

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 perficetur*; 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.

No 13.

Answered; Writ is necessary to convey a real right; so that till it be adhibited, there is place for repentance; and therefore Sir James cannot insist on any consent by Kincaid, if it had been given, which was not reduced into writing.

THE LORDS adhered.—See PROOF.

Act. *H. Home.*

Alt. *Hamilton Gordon.*

Fol. Dic. v. 3. p. 393. D. Falc. v. 2. No 121. p. 137.

* * * Kilkerran reports this case :

1750. *Jan. 12.*—STIRLING of Glorat had built a lint-mill, resting his dam-dyke upon the ground of Kincaid of that ilk, as Kincaid alleged, without his consent, and as Glorat alleged after Kincaid's consent previously had and obtained thereto.

In the mutual declarators pursued on this occasion, and wherein an act before answer was given, the LORDS, at advising, were of opinion, that although a real servitude may be constituted by long possession, because such a possession presumes a title, yet such a servitude cannot be constituted by verbal agreement to be proved by witnesses; nay, though a verbal agreement were admitted, there is *locus poenitentiae* till writ be adhibited; yet if, in consequence of such verbal agreement, the dam-dyke had in this case been suffered by Kincaid to be built, he would have been barred *personali exceptione* from obliging Glorat to demolish it, as it was out of time to repent after the thing was done.

But as the proof brought by Glorat was not thought to amount even to a verbal agreement, but rather to a sort of *non repugnantia* by Kincaid to the proposal when made at his house by Glorat, and that there was no sufficient evidence that Kincaid knew of the building till it was done; the LORDS found, "That Glorat had no right to lay the south end of his new dam-dyke on Kincaid's ground, nor to cut any gap or sluice in Kincaid's dam-dyke, and therefore ordered the same to be demolished."

Kilkerran, (PROOF.) No 13. p. 447.