

Although, therefore, the years of prescription were expired, and, although the allegation of the defender, that, past all memory, the possessors of these lands had only manufactured at this mill what was used for family-use, were to be held as true, the defence of prescription must nevertheless appear to be ill founded, for the reasons above stated. This defence does, in fact, resolve into an admission of the libel; and the Court never will permit the defender to take advantage of his own fraud, and, because he may have abstracted part of his own grain for some years past; to argue, that he can be no farther liable than to the extent of what he has been in use of manufacturing at the mill.

Observed on the Bench; This was not a thirlage created by a single writing, against which prescription will operate; but an obligation upon the heritor of these lands, to carry his whole growing corns to the pursuer's mill, and pay multures, which has been renewed in all the successive titles of this estate, acknowledging their being subjected to such thirlage: And here there is a new constitution, although the ancient thirlage had been totally cut off by prescription. Here too, it was stated, at the advising, that the family of Kinross were superiors of both tenements, and liable in warrandice of the multures.

"THE COURT adhered to the Lord Ordinary's judgment."

Act. Al. Abercromby.

Alt. Rolland.

Clerk, Pringle.

Fol. Dic. v. 4. p. 92. Fac. Col. No 101. p. 262.

S E C T. VIII.

Feu and Tack-duties.

1627. *March 10.* STEWART in Glasgow *against* FLEMING's HEIR there.

IN an action betwixt two men in Glasgow, the pursuer's predecessors having acquired infestment from the defender's predecessors, of a tenement of land in wadset, and having set a back-tack to the heritor, who gave him the said infestment redeemable, pursues the heir of the granter of the wadset, for payment of the back-tack-duty, resting owing for the space of 40 years preceding the summons; which action the LORDS sustained for the said tack-duty, for the said years by-past, not elder than 40 years, but within that space; but found that no action could be granted for any year before the 40 years preceding the said summons, seeing the action was prescribed for these elder years, the same not being pursued *debito tempore* within 40 years after the date of the tack; and found, that the prescription did not militate for the 40 years immediately preceding the summons, seeing the back-tack whereupon the pursuit was founded, contained

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If feu-duties and tack-duties are sued for, due by the rights of the defenders, they cannot propone prescription; but they will be liable to pay only those due within 40 years.

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annuam prestationem canonis, and was not for payment of a principal sum, but had *tractum temporis successivum*; and also the back-tack was set by him, who had an heritable infeftment of the land, who by virtue thereof, might have pursued for the whole mails of the land, if the back-tack had not been set.

Clerk, *Scot.**Fol. Dic. v. 2. p. 100. Durie, p. 288.*

. Spottiswood reports this case :

GEORGE STEWART wadsetter of a tenement in Glasgow, set back-tack again to Fleming heritor, who had given the wadset for payment of L. 10 yearly. He pursued Fleming's heir for the tack-duty *ab anno 1571*. Prescription of 40 being objected, it was found that a yearly duty founded upon an infeftment, was not of the nature of a bond, but that it might be sought for all the years within 40, but not above.

Spottiswood, p. 235.

1638. December 15. L. GAIRNTULLY against COMMISSARY of ST ANDREWS.

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Found as
above.

SIR WILLIAM STUART of Gairntully having a pension of L. granted to him by the Duke of LENNOX, and for payment thereof the feu-duties of the lands of _____, which pertained in feu to the Commissary of St Andrews, extending to the sum of L. yearly of feu-duty, contained in his feu infeftment, being assigned to him, he pursues the said Commissary for payment of the saids feu-duties, many years bypast, these 40 years or more. And the Commissary *alleging*, That the action was prescribed, he not being pursued therefor these 40 years bypast, and not being sought for the same, the LORDS repelled this allegiance; for they found that this being a pursuit moved for payment of feu-duty, owing by the defender's own charter, he could not be heard competently to propone prescription against the same; but the LORDS thought it expedient, that the pursuer should retrinsh his pursuit to so many years bypast, as might be within these 40 years last bypast.

*Act. Stuart.**Alt. Rollock.**Fol. Dic. v. 2. p. 100. Durie, p. 867.*