1686. *January*.

SIR ADAM BLAIR *against* CREDITORS of WILLIAM RIGG of Carberry.

No. 6.

FOUND, That a bond of liberty to run levels through the granter's ground, not clothed with possession, is not a real servitude; but the Lords inclined to sustain inhibition upon the bond, as sufficient possession.

Fol. Dic. v. 2. *p.* 373. *Harcarse*, (SERVITUDES) *No.* 851. *p.* 243.

1712. *July* 26.

HENRY BLAIR of Newtounmill, *against* DAVID EDGAR of Kethick.

No. 7.
A bond of thirlage found a real servitude, good against singular successors, though no other possession was proved than that the granter sometimes went to that mill, and as often to others.

HENRY BLAIR having pursued a declarator of thirlage against David Edgar of Kethick, upon an old contract in the year 1633, betwixt John Edgar, then heritor of Kethick, and Patrick Blair, the pursuer's author, whereby the said John Edgar "obliged himself, his heirs, successors, and tenants of his lands, to haunt and repair to Patrick Blair's mill with their grindable corns to serve their houses and families for free multure, and good services, viz. a peck of six firlots, used and wont," it was found relevant for the defender to free his lands of thirlage by the contract, that he was a singular successor to the said John Edgar, and the obligation never clothed with possession. The pursuer produced some witnesses for proving possession conform; who deponed, that the defender came to the pursuer's mill when he pleased, and went to other mills when he pleased, without being challenged; and when he came to the pursuer's mill, never paid knaveship; and the mill horses brought the corns to the mill, and carried home the meal.

The Lords found a thirlage constituted by the contract 1633, and possession thereupon proved by the above voluntary acts of coming sometimes to the pursuer's mill, though the defender was never interpelled or hindered to go to other mills, when he pleased, nor paid dry multure when he went by the pursuer's mill, in respect of his author's anterior obligation to come to the mill. But because the pursuer did found upon the depositions aforesaid, to instruct possession upon the bond of thirlage, and that bond mentions good services as the conditional terms of coming to his mill, the Lords explained these good services by the depositions, viz. that the defender should not be liable to knaveship, and that his loads should be carried to and from the mill upon the mill-horses.

Fol. Dic. v. 2. *p.* 373. *Forbes*, *p.* 628.

1724. *July* 1.

WILLIAM FORBES, Merchant in Aberdeen, *against* DAVID WILSON of Finzeach.

No. 8.
The tolerance of a specified number of

MR. WILSON's predecessors having a house adjoining to a garden now belonging to Mr. Forbes, they obtained from his authors, in the year 1644, a tolerance or

No. 8.
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-