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' sessor of the lands for his title of the same,' are such as every one must admit to be free from both prescriptions; and reversions registrate are joined in the same sentence and put upon the same footing. And there is good reason the positive prescription should have no place against reversions registrate, more than where engrossed and used by the possessor for his title, upon this principle, ' That no man can prescribe contrary to a quality in his right.' Now, the registers being designed for publication, every thing therein contained is presumed to be public, so that one possessing by virtue of a right, whereof there is a registrate reversion, is presumed to be conscious that his right is qualified, equally as if the reversion were engrossed; and in neither case will be understood to possess *eo animo* as absolute proprietor, without which *animus* there can be no prescription exclusive of the reversion.

To the *second* this reply was made, That it is highly reasonable a purchase made upon the faith of the records meet with all favour the law can afford it; but even at first view it must appear incongruous, that one purchasing contrary to the express admonition of the records, should plead favour, merely because it is a little troublesome to look them over. But let it be considered, no purchaser imagines himself safe, with a bare infestment and 40 years possession, without going to the records; for one article, there being many sorts of interruptions, sufficient to stop prescription, not so easily found out as reversions, though the records be searched back even as far as the 1617. There is equal difficulty in finding out infestments of annualrent, which may be kept alive 100 years by minorities. Infestments of warrandice will take place in many cases, a long time after the date of the infestment, and the same in inhibitions and other diligences; so that to conclude, the rule is the same in reversions, as in other cases, that whoso pretends to purchase with safety must have recourse to the records.

" THE LORDS found, That the reversion being registrate in the register of sasines and reversions, does not prescribe."

*Fol. Dic. v. 2. p. 113. Rem. Dic. v. 1. No 92. p. 181.*

No 184.

Use of payment for 40 years past, of an additional stipend, by the inhabitants of a burgh of barony to their minister, found sufficient to bind them in all time coming.

1757. December 21.

Mr DAVID TURNER, Minister of Greenock, *against* The MAGISTRATES and COUNCIL of the Burgh of GREENOCK, and the FEUARS and INHABITANTS thereof.

IN the year 1686, the village of Greenock was erected, by a charter from the Crown, into a burgh of barony, in favour of Sir John Schaw of Greenock, with the usual privileges competent to every burgh of barony.

In the year 1741 and 1751, Sir John Schaw granted charters to the feuars and sub-feuars of the burgh, empowering them to elect two Bailies, a treasur-

er, &c. for administration of justice, maintaining order, and managing the funds for the common good of the burgh, with all powers competent to the Magistrates of any other burgh of barony; "reserving to the baron-bailies to be appointed by Sir John, and his heirs, a cumulative jurisdiction over the inhabitants of the town, with the Bailies to be chosen in virtue of the above grant." In pursuance of this charter, a magistracy was regularly elected, and the burgh has continued under their government.

The parish of Greenock consists of the burgh and barony of Greenock, and of the village of Crawfurdsdike. In the year 1694, the parish of Greenock having become vacant, the heritors and elders thereof joined in giving a call to Mr John Stirling; and as the stipend of the parish was then only L. 50 Sterling, which was all payable out of the teinds of the landward parish; and as the number and wealth of the inhabitants was then greatly increased, by means of their growing trade; the feuars of the town of Greenock and Crawfurdsdyke, in order to encourage Mr Stirling to accept of the call, made offer to pay him an additional stipend of L. 400 Scots yearly, of which L. 300 was to be paid by the feuars of Greenock, and L. 100 by the feuars of Crawfurdsdyke. This agreement was entered into at the sight of the presbytery; and, by their appointment, bonds to the above effect were granted, and lodged with the clerk of the presbytery. And it appears to have been one of the conditions insisted on by the presbytery, That these bonds should be granted as a security for the said additional stipend of L. 400 Scots yearly to the former modified stipend; and that they should be registered in the books of the commission for the plantation of kirks, &c. "in order that Mr Stirling might have a real right and legal title unto the said additional stipend, as it is now settled." It appears also from the minutes of the presbytery, that the feuars of the town of Greenock agreed to grant their bonds in the terms required by the presbytery; "and declared, that they were sending them in to Edinburgh, in order to be recorded in the books of the commission." But whether they were so recorded or not, is not known, as the records of that court, preceding the year 1700, perished by fire.

