No 12.

were a very finifter interpretation, to make a detorfion, of what is defigned for a benefit, to my prejudice; for, put the cafe, that the donator had interrupted the prefcription, which was running againft the rebel, or fet a profitable tack; would not thefe accrefce to one reftored, *per modum juftitiæ?* And, on the 13th of July 1664, between the Earl of Lauderdale and Bigger of Wolmet, (*No* 5. *h. t.*) a certification, obtained by Swinton, when donator, was found to belong to Lauderdale, that he might found on the fame.—THE LORDS generally inclined to think, the forfeited perfon might ufe any benefit the donator had obtained; even as the improvements of a tutor accrefce to a minor; *meliorem facere poteft conditionem pupilli fed non deteriorem;* but, falling to confider this decreet of preference, they found it not to be a preference in time coming, but only for fome bygone year's teinds; and found it no fufficient active title to compete with Caffillis for fubfequent years, without the tack itfelf were produced. (*See* PROCESS.)

*Fol. Dic. v.* 1. *p.* 1. *Fountainhall, v.* 1. *p.* 704.

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1702. *November* 25.

BOTHWELL of Glencorfe *against* SIR JOHN CLERK of Pennycuick.

No 13.
Found that infeftment of a mill carried the ancient thirlage along with it, as a confequence, although the purfuer did not connect his right with the party who firft acquired the thirlage.

BOTHWELL of Glencorfe, purfues a declarator againft Sir John Clerk of Pennycuick, that his lands of Cooking are thirled to his mill; and craves the bygone abftractions fince 1685. *Alleged* for Sir John, That the purfuer had not fufficient title to feek or declare this thirlage; for he produced nothing but a bafe infeftment in the mill, proceeding upon a difpofition, contained in his contract of marriage in 1657: and, though he likewife produced a feu-charter in 1611, of his mill, from the Lord Salton to one Abernethy, yet he fhewed no progrefs nor connection from that feuer, Abernethy; and, if he did not derive right from him, he could not claim the multures of the defender's lands of Cooking; unlefs he could, in the *fecond* place, fay, that he prefcribed it by forty years peaceable poffeffion; any of which, either a connected progrefs, or immemorial prefcription, he was willing to find relevant to infer the aftriction of his lands to that mill; feeing, *tantum præfcriptum eft quantum poffeffum, et non amplius.*—*Anfwered*, Seeing you can pretend no right to the mill, I need produce no more than to fhew your lands were once thirled to that mill, (which the charter and fafine in 1611 inftructs,) and that I ftand infeft therein; and I am not bound to produce a right from Abernethy, or a connected progrefs derived from him; as if I were purfued in a reduction and improbation; but my infeftment in the mill carries the ancient right of thirlage, in confequence, as a part and pertinent; and, unlefs the defender can fay, he has prefcribed liberation and immunity, by forty years going to other mills, and abftracting, and abftaining from coming to this, he fays nothing.—*Replied*, Glencorfe having no right, but what his father conveys to him, in his contract of marriage, whereon he is infeft bafe; this can never fuftain his title to the multures of the defender's lands, unlefs he fhew that his father had a

No 13.

right; otherwise, it flows *a non habente potestatem*; and, by the decisions in Durie, particularly 12th July 1621, Douglas *contra* the Earl of Murray; 17th July 1629, Newliston *contra* Inglis; and 13th July 1632, Earl of Morton *contra* Feuers of Muckart;—the Lords found, that anciently astricted multures do not follow in consequence of a right that a party may acquire to a mill, unless these anciently astricted multures be likewise disponed, *per expressum*; and, that tenants going to a mill, can never oblige the master and heritor, without his own knowledge and consent, it being *actus meræ facultatis*, and free to go or not at their pleasure; unless there had been acts of courts, decreets, or other legal compulsitors forcing them.—THE LORDS sustained the pursuer's title; and found he needed not connect his right with Abernethy; and that his infeftment of the mill carried the ancient thirlage along with it as a consequence.—And I find this agrees with what my Lord Dirleton observes in his Doubts and Questions, p. 128. that *vendita moletrina, licet non fiat mentio districtus, venit tamen, quia simplex rei alienatio pertinentias rei continet*: And here the LORDS declared the thirlage in favour of Glencorse, the pursuer. (*See* the cases above quoted, under THIRLAGE.)

*Fol. Dic. v.* 1. *p.* 1. *Fountainhall, v.* 2. *p.* 161.

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1706. *July* 11. DUNDAS of Breastmill *against* SINCLAIR of Carlourie.

No 14.
An ancient charter of lands, *cum molendinis et multuris*, sustained to infer immunity from thirlage, in favour of a succeeding heritor, who derived no right from the obtainer of the charter.

THE Lord St John, or preceptor of Torphichen, feus his mill, called the Breastmill, to one Dundas, in 1558, and thirls his whole barony of Oldliston thereto. James Dundas, now of Breastmill, pursues a declarator against Harry Sinclair of Carlourie, of thirlage and astriction, and for astricted multures.—*Alleged*, 1*mo*, That his lands of Over and Nether Carlourie, are no part of the lands astricted; in so far as their rights mention them only to lie within the barony of Liston; which is different from Oldliston; which only is thirled by the orignal charter of the mill in 1558.—*Answered*, The designations are materially the same; and his lands are part of the barony of Oldliston —THE LORDS repelled the allegeance, unless Carlourie would prove, that Liston was a separate distinct barony from Oldliston.—*Alleged*, 2*do*, That the Lord St John, superior of this mill, feued out the lands of Over Carlourie in 1543, to one Kincaid, *cum molendis et multuris*; which freed these lands of all thirlage, being 13 years before the mill was feued out; after which, the superior could not, by any subsequent deed, thirl or astrict these lands, by his charter of the mill to Dundas.—*Answered*, Harry Sinclair, now of Carlourie, cannot found on that exemption and immunity given to Kincaid; unless he can instruct a connected progress from him down to himself; for it is *jus tertii* for him, to found on a charter whereto he shows no right.—*Replied*, If the deed were within these forty years, there might be some pretence to cause an heritor to show a connection, for establishing his right of property; but this charter of exemption being more than 150 years ago, it is impossible to demand a connected progress, only to exeem from a servitude; unless they will say, that Kincaid, or some in his