1684. DRUM *against* COLTNESS, and LADY GOOTERS.

No 36.

FOUND, that a right of reversion of a wadset did not prescribe for not being used for 40 years, the subject not being *juris*, but *facultatis cui non præscribitur*. Here the reversion was *incorporatio in græmio* of the wadset; and the case had been the same, though the reversion had been on a paper apart, unless the right had been conceived in irredeemable terms, and had passed to singular successors.

Harcarse, (PRESCRIPTION.) *No* 771. *p.* 219.

1697. *January* 15. TURNBULL *against* HUSBAND.

No 37.
Donatio inter virum et uxorem may be revoked at any time, and suffers not the negative prescription.

TURNBULL had granted a bond to Christian Grimman, his wife, her heirs and executors, for 1700 merks, *stante matrimonio*. She assigns this bond. The assignees charging, he suspends, on this reason, that it was *donatio inter virum et uxorem*, and revocable, and *de facto* by him revoked; 2*do*, The assignation was null, being granted by his wife *viro vestita*, without his consenting thereto; 3*tio*, Prior to the intimation she had discharged the bond. *Answered* to the 1*st*, The bond, bearing date in 1653, and he not revoking the same till 1653, after 42 years, his faculty of revocation was prescribed; 2*do*, The assignation needed not his consent, for it cannot be presumed he would consent to an assignation against himself; 3*tio*, She could not discharge, because it was provided to her heirs and executors, and not to herself. *Replied*, Such donations are never confirmed *nisi morte concedentis*, and therefore his revoking was *actus meræ facultatis*, which he might exercise any time; and if his faculty was prescribed, then the bond was also prescribed.—THE LORDS sustained the husband's revocation, and suspended the letters, and assoilzied him from the bond.

Reporter, *Crocerig.*

Fol. Dic. v. 2. *p.* 98. *Fountainhall, v.* 1. *p.* 756

1704. *July* 4.

ANTHONY and ZEROBBABEL HAIGUES, elder and younger of Bimmerside, *against* THOMAS HALYBURTON of Newmains.

No 38.
Power being given to a party to build a miln on his own ground,

THE commendator of Dryburgh, by his charter in 1562, feus his abbey-mill, with the multures of the hail lands and teinds of the parish of Myreton, within which it lies, to which mill Newmains has right by progress. The lands

of Bimmerside lying locally within the said parish, and being uncontrovertedly thirled to the abbey-mill, yet Bimmerside begins to build a mill within his own ground. Newmains, *nunciatione novi operis*, interrupts by way of instrument, requiring him to desist; but he, not regarding this civil interruption, goes on with the work; whereon Newmains applies for a suspension against him, and obtains it. Bimmerside finding he would not get the suspension discussed this Summer-session, he gives in a bill to the Lords, representing, that a suspension of a fact was a thing extraordinary and unusual; and therefore craved the stop might be taken off, that he might go on in his work, and he was content to find caution to demolish his mill, if it were found he had no right; for he founded on an express concession allowing them to build a mill; and if this point were left undiscussed till November, the materials he had led would either be stolen, or would rot and spoil. *Answered* for Newmains; This were to anticipate the course of the roll, and to discuss a suspension before it comes in, contrary to the act of regulations in 1672 and 1695; and though suspensions be most ordinary in liquid sums, yet there is nothing to hinder them to take effect as to the suspending of facts; and was so practised lately in the case of Helen Shand against the Old Town of Aberdeen, (see PROCESS); and though the favour of mills be great, yet that is only where they are going mills; and that clause he founds on, permitting him to build in his own ground, will not be found so clear when it comes to be examined; and in the late debate betwixt Pringle of Torsonce and Borthwick of Stow, anent the building of a mill within the thirlage, (see THIRLAGE), the Lords stopped the work during the whole time of the process; and Newmains is willing to find caution for Bimmerside's damages if he prevail.—THE LORDS would not summarily, on a petition, discuss the suspension, especially when the ground pleaded, for a liberty to build, was not so clear, having read the clause; and therefore would not remove the stop put to the work, but superseded to give answer till November next. Craig, *de feudis*, p. 186. goes a greater length; for he states the question, and thinks one thirled to his neighbour's mill may build one of his own, provided he abstract none of the corns growing in his land, but content himself with outsucken multures of others unthirled, who voluntarily come to him. But Stair, lib. 2. tit. 7. shews the decisions since Craig's time have run in the contrary, and that the building of such a mill is unwarrantable.

