1678—1687. Sir Andrew Ramsay of Abbotshall *against* The Town of Kirkcaldy, and the Heritors of the Balsusney-acres.

1678. *February* 26.—Sir Andrew Ramsay of Abbotshall pursues the inhabitants of Kirkcaldy, and possessors of the adjacent acres, and others, astricted and thirled for abstracted multures from the West-mill of Kirkcaldy. Alleged,—1*mo*, By a decreet-arbitral proceeding upon a submission betwixt George Boswell, then heritor of that West-mill, and the Town of Kirkcaldy, he is restricted allenarly to take a peck of ten firlots; and yet now he pursues for more, *viz.* for a peck of two bolls. Answered,—The quantity pursued for is contained in the pursuer's own and his author's infeftments; and the decreet-arbitral never took effect by possession, and so cannot bind him, who is a singular successor; and, it being a servitude, it is *certissimi juris* that servitudes, unless clad with possession, can neither be constituted nor destituted.

2do, It was alleged for the Heritors of the acres,—That they sold their corns growing on these acres to the inhabitants of Kirkcaldy, and there it was either brewed or brought to the West-mill, and paid multure; and so could not pay twice. Answered,—That was nothing to the pursuer; for what it paid in the Town of Kirkcaldy was because it fell under *invecta et illata*; but *omnia grana crescentia* on these acres were astricted; and let them pay for them on the ground, and then carry them whither they will; otherwise their corns should be no more thirled than that which comes from Loquhaber, or from other seas, as Dantzick.

This being reported by Craigie, Justice-Clerk; the Lords having heard his report, and seen the decreet-arbitral produced, they find, that, by the decreet-arbitral, it is declared the Town was astricted, before the said decreet-arbitral, both as to *grana crescentia et illata*; and find, that the decreet-arbitral is sufficient to restrict the thirlage effectually against singular successors, unless the same be taken away by paction or prescription; and therefore find the pursuer's allegeance, that he and his authors have been 40 years in peaceable possession before intenting of the said defender's declarator of a peck out of two bolls, relevant to extend the thirlage thereunto, notwithstanding of the decreet-arbitral, unless there be interruption or contrary possession; which, if it be alleged, the Lords allow to the parties mutual probation. And repel the allegeance proponed for the rest of the heritors, as to one peck off twenty-four, notwithstanding that the same was sold to the Town of Kirkcaldy and grounded there.

Then the defenders alleged the pursuer behoved to say his possession was universal and uniform; and that, for 40 years, he never received less.

This were strange and impossible to prove; but all in reason he can be obliged to, is, to prove that the general stream of the custom and his possession was for him and his millers to exact, and for them to pay, the duties mentioned in his infeftments, and now acclaimed: for, if, for favour or other personal respects, or to engage them not to abstract, the miller gave them sometimes an ease, yet, if that was not general, it can in no sense prejudge the pursuer, else it shall be in the power of any miller to low his master's rent and

give it away. See thir same parties and cause at the 18th of July 1678.
Advocates' MS. No. 730, folio 320.

See the numerous intermediate parts of the report of this case, Dictionary, page 9409, *et seq.*

1680. *November* 24.—The Lords advised the probation betwixt Abbotshall and the Town of Kirkcaldy, (11th Feb. 1680,) anent the 40 years' possession of the quota of the multure, whether it had been paid conform to a peck of two bolls of malt, as his charters and infeftments bore, or at a peck of 10 firlots, or a load of malt only, conform to the decreet-arbitral produced by the town; and found, by the witnesses produced, that Abbotshall, Dalhousie, and George Boswel his authors, have been in peaceable possession of a peck of two bolls of malt 40 years before the intenting of the Town of Kirkcaldie's declarator; and that the witnesses adduced by the Town had not proven any such interruptions as might take off the said prescription. But declared they would further hear the parties as to the interruption founded on the decreet-arbitral mentioned in the decreet of suspension obtained by Abbotshall against the Town of Kirkcaldy in 1664, produced by himself; and anent the quality of Abbotshall's possession, whether the same, not being proven by him to be universal and uniform, imports an interruption or not.

