

The Lords, as to the *first*, ordained the communers 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.

* * Stair reports this case :

No. 37.

Umquhile Laurence Oliphant of Conde did dispone to Thomas Oliphant his third son, certain lands, and the charter contains this clause of thirlage, “ cum granis super dictis terris crescentibus, semine et decimis exceptis, et molendis apud molendinum de Condi, solvendo multuras et lie knaveship solitas et consuetas. This Conde, and his miller of Conde, pursue Thomas and his tenants for the abstracted multure. The defender alleged *absolutor* as to the multure of bear, because there was never any paid to this mill ; and because the neighbouring mills in that country, though astricted by the like cause, pay no multure of bear, especially seeing the thirlage is but for multures, knaveship used and wont, so that unless that the pursuer can instruct that multure of bear was used and wont, he cannot claim the same. The pursuer answered, that he opposed the clause of thirlage, being expressly of all grains growing, teind and seed excepted, and that part of the clause, used and wont, relates not to the grains, but to the quantity of the multure ; and if before this thirlage, bear was not accustomed to pay multure of bear, but of oats ; the multure of the bear must be the same as of the oats ; for there is nothing pretended here of prescribing a liberty, as of bear, by positive and known acts ; nor can be, seeing it is not 40 years since the right was granted.

The Lords repelled the defences, and sustained the thirlage for the bear, according to the quantity of the thirle multures of the mill ; but in respect, that the defender hath ground to doubt of the meaning of the clause, and that 30 years by-gone multures were now pursued for, they moved to the pursuer to pass from by-gones.

Stair, v. 2. p. 203.

1675. July 3.

BAIRDNER *against* COLZIER.

No. 38.

What extent of astriction implied in the right to a mill ?

In a process for abstracted multures, the time of the advising of the cause, these points were debated among the Lords, viz. Whether or not the right of a mill being feued by the Abbot, in these terms, *cum astrictis multuris*, did import astriction of all the grains growing, so that those that were astricted should be liable to bring all the corns that grew upon the lands to the mill ; and in case any such be sold, the heritors and their tenants should be liable for astricted multures ; and, 2do, There being decreets recovered at the instance of the feuer of the mill, against the feuers of the lands, for abstracted multures of *grana crescentia*, if the same should import astriction as to all such grains, though neither the right of the feuer of the mill, nor of the heritors of the lands be express of *grana crescentia*, but only of the terms foresaid *cum astrictis multuris*.

Some were of the opinion as to the *first* point, That a feue of a mill in the terms foresaid *cum astrictis multuris*, should import nothing else, but that they that were