was made, and of the witnesses by whom he proposed to prove it;" and, of this date, he was "Allowed a proof before answer."

Fol. Dic. v. 4. *p.* 161. *Kilkerran*, (PROOF.) *No* 9. *p.* 444.

1749. *June* 3. CADDEL *against* SINCLAIR.

No 239. A servant hiring himself for more years than one, how to be proved?

A SERVANT'S hiring himself for more years than one can only be proved by writ; and although his hiring for one year may be proved by witnesses, yet if the writ by which he engaged for more years be null, it will not be competent to supply it even by his oath, as the nullity of a written contract cannot be supplied by the party's oath upon the terms of the agreement. But if, upon such null contract, the servant shall have entered to his service, then the bargain being proved by his oath, *res non est integra*, to this effect, to oblige him to serve for one year, (but no longer,) as so far he could have bound himself by a verbal contract.

No 239.

And, accordingly, in this case, which was a process at Caddel's instance against Sinclair, his servant, for deserting the service which he had undertaken for three years, and which, in the inferior Court, he had acknowledged on oath to be true, the LORDS, in respect no writ had intervened, "Found him only bound to serve for one year."

The case is the same with respect to tacks. A tack for more than one year can only be proved by writ; and if the writ be null, it cannot be supplied by the oath of party. Or where a verbal agreement is made for a tack of three or more years, but with this provision, that it is to be reduced into writing, till writ follow, the agreement is of no effect; but if, in consequence of such verbal agreement, the tacksman be permitted to enter into possession, it will be effectual for one year, though writ should never follow.

Fol. Dic. v. 4. *p.* 161. *Kilkerran,* (PROOF.) *No* 10. *p.* 445.

No 240.

1750. *January* 12. KINCAID *against* STIRLING.

A PERSON having built a dam-dyke, resting upon the ground of another, whose consent he alleged he had obtained, and offered to prove the agreement by witnesses; it was questioned, whether a real servitude of this kind could be constituted by a verbal agreement, probable by witnesses. THE LORDS thought, that, even if such agreement were admitted, there is always a *locus pœnitentiæ* till writ be adhibited; but that, in this case, if it should appear, that, in consequence of such verbal agreement, the complainer had suffered the dyke to be built, he would now be barred, *personali exceptione*, from having it demolished; and, for that end, they allowed a proof of the agreement.

Fol. Dic. v. 4. *p.* 161. *Kilkerran.*

*** This case is No 13. p. 8403. *voce* LOCUS POENITENTIÆ.

No 241.

1773. *June* 24. FRASER *against* WILLIAMSON.

A VERBAL submission was found not probable by the oath of the arbiters.

Fol. Dic. v. 4. *p.* 161. *Fac. Col.*

*** This case is No 73. p. 8476. *voce* LOCUS POENITENTIÆ.