Upon which interlocutor, it being ALLEGED for Abbotshall, that the decreet of suspension produced by him could never be a foundation whereupon the Town of Kirkaldy could ground any interruption, because though it bore in the debate that one of their reasons of suspension was, that there was a decreet-arbitral betwixt the Town and his authors, whereby he was restricted; yet there being a term assigned to them to produce it, they failed, and the term was circumduced against them; and, they never producing the said decreet-arbitral till after the 40 years, it could never impede prescription.

The Lords having advised this in the end of Feb. 1681, they found neither Boswell's decreet in 1636, nor the decreet of suspension in 1664, nor any contrary possession proven by the Town of a lesser quantity than a peck of two bolls, inferred an interruption; the decreet of suspension not founding expressly on the said decreet-arbitral, for instructing a peck to be due only out of ten firlots.

Then Kirkaldy gave in a bill against this.

But the Lords adhered; only declared the prescription of the decreet-arbitral, as to the quantity of the multure, should not be prejudicial to other points of that decreet which were yet in observance. *Vide* 29th March 1682.
Vol. I. Page 118.

1682. *March* 29.—The town of Kirkaldy presented a bill against Abbotshall, when he was extracting his decreet against them; (*de quo, vide* 24th November 1680,) which was refused; and the Lords adhered to their former interlocutor, and ordained his decreet to go out; notwithstanding of their clamorous representations against their paying of multure for imported malt, and their objections on the decreet-arbitral, why they should only pay a peck of ten firlots, and not of two bolls. Then they gave in a new bill, representing that they were oppressed by Abbotshall, with whom it was *impar congressus;* and begged his decreet might be stopped till they were further heard.

The Lords, after a strong debate, also rejected this bill. *Vol. I. Page* 182.

1683. *March* 15.—The heritors of the Balsusney acres, beside Kirkcaldy, being ordained to be reëxamined, in Abbotshall's process against them, for abstracted multures, (*vide* 12th December 1679,) they gave in a bill, craving they might depone on a commission. Which the Lords refused.

Vol. I. Page 226.

1685. *January* 27.—Sir Andrew Ramsay's cause against James Law, and the other heritors of the Balsusney-acres, beside Kirkaldie, was advised. He having pursued them for abstractions, they had formerly deponed that they had brought their corn to his mill, and had paid the multure. (*Vide* December 12, 1679.) But, in regard there were two multures found by the Lords to be due, one of the *grana crescentia*, and another of the *invecta et illata*, and that they had only paid one of these two; the Lords, on the 24th of November 1680, ordained them to be reëxamined, if they had paid both multures, yea or not. And these second depositions being this day advised, they alleged, a part of their town was built on the Balsusney-acres, and so they behoved to have the privilege of borough-acres, and be liable in one single multure.

Yet the Lords decerned against them for the multure of the increase and growth of each acre confessed. And, where their depositions were not special as to the quantity of the growth, the Lords decerned it to be 7 bolls the acre, as the common increase proven; and deduced 7 firlots off each acre, for the seed, which is excepted from the multure: (this is at the fourth pickle or curne:) and found that the teind, which is also free of multure by the contract in 1656, is the tenth of the growing corn: and that the multure they have already paid, is a distinct multure from the other, *viz. pro invectis et illatis*, and so cannot liberate from the other multure *granorum crescentium:* and found the said multure *granorum crescentium* to be a firlot on the acre, and the 24th peck. *Vide* 27th November 1685. *Vol. I. Page* 334.

1685. *November* 27.—The debate between Sir Andrew Ramsay of Abbotshall and the Town of Kirkaldy, mentioned 27th January 1685, was reported by Harcus. Their reasons of suspension against his decreet were:—1*mo*, That there never was a term assigned to the Magistrates to depone, and so they could not be holden as confessed, nor the term circumduced against them. 2*do*, The abstractions only concerned the tenants and possessors, and not them, the masters. 3*tio*, This common muir was a part of their borough-acres. 4*to*, The quantities of the *grana crescentia* were exorbitantly libelled.

