

1757. July 20.

MAJOR WILLIAM ARNOT of Abbotshall, *against* PROVOST JOHN CURRIE, and other INHABITANTS of KIRKALDY.

The barony of Kirkaldy belonged anciently to the abbacy of Dunfermline, and the town of Kirkaldy was the burgh of the barony.

In 1539, George, commendator of the abbacy of Dunfermline, disposed the lands of Abbotshall, part of the said barony, to Thomas Scot.

In 1556, the said George, commendator of Dunfermline, granted a feu-charter of the west mill of Kirkaldy, with the astricted multures of the whole barony, to George Boswal, bearing a *reddendo* of a feu-duty of 40 bolls of meal, and £.8 Scots.

In 1557, the same commendator granted, for an onerous cause, an obligation to the said George Boswal, That neither he nor his successors should build, or allow any mills to be built within the barony, in prejudice of the thirlage to the west mill, which then seems only to have extended to the *grana crescentia*.

After the Reformation, King James VI. as in right of the abbacy, granted a charter of confirmation 1585, to the said George Boswal, of the above rights.

In 1598, Queen Anne having a grant of that abbacy, did, with consent of King James VI. her husband, give a charter to the same George Boswal of the said mill, and astricted multures, containing a *novodamus* of a new astriction or thirlage of the *invecta et illata* within the lordship, barony, and burgh of Kirkaldy, in these words: "Ac etiam cum particularibus astrictis multuris subsequen. omnium generum frugum illatarum et invectarum, tam infra integras bondas totius et integri nostri domini Schyr, ac baroniæ de Kirkaldie, quam infra dictum burgum et villam de Kirkaldie, ac ignem et aquam in eisdem patientium, (vulgo tholling fire and water therein,) omni tempore futuro, viz. in uno bato, (vulgo lie peck) ex duabus bollis, brasina, ac uno bato, (vulgo lie peck) ex sex modis omnium aliarum generum frugum."

In 1636, the above grants were ratified by charter from King Charles I.

In 1644, the town of Kirkaldy was erected into a royal burgh.

About the same time, Sir Andrew Ramsay purchased the estate of Abbotshall, and soon after acquired from the heirs of George Boswal right to the aforesaid west mill of Kirkaldy, with the multures.

In 1725, Sir John Arnot purchased, at a judicial sale, both the said estate and mill; and the proved rent of the latter was no less than £.120 Sterling.

Sundry attempts were made by the inhabitants of Kirkaldy to evade this thirlage, after the erection of the burgh into a royal burgh; but in these they were generally unsuccessful, as appears from the decisions collected by Lord Stair, 11th December, 1678, and 24th November, 1680; and the judgments then given were repeated upon mutual declarators brought in 1685, and again in 1726; when it was also found, That the inhabitants could not use steel mills, without being liable in multure.—See No. 39. p. 15981. and No. 41. p. 15984.

No. 99.

A thirlage of all grain imported, and tholling fire and water, does not affect ale imported.

No. 99.

Provost William Currie having lately erected a malting-house and brewery at the east end of the town of Kirkaldy, but not within the limits of the burgh or barony, imported his ale made there into the town, without paying multure to the west mill.—Major Arnot, the proprietor of that mill, brought an action for payment of abstracted multures, and damages, against Provost Currie, and certain inhabitants of Kirkaldy, who sold or retailed the ale imported from his brewery.

