

The Lords found the pursuer's libel relevant, for giving him the multures of the feuers of the Abbacy within the old thirle, and of the burrow-roods, if the same were proved to be within the old thirle, and also to give him multures of the malt made or brewed within the Town, whether it grew within the old thirle or not, whereby if the Town bought victual out of the old thirle, they would be liable in double multure ; and as to the meal bought in their markets, the Lords before answer ordained the custom of this and other mills to be proved by either party, and sustained the exception of prescription, and the reply of interruption, and the duply, that these multures were in the *reddendo* of the town's charter, and found that thereby they could not fall under prescription.

No. 39.

Stair, v. 2. p. 655.

1680. June 30.

ADAIR against M^cCULLOCH.

Mr. Alexander Adair pursues M^cCulloch of Mooll for abstracted multures from the mill of Drumore, and produces a contract betwixt him and Thomas Kennedy of Mooll, the defender's author, bearing, " Thomas to be obliged to bring his corns growing upon the third part of Mooll to that mill, paying the twenty-fourth grain, and not to hinder his tenants to come to the said mill, and to pay the sixteenth grain, as accords, with the mill services and knaveship used and wont ;" and on the other part, Mr. Alexander, as donatar to the ward of Kinhilt, " grants liberty of fuel and heather to the possessors of Mooll out of a roum of Kinhilt's adjacent, according to which there was possession before this Mooll's right, which did perfect the thirlage as a real burden effectual against the singular successor, and does acknowlege use and wont, knaveship, and mill-services. The defender alleged *absolvitor*, because there can be here no real constitution of a real servitude of thirlage, because the pursuer's right was but temporary as donatar, and therefore it is but a personal contract of coming to the mill, during the donatar's right for fuel and heather, which is the mutual obligation, and presumed to be the cause, though the contract bears not expressly, for the which cause, seeing it bears no other cause of Mooll's obligation : And as to the tenants, it is but a permission as accords, which must relate both to the multures, knaveship, and services ; and use and wont cannot constitute the service, except in the King's mills, neither is this thirlage completed by prescription. The Lords found there was no thirlage constituted, but a personal contract ; and therefore assoilzied the defender as singular successor. The said Mr. Alexander did also insist for the teinds of the mill, conform to a tack by way of contract betwixt him and the said Thomas Kennedy, whereby the said Mr. Alexander set the teind of Mooll for £.100 yearly. The defender alleged *absolvitor*, because he had no right to the teind, and could not be burdened with his author's tack, which his author might have renounced, if it had not been by contract, and his personal obligation cannot burden his singular

No. 40.

Distinction between thirlage constituted so as to affect the lands, and a personal contract relative to the multures.

No. 40. successor, but he is content to be liable to the fifth part of the payable rent till a valuation.

The Lords found the defender liable only for the fifth part of the payable rent till the valuation, and not by the tack-duty, unless he had been in use of payment of it, whereby he would be liable by use of payment till interruption.

Stair, v. 2. p. 779.

1680. November 24. RAMSAY *against* The TOWN of KIRKALDY.

No. 41.

Thirlage of *invecta et illata* tholling fire and water within a town was extended not only to malt made within the town's liberties, but to malt brewed within the same.

Sir Andrew Ramsay pursues the Town of Kirkaldy for abstracted multures of *invecta et illata*, tholling fire and water within the thirle of the West-mill of Kirkaldy, whereof he is heritor, conform to an astrictio in these terms. The defenders alleged, that tholling fire and water could only be understood of bear made in malt within the thirle, for the steeping is the tholling water, and drying is tholling fire, and could never be extended to brewing within the Town, otherwise most of the towns having such thirlage, might crave multures of all the malt sold in their markets, which was never pretended by any, and would be of great damage to the lieges; and Craig doth interpret tholling of fire and water to be killing and cobling. It was answered, that the literal sense of tholling fire and water doth as well extend to brewing as making of malt, and is more suitable to the design of the thirlage, which might be evacuated, and import nothing, if it were only extended to malt made in the Town, which they might forbear; this being a distinct thirlage from the thirlage of *grana crescentia*, and by a distinct right, the true intent whereof hath been, that the Town should make use of no malt, but what was ground at the pursuer's mill; and therefore the brewing is mainly considered, so that the malt made within the thirle, though not brewed there, ought to be carried to this mill, and no malt should be brewed in the Town, but should be ground at this mill, or else they should be liable for multure, as if ground there, especially the multure being so easy, as but a peck of two bolls, and as the defenders contend for a peck of ten firlots. The Lords did, before answer, ordain witnesses to be examined by both parties, what hath been the ancient custom in this thirlage; which being advised, the import was, that some of the witnesses for the pursuer deponed, that it was the constant custom very ancient to get multures of all corns brewed within the town, but that the inhabitants used to steal it in, in the night time, and several witnesses deponed upon some instances of the seizing upon malt brought ground into the Town, and sometimes arrested by warrant of the bailies. The Town's probation did only bear, "that the witnesses did know no such thing."

The Lords having considered the probation, found that this thirlage did extend to malt brewed in the Town, though not malted in the Town or its liberties, but not to meal.

Stair, v. 2. p. 805.