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windows found to be extended to a greater number by immemorial possession.

liberty "to strike out six lights in the backside of the tenement contiguous to the garden, they always filling the same with glass, that it might be profitable and useful to them in all time coming for giving light to the house." There were now nine windows in the backside of the house, and, in place of their being filled with close glass, the casements were made so as to open; therefore, Mr. Forbes insisted to have the number of windows reduced to six, and that they should all be shut casements, in terms of the tolerance.

The defender pleaded, That the tolerance did not necessarily import, that the windows should be shut glass; and though it did, yet the tolerance was prescribed, both as to the number and fashion of the windows, by a possession of them for forty years in the condition they now are.

It was answered for the pursuer, That if the tolerance was founded on, it must be taken with its limitations; but if it was prescribed, then it was not binding on Mr. Forbes, and so he was at liberty to use his property, by planting or building, as he had occasion.

Replied for the defender, That the tolerance was explained by the immemorial possession; and that it was inconsistent with it to allow the pursuer to plant or build, so as to obstruct the defender's lights *in æmulationem*.

The Lords found, That the obtainer of the tolerance might prescribe a right to more windows than were allowed by the tolerance, and likewise a right to open them; but found, in that case, the other party might use his property, by planting or building, as was most convenient for him.

Act. *Pat. Grant.* Alt. *Jo. Kennedy.* Reporter, *Lord Justice-Clerk.* Clerk, *Dalrymple.*

Fol. Dic. v. 4. *p.* 279. *Edgar, p.* 61.

1739. *February* 21.

DAVID CLELLAND, Painter in Edinburgh, *against* STEWART JAMES MACKENZIE, of Rosehall.

No. 9.
How a servitude restricting the liberty of building may be constituted?

ROBERT CUNNINGHAM of Auchinharvie, being proprietor of a house and yard in Edinburgh, did, in the year 1677, dispone part of the house to Sir George Mackenzie of Rosehall, whereupon he was infeft that year.

Anno 1681, Auchinharvie disponed that part of the house and yard which he had reserved to himself, to James Gray of Warriston, and Elizabeth Cunningham, his spouse, in life-rent, and to Robert Gray, their second son, in fee, but with a servitude upon the foresaid yard, in favour of Sir George Mackenzie's lodging; which, by a marginal note in the disposition, was conceived in the following terms, viz. "And it is hereby specially provided, That it shall not be leisome to the said James Gray and his foresaids to build upon the yard of the said house, in prejudice of the lights of the said Sir George Mackenzie's gallery."

Upon this conveyance, Elizabeth Cunningham, and her son Robert Gray, obtained a charter from the magistrates, *anno* 1692, wherein the servitude was ex-

pressed in the following terms, viz. "Cum servitudine super dictum hortum non aedificandi, nec luminibus porticus dicti Domini Georgii Mackenzie officiendi." And this clause was repeated in the two different sasines following thereon in favour of Robert Gray, the one in the year 1692, and the other in 1705. Robert Gray, in the year 1710, disponed his part of the said tenement to one Donaldson, who thereupon was infeft base; and from him it thereafter passed into different hands, until it was conveyed to David Clelland; but none of these conveyances, from the 1710, made any mention of the servitude. Clelland, apprehending that, by the state of his rights, nothing else was intended but a servitude, *ne luminibus officiatur*, prepared materials for building a little house or to-fall in the said area, which he alleged would not prejudge the lights of the dominant tenement; but, before he began to build, he was stopped by a suspension, obtained by Stewart James M'Kenzie, to whom Sir George's part of the house belonged.

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For the suspender it was argued: That a real servitude may be constituted by any writ granted by the proprietor of the servient tenement; and, if possession follow, it will be effectual against all the succeeding proprietors thereof; so that, if Auchinharvie, or his successor Gray of Warriston, had granted an obligation to Sir George not to build upon the yard in question, nor to prejudice his lights, and had possession followed, the servitude would have been effectual. *2do*, It is as strong and unexceptionable a method of establishing such servitude as any, to engross it in the infeftments of the servient tenement; seeing, in such a case, neither the proprietor, nor any purchaser from him, can misken the servitude with which his right is burdened; and there can be no doubt of its being real, when it is a quality of his feudal right to the servient tenement. Nor can it create any difficulty, that the disposition by Auchinharvie to Warriston contains only a servitude not to prejudice the lights of Sir George's gallery, and that the charter contains one more extensive, *scil. non aedificandi*; since it would be new to maintain, that a burden could not be imposed upon the vassal's right, which he was not formerly subjected to, without a separate antecedent warrant in writ. No doubt, the vassal is not bound to accept of a new charter, disconform to his former rights, as the law has given him remedies to compel the superior to grant him charters agreeable to his former infeftments; but, if the vassal agree to accept of a new charter, with greater burdens than were contained in the former, he is tied thereby, and his accepting thereof in that manner is a legal proof of such agreement, as much as if he had subscribed the charter, which is understood to be a mutual contract, whereby both the vassal and superior are bound; nor can the vassal otherwise get the better of these burdens, than he could get free of the obligations he had come under in a mutual contract, by proving fraud, force, error, &c. Are not the prestations upon the vassal every day changed at the renovation of their charters, additional feu-duties, and other burdens imposed? And, did ever any body dream that such clauses were reducible, because they were not contained in the procuratory, or other warrants upon which the charter proceeded? Such doctrine would produce many bad consequences both to the superior and vassal; wherefore, as

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Elizabeth Cunningham and her son accepted of a charter, subjecting their tenement to the servitude therein mentioned, neither to build upon the yard, nor to prejudge the lights of the suspender's tenement, it must bind them, suppose, by the former rights, no such servitude was constituted.