No 38.
it was found, that though he had not built any for upwards of 100 years, yet that being *res meræ facultatis*, it could not prescribe. See No 10. p. 10623.

1707. *March* 14.

BETWEEN Newmains and Bimmerside, mentioned *supra*, 4th July 1704. They had now raised mutual declarators, viz. Haliburton of Newmains raised a declarator of Bimmerside's lands being thirled to his mill of Dryburgh; and Haig of Bimmerside brought a counter declarator for exempting immunity. The first declarator was founded on the Abbot of Dryburgh's charter in 1652, feuing that mill; and the second, on a contract of marriage in 1591, giving a

No 39.

power to Bimmerside to build a mill on his own ground; and Newmains having *alleged*, That faculty was prescribed, not having been made use of now for these 110 years, and so was lost *non utendo*; the Lords found these things that were *meræ facultatis* could not prescribe. Then Newmains *alleged*, That Bimmerside being restricted to build the mill on his own ground, he could not erect this mill, because his dam-dyke rested on his neighbour's ground, which was contrary to the design of the clause, giving him only a limited liberty; and though he had a written license and tolerance from that neighbour, yet he being Newmains' vassal, and likewise thirled to his mill, he could give him no such privilege.—The Lords found the mill being on his own ground, he might rest the butt of his dam on his neighbour's land, with his consent. Then, 3*tio*, Newmains *alleged*, That, *esto* Bimmerside might grind his corns at his own mill, yet *quoad* his teind, it behoved to remain thirled, because it belonged to the Abbot, and he had disponed the said multure *decimarum*, as well as *terrarum*.—The Lords found Bimmerside's teind remained thirled to Newmains' mill. Then, 4*to*, *alleged*, Bimmerside's mill at most would be but a winter-mill, having only water to make it go in time of speats; and therefore, when he could not get his corns grinded there, he behoved to return to Newmains' mill, to which he was originally thirled, seeing the allowance of erecting a mill must be understood *cum effectu*; and, when that fails, your ancient thirlage reconvalesces; and the Lords found and declared accordingly, that he could not go by Newmains' mill, when his own could not serve him.

Fol. Dic. v. 2. p. 99. Fountainhall, v. 2. p. 235, & 359.

*** Forbes reports this case:

The Laird of Newmains's predecessor having, in the year 1562, got from the Abbot and Convent of Dryburgh, a charter of the Mill of Dryburgh, cum omnibus multuris et divoriis dicti molendini, et signanter cum multuris omnium terrarum et decimarum parochiæ de Mertoun, nobis, et dicto nostro monasterio pertinen; and Haig of Bimmerside having begun to build a mill, Newmains stopped the work by a suspension; at the calling whereof he repeated a declarator of his right to the multures of Bimmerside's estate, which lies within the said parish of Mertoun.

Bimmerside repeated a counter-declarator of immunity, how soon he builds a mill of his own, conform to a clause in a contract of marriage *anno* 1591, betwixt a daughter of the then Bimmerside and Newmains's predecessor, which, besides a certain tocher, astricts the whole corns of Bimmerside's lands (except wheat and malt for his family) to pay thirle, multure, and knaveship to Newmains's Mill of Dryburgh perpetually in all time coming, except Bimmerside's heir happen to build a mill of his own upon his own lands, within his own bounds and heritage of Bimmerside, after the death of the then Bimmerside, and Newmains and his spouse.