The bonds granted by the feuars of Greenock were lost, and could not be recovered; but the bond by the feuars of Crawfurdsdyke was found. It proceeds upon a narrative of the several acts of the presbytery above-mentioned, and that, "at the time of Mr Stirling's transportation, the feuars of Greenock and Crawfurdsdyke had agreed to pay him an additional stipend of L. 400 Scots yearly, during his incumbency, according to the proportions therein mentioned; and therefore they oblige themselves, conjunctly and severally, their heirs, &c. to pay to the said Mr John Stirling, the said sum of L. 400 Scots yearly of additional stipend, and that during the hail years of his incumbency, and serving the cure at the said kirk allenary."

In consequence of these obligations, this additional stipend was regularly paid by the feuars and inhabitants of Greenock and Crawfurdsdyke, from the

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date of the above settlement in the year 1694, down to the year 1746, to two successive ministers, and to this pursuer, without challenge or interruption; and the constant uniform method of raising this sum was by an annual stent, which was proportioned upon the feuars and inhabitants by stent-masters, and uplifted by collectors named by Sir John Schaw's baron-bailie.

In 1741, the trade and numbers in this parish having continued to increase, a new erection of a second minister in the town of Greenock took place; but the former modified, and additional stipends, payable to the first minister, were expressly reserved to him in the new erection, down to the year 1746. After that period, the Magistrates and feuars of Greenock refused to pay the additional stipend to the first minister, on pretence, that the greatest part of the inhabitants live within the bounds of the new parish, to the minister of which they are burdened with the payment of a competent stipend; but the feuars of Crawforddyke continued to pay as formerly.

The pursuer thereupon brought an action before the Court, libelling on the two bonds, and use of payment above-mentioned; and concluding, "That the Magistrates of the Town of Greenock should be found liable for the sum of L. 154 Sterling of arrears, and in payment of the additional stipend in all time coming; or, at least, that they should be decerned to proportion the said additional stipend, and to name and appoint stent-masters and collectors as formerly." And in this summons, the feuars of the town of Greenock were called for their interest.

*Pleaded* for the defenders; Although the constant use of payment to a minister for forty years of any annual sum, as a part of his stipend or benefice, will indeed establish an absolute right to that annual payment to the minister, and his successors, without necessity of producing any original constitution or title in writing; yet this only takes place where such payment has been made beyond the years of prescription, either by an individual person, and his predecessors whom he represents, or by a body-corporate, having perpetual succession, and power to bind their successors, and the members of the incorporation. But the burgh of Greenock was not a legal incorporation till they obtained their charter from Sir John Schaw in 1751; and the payment of the additional stipend to the pursuer, and his predecessors, from the 1694 to the 1746, may be binding upon such of the particular feuars and inhabitants as have submitted to that payment past the years of prescription, but cannot be binding upon such feuars and inhabitants as have acquired their feus, or become inhabitants of the burgh, within these forty years, who are not bound by the prescription; and far less can those who have lately come within the burgh, and made no payment of this additional stipend, be bound thereto; because as this use of payment was not made by any body-corporate, or by their legal representatives, the community could not be bound by the deeds of the individuals.

*2do*, From the writings produced, there is sufficient evidence, that the bonds which gave rise to this use of payment, were only meant to be temporary during the incumbency of the said Mr John Stirling, in whose favour they were granted. This appears particularly from the above-mentioned tenor of the bond granted by the feuars of Crawforddyke, which is produced; and the legal presumption is, that the bonds by the feuars of Greenock were in the same terms. In the several acts and minutes of presbytery before recited, these bonds are all described as in favour of Mr Stirling only, without any mention of his successors in office; and in the records of the baron-court of Crawforddyke, which have been more carefully preserved than those of Greenock, this additional stipend is constantly mentioned as a gratuity revocable at pleasure.

