No 120. been private and clandestine, and the probation during memory, before this controversy, was found to instruct anterior possession, to complete prescription. See Proof.

Fol. Dic. v. 2. p. 106. Stair, v. 1. p. 286.

*** Newbyth reports this case:

In an action of abstracted multures pursued by Colonel James Montgomery of Collfield against the Tenants of Drumlie, the Lords found the depositions of the witnesses adduced for proving of Colonel James and his authors, their possession, albeit they did not prove 40 years possession fully, yet being joined with decreets of the date 1569, and other subsequent decreets, sufficient *ad victoram causæ*, to decern against the tenants in the multures libelled, and found the astriction thereby sufficiently proved.

Newbyth, MS. p. 29.

1672. *February* 2.

John Forbes of Culloden *against* The Magistrates of Inverness.

No 121.
Possession of mills, taking multures with a greater measure than the statutory standard, for 40 years without interruption, found to have a prescriptive right to that measure; a thing regulated by custom.

In a suspension and reduction of a decreet, given by the Magistrates against Culloden's miller, fining him for using of measures, for the multures and other duties, which were more than Linlithgow measure, in respect that by the act of Parliament, that measure is to be standard for all Scotland; and that the miller did transgress the same, in taking multures for the corns grinded at Culloden's mill; as likewise, because, by a contract betwixt the feuars and the Town, the feuars, in case they transgress, in taking more for the multures than the quantity agreed on, or any other point of the contract, they submit themselves to the Magistrates of the Town; the reason of the suspension and reduction was, that the act of Parliament, *viz.* 115th act K. Ja. VI. 1587. anent measures, is only in relation to buying and selling, and bears an exception of private persons, rights by infeftment, tack, or contract, which cannot meet this case of duties paid to millers of thirlage, which is a particular measure agreed upon, and whereof they have been in possession past memory of man, without interruption. The Lords sustained the reason founded upon 40 years possession, unless the chargers would prove interruption.

Fol. Dic. v. 2. p. 108. Gosford, MS. No 460. p. 239.

*** Stair reports this case:

1673. *January* 2.—The Town of Inverness having obtained an ancient infeftment from the King of the King's-mill of Inverness, that was then situated near the Castle of Inverness, and transported by the Town to another place of the river; they did feu the same out to certain feuars, and, by an act of thir-

lage, thirled all the inhabitants of the town, and their vassals, to the mill; the right of which mill being now in the person of Culloden, and others, they have been in possession of a peck for each two bolls for multure, and a bushel, called there a muty, being the third part of a peck, for knaveship: But, *in anno* 1664, the Dean of Guild of Inverness did visit the measures of the mill, and alleging that they were not just, did burn the same, and fined and imprisoned the millers. Culloden obtained suspension of the Dean of Guild's decreet, and insisted upon these reasons, 1*mo*, That the Dean of Guild had no power to visit or alter the measures of the King's-mill, but only measures within the burgh; 2*do*, That the destroying of their muty was most unwarrantable, upon pretence that it was more than a lippie, or a fourth part of a peck, because they had been in immemorial possession of the knaveship by that measure. And the Town alleging interruption, there was assigned to either party to prove, and witnesses were adduced for both; by which Culloden proved that he, his predecessors, and authors, had been in possession of that quantity for knaveship, much more than 40 years; and both witnesses proved that there was never another measure in use. The Town's witnesses did also prove, that, *in anno* 1664, the muty was burnt, as the Dean of Guild's decreet bears. Culloden produced the old act of thirlage of the Town, and letters of horning upon a decreet following thereupon; in which act of thirlage, and in the infeftment of the mill, there was no special quantity of multure nor knaveship expressed, but only the multures and sequels used and wont. The Town produced an act of the Town Court *in anno* 1613, renewing the thirlage, and expressing the quantity of the multure, and of the knaveship to be a lippie, or the fourth part of a peck; and bearing, that the millers should carry the corns to and from the mill; they did also produce a decreet of the Lords *in anno* 1637, at the instance of one of the feuars of the mill against one of the vassals, wherein there being libelled a greater quantity of multure and knaveship:

No 121.

THE LORDS decerned only for a peck of multure for two bolls, and for knaveship a lippie; that is, the fourth part of a peck. They did also produce the Dean of Guild's decreet *in anno* 1664, and thereafter in that same year a decreet-arbitral between the Town and the Feuars of the mill, decerning the multures according to the thirlage, and acts and decreets thereupon, and the knaveship according to use and wont:

Whereupon it was *alleged* for the Town, That they had instructed sufficient interruption, not only by the decreet of the Dean of Guild *in anno* 1664, but by the decreet of the Lords *in anno* 1637; finding the knaveship to be the fourth part of a peck; and though the millers had insensibly encreased the lippie, till it was come from a fourth part to a third part of a peck, that could infer no prescription, but a latent insensible encroachment, which the possessors of all mills, if it be approved, may follow; and the third part of a peck being no measure, not known in law or custom, nor the name or quantity of a muty, the thirlage must be restricted to a lippie, which is a known and ac-

