

bought ribbons and tobacco from a chopman there; and though he was carried to the church, yet he walked more than ten pair of boots freely of himself; and that Craig the doctor, who seems only to depone the contrary, is suspect, and received only *cum nota*. All which could not but amount to prove the disponder to have been in perfect health, both of body and intellectuals, (excepting the gout in his feet) the time he granted the same, and long after: and to stretch the law of death-bed to such deeds as this, which fully satisfies the intent of the law, will open a gap for subverting the security of the lieges. Notwithstanding of all which the Lords reduced *ut supra*. The incentives were Faskin, who had got the disposition, was popish, and this Boyde, who had married the heir, was a minister. Likewise the Lords had the cases of *Balmerino* and *Couper*, *Pargillis* and *Pargillis*, and *Sir Robert Richardson* against *Sir Jo. Sinclar*, marked by Dury, 30th July 1635, before their eyes. *Vide supra* [20th Feb. 1670,] *Balmerino's case*; *item Pargillis: vide infra in December 1677, Lockhart, [No. 677.]*

Faskin and his procurators made a great clamour at the decision, and represented things so to several of the Lords, that it was thought if the president had but suffered it to pass to a vote again he would have been assoilyed; sundry of the Lords who had not pondered the consequence of the preparative, now forethinking what they had done; which repentance had this effect, that after the pursuers had extracted their decret, they forced them (which was scarce legal) to consign it in Colinton's hand, and he was recommended to settle them: and the pursuers, notwithstanding of their decret, were glad to transact it, and give Faskein some part of the estate.

And the truth is, the interlocutor seems to be founded on very strict law, without any allay of equity. *Advocates' MS. No. 379, folio 159.*

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1672. *December.* The MAGISTRATES of INVERNES *against* JOHN FORBES of CULLODIN, WILLIAM ROBERTSONE of INCHES, and OTHERS.

IN the same month of December, 1672, was advised the debate betwixt the Magistrates of the town of Invernes, and John Forbes of Cullodin, Mr. William Robertstone of Inches, and the other heritors and feuars of the mills of Invernes; betwixt whom there were two actions depending. The first was this. *In anno 1671*, the procurator-fiscal of Invernes obtained a decret against the feuars of their town's mill, belonging to Cullodin, Inches, and other feuars, before the Dean of Guild of Invernes, whereby the Dean of Guild, after trial taken of the measures, viz. firloot, peck, and lippy, used at the said mill for receiving their multure and knaveship, he found the same false and unjust, and greater than the Lithgow measure used in the town, and established by law and act of Parliament through the hail kingdom, and therefore fined the millers each in L.100. Of this decret, the feuars, their masters, raised suspension and reduction on thir grounds: *1mo*, That the said decret was null, as given *a non suo iudice*, the Dean of Guild being judge only to measures between burgesses within burgh, and not to measures without burgh used in the mills feued by them. *2do*, It is most unjust, because the 114th act, Parliament 11, James VI. (which is the only act

by which he walked, and which ordains all measures to be reduced and broken to the Lithgow measure,) was no ground or warrant for the decret; in so far as the said act regulates only market mets and measures for buying and selling, and noways concerns measures in mills; yea it bears an express reservation, that the said determination of the quantity of measures should be without prejudice to any persons who are founded, infeft, or addebted by tack or contract for victual or farms of any other measure: the same quantity shall remain with giver or receiver, so that measures whereby masters receive their farms, or heritors of mills and their service, their multure duties, (which in effect is their farm or rent,) are not comprehended. (*Vide Dury, March 9, 1622, Laird of Barnes.*) *3tio*, The said decret is yet most unjust, because the Dean of Guild did neither observe the meaning of that act of James VI. nor the form and method prescribed for the settling of measures by the 38th act of his majesty's first Parliament in 1661, by which all he is authorised to do was to report the disconformity he found in the said mets with the usual measures of the country to the secret council. *4to*, The feuars being infeft in the mill, with the multures used and wont; it is offered to be proven, that thir measures now controverted (which resolves mainly on the quantity of the knaveship) are the same which they and their predecessors have been in possession of past all memory, and which is sufficient to fix the quantity and justify the exaction of the same in all time coming.