Answered to the *first*,—A day was assigned to the tenants of Bogie, and feuars of Balsusney; and, in contradistinction to them, the same day was assigned to the haill other inhabitants of the burgh of Kirkaldy, defenders; which certainly comprehends the Magistrates. As to the *second*, It is true, the tenants are *regulariter* bound for the abstractions, multures not being *debitum fundi*, and the master is free; so Stair's Decisions, 10*th December* 1667, *Earl of Cassilis* against *The Sheriff of Galloway*. Yet here there was a specialty; for, 1*mo*, They had not taken their tenants obliged in their tacks to come to the pursuer's mill; but, on the contrary, had set their land as free. 2*do*, They had not proponed this defence in the decreet, but all along maintained their tenants as not liable, and spun out the debate for seven years; during which time, the tenants are either dead, removed off the ground, or broken and insol-

vent: and, so they having maliciously defended and prolonged the action, they become personally liable. And Haddington, in his Decisions, 15*th June* 1610, *Laird of Balnagoun* against *Monro*, tells us, one was found liable for the violent profits *super eodem medio*, that he had maliciously defended the tenants in a removing. *3tio*, *Quoad* the sum paid by the tenant, the master is certainly intromitter and possessor, and so bound for its multure.——Yet where it is payable in money rent, this is dubious, seeing the master gets not the *ipsa corpora*, (which is the subject out of which multure is payable;) yet, *fictione brevis manus, et quia surrogatum sapit naturam, &c.* he is reputed to intromit with the victual itself. To the *third*, Thir lands lie a mile or two from the Town, and so are no part of their borough-acres. To the *fourth*, When this bill was presented in the vacance, a competent space was allowed them to prove the true rental; and they were instrumentally required, but did it not, because they were not lesed by that libelling.

The Lords repelled the reasons of suspension, and found the letters orderly proceeded; but recommended to Abbotshall to use them kindly.

Vol. I. Page 378.

1687. *February* 23.—The case of Sir Andrew Ramsay of Abbotshall and the Town of Kirkaldy, mentioned 23d November 1687, is reported by Carse. The Lords repelled the first reason of suspension and reduction, in regard of the answer and decreet charged on, whereby they found there was no fact admitted to be proven by the charger anent the tenant's insolvency, and so it was not null for lack of that probation; and repelled the second, bearing the decreet to be *ultra petita*, for years after the libel, in respect the suspension is only for bygones preceding the year 1677: and also repelled the third reason, founded on the payment, as being repelled in the decreet of suspension,—as competent and omitted in the first decreet. But,—as to what discharges the suspenders shall instantly produce under the charger's own hand, or what the suspenders shall depone they made real payment of, in money, to the miller, (for eviting and discovering collusion,)—upon their getting his receipts, to be produced before extracting this decreet, ordain the same to be allowed.

Then Balcarras, provost of the Town, gave in a bill, pretending that *numquam susceperunt litem* for their tenants, except only by a bill given in by Sir David Thoirs; who disclaims that he was employed for Kirkaldy, but only for the Balsusney feuars. *2do*, If the Magistrates, their predecessors, malversed in neglecting the Town's affairs, they, as successors, cannot be liable, seeing *delicta suos sequuntur auctores.* ANSWERED,—1*mo*, An advocate's disclamation cannot deprive me of my *jus quæsitum.* *2do*, Magistrates, and their successors in office, *tenentur ex delicto decessorum*, as in subsidiary actions for prisoners escaping, &c.; and if they have been *in dolo vel culpa*, the present Magistrates, and the Town, have recourse and relief against them.

The Lords refused their bill; but yet found the letters orderly proceeded, against the last Magistrates only, (as being the suspenders;) and their cautioners in the suspension; which was a stretch; on this pretence, that Balcarras and the Magistrates put in by the King must not be discouraged.

But who will now lend to burghs, or bargain with them, if this hold?

Vol. I. Page 448.