

No 66.

1685. *March 4.* TARSAPPIE *against* PITTENDRIECH.

IN an action for abstracted multure, founded on a thirlage, constituted by the pursuer's charter, the defender having *alleged* prescription of freedom from the mill, and the pursuer *replied* no interruption; it appeared by probation led, that the defender; for the space of 40 years and upwards, had gone very frequently, without being quarrelled by the pursuer, to any other mill he pleased; and sometimes, but seldom, to that to which he was thirled.

Alleged for the pursuer, That the depositions did not prove 40 years continued and uninterrupted freedom, since they avouch, that the defender came sometimes to the pursuer's mill; and as such a probation would not infer prescription of the thirlage, if interrupted but by one single act of going to another mill, no more can it make a prescription of immunity from an astriction constituted by writ.

THE LORDS found prescription of freedom proved for the defender.—This appears to be a very irregular decision.

Fol. Dic. v. 2. p. 101. Harcarse, (MULTURES.) No 726. p. 205.

1688. *June 13.* FEUARS OF GAITMILK MILL *against* FEUARS OF DUNFERMLINE.
Or, THOMSON of Mildeans *against* HERITORS OF KINGLASSIE.

No 67.

In a declarator of immunity from thirlage of *grana crescentia omnium terrarum*, the Lords assolizied because the proof as to immunity was only *negative*.

IN a declarator of the immunity of beer, sold, and not ground, from a thirlage of *grana crescentia omnium terrarum*;

Alleged for the defender, That the pursuer must prove *positive*, that for the space of 40 years, &c. regularly and openly the bear was sold without any multure exacted, and not barely *negative*, that the multure of any bear sold was not exacted, seeing the thirlage was constituted *scripto*; although such a negative probation were sufficient to hinder or take off a constitution of thirlage by prescription; *2do*, The possession of any species of grain constituted *scripto* ought to preserve and interrupt.

THE LORDS sustained the first allegiance for the defender, and probation as to the immunity being only negative, they assolizied from the declarator, and found that the immunity was not proved; and so the second point was not considered. *Item*, THE LORDS found, That the master's rents, viz. the Abbot's feuduties, in victual and horse-corn paid to the Abbot (not being converted) were free of multure. Though it was controverted by severals, and not determined, if horse-corns, spent upon labouring horses, should be free.

Thereafter, upon the 14th July 1688, the LORDS found, That the ancient barony being now divided into many hands, the decreets of abstraction for both, (in respect of the constitution by writ) against several of the heritors for diverse years, did interrupt even against the other heritors not contained in the

decreets *quoad* barley. And the LORDS inclined to find, That the taking new charters from the Abbot's successor Lord Tweeddale, within the 40 years, containing the general astrictiō of corns of all sorts, was an interruption of the freedom, though there was no act or document of the pursuer, heritor of the mill, but of the superior. And 20th July 1688, the LORDS adhered to the promiscuous interruption by decret. *Item*, Found that teinds not being *decimæ inclusæ*, or converted, or valued to money, therefore ought to be free of multure.

This practick is not so very clear. See THIRLAGE.

Fol. Dic. v. 2. p. 101. Harcarse, (THIRLAGE.) No 730. p. 206.

. This case is reported by Fountainhall :

1687. *June 10.*—JAMES THOMSON of Mildeans, burges of Kirkaldy, gives in a bill, representing, that he and his authors stood infeft in Gaitmilk mill by the Abbot and Convent of Dunfermline, with the astricted multures of the parish of Kinglassie, for a particular thirle-duty, which the heritors denied, and yet it was in the *reddendos* of their own charters and rights; and therefore craved an incident diligence against them to cause them produce their writs for proving the special quantity: Which desire the LORDS granted, and he cited their advocates, in whose hands they were; who alleged they were not bound to exhibit, having them *ratione officii* only in trust.

1688. *June 13.*—JAMES THOMSON of Mildeans *contra* the Heritors of Kinglasse, for astrictiō to his mill, as mentioned 10th June 1687, wherein exemption and immunity from the thirlage of bear, and especially of farm-bear, was mainly pleaded, and decisions were cited *hinc inde*, 11th July 1621, Keith, *voce* THIRLAGE, where a farm was found not liable; and 21st March 1637, Cuthbert, *IBIDEM*, where the contrary was found; Stair, 23d January 1673, Bairner, *infra, h. t.*; 3d July 1673, Oliphant, *voce* THIRLAGE; and 26th June 1635, Waughton, D. 15. § 1. *h. t.*; and horse-corn was also craved to be excepted, which was refused. Yet see 14th January 1662, Nicolson, *infra, h. t.*; and on the other hand the pursuer contended by the feuar's own charters, (as the registers of the Abbacy of Dunfermline's vassals produced did instruct) *omnia grana crescentia* were thirled; and their leading posterior charters, with clauses discharging these prior ones, could not wrong the heritor or feuar of the mill. THE LORDS having advised the writs and probatiō adduced by either party, they found the thirlage proved, and the prescription of freedom not proved; and therefore decerned the defenders to be liable in the thirlage-multures to the pursuer's mill for all the *grana crescentia*, whether bear or others, except such bear or other corn which were payable to the Abbot or Commendator at the time of feuing of the mill, as farm or feu-duty.

No 67.

The Heritors gave in a bill, representing they had never been in use to pay dry multure for any bear not milled or killed, but sold without the thirle; and that it had been avowedly and not clandestinely done, (though it was but of late that bear came to be sown on this ground,) and that the pursuer's charter only mentioned *lie* shilling, of which multure was to be taken; which seemed to import that no more was thirled but only what was grinded. After a great debate amongst the LORDS, they, on the 20th June, appointed a new examination of the defender's witnesses, if ever the bear sold without the thirle used, or was forced to pay multure; reserving the consideration of the decreets which James Thomson's authors had got against them for bear, how far they would serve for interruptions of this 40 year's immunity. And the LORDS having advised on the 14th June these last depositions of the defender's witnesses, with the answers, interruptions and writs produced by the pursuer, they found, That there being many decreets obtained by the heritors of the mill, against many of the thirle, albeit some particular heritors be not pursued, yet they find the said decreets sufficient to take off the prescription as to the whole thirle, as a *jus individuum*; and therefore they adhered to their former interlocutor, and ordain the decret to go out; and find, by the defender's charters, and the pursuer's decret, that even bear, though exported out of the thirle, was liable.

It seemed hard, and very singular, that sentences against one (which is *res inter alios acta*.) should interrupt *quoad alios*, though possession of a part preserves the right *in toto*; and intimation to one of more debtors interrupts *quoad* all; and the parallel case was decided somewhat against this in November 1676, Mr George Shiel *contra* his Parishioners, No 61. p. 10761. where one heritor's paying a species of vicarage-teinds did not tie the rest of the parish to that kind.

Fountainhall, v. 1. p. 455. & 506.

No 68.

1727. July 25. MR JOHN M'LEOD *against* HIS VASSALS OF MUIRAVENSIDE.

A SUPERIOR, whose vassals in their charters were thirled to his mill by a thirlage of *omnia grana crescentia*, having insisted in a process of abstracted multures; the vassals *pleaded* as to their bear, That they had prescribed an immunity from the thirlage, having brought no corns of that kind to the superior's mill, nor paid any sort of duty therefore, for the space of 40 years. It was *answered*, That the astriction being established in the defender's charters, they could perceive no right or immunity contrary to the tenor thereof; which was sustained. See APPENDIX.

Fol. Dic. v. 2. p. 101.

The Title PRESCRIPTION is continued in Vol. XXVI.