Pleaded for the pursuer, *1mo*, The thirlages both of the *grana crescentia* and the *invecta et illata* to this mill, were purchased by a most valuable consideration; and for which a high feu-duty is still payable: Special care was therefore taken to establish the same in the most effectual manner, and to guard against every fraud then foreseen, whereby the same might be eluded. Hence the building other mills of any kind was restrained; and although the like precaution was not used with respect to the importation of ale, or many other frauds afterwards attempted, which were not then foreseen; yet as the Abbots had power to constitute this thirlage, every fraud inconsistent with what was manifestly in the view of parties, by the constitution of that thirlage, was thereby prohibited, if not in express words, yet by necessary implication. *2do*, If this mill had remained with the convent at this day, the convent, as possessed of the right of barony, *cum brueriis*, extending over the whole town and territory, could have discharged the importation of ale, agreeable to the decision in the case of the Town of Musselburgh, which originally belonged to the same convent, and where it was found, 21st February, 1719, “That the Magistrates of Musselburgh, as come in place of the Baron, had right to restrain the importing of ale not brewed within the liberties of the said burgh for sale.”—See APPENDIX. Here every right competent to the Baron, necessary for maintaining this thirlage to the effect for which it was constituted, was transferred to the purchaser; and therefore the pursuer, as standing in the place of the purchaser, has the same right the convent would have had to stop this fraudulent evasion of the thirlage. *3tio*, The judgments formerly given respecting other evasions of this same thirlage, and a similar decision, 11th December, 1741, in the case of Kelso, where it was found, “That in a thirlage of *invecta et illata*, the inhabitants of the thirle could not import and consume grind-ed malt, without paying multure,” all prove, that devices to elude a thirlage of this kind, though not expressly prohibited, are not allowed, as being under an implied prohibition.—See No. 83. p. 16020.

Answered for the defenders, *1mo*, It matters not what price was paid for this mill or thirlage, in a question with the defenders. The feu-duty was fixed before the new thirlage of *invecta et illata* was imposed. Thirlages of all kinds, especially so severe a one, extended over a Royal burgh, are to be strictly explained, and cannot be made more burdensome on the inhabitants by implication. The words of the original grant show, that only *fruges*, or grain, brought in to the thirle, was to pay multure; and ale cannot be considered as grain, nor as tholling fire and water after it is imported. *2do*, Whatever power the Convent as Barons might have had of imposing a new prohibition, such power is not devolved upon the

pursuer, who has no right to the barony of Kirkaldy. The case of Musselburgh, therefore, does not apply, as there the jurisdiction of the Baron had been expressly conveyed. Neither, it is apprehended, would it now be competent for the Baron of Kirkaldy to make such a prohibition, after the erection of the town into a Royal burgh. And, *3tio*, The former decisions, respecting this thirlage and the thirlage of Kelso, are not similar, as there the grain was imported, and to thole fire and water within the thirle, although made into malt, and grinded before the importation.

No. 99.

Moreover, it was lately found, in the case of the Town of Perth, that the Magistrates and Council, as having right to the mills and astricted multure, could not prohibit the importation of ale or beer brewed without the liberties.—See No. 91. p. 16025.

Replied, The Town of Perth had no right to the thirlage of *invecta et illata*; neither had its charters given the power of a Baron to the Magistrates and Council.

“ The Lords sustained the defences, and assoilzied the defenders from the process.”

Act. Rae, Lockhart.

Alt. D. Græme.

D. R.

Fac. Coll. No. 44. p. 71.

1757. July 29.

MR. JOHN MACLEOD, Advocate, against WILLIAM ROBERTS.

The vassals of the barony of Muiravenside, belonging in property to Mr. Macleod, were immemorially astricted to the mill of the barony, for all their grain, except bear or barley, pease and beans, as to which they were exempted by their charters from paying multure for such part as they should have occasion to sell, or carry out of the barony, upon payment of a certain small feu-duty; but they were bound “ to carry and grind as much of the grain of bear, pease, and beans, at the said mill, as should remain unsold, and should be necessary to grind for their own daily use.”

William Roberts, one of the feuers, lately erected a barley mill upon the lands of Woodside, lying within the barony. Mr. Macleod, considering this to be an encroachment upon the thirle, brought a process against Roberts, concluding to have the mill taken down and demolished.

Pleaded for the pursuer, It is a point established by repeated decisions, particularly the late one of Urquhart against Tulloch of Tannachy, No. 96. p. 16028. that a corn-mill cannot be erected, upon any pretence, within the thirle of another mill.—It is implied in the servitude of astriction, that the proprietor of the lands astricted, as he is bound to grind his corns at the mill, so he is restrained from building a mill on the servient tenement as long as the thirlage subsists. And accordingly it is laid down in the law books, That where the heritor of a barony thirled to a mill, feus out a part of the barony *cum molendinis*, he is understood to discharge the astriction; but if no such clause is contained in the feu, the

No. 100.

Whether a
barley-mill
may be
erected
within a
thirlage?