No 52. servient tenement, was found liable to the negative prescription.

ments. The proprietor of the dominant tenement having neglected to use this servitude for 40 years, the question occurred, If it fell by the negative prescription. That it could not fall, was argued from this consideration, That in feuing out the second tenement, it behoved to be the same, whether the superior reserved the pasturage in favour of himself, or of the purchaser of the first tenement; that in the one case it is a branch of the superiority, and can no more suffer the negative prescription than the right of superiority itself; that in the other, it is a branch of the purchaser's property, which must preserve it equally from the negative prescription; 2*do*, The servitude being established in the right the vassal has to his lands, he can prescribe no right or immunity contrary to the tenor thereof. *Answered* to the 1*st*, There is a wide difference betwixt the cases; a right to pasturage, reserved by a superior, is considered in law as a reservation of the property *pro tanto*, which therefore cannot be discharged nor fall *non utendo*; but where the servitude is reserved in favour of a third party, as in the present case, it becomes indeed an accessory of his property, but by no means a part or branch of it. 'Tis an accession the property once subsisted without, and may so subsist again; thereby it is, that a real servitude may be discharged, and of course may fall by the negative prescription. To the 2*d answered*, The reservation of a right in an infeftment will support the right against the positive prescription, because no man can acquire by prescription more than his title carries him to; but it will not save from the negative prescription, which is founded upon the negligence of the person to whom the reserved right belongs. The Lords sustained the defence of prescription.—*See* Appendix.

Fol. Dic. v. 2. *p.* 100.

1774. *January* 25.

Colonel Robert Skene of Halyards *against* James Simpson of Maw.

No 53. The plea of the negative prescription, founded upon only a partial possession by the dominant tenement, not admissible to limit the extent of a thirlage of *omnia grana crescentia*, constituted by writ, where the obligation of thirlage, as

By a feu-charter, granted by Sir William Bruce of Kinross, to John White, in 1677, of the lands of Maw and Carse, now belonging to James Simpson defender, these lands were astricted to the mill of Kinross, as to the *gana cresentia*. In the renewed charters granted to the owners of these lands, they were astricted to another mill erected by Sir William Bruce, called the mill of Burngrange, likewise for *omnia grana crescentia*. The estate of Burngrange was afterwards sold by the family of Kinross; and Colonel Skene having lately acquired right to the property of this estate and the mill, insisted that Simpson's lands were astricted for the whole growing corns, and brought a process of abstracted multures against him and several others.

There was produced by the defender Simpson, the original feu-charter, granted by Sir William Bruce to John White; and, 2*dly*, A precept of *clare con-*

stat, in 1760, by Sir John Bruce of Kinross, in favour of the defender himself, as heir to his grandfather; which precept contains the following clause: "As also, carrying all grain growing on said lands, to my mill of Burngrange, seed and teind excepted, and there paying the multures and knaveship, with the dry multures, and other services at said mill, used and wont; and also paying to the mill of Kinross, the dry multures, and other services due and payable to the said mill, conform to use and wont." And the Lord Ordinary pronounced the following interlocutor: "Finds, that the lands of the following persons, by their own title-deeds produced, are expressly thirled to the pursuer's mill, for the whole *grana crescentia*, viz. the lands of James Simpson, &c. Finds, that they have not offered any sufficient condescendence in fact, or ground in law, to limit the astrictions so constituted and repeated in the titles to their lands," &c.

No 53. originally constituted, has been repeated in the successive investitures of the servient tenement, the latest whereof, in favour of the defender himself, has been much within the years of prescription.

Pleaded for Simpson in a reclaiming bill; It is a rule quite established, that all servitudes may be lost *non utendo*, and immunity from them acquired by prescription. The pursuer seemed to admit this doctrine in general; but *urged*, that servitudes constituted by one's title-deeds, were an exception from this rule, and could not be lost by the negative prescription; for that none could prescribe against their own title.

But this distinction is not well founded. The pursuer, in this plea, is confounding the nature of two prescriptions, the positive and negative. In the former, it is impossible that one can prescribe against his title; for this reason, that a title is absolutely necessary for that kind of prescription. But the negative prescription stands on a very different foot. It is founded upon a presumed dereliction on the part of the creditor in the right, whatever it is; and, as a servitude, constituted by the charter of the servient tenement, may be derelinquished as well as any other, it seems to follow, of necessary consequence, that it may be cut off by the negative prescription. The case, Graham of Douglastoun against Douglas, 7th February 1735, No 52. p. 10745. is a decision directly in point. And, indeed, if a servitude of this kind might be renounced, it seems to be an unavoidable consequence, that it may be derelinquished, or fall by the negative prescription; for dereliction is nothing more than a tacit or presumed renunciation.