Neither can it afford any objection, That possession has been had by subsequent conveyances, wherein no mention is made of the said servitude; for, as it was once regulary constituted by Robert Gray's infeftments, he could not, in the year 1710, discharge his tenement thereof; nor could he lawfully convey the same, as freed of the servitude, to Donaldson; and this must hold the more forcibly, as it became a quality of his feudal right to the yard which could not but be known to his successors. Besides, it would be a short way of extinguishing real servitudes, if the proprietor of the servient tenement could free it by a conveyance, without expressing the same. *2dly*, The right to the house still rests on Gray's infeftment, which expressly contains the servitude in question (there being none other posterior thereto, but the base one in favours of Donaldson:) So that the charger cannot come at a public infeftment from the town of Edinburgh, but under Gray's infeftment, and they are not bound to grant one to him, otherwise than in terms of Gray his author's right.

Answered for the charger: That, by our law, there are two ways of constituting a servitude, viz. either by prescription, or the consent of the proprietor. In the present case, prescription cannot be alleged, since from the rights above stated, the charger and his authors have possessed for these thirty years past, in virtue of titles, in which there is no mention of this servitude: and indeed, by the nature of the thing, as it consists *in non faciendo*, it cannot be constituted by prescription alone; since it is a rule laid down by all lawyers, That, where a person has a right to an area, he may build thereon at any time, and will be excluded by no prescription, unless his adversary can shew a title legally constituting a servitude to the contrary. It remains then to consider, if it has been properly constituted by the consent of the proprietor. As to which it was observed, *1mo*, That, where a superior grants an original charter in favours of his vassal, as the right was *pleno jure* in him before the grant, he may qualify and burden it in what manner he thinks proper. *2do*, Where a servitude is contained in a charter of resignation, if it was likewise contained in the disposition which was the warrant thereof, and in the infeftment following thereon, there it may also be duly established; since the disposition which conveys the right is expressly qualified with that burden. But then, *3tio*, (which applies directly to the point in hand), where a charter of resignation contains any new servitude which is not specified in the procuratory whereon it proceeds; in such case, it is believed, the servitude is not legally constituted, and must fall to the ground as being inserted in the charter without any warrant; especially if, as in the present question, it is done in favours of a third party, with whom the superior has no connection: The reason is obvious; for here the resigner, and the person in whose favours the resignation is made, are the only parties contracters; and the superior, as he is only a hand necessary to complete the contract, so he can im-

pose no burden, but, by accepting the resignation, is bound to infeft the new vassal in a right as full and ample as that which stood formerly in the person of the resigner. Nor is it of any weight, that Warriston accepted the charter with such a clause, since it was entirely unwarrantable, in so far as it is different from the disposition; and therefore the vassal had no reason to regard it. Put the case, a superior should unwarrantably impose a new burden in a charter of adjudication, surely the adjudger's accepting of the charter, or even taking infeftment thereon, would not infer an acquiescence, so as to establish against the adjudger a servitude to which the debtor was not liable.

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As to the pretence, That, at the time of extending the charter, there had been an agreement betwixt Sir George Mackenzie and the proprietor of the servient tenement, there is not the least evidence produced to shew such was the fact; and as, on the one hand, it cannot be presumed that the magistrates would be officiously interposing in an affair they had no concern with; so, on the other, it cannot be supposed that Sir George, if any such thing had been intended, would have rested satisfied with a servitude constituted in so precarious a manner that it could be taken away at any time without his own consent; for the charter, the only document thereof, might have been retired next day, and a new one taken, without any mention thereof. But, supposing a superior could, *proprio motu*, without any warrant, impose a new burden in a charter of resignation, yet the argument would not apply here, since the words of the charter, if rightly understood, contain nothing more than what is in the disposition; and it will be plain, upon comparing the two, that any small variation betwixt them has been owing to the inaccuracy of the writer in translating the clause in the disposition.

The Lords found, "That the servitude is sufficiently constituted by the charter and sasine, and cannot be restricted by the marginal note in the disposition; and found, That David Clelland can neither build in the yard in question, nor otherwise prejudge the suspender's lights; and therefore suspended the letters *simpliciter*.

C. Home, *No.* 117. *p.* 185.

1745. *January* 15.

EARL of BREADALBANE *against* CAMPBELL of Lochdochart.

No. 10.
A feu charter of certain lands, *et lie Schiellis de Conynche*, was found to give the property of Conynche, and not a servitude only.

SIR ROBERT CAMPBELL of Glenorchy, in the year 1648, feued out to Alexander his fourth son, "totas et integras terras de Leragan, terras nuncupat. lie Port de Lochdochart, terras de," &c. mentioning the names of some other parcels of land; and then follows, "et lie Scheillis de Conynche." The same expression runs through the whole clauses of the charter, and the precept is to give sasine, "totarum et integrarum prænominatarum terrarum de, (repeating them all) et lie Scheillis de Conynche, per terræ et lapidis fundi dictarum terrarum traditionem;" and accordingly the sasine has been always taken on the ground of the lands of Conynche, as well as the other lands specified.