No 38.

Alleged for Newmains; Whatever be the import of that personal contract 1591, he makes no use thereof, but has prescribed a positive right to Bimmerside's multures by immemorial possession, by virtue of the Abbot's charter 1562, and a continued tract of real rights and infeftments ever since, thirling all the lands and tithes within the parish of Mertoun, which is sufficient to sustain his declarator of astriction. *2do*, Bimmerside's right to build a mill of his own by virtue of the contract 1591, is prescribed and lost *non utendo* within 40 years. *3tio*, *Esto* the faculty to build were not prescribed, the present building must stop, because it is not upon Bimmerside's own land, within his own bounds in the terms of the contract; the dam, water-gang, and sluice, (the essential parts and pertinents of the mill) being upon another man's ground who is Newmains's vassal and thirled to his mill; so that the condition of the obligement doth not exist *in forma specifica*. *4to*, Suppose such a mill were allowed to be built, the grist it cannot grind, either through want of water in the summer time, or otherways when it is deserted, ought to remain astricted to Newmain's mill; because, wherever an exception does not effectually take place, the rule retains its vigour; and the thirlage cannot be evacuated by once building of a sham mill that cannot serve the thirle, or comes afterward to be let fall; since all clauses are to be understood, secundum subjectam materiam, et ut prævaricatio evitetur. *5to*, In all events, the tithes of Bimmerside's estate must continue astricted to Newmains's mill, because the Abbot, who was titular and heritor of these *in anno* 1562, had power to thirle them.

Answered for Bimmerside; Newmains cannot ascribe his possession of the multures in question, to any other title than the constitution of thirlage 1591, whereby the title in the charter 1562 was passed from; because, nemo potest mutare causam possessionis in præjudicium tertii; and, seeing he pretends not to singular titles, he is presumed and bound to possess as his predecessors did. *2do*, The contract 1591 being the only title of the astriction, the exception *in gremio* does perpetually qualify, and can never prescribe; but every time the corns of the lands of Bimmerside were grinded and paid multure at the Mill of Dryburgh, conform to the astriction, the exception is understood to be repeated as effectually as if a protest had been taken for saving thereof; and it was *res meræ facultatis* for Bimmerside to build or not to build in his own property as he pleased; besides, the exception being conceived in favours of liberty, it is the more fully to be extended; and Bimmerside being hindered by the contract to build a mill in his own, or in the then Newmains and his spouse's lifetime, that implies a liberty to build in any time thereafter; for the exception must be understood as ample at the time of the contract, as the constitution, which was to take effect perpetually in all time coming, except Bimmerside should build a mill. *3tio*, The quality in the exception to build upon his own ground did not bind up Bimmerside from acquiring a servitude, or an aqueduct from a neighbouring heritor for the better accommodation of his mill; and the water is no less necessary to a mill than the end of a dam; and to pre-

No 38. tend that a vassal, who is astricted, cannot constitute a servitude upon his ground in favours of another than his superior the master of the thirle, is as extravagant as to say, That a mason, whose land is astricted, cannot lawfully be employed to build and repair any mill in the neighbourhood. *4to*, As to the pretence, That though the mill were built, Bimmerside must remain astricted, in so far as his mill cannot serve; this is, in plain Scots, to crave, that the Lords may add a new clause to the charter of astriction; but the present process being a suspension for hindering the charger to complete his mill, he is not bound *in hoc statu* to dispute what shall be the effect and consequence of the building; and whether after the mill is built, he will be still liable as to certain events. And albeit the suspender hath repeated a declarator with his reasons, it cannot be further insisted in *in hoc statu*, than the reasons of declarator and suspension are coincident. *5to*, As to the tithes, the Abbot could not alienate or diminish them by servitudes; because these are the spirituality of the church, and *extra commercium;* and may be said to be freed from thirlage by the act 1633, which allows them to be valued and bought without any such burden; again, the Abbot's thirling his own tithes (whereof he, and not Bimmerside's predecessors, was proprietor and titular, and no doubt drew the *ipsa corpora*) can only infer a burden upon himself and his successors the titulars; and not upon Bimmerside, who is only tacksman, and liable to a specific duty.