If a servitude of this kind may be cut off by the negative prescription in whole, it seems to follow, that it may likewise be cut off in part. So, indeed, it is expressly laid down by all the writers upon our law; Erskine, b. 2. tit. 10. § 37.; and, therefore, though the defender's lands had been originally thirled to the mill of Burngrange, for *omnia grana crescentia*; yet as, by the constant practice, not only beyond the years of prescription, but immemorial, the proprietors and possessors of his lands have never manufactured more at this mill, than what was used for family use, the servitude has thereby suffered a restriction. He has acquired an immunity from the multures of the surplus corns.—The defender knows, that abstractions have no effect in questions, either with

No 53. regard to the constitution or destitution of the servitude by prescription. But this case cannot fall under the character of abstractions. These are clandestine, partial, and occasional: But here the practice has been regular, avowed, and invariable; and the distinction betwixt the grindable corns and growing corns, as uniformly observed, as if a servitude of the first kind only had been constituted from the beginning.

Answered; It is inconceivable what aid the plea of prescription can afford to the defender, or how it comes to be founded upon by him in the present case. It is admitted, that, in the original charter, the defender's lands were astricted for the whole growing corns; and that, in every renewal of the investiture, the same astriction is repeated. The precept of *clare constat*, granted by Sir John Bruce of Kinross, in favour of the defender so late as the 1760, contains a clause, astricting, in the most explicit terms, the defender's lands to the mill of Burngrange, for *omnia grana crescentia*. Supposing, therefore, that the doctrine laid down with regard to prescription of servitudes, were, in every respect, well founded, it would be time enough to plead that doctrine after the expiry of the years of prescription. And it must appear rather premature, to plead prescription before a fourth part of the years of prescription is run.—But farther, the pursuer must still be allowed to doubt, how far a vassal, who, by his charter, is thirled to a particular mill, can prescribe an immunity from the thirlage, contrary to the tenor of his own charter. In the opinion of the writers upon the law of this country, a vassal, in such circumstances, cannot acquire, by prescription, an immunity from the thirlage. And this doctrine has been adopted by the Court. In the case of M'Leod of Muiravenside, against his Vassals, *infra*, *h. t.* the question was solemnly tried and determined: And there does not appear to be the smallest difference, in any particular, between this and the present case.

In another view of the case, the plea of prescription appears to be equally ill founded. The defender does not here contend for a total immunity from thirlage; but only that it should be restricted to the grindable corns, which he admits the proprietors and possessors of his lands have always been in use to manufacture at the pursuer's mill. But there is no point more established, than that where a thirlage is established by writ, the carrying part of the corns to the mill to which the lands are thirled, is sufficient to interrupt prescription as to the whole. This opinion Lord Stair lays down in the clearest terms, b. 2. tit. 12. § 26.; and conformably thereto, in a case observed by Durie, it was found, in a thirlage of *omnia grana crescentia*, established by writ, that the defender having grinded a part of his corns at the mill to which he was thirled, this was sufficient to sustain the astriction for the whole, though there was a desuetude for the rest above the space of 40 years; 26th June 1635, Waughton against Home, *infra*, *h. t.* The like judgment was pronounced in the case of M'Leod of Muiravenside against his Vassals, 25th July 1727, (above mentioned.)

Although, therefore, the years of prescription were expired, and, although the allegation of the defender, that, past all memory, the possessors of these lands had only manufactured at this mill what was used for family-use, were to be held as true, the defence of prescription must nevertheless appear to be ill founded, for the reasons above stated. This defence does, in fact, resolve into an admission of the libel; and the Court never will permit the defender to take advantage of his own fraud, and, because he may have abstracted part of his own grain for some years past, to argue, that he can be no farther liable than to the extent of what he has been in use of manufacturing at the mill. No 53.

Observed on the Bench; This was not a thirlage created by a single writing, against which prescription will operate; but an obligation upon the heritor of these lands, to carry his whole growing corns to the pursuer's mill, and pay multures, which has been renewed in all the successive titles of this estate, acknowledging their being subjected to such thirlage: And here there is a new constitution, although the ancient thirlage had been totally cut off by prescription. Here too, it was stated, at the advising, that the family of Kinross were superiors of both tenements, and liable in warrandice of the multures.

"THE COURT adhered to the Lord Ordinary's judgment."

Act. *Al. Abercromby.* Alt. *Rolland.* Clerk, *Pringle.*

Fol. Dic. v. 4. *p.* 92. *Fac. Col. No* 101. *p.* 262.

SECT. VIII.

Feu and Tack-duties.

1627. *March* 10. STEWART in Glasgow *against* FLEMING's HEIR there.

No 54.
If feu-duties and tack-duties are sued for, due by the rights of the defenders, they cannot propone prescription; but they will be liable to pay only those due within 40 years.

IN an action betwixt two men in Glasgow, the pursuer's predecessors having acquired infeftment from the defender's predecessors, of a tenement of land in wadset, and having set a back-tack to the heritor, who gave him the said infeftment redeemable, pursues the heir of the granter of the wadset, for payment of the back-tack-duty, resting owing for the space of 40 years preceding the summons; which action the LORDS sustained for the said tack-duty, for the said years by-past, not elder than 40 years, but within that space; but found that no action could be granted for any year before the 40 years preceding the said summons, seeing the action was prescribed for these elder years, the same not being pursued *debito tempore* within 40 years after the date of the tack; and found, that the prescription did not militate for the 40 years immediately preceding the summons, seeing the back-tack whereupon the pursuit was founded, contained