

1635, July 7. L. INNERWEIK *against* HAMILTON.

## No. 26.

In a constitution of thirlage, even when it is of *omnia grana crescentia*, the heritor of the servient tenement is never understood to astrict the teinds, where they do not belong to himself, but to a titular.

A decree being given at the L. Innerweik's instance, against one Hamilton, finding the corns growing upon the said Hamilton's lands of ——— to be astricted to the Laird of Innerweik's mill of Bancriff, whereupon he being charged to pay the multures of the corns growing thereon; and the other suspender craving deduction of the teind, as use is; and the charger answering, that albeit, by ancient custom, the teind of old was excepted from the thirlage, yet that now *res devenit in alium casum*, seeing the reason of the exception was, that the teinds pertained not to him who was heritor of the lands thirled, but belonged to the titular of the teinds, or to some others having right from him, whereby he was subject to them for the said teind, and therefore could not come under the thirlage, not being his own; but now that reason ceasing, the exception ought to cease; seeing, according to the order universally taken and established by law, every heritor hath the right of his own teinds, as this suspender hath also right to his; and therefore the teind ought to come under the same course and rules of the rest of the corns growing on the ground, seeing the defender will make the like use of the teind as he doth of the rest of the corns growing, and therefore ought to be subject to the same thirlage; notwithstanding of which answer, the Lords found, That the suspender was not holden to grind his teind at the said mill, as astricted thereto, and that the thirlage did not extend to the same, notwithstanding that the suspender had purchased the right of his own teind; for the teind being excepted *de sua natura*, and by the custom and practice of the kingdom out of the astriction, the acquiring of the same now by the person thirled altered not the thirlage, to make it to extend further, and to enlarge the same more than it was of extent before this law and order of acquiring of the right of teinds; which acquisition was not purchased to add any benefit to him who had the right of the thirlage, and to make the purchaser, by that his own purchase, to lie under a far heavier servitude, both against his intention, and against all reason; and therefore found, that the suspender for the teinds, might grind the same where he pleased, or otherwise use or dispoise thereupon as he thought expedient; and that he was not tied therein to the charger to grind the same at the mill of the thirlage, neither as astricted nor as free multure, but that he might use the said teinds either to grind or not to grind the same, as he pleased: Neither was it respected, where the charger offered to prove, that the heritors of the rest of the lands of the barony astricted did grind their teinds at the said mill, which was repelled; for their voluntary deed could not bind any other, who was not alike willing.

Act. Stuart.

Alt. Nicolson.

Clerk, Scot.

*Durie, p. 771.*

\* \* See Fordel, No. 1. p. 15859.; Pittarro, No. 125. p. 10863.; Gardin against Watson, *infra, h. t.*; also the case Cuthbert, No. 27. which immediately follows.