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within the sucken and astriction should be liable, only to grind at the mill all such corns that they should have need and occasion to grind, seeing thirlages are a most odious servitude, and ought to be taken strictly; and multures being *molituræ* and due for grinding, they ought to be understood only in the case of corns, which the feuers do bring to the mill to grind, or which they have need and use to grind, and yet abstract and go to other mills, otherwise there should be no difference betwixt the astriction of *grana crescentia*, and an ordinary astriction. 2*do*, The case in question was of a mill feued by the Abbot of Culross, and of lands likewise feued by himself after the feu of the mill, and the time of the feu of the mill lands being the Abbot's own, either in mainsing or set to tenants; it cannot be thought, that the astriction was in other terms than such as tenants are in use to be astricted to their master's mill; and besides the teind and seed, and the duty payable to the master, which being payable to the Abