No 64.

The Duke of Roxburghe pursued a declarator against Gala, of his right to the teinds of the parish; wherein it was *pleaded* for the defender, That he had lost his right to them, by the negative prescription; and they, therefore, being in the same case as if no grant had been made, belonged now to the patron, in virtue of the statutes made for that purpose.

Answered, An immunity from teinds cannot be prescribed; the heritors remained liable to the Lord of Erection at the time of the statute establishing the patron's right, which, therefore, did not affect these teinds.

Replied, Although the heritors cannot prescribe an immunity from teinds, yet a titular may lose his right by the negative prescription; which will be beneficial to a competitor, whose title is not prescribed, or to the King; in this case, the titular's right was lost by prescription in 1690; the teinds, therefore, belonged to the King; and, consequently, fell under the statute.

Duplied, There was no prescription run in the 1690, nor is there now; part of the teinds were possessed by the minister, with whose provision the titular was burdened by his erection; and Gala having possessed his by tack from the abbot, there was an action brought against him in 1685, on the supposition that it was expired; which action was not prescribed when the declarator was raised: But without regarding these interruptions, the right could not be lost by the negative prescription, at the time of Gala's grant; as it cannot be pretended the King had then acquired any by the positive.

The Lords, 3d November, found that the right of the teinds of the parish of Lindean was in the person of the Duke of Roxburghe; and this day, on bill and answers, adhered

Reporter, *Murkle*. Act. *R. Craigie*. Alt. *H. Home*. Clerk, *Kirkpatrick*.

D. Falconer, *v.* 2. *No* 108. *p.* 123.

SECT. X.

Thirlage.

1632. *December* 20. Sir A. Hamilton of Innerwick *against* Hamilton.

No 65.
Parties having continually, since astriction to a mill, till within a few years of action for abstraction, carried their corns to the mill, the as-

By contract betwixt the pursuer's father and the defender's father, the pursuer's father is obliged, and his heirs, to give infeftment of the lands of , to the defender's father; likeas the defender's father obliges him and his heirs, they being infeft, to grind their corns at the pursuer's father's mill, as astricted thereto; whereupon the defender being convened for abstracting of his multures, and the excipient *alleging*, That the pursuer's self had granted to the excipient's father, and his heirs, an heritable feu-infeftment of the lands libelled, with an express clause of *molendinis et multuris*, and in the *reddendo* containing

No 65.
triction was found not to be lost *non utendo*, although they had more frequently employed other mills.

a certain silver duty, to be paid *pro omni alio onere*, whereby he alleged he was free of that astriction;—the LORDS repelled this exception, in respect of the preceding obligation of thirlage, contained in the said contract; for, by the same, the one party was obliged to give an heritable right of the lands; and the other party, viz. the defender's father, and his heirs, were obliged, after they were infeft, to the said astriction; so that the infeftment, albeit after the obligation of astriction, yet being given upon the necessity of implement of that contract, which bore 'mutually either parties obligation to others *hinc inde*,' albeit the charter made no mention of that contract, nor had any relation thereto; and albeit it was granted, not by the contractor, but by the pursuer, his son and heir; yet was reputed by the LORDS to be done for fulfilling of his part of the contract, and as if it had been instantly done the time of the contract, and so could not derogate to the contract, by the which the other party, when he was infeft, obliged him and his heirs to that thirlage; except that the defender would allege, that after the contract, or at the time thereof, the pursuer or his father had perfected another charter of the lands to him, for satisfying of the contract before this infeftment, whereupon now he excepted; *quo casu* if there had been any other infeftment expede of before, conform to the contract, and that this infeftment had been thereafter acquired, having no relation to the said contract, then the said second right, with the clause of mills and multures, &c. would have liberated the defenders from the said thirlage, and no otherways, except the said thirlage had been expressly discharged, which they found not to be discharged by the infeftment, which behoved to be understood as given conform to the contract, there being no other given but only this, which, containing the common clause insert, of common stile of Court, could not derogate to the contract, conform whereto it behoved to be taken as given, and was not *per expressum* discharged; specially also seeing the pursuer offered to prove, that since the contract and the defender's infeftment alleged, he and his father has been in use to come and grind their corns at the mill libelled; which the LORDS sustained. And thereafter the defender *alleging* the contract to be prescribed, being above 50 years since the date thereof; this allegeance was repelled, in respect of the foresaid reply of coming and grinding their corns at the mill continually since the date thereof, except within three or four years last by-past, whereby the prescription (which takes place only *a tempore cessationis*) had no place in this case. And albeit the defender *duplied*, That though he came sundry times to grind his corns at the mill libelled, which was a voluntary deed, and not done as astricted, but was done as a free miller, for he was in use to grind more frequently at other mills in the country yearly since the said astriction, and which he offered to prove, and whereby he had prescribed a freedom and liberty; which duply was repelled, and the said reply sustained, *ut supra*. See THIRLAGE.

Act. *Stuart.* Alt. *Nicolson.* Clerk, *Scot.*

Fol. Dic. v. 2. p. 101. Durie, p. 661.