To the which reasons it was ANSWERED, *1mo*, That thir suspenders could never call the Dean of Guild's jurisdiction and competency in question, because, before pronouncing of that decret they had compeared and proponed this defence, that these measures were marked by himself. *2do*, The mills being a part of the town's property, and feued by them, to be holden of themselves; the feuers, and who also are all burgesses, cannot be heard to decline them. As to the second and third reasons, whatever privilege and reservation there is in favours of heritors for their farms, there is neither sense nor reason why that should be indulged to heritors of mills; but, on the contrary, their measures in all justice [ought] to be conform to the set standard, else the slavery of astrictio may be made much more intolerable than it is already; *et odiosa sunt restringenda*. To the fourth, answers, that the town offers to prove interrupted.

The Lords having considered this debate, and finding the hinge of the whole controversy turned on the single point of the lippie or muttie, which is the measure by which the knaveship is received and paid, (for neither party controverted the quantity of the multure, but acknowledged it to be a peck of two bolls;) which the town alleged was only the fourth part of a peck, and called it a lippie; and the feuars contended it was the third part of a peck, and which was termed a muttie, (it may be from the French *moietie*,) and which they had immemorially so uplifted and possessed; the Lords, before answer, ordained the said feuars to prove their possession of the said muttie at the third part of a peck, by the space of forty years, and the town to prove their interruptions, and that the said lippie ought only to be the fourth part of a peck, either by writ or witnesses.

Probation having been led accordingly, and coming to be advised by the Lords, it was ALLEGED for the town, that they had clearly astructured the said lippie ought and was no more but the fourth part, *1mo*, By a judicial act betwixt the feuars of the said mill and the town in 1613, declaring and determining the knaveship at the fourth part; and which is a fundamental settlement, and cannot be loosed

without endless plea. *2do*, By a decret of the Lords *in foro* in 1637, wherein Inches, one of the feuers, pursued Cuthbert of Draikies for abstractions; and in which action, conform to probation led by the pursuer, the Lords decerned the lippie to be the fourth part. *3tio*, By decret of the dean of guild of Invernes, in 1664, whereby he broke and burnt their mutty, because it was more than the fourth part. *4to*, By a decret arbitral in 1664, pronounced by my Lord Brodie and Sir G. Monro, wherein they decern the duties to be paid according to former acts, decreets, and sentences; which can be no other than those in 1613, 1637, and 1664. *5to*, Any possession the feuers have had of a greater quantity, can give them no right, being most unjust and exorbitant, and different from the customs of all other mills, and nothing save an usurpation *clam vi vel precario*, or by inadvertence of the townsmen, or extorted these thirty years past, the heritors of the mill having been either provosts or bailies of Invernes; or occasioned by the troubles which have harassed the whole kingdom since 1637. *6to*, No immemorial possession can prescribe the said quantity at a third part, because the contrary being clearly determined by the act 1613 and decret 1637, they were *in mala fide* to exact any more; and so, without *bona fides* or a title, no prescription can run. *7mo*, The feuers' witnesses are most suspect; for *1mo*, one of them is received *cum nota*, being Inches' tenant; *2do*, the rest are obscure fellows, and highlandmen, and tenants to Cullodin's brother-in-law, and so not *omni exceptione majores*; *3tio*, they must prove forty years possession before 1664; and if any hath deponed so, it is desired the Lords may consider how it can be in nature, one of them being but fifty-one, and the oldest but fifty-eight.