No 121. customed quantity; and *alleged*, That the witnesses were obscure inconsiderable persons; and that they proved not 40 years preceding 1664, which was an unquestionable interruption; and that the decreet-arbitral did relate to decreets and acts, which could be no other than the act 1613, and the decreet 1637; and that the feuars being the Town's vassals, not by any recent purchase, but by ancient gift of the King, and subject to the Town's jurisdiction, as a part of their common patrimony, the Dean of Guild did warrantably, by his office, visit, and correct the measures thereof. It was *answered* for the Feuars, That they had proved sufficiently their possession of this quantity of knaveship past prescription, by habile witnesses; and none others, in such a case, could be expected to know the measures for so long a time, but those who had served in and about the mill, neither was there any sufficient interruption proved; for where an infeftment and thirlage is general, according to use and wont, without expressing a quantity, it is not every interruption that will abate that quantity, unless the vassals had attained to the possession of paying a less quantity, which is contrary to the probation of both parties; for if interruption, by hinderance or refusal of payment, were sufficient, then the same might not only reduce the measure to a fourth part, but to any part they pleased; so that where there is an antecedent determined right of a special quantity, either by infeftment, act, or possession, any interruption, by hinderance only, will be sufficient to hinder prescription of any greater quantity, and to reduce it to the former determinate quantity; but where there is nothing special, to recur to interruptions by hinderance, without possession of a less quantity, must either operate nothing, or totally evacuate the right itself, having no quantity to stand at; and, therefore, though the interruption *in anno* 1664 had been lawful, it could not alter use and wont, but by another use and wont; and as to the decreet *in anno* 1637, it is but at the instance of a sharer of the mill against an heritor, and there is no debate in it anent the quantity of the knaveship, and the mention or explication of a lippie hath been but of course by the clerks, who knew no other measure. Likeas, the decreet-arbitral makes for the feuars, which, as to the knaveship, decerns simply, according to use and wont, without any relation to act or decreet, which is only related as to the multure, and the first act of thirlage, and decreet thereupon, are meant thereby. It was *replied* for the Town, That, albeit the thirlage was general at first, yet, by the act 1613, it was made special, whereunto the interruptions ought to return, and likewise by the decreet 1637; and though none of these were, the interruptions must reduce the knaveship to the common accustomed quantity of knaveship, which is either proportionable to the multure, or, at most, the fourth part of a peck. It was *duplied*, That there could be no recourse to the act 1613; because acts of Court, without a warrant subscribed by parties, have no effect; and this act, albeit it bear the feuars of the mill to be present, yet it cannot instruct the same, much less their consent, without their own subscription or possession conform; neither is there a common stand-

ard of knaveship, but every mill hath it according to ancient custom; and in the act of Parliament anent measures, there is a particular exception of the measure of several baronies of lands; and it is a groundless pretence, that parties concerned will not perceive the difference of a measure, when it ariseth from a third part to a fourth part. No 121.

THE LORDS found, that there being no determinate quantity of this knaveship, and that it having been only, and constantly paid by this muty, or third part of a peck, they found that it was the due measure, and that the act *in anno* 1613, without subscription or possession, did not prove the feuars consent; and they had no regard to the decreet 1637.

Stair, v. 2. p. 139.

1673. *January* 23. BAIRNER *against* COALZIER.

No 122.
In a thirlage, constituted by act of court, a defender found free of a particular species, *nam tantum prescriptum quantum possessum.*

BAIRNER being infeft in Cultmill, with the astricted multure of Cults, being a pock of five firlots, pursues Halcroft, being a feuar of the barony, for the multure of his bear abstracted. The defender *alleged*, Absolvitor; because he was infeft in his lands long anterior to the pursuer's infeftment of the mill for a feu-duty, *pro omni alio onere*. The pursuer *answered*, That the defender was thirled by an act of thirlage, in the Regality Court of Culross, conform whereunto the pursuer had been in constant possession past memory of intowns multures; and such acts of thirlage are sufficient titles for prescription, to constitute a thirlage. The defender *replied*, That a thirlage introduced, not by contract or infeftment, but by act of thirlage, and long possession, could not be extended beyond that possession which did constitute the same; and the defender makes no opposition against the thirlage of oats or of bear, which thole fire and water within the thirle; but as for bear sold to merchants, that never tholed fire and water within the thirle, the pursuer was never in possession of any multure therefor. The pursuer *duplied*, That it was sufficient for him that the defender was in possession of the intowns multure for bear continually; and albeit the defender did clandestinely abstract some part of the bear, that could not import a liberation; for so there is no thirle, but there is some clandestine abstractions.

THE LORDS found, that this thirlage being constituted by possession, upon an act of Court, that the defender's allegeances, that he was constantly free of thirle of all the bear that tholed not fire and water within the thirle, which was not as a latent abstraction, but known and avowed, was relevant.

Fol. Dic. v. 2. p. 107. Stair, v. 2. p. 159.