multure. The pursuer *answered* to the *first*, That it is a prerogative royal competent to no subject to infer astriction by possession, except by dry multure; and, for the act of sederunt, it is in favours of feuars, heritable possessors of the lands, and against the churchmen or their successors, but never in their favours to give them right to the lands they possess, much less to a thirlage of other mens lands; so that no possession of what endurance soever, though of in-towns multures, much less of helping of the dam, or leading millstones, which may be a mere favour, can infer astriction; and as for the decreets, they are in absence against the tenants only, without calling the masters, and therefore can give no right, neither can there be a title for prescription, because the same hath not been perfected by 40 years peaceable possession, in so far as there is produced a decreet of reduction *in anno* 1599, reducing the decreet produced, and the decreet related therein, which is mch much more than interruption. It was *replied*, That the decreet of reduction is in absence, and bears only to reduce the decreets called for therein, ay and while they be produced, and now they are produced. The pursuer *triplied*, That the decreet of reduction having stood unquarrelled for 40 years, any reduction thereof was prescribed by the act of Parliament; whereupon the defender offered to prove interruption within 40 years of the decreet of reduction, which was admitted to his probation, and a term assigned. But now the pursuer further insisted on his first ground, That albeit his decreet of reduction was yet quarrelable, yet it was an unquestionable interruption against the defender's right of thirlage, who instructed no right but possession, and decreets in absence are not validate by 40 years peaceable possession. No 125.

The LORDS found, That possession, though by laying in of dams and leading of millstones, did not infer astriction, even in favours of churchmen possessing either after or before the Reformation, and that the decreets produced, not proceeding upon rights, but possession, and being interrupted by the decreet of reduction produced, did establish no thirlage; and therefore did declare the pursuer's lands free of the said thirlage.

Fol. Dic. v. 2. *p.* 105. *Stair*, 2. 542.

1677. *December* 7. HENDERSON *against* ARNOT.

No 126.
Infeftment in a mill bearing *per expressum* the multures of the defender's lands, with 40 years possession, found a sufficient constitution of

ROBERT HENDERSON having obtained a decreet for abstracted multures against Arnot of Greenside, before the Sheriff, he suspends, and raises reduction on this reason, That he is infeft in the lands of Greenside for a feu-duty, *pro omni alio onere*; and yet the Sheriff sustained the astriction upon the charger's infeftment, which was posterior to the suspender's; and albeit it bear an infeftment in the mill, with the multures, &c. of the suspender's lands *per expressum*, yet being posterior to the suspender's right, *ab eodem auctore*, it could not prejudge

No 126.
thirlage, though flowing *a non habente potestatem.*

the suspender, being *a non habente potstatem;* and as for the long coming to that mill, which is the other ground of the decreet, it was *meræ voluntatis*, and could infer no astriction. It was *answered* for the charger, *1mo*, That the suspender's infeftment, granted by the Abbot of Balmerino, though it bear a feu-duty *pro omni alio onere*, that could not import that the lands which before were thirled to the Abbot's mill, which mill paid a duty, that the mill-multures were past from, which behoved to infer an alteration in the rent of the mill, which is never presumed but when it is expressed by the clause *cum molendinis*, &c. For the superior's jurisdiction is not taken away by the clause *pro omni alio onere*. *2do*, Though the suspender's charter had made him free, yet he is now become astricted by 40 years possession by a title, *viz.* the charger's express infeftment in the multures of his lands, which, being posterior to the suspender's infeftment, would not be sufficient alone, but it is a sufficient title for prescription, much more than an act or enrolment of a baron court, which with 40 years possession doth unquestionably constitute a thirlage. It was *replied*, That the possession was only of out-sucken multures, *viz.* a peck of six firlots, which could not import thirle multures, and the suspender did oftimes go to other mills.

The Lords sustained the decreet proceeding upon an infeftment in the mill, with the multures of the suspender's lands, *per expressum*, and 40 years possession proved, seeing there was nothing alleged or proved of interruption, by going to other mills for some whole years; for a clandestine going to other mills with a part for several years, would not be relevant; and, though the multures be small, yet there was nothing proved of a greater in-sucken multure, neither did the charger's infeftment express a special quantity of multure, which therefore behoved to be regulated according to use and wont; but the Lords found not the thirlage constituted, because the lands were thirled after they were feued, and did not bear *cum molendinis*, &c. but found the feu *pro omni alio onere* did import liberation from the thirlage. See Thirlage.

In the suspension of the decreet for multures at the instance of Henderson *contra* Arnot, decided the 7th instant, the suspender further *alleged*, That seeing the thirlage was found perfected by prescription of the charger's possessing the multures in question 40 years; the suspender offered to prove interruption, in so far as he went oft-times to other mills, and, that this might not appear clandestine, he offers to prove that he took his sacks unground out of the pursuer's mill. The charger *answered*, *1mo*, That this allegeance is competent and omitted; *2do*, That it is contrary to his libel and probation of a constant possession 40 years; *3tio*, That it is not relevant, because this mill being a burn-mill, did oft-times want water, at which time the suspender might be suffered to go to other mills, but no less could be relevant than abstraction for some whole years. The suspender *replied*, That competent and omitted is not sustainable as to decreets of inferior courts, especially where the point is not

understood by ordinary procurators, such as the constitution of thirlage by possession, or interruption thereof, neither is their any contrariety; but if the suspender be reponed, the pursuer having libelled 40 years possession, he may propone interruption, and both would be admitted to prove, because the defence doth not acknowledge the libel; so here the charger having proved his possession, the suspender should be admitted to prove his interruptions, either *via facti* by intermission or hinderance, or *via juris*. No 126.

The LORDS sustained the allegeance of interruption, not by abstraction of a part of several crops, but by abstracting of whole crops, one or more, when the mill was in case, but not till the suspender or his procurator deponed de calumnia & cum onere maximarum expensarum, seeing in effect the charger was put to a new process; but the Lords allowed the charger to produce his testimonies taken by the Sheriff of his possession, or produce new ones.

Fol. Dic. v. 2. p. 107. Stair, 2. p. 573, & 575.

*** Fountainhall reports this case:

ONE pursues for abstracted multures. *Alleged*, He is infeft by the Abbot of Balmerino for payment of a feu-duty *pro omni alio onere*, without mention of any astriction, and prior to the feu of the mill. *Replied*, Mitchell Balfour stands infeft in this mill of Denmiln, and in the multures of these lands *per expressum*, and has been 40 years in possession. THE LORDS repelled the allegeance, in respect of the reply; and found it actually prescribed; and found such an infeftment of greater force than an act of thirlage or a rollment of Court clad with possession, unless it can be proven the defender had paid a less quantity of multure. Further *alleged*, The prescription was interrupted, because they went publicly and in the day-time to other mills, and did all that other outsuckeners used to do. *Answered*, Competent, and omitted before the Sheriff; 2*do*, *Non relevat*, unless it were a continued abstraction of the hail corns together, and at a time when the mill would serve. THE LORDS repelled competent and omitted, being *in apicibus juris*, and not known to ordinary inferior procurators; and found this relevant, that he had abstracted his whole corns for a whole year together; and found the abstraction of single bolls in a clandestine way, or when the mill was not able to serve, was not sufficient to elide the thirlage.——A bill was given in shewing the impossibility of proving this; but offered to prove abstraction for 20 years together of great quantities, as 20 bolls together. Many of the Lords were convinced by this bill; yet it was on the 3d of January 1678 refused, by a plurality of votes.

Fountainhall, MS.