*Answered* for the pursuer; To the *first* defence; *imo*, The character and right of a burgh of barony, as an incorporation, which, by the law of Scotland, it certainly is, arises from the charter of the Sovereign, and not from any after grant of the baron, empowering the inhabitants to chuse their own Magistrates. Such grant by the baron can establish no new right, and is no more than a model for the government of the burgh. The Magistrates elected are the baron's bailies within the burgh, and exercise the jurisdiction communicated to them by him, in the same manner as the baron's own bailie does over the rest of the barony; and therefore the agreement made in the year 1694 by Sir John Schaw, the baron, with the consent of the whole feuars and inhabitants of the burgh, must by law be as effectual and binding, as if it had been granted by the Magistrates and Council, who are now established as the heads of a legal corporation. *2do*, When a minister has acquired right to any annual payment or prestation from his parishioners by forty years possession, it is good in law to establish a right to him and his successors in all time coming. And it is sufficient if the minister has had the possession against the collective body, though not united under a legal corporation, or representing one another under any passive title. Thus the Court found, That a minister of a parish was entitled to a certain duty from the weavers of his parish, for each loom employed by them, in consequence of a forty years possession, although there was no corporation of the weavers in this parish, which could bind themselves and their successors in trade; neither could it be said, that the weavers which then were, did in any respect represent those of the same employment, against whom the right was first established by prescription; 29th November 1678, Birnie *contra* Earl of Nithsdale, No 1. p. 2489. And the like decision was given, 10th February 1666, in the case of the Minister of North Leith, No 146. p. 10890. *3tio*, As the use of payment, and the method of collecting it, has been established for above fifty years, the pursuer is no way interested in the question, Whether the late feuars and inhabitants ought to bear a part of this burden, with the more ancient ones who have become liable by their own and their predecessors' use of payment? This they may settle among themselves. The pur-

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suer is entitled to have his whole additional stipend assessed and collected, in the same manner as has hitherto been practised.

To the *second* defence ; It appears from the minutes of the presbytery, that it was insisted on, that this additional stipend should be made not only to Mr Stirling personally, but as an addition to the former modified stipend of the minister of this parish ; and for that purpose it was agreed, that the bonds to be granted should be recorded in the books for plantation of kirks ; which certainly was done, though these records are now lost ; and the constant continuance of payment for so long a course of time, in consequence of that agreement, not only to Mr Stirling, but to two other subsequent ministers, is irresistible evidence of the design and import of these obligations. And this is further confirmed from the decret of disjunction and new erection of the second minister, which contains an express proviso, " That the benefice of the present kirk of Greenock should not be thereby diminished in any sort." And accordingly the defenders continued the same regular payment of the stipend due to the pursuer as formerly for five years after the new erection.

" THE LORDS found the feuars and inhabitants of the town of Greenock liable to the pursuer in payment of the additional stipend of L. 25 Sterling yearly libelled on ; and found, That the method of levying the same is, by stent-masters, and a collector to be named by the Bailies of the burgh ; and ordained the said Bailies to appoint such stent-masters and collector for levying, collecting, and paying the said additional stipend for bygones, and in time coming, according to former usage."

Act. Miller.

Alt. G. Brown.

G. C.

Fol. Dic. v. 4. p. 96. Fac. Col. No 75. p. 127.

## DIVISION IV.

## Vicennial Prescription of Retours, and of Holograph Writs.

1673. *January 11.*LAMB *against* ANDERSON.

No 185.

A younger brother being retoured as heir to his father upon the supposed death of an elder brother

WILLIAM LAMB being entered as heir to his father in certain tenements in and about Stirling, and infeft therein, and having granted bond to John Anderson containing an assignation to the mails and duties of the lands, John entered into possession, but shortly thereafter, Christopher Lamb, William's elder brother, who was out of the country when William was served heir, re-