Replied for Newmains; Any kind of title *etiam a non domino*, with 40 years possession of in-town multures, doth establish an astriction, Stair, Instit. Lib. 2. Tit. 7. N. 16. And suppose that Newmains's predecessors had formally, in the year 1562, renounced any claim of astriction, yet the subsequent prescription by his continuing to possess in-town multures perpetually thereafter by virtue of his infeftments, would revive the thirlage; especially considering what the Lords have decided in cases more narrow, November 27. 1677, Grant *contra* Grant, *Infra, h. t.*; February 20. 1675, Countess of Murray *contra* Wemys, No 15. p. 9636.; July 14. 1675, College of Aberdeen *contra* Earl of Northesk, *Infra, h. t.* And possession *in dubio* is ascribable rather to a real right and infeftment, than to a personal title; the former being *jus nobilius*. *2do*, Bimmerside's faculty to build by virtue of the contract 1591 is prescribed; for the question is not, If a mere faculty *in gremio* of the possessor's only right can prescribe, which indeed cannot; but, if a faculty in the body of a right can prescribe, when the possessor has and uses another title, which no doubt may prescribe, notwithstanding the act 12th, Parl. 1617, which only declares, that reversions incorporate in the body of an infeftment used and produced by the possessor of the lands as his title, do not prescribe. *3tio*, The pretence for exeeming the tithes from the thirlage, is ridiculous; for, was there any thing more common in the nation, than for ecclesiastics, with consent of their convents or chapters, to thirle their tithes, either separately, or with the stock? Which was not understood to fall under the prohibition, more than tacks of the greatest length; subinfeudation only being that which was prohibited by the

canons. And the design of the act of Parliament 1633, being only to ease the heritor from the trouble of having his tithes drawn by a third person, *salvo jure cujuslibet*, it did noways evacuate thirlage constituted *ab ante*; again, the Abbot, who was titular, having thirled the *ipsa corpora* of the tithes, that thirlage became *onus reale*, which affects the *corpora* in the hands of any immediate intromitter therewith, and consequently must burden Bimmerside who possesses stock and tithe by a tack. No 38.

Duplied for Bimmerside; The decisions cited by Newmains are not to the purpose; for that betwixt Grant and Grant had many specialties, and was founded on possession by charter and sasine subsequent to a very ancient tack; and in the practick 1675, betwixt the Countess of Murray and Weems, the 19 years tack was a temporary title; which, though it may be continued *per tacitam relocationem*, the master's possession could not be understood to continue after his neglect 40 years to exact the tack-duty; especially seeing the lands were possessed by singular successors, who could not be presumed to possess by virtue of a tack they were not bound in law to know.

THE LORDS found, That Bimmerside's faculty of building a mill within his own bounds, conform to the contract 1591, did not prescribe; and that he might build, though both the ends of the mill-dam were not on his own ground, to free him from the thirle of such corns as can be grinded at his own mill; but found the thirle to the Mill of Dryburgh continues still in the terms of the contract, whenever Bimmerside's own mill cannot grind; and that the Abbot's feu-charter of the Mill of Dryburgh 1562, having thirled the tithes of the parish of Mertoun (within which the lands of Bimmerside lie), the building of the mill conform to the contract, can operate no liberation from the thirle of the tithes.

Forbes, p. 147.

1712. *January* 12.

JUSTICES of the PEACE of AYRSHIRE *against* TOWN of IRVINE.

THE LORDS over-ruled the plea, that the exercise of the power of re-pledging was *meræ facultatis*, and found that the negative prescription *non utendo* took place.

Fol. Dic. v. 2. *p.* 99. *Fount.*

*** This case is No 17. p. 9398, *voce* OATH OF PARTY.