

1668. February 27. MAITLAND *against* LESLY.

No. 35.

Thirlage being constituted by infeftment, bearing multures and sequels, it was found, that the ordinary services to the mill dam and millstones were included in the infeftment.

In a concluded cause of abstracted multures betwixt Maitland and Lesly, the pursuer being infeft in the mill, with the multures and sequels, and having proved the astringency of in-town multures, and witnesses being adduced concerning the services, for upholding the mill and dam, and bringing home millstones, who proved, that some of the lands were not in use of these services, but by two or three several acts, as once laying in the dam, at which the heritor was offended, and broke the tenants' heads, and twice going to help home the millstones, whether these lands were liable to the services;

Whereupon the Lords considered whether the constitution of a thirlage, with multures and sequels, did, by the nature of the right, give the ordinary mill-service, without relation to possession, so that, immediately after the constitution, these might be demanded:

Which the Lords decided *affirmative*, and then found, that these lands were liable to the service, unless they had, either by paction or prescription, attained freedom from the service, and found that the testimonies did not prove freedom for forty years, and that these acts were enough to interrupt, and so decerned for the ordinary services.

Stair, v. 1. p. 537.

1672. January 26.

CAMPBELL of Cruning *against* CAMPBELL of Keithick.

No. 36.

Knaveiship, &c. may be demanded in an action for abstracted multures. See Adamson, No. 17. p. 15965.

Cruning being charged upon a bond of thirlage granted by him for payment of the 22d curn of all grindable corns growing upon his lands thirled, did suspend upon these two reasons, *1mo*, That the bond not bearing *grana crescentia*, but only all corns grindable according to use and wont, could not be interpreted to comprehend any other corns but such as tholled fire and water, and not the duties paid by tenants; *2do*, He was not obliged to pay the 22d curn, but with deduction of the knaveiship and bannock paid to the millers, seeing the bond did bear the 22d curn to be the multure, only payable for grindable corns: Likeas, the suspender did offer to prove by the comuners and trysters betwixt both parties, that it was agreed that the bond charged upon should be no further obligatory.

It was answered, That the bond being conceived as said is was opposed, and the word grindable comprehending all corns growing upon the lands, the deposition of the comuners could not take away the same, and the meaning thereof was only proveable *scripto vel juramento*. As to the *second*, it was answered, That the quantity of the multure being the 22d curn, only could be understood of that which was payable to the feuer of the mill, but not what was payable to the servants as their dues.

The Lords, as to the *first*, ordained the comuners to be examined *ex officio*, in respect the word grindable was not ordinary, and was dubious in itself; but for the *second*, They found that the 22d curn was due to the heritor without deduction of what was due to the servants.

No. 36.

Gosford MS. p. 235.

1673. July 3.

LAWRENCE OLIPHANT of Conde *against* THOMAS OLIPHANT of Rossie.

In a pursuit for abstracted multures at the instance of Conde against his brother and his tenants, as being thirled by his charter of the said lands of Rossie, bearing expressly, *omnia grana crescentia super omnibus, semine et decimis exceptis*, whereupon he concluded for payment for the whole corns growing upon the lands for by-gones, and in time coming; it was alleged that the summons could not be sustained for payment of the multure of bear, because the charter, albeit it be conceived as said is, yet there is adjected to the clause of thirlage of all grains, that they should pay multure according to use and wont, so that unless it could be subsumed that he was ever in use to pay multure for bear, he ought to be free thereof in all time coming; but so it is, that since the said charter, which was granted about 30 years ago, nor no time before, was there ever multure paid for bear, or any action for abstracted multures; and therefore the addition of used and wont in the charter itself, and the custom of paying multure for all other corns grind at the mill, and never bringing bear to be grinded thereat, ought to regulate the charter and constitution of thirlage therein contained. It was replied, That the summons ought to be sustained, notwithstanding the allegiance, because the constitution of thirlage being general of all corns growing, with an exception of seed and teind only, *exceptio firmat regulam in cassibus non exceptis*, and therefore bear must be liable as well as any other grain growing upon the lands; and the adjection of these words used and wont can only relate to the quantities of the multures to be paid, but cannot limit the general clause, and free the defender from the multures of bear, unless it had been specially mentioned in the exception; and as to any forbearance of exacting or pursuing for any multures of bear, it being but *mere facultatis*, and a favour, cannot be obtruded unless the defender would allege that he had acquired a freedom by prescription, which he cannot do. The Lords did repel the defence, and decerned, and found that this being a new constitution of a thirlage contained in a charter granted by a father to a third son, which was so general as to all growing corns, and had no exception but seed and teind, that the bear growing could not be exeemed; and that there being no prescription of a freedom, the not exacting thereof could be no defence; yet as to the by-gones, they did recommend to the Lord who reported the cause, to gree the party, seeing the same was never craved, and the case needed a decision in law, being of some difficulty.

No. 37.

Bear was found included in a thirlage of *omnia grana crescentia*, containing only an exception of seed and teind, although no multure of bear had been demanded for 30 years, the date of the constitution of the thirlage.

Gosford MS. p. 353.