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Pleaded for the Respondent.—The entail requires that the provisions be "competent and convenient, such as the estate "may conveniently bear." Here the estate was heavily burdened; and, looking to the circumstances of the appellant, (Sir John's daughter,) who has been otherwise amply provided for, the second bond for £1000 was both unjust and irrational. Burdened already with £7000, the sum of £2000 was more than the estate could conveniently allow, and consequently Sir John has exceeded the power of burdening given him by the entail. Besides, by the execution of the first bond for £1000, which was ample and sufficient in the circumstances, this power ought to be viewed as having been thereby extinguished, so as to foreclose him from again resuming a power which had been already fully exercised in terms of the entail; and no consent of the relations on the father and mother's side could validate such an exercise of the power, unless specially conferred by the deed.

After hearing counsel, it was

Ordered and adjudged that the several parts of the interlocutors complained of in the appeal, so far as they sustain the defence *quoad* the bond of provision granted by the deceased Sir John Bruce to the appellant in 1759, be *reversed*. And it is further ordered, that the defence be repelled, and that the cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For the Appellant, *Ja. Montgomery, Al. Wedderburn.*
For the Respondent, *Al. Forrester, Dav. Rae.*

Unreported in Court of Session.

JOHN COLTART, - - - *Appellant;*
WILLIAM FRAZER, - - - *Respondent.*

House of Lords, 28*th January* 1774.

SERVITUDE—THIRLAGE.—The servitude of thirlage cannot be constituted by usage of grinding corn at a mill, and paying insucken duties, without written title astricting the lands to the mill; and though these may have been originally astricted, yet where, by the subsequent charters and title, these are freed and released therefrom, this must govern the question.

The lands, miln, multures, and appurtenances of Kirk-

patrick-Durham, in the Stewartry of Kirkcudbright, belonged anciently to the Barony of Newabbey, and afterwards to the Maxwells of Nithsdale. In 1696, William Maxwell, Earl of Nithsdale, was served heir "in totis integris quadraginta "novem mercatis terrarum et duabus solidatis terrarum de "Kirkpatrick-Durham, videlicit, quadraginta solidatis ter- "rarum de Turbarrock, &c. quadraginta solidatis terrarum "Drumconchra *et molendina earundem cum omnibus et sin-* "*gulis suis annexis connexis*," &c.; and he thereafter sold the lands of Drumconchra, being part of these lands, and barony of Kirkpatrick-Durham, to Robert M'Clellan, excepting from the disposition thereof "three load of dry "multure corn, due and payable out of the said lands to "Robert Johnstone of Keltown, with £3 Scots of money, "also due to him, so that the said Robert his right is re- "stricted thereto." Upon these titles M'Clellan resigned the lands, &c. to his Majesty, lawful superior thereof, and obtained a charter in 1715 from the Crown, in terms of the former charter obtained by the Earl of Nithsdale, conveying the lands of Drumconchra "cum molendinis multuris et "earum sequelis," &c., with a reddendo as in the former charters 1706 and 1708, of £5. 3s. 4d. Scots, *pro omni alio onere exactione*, &c. These subjects, with the multures, were afterwards acquired by the respondent's father; and the other lands of the Barony of Kirkpatrick-Durham remained for long in the family of Nithsdale, and were afterwards acquired by the appellant, and described as "All Sep. 22, 1763. "and whole the miln of the forty-nine merk two shilling "land of Kirkpatrick, lying in the parish thereof, and stew- "artry of Kirkcudbright, commonly called the miln of Kirk- "patrick-Durham, and haill pertinents thereof, and astricted "multures and sequels due and in use to be paid to the "said miln, out of the said forty-nine merk two shilling "land of Kirkpatrick-Durham." Under this title the appellant, as proprietor of the mill, which was within the bounds of both lands, claimed the multures of all grindable corn or flour on the lands of Drumconchra, which he contended was a part of the barony of Kirkpatrick-Durham, all the lands of which were astricted to his mill.

The appellant accordingly raised the present declarator of astriction, stating his title to the miln of the said barony; also the ancient immemorial usage and constant custom of the proprietors of the said barony, and among these the

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proprietor of Drumconchra, and their tenants grinding their corn at the said miln, and paying therefor certain rates and quantities of multure, and concluding that the several defenders, among whom was the respondent, should be decreed to pay the same. In defence to this action, besides several objections to the title, such as that no sufficient title was adduced to the mill, and that no decrees or acts of the Barony or Multure Court were produced, the respondent denied that his estate of Drumconchra formed any part of the forty-nine merk two shilling land of Kirkpatrick-Durham, and that these lands were never erected into a barony—that they were never thirled to his mill of Kirpatrick-Durham. It was admitted, that the purchasers of the lands of Drumconchra had been in use to grind the greatest part of their corn at this mill, but only because it was more convenient than any other, and not from any obligation which bound them to the miln.

The Lord Ordinary, by various steps of procedure, pronounced an interlocutor ascertaining the thirlage claimed against the said lands of Drumconchra, and against the lands of some others of the defenders. And, on representa-

Feb. 4. 1768. tion, he pronounced this interlocutor, finding " that the as-
" triction established by this and the former interlocutor is
" an astriction of *omnia grania crescentia*, and extends not
" only to oats, but to all other kinds of grain which may
" happen to grow upon the lands astricted: Finds that the
" defenders have conducted their defence in a manner high-
" ly improper, in denying all astriction to the mill libelled,
" when in fact they, or most of them, were astricted by their
" own title-deeds."

The respondent, conceiving his case different from the other defenders, again represented in his own name alone;

July 19, —— whereupon his Lordship, of this date, pronounced an interlocutor, finding that the respondent's " lands of Upper and
" Nether Drumconchras are part of the said lands of Kirk-
" patrick-Durham, and that the possessors thereof have been
" immemorially in use of grinding their whole corns at the
" mill of Kirkpatrick-Durham, and of paying the heavy in-
" town multures libelled: Finds that the said immemorial pos-
" session, joined with the other circumstances of this case,
" afford sufficient presumptive evidence that the said lands
" of Drumconchra were originally astricted to the pursuer's
" mill. And finds that the charters founded on by the de-

" fenders, as explained by the possession of intown mul-
" tures which has followed since that time, do not prove that
" it was thereby intended to discharge the obligation of thir-
" lage *quoad* the defender's lands."

On reclaiming petition for the respondent, the Court, of this date, sustained the defence; and found the defender's (respondent's) lands not thirled to the pursuer's mills; and, on further reclaiming, the Court adhered. Dec. 13, 1768. Mar. 9, 1769.

Against these two last interlocutors the appellant appealed to the House of Lords.

Pleaded for the Appellant.—The lands of Over and Nether Drumconchra were part of his forty-nine merks two shilling land of Kirkpatrick-Durham, and that this forty-nine merk two shilling land was a barony, and was so called in the old charters and titles of the same; and therefore Drumconchra passed and was astricted as part and pertinent of the greater lands. From the title deeds, it was clear that the whole lands of the barony were astricted to the mill in question, and the proprietors of Drumconchra, as well as the other parts of the barony, have been in immemorial use of grinding their corn, and therefore must now, with the others, be liable to this servitude. Nor is it any answer to say, that the subsequent three charters of the respondent, in 1706, 1708, and 1715, contain a tenendas clause releasing Drumconchra from the servitude of thirlage to the appellant's mill, because no tenendas clause in any charter can have this effect, unless it expressly corresponds with the dispositive clause, and in none of these three charters are those multures conveyed by the dispositive clause.

Pleaded by the Respondent.—Every servitude or burthen whatsoever affecting land property must appear in the title, and from the record: and it is to these latter alone that every purchaser has recourse for information to see what burdens affect the same. In this case, the records, the title-deeds, and the leases of the estate, all demonstrate that these lands are free from the servitude of thirlage claimed. And, even supposing these lands to have been originally astricted, it is quite clear that this servitude is, by the latter titles, expressly discharged. The servitude of thirlage by law, must be constituted either by the title deeds of the lands, or by some other deed referring thereto: and such right cannot be acquired, by prescription alone without such title. The usage, therefore, of grinding corn at the mill,

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and paying the high duties of insucken multure, must go for nothing; and the mere voluntary choice of the tenants, to which the landlord was in no way consenting, resorting to this mill, (very likely because most convenient to themselves), could not constitute a servitude against the respondent, their landlord.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For the Appellant, *Ja. Montgomery, Al. Wedderburn.*
For the Respondent, *Alex. Ferguson, Ar. Macdonald.*

Not reported in Court of Session.

JOHN ANGUS, Merchant in Edinburgh, *Appellant;*
THOMAS MANSON, Writer in Edinburgh, *Respondent.*

House of Lords, 22*d March* 1774.

BANKRUPTCY—STATUTE 1696.—Circumstances in which held deposition of a bill in the hands of a creditor, by his debtor, within 60 days of bankruptcy, reducible under the statute 1696, c. 5.

This was an action of reduction raised to set aside a deposition of a bill given to a creditor by his debtor in security of his debt. The bill was not assigned by deed of assignation. But it was alleged that this bill was indorsed by Farquhar, the bankrupt, to Angus the creditor, which was supported by general circumstances presumptive of the fact: and by a letter under the hands of the creditor, it was proved that he held this bill as security for his debt; and it was therefore concluded that the transaction was reducible under the statute 1696, as an unjust and unlawful preference or security given to one creditor to the prejudice of the others, within 60 days of Farquhar's bankruptcy. In defence, it was contended that the statute only applied to dispositions, assignations, " or other deeds," granted in security of prior debts, and not to the indorsation or deposition of a bill.

The Court of Session held that such a transaction fell under the statutory words, *all assignations* " and other deeds," and therefore reduced and decerned. *Vide* Morison, App. " Bankrupt," No. 7, for full report of case.

The case was appealed to the House of Lords.