Whereunto it was REPLIED for the feuers,—To the *first*, The act 1613 is no interruption; because neither agreed nor consented to by the heritors of the mill for the time, being only subscribed by the town clerk and two notaries, not bearing any command they had to subscribe for the feuers, and who were persons who could write; and, therefore, the notary's assertion can neither bind presence nor consent on them. *2do*, As they did not consent to that act, so they have ever uplifted the mutty at the third part since syne. As to the *second*, the decret in 1637, it cannot be reputed or looked upon as a settling of the quantity of the knaveship, that not being in the least controverted there; only the Lords, in the decernature, not understanding the term *muttie*, did *obiter* express it by a more known term of a lippie; and, notwithstanding of that mistake, Draikies (who knew it to be such,) ever paid the muttie since. *2do*, That decret was at the instance only of one of the feuers, who neither did nor could prejudge the rest. As to the *third*, no respect can be had thereto, because whatever power he had by acts of Parliament to reduce the measures, yet he could not diminish the quantity of the knaveship, whereof the feuers were in possession; and his decret, in so far, was most unjust and absurd. As to the *fourth*, the said decret is reponed and retorted. As to the *fifth* and *sixth*, the quantity of multure and knaveship is either specially constituted by infestments, decreets, and acts of court, or otherwise the same is general and undetermined,—the abstracted multures and knaveship used and wont; and there is nothing more certain than, where the quantity is general and undetermined, but constant possession rules the same; and which, as it is a sufficient evidence to determine the quantity in all mills, so much more in the king's mills, (of which this is one, and though the feuers hold it of the town

feu, yet the town holds it of the king,) where possession is sustained not only to clear the quantity, but even to constitute the very thirlage, and which use and wont in his Majesty's mill they neither ought nor could have altered or interrupted. To the *seventh*, their witnesses are most famous, and one of them is only tenant to Inches' mother, and liferentrix; and for the rest refers to the depositions.

The Lords found the feuers' allegiance of immemorial possession of the muttie at the third part of a peck sufficiently proven, and found the interruptions used by the town not sufficiently instructed; and, therefore, declared the said muttie, in all time coming, to be the third part of a peck, and allowed the same, *interdicto uti possidetis*.

*Advocates' MS. No. 380, folio 159.*

[See the following case, the other action betwixt thir parties.]

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1672. MAGISTRATES of INVERNES *against* JOHN FORBES of CULLODIN, WILLIAM ROBERTSONE of INCHES, and OTHERS.

THE other action that was ventilated betwixt these parties this same winter, was upon this occasion. For maintaining the former plea, [see the preceding case,] about the muttie, the Magistrates of Invernes lay on a stent on the whole burgesses of the town, and in particular upon Cullodin, Inches, and the other feuars of their mills. The said feuars raised a suspension thereof upon thir grounds: that the said town, by their intolerable and arbitrary way of stenting, had uplifted from their vassals and feuars more than eight-score a month's cess, since his Majesty's restitution; and that the present stent was for prosecuting a most unjust law-suit against their selves, and to which they ought not to contribute, and that they saw no end of such unwarrantable exactions; and that in the manner of imposing it they had grossly contravened the rules of stenting prescribed by the Lords of Session in a former decret *in foro* betwixt thir same parties; and that the said stent was most unnecessary, yea unjust, as to the causes of it, and most unequal, exorbitant, and partial, as to the adjusting and laying on of the several proportions. (*Vide supra, 9th July 1670, Magistrates of Montrose against Scots, No. 70.*) That being only feuars and vassals, and having no trade or commerce within the town, they cannot be liable to any stents imposed by the town's private authority, but only to those laid on by authority of Parliament or conventions of estate; and particularly could bear no part of their minister's stipend, they being heritors of the land-ward parish, and paying their proportions for their lands. Likeas they had raised a declarator, craving to have it found and declared, in so far as concerns their lands holden feu of the town for payment of a feu-duty, with this clause, *pro omni alio onere*, they are not subject or liable to be stented with the town in any of their private stents, but only such as are imposed by public authority, and whereunto the other heritors of the kingdom are liable: else royal burghs at their pleasure shall exhaust the property of their feuars' lands, and by their insupportable and reiterated taxes, and unequal proportioning, render them of no advantage to the feuars; and which is the very malicious design of the burgh of Invernes: because the feuars will not comply with all their unreasonable demands, they, out of resent-