

transported over seas, as for such as may be transported to any other haven in Scotland. No. 30.

Which accordingly the Lords found, and therefore repelled the allegiance.

Decided also *de novo* in the Winter Session.

*In Presentia.*

*Gilmour, No. 90. p. 69.*

1665. December 7. VEATCH against DUNCAN.

No. 31.

The clause, *cum molendinis et multuris*, importeth freedom from astriction, though it be only in the *tenendas*. *Me referente.*

*Dirleton, No. 1. p. 3.*

\* \* Stair reports this case, where other particulars are treated of:

David Veatch, as heritor of the mill of Dersie, pursues John Duncan for abstracted multures, and obtains decree. He charges, and John suspends. Both parties being ordained to produce their rights, the heritor of the mill instructs, that his author was first infeft in the mill, before the defender's author was infeft in the land, and produces a decree of the Lords, *in anno 1575*, declaring the thirlage, wherein it was alleged, that the heritor of the mill being first infeft of the common author, and producing a precept from Cardinal Beaton, then Bishop of St. Andrew's, common author, ordaining the tenants of the defender's land to pay multure to the mill of Dersie, it was alleged, That this was not sufficient, seeing the charter did not thirle the defender's lands, but was only of the mill and multure thereof generally; as for the Cardinal's precept, it was not with consent of the Chapter, and so could not extend beyond the Bishop's life. Yet the Lords declared the astriction; notwithstanding it was now alleged, That the defender was infeft *cum molendinis et multuris*, by virtue whereof he had prescribed his freedom by 40 years time; it being answered, That once being thirled by the common author, no charter granted by him thereafter could prejudice the feuer of the mill; and as for prescription, offered to prove interruption, by paying of insucken-multures within the space of 40 years.

*Stair, v. 1. p. 324.*

1666. February 9. The HERITORS of JOHN'S MILL against The FEUERS.

No. 32.  
Insufficiency  
of the mill.

There being an old thirlage of a parish, which was a part of the barony of Dumfermline, to John's Mill, the feu of the mill being first granted by the Abbot of Dumfermline, and the feu of the land thereafter, there is a decree, *in anno 1610*, pronounced by the Chancellor, as lord of the regality, decerning all the feuers to

No. 32. pay the five and twenty curn of all corns that they brought to the mill, and a greater of that they abstracted. The feuer of the mill pursuing for abstracted multures, and, for instructing the *quota*, producing this decree, it was alleged for the defenders, That they offered to prove, that past memory of man, at least 40 years bygone, they have been constantly in use to pay five bolls of bear in satisfaction of all multure, and so can be liable for no further, they having prescribed their liberty from any further; *2dly*, That no respect ought to be had to the decree, in so far as it decerns a greater quantity for the corns abstracted than for those grinded, which is without all reason, especially seeing this is but a burn mill, and not sufficient for the thirle; *3dly*, They offer them to prove, that the mill was insufficient the years pursued for, and noways able to serve them and the rest of the thirle, as being but a burn mill, dry in summer, and not having water enough in winter. It was answered for the pursuer to the *first*, that they offered them to prove they were in possession of the multure libelled within these 40 years, at least that any lesser duty was accepted by a particular paction for a time only; to the *second*, opponed the decree standing, against which there has neither been suspension nor reduction, nor any ground for the same; for it is like the coming to the mill frees them from a greater quantity, for abstraction; and seeing the *quota* is but the five and tweny curn, far below the ordinary thirle multure, it was very reasonable that the same being abated to a less quantity, they should pay a greater if they came not. As to the insufficiency of the mill, it was answered, *Non relevat*, unless it were through the default of the pursuer or his millers, for they being astricted to a burn mill, what defect is therein, without the pursuer's fault, cannot loose the restriction.

The Lords found the replies relevant, unless the defenders condescended upon an insufficiency through the pursuer's fault.

Here occurred to the Lords, whether the feuers could, by possession, prescribe their liberty as to a lesser multure, seeing the possession of a part of the multure was sufficient to exclude prescription as to the whole. Some thought, if the multure had been a certain *quota* in the infestment of the mill, possession also not of the hail would hinder prescription of any part; but if the infestment of the mill was only with the multures used and wont, and that the speciality was but by a decree, as the use and wont, that, in that case, use and wont might change. Others thought not; but, in respect the pursuer insisted not on that point, but offered to prove possession, conform to the decree, within these 40 years, the Lords decided not that point.

Here also it was alleged, that, by an act of the Court of Dumfermline, the defender consenting, at least present, it was enacted, that such of the defenders as could not be served might go to other mills.

The Lords found this allegiance only relevant, that it was by consent of the pursuer, or his authors; but left it to the defenders, after production, to qualify what way the consent was given; but that his presence and silence was not enough.