

1769. March 10.

JAMES BRUCE, Multurer of the Mills of Alloa, against ROBERT STEIN, and Others,
Brewers in Alloa.

Charles Earl of Mar, in 1677, obtained a charter under the Great Seal of the lordship, barony, and regality of Alloa, "with the mill and pertinents thereof;" and another charter of like nature, and containing the same clauses, was afterwards expedite by his successor, John Earl of Mar, in 1699.

These lands having come into the person of Lady Frances Erskine, an action of abstracted multures was brought by the tacksman of the mill against Robert Stein, and other brewers in Alloa, before the court of the barony.

The cause having been advocated by the defenders, it came out, upon evidence, that, for more than forty years, the brewers of Alloa had been in the use of grinding their malt at the mill of the barony, and of paying in-sucken multures; that sundry decrees had, in the course of that time, been recovered against the feuers for abstractions; that they had been in use of performing mill-services.

Pleaded for the defenders: Except in the case of mills of the King's property, or those belonging to churchmen, the mere use of grinding is not sufficient to establish an astriction; and the clause of "the mill and pertinents," contained in the charters, can import no more than a conveyance of whatever thirlage might have been, *ab ante*, imposed.

The feu-charters granted in favour of the vassals uniformly bear the *reddendo* of a particular duty, *pro omni alio onere*: Which clause, however little it may imply liberation from a prior astriction, will at least be a strong circumstance to show, that it was not the intention of parties to introduce a subsequent thirlage.

Answered for the pursuer: It is a point agreed by all our lawyers, that payment of dry multure continued for more than forty years is, *per se*, sufficient to establish a thirlage, since use of payment cannot be explained but upon the footing of a servitude.

Payment of in-town multures continued for the same period must receive the like construction; more particularly, where the lands of a barony are the servient tenement, and the mill of the barony the dominant; for such and so intimate is the connection of the lands of the barony with the mill of the barony, that the servitude is understood to have been actually reserved, unless the vassal have taken care to obtain an express immunity from it.

In this argument the pursuer is supported by the opinion of Lord Bankton, which is confirmed by an after decision in the case of the Earl of Hopeton against the Feuers of Bathgate, 21st November, 1753, No. 97. p. 16029. Nor can any solid objection be founded upon the clause, *pro omni alio onere*, in the charters of some of the vassals, confined as it is, by the sense of the Court, and the reason of the thing, to the feu-duty, nor ever extended farther.

No. 112.

Thirlage acquired by prescription, upon a grant of the "mill and pertinents."

No. 112.

The Lords, moved, not so much by the use of coming to the mill, which might have arisen from motives of conveniency, as by the decrees which had been taken in the baron-court for abstractions, and the presumptions in favour of the mill of a barony, found, "That the defenders are astricted to the mills of Alloa, and that they cannot erect steel-mills within the thirle."

Act. *M^cQueen.* Alt. *Lockhart & M^cLaurin.* Reporter, *Monbodo.* Clerk, *Kirkpatrick.*
G. F. *Fac. Coll. No. 98. p. 178.*

1775. December 20.

COLONEL ROBERT SKENE of Hallyards *against* JAMES REDDIE and Others.

No. 113.

Astriction to a kiln, though resorted to by the sucken, is not a part of the thirlage.

In a declarator of thirlage at the instance of Colonel Skene, as proprietor of the lands and mill of Burngrange, against Reddie and others, besides deciding other points in the cause, the Lord Ordinary gave judgment upon one as follows: "And as the defenders neither deny the immemorial practice, nor the extent of dues exacted for kilning their grain, as condescended on by Colonel Skene, finds, That this is also part of the thirlage, and that they are liable for the said dues."

The defenders having reclaimed, the Lord Ordinary explained the ground of his judgment, viz. That he considered it as an incident to the thirlage itself: But the Court altered, and

"Found the defenders are not thirled to the pursuer's kiln."

Act. *Al. Abercrombie.* Alt. *M^cLaurin.* Clerk, *Pringle.*
Fac. Coll. No. 211. p. 161.

1777. June 19. MAGISTRATES of CUPAR *against* LEES and Others.

No. 114.

A thirlage was sustained, though not conveyed in the dispositive clause of a Crown charter, but only in the *tenendas*, and followed by possession beyond the years of prescription.

In this case, the Magistrates, who had a Crown charter with a clause in the *tenendas, cum multuris et sequelis*, had been at great expense in repairing the mills, in consequence of which, in 1750, they entered into a contract with the Corporation of Bakers, by which the latter, in consideration of the expense above mentioned, "and to compensate for the same, obliged themselves and successors in the Corporation to pay, over and above the ordinary multures, dry multure for all flour not grinded, but bought by them, to be baked and vended within the burgh," and the subscribers obliged themselves to take new members bound to come under the same obligation. In a declarator brought by the Magistrates, the Bakers pleaded in defence, That there was no evidence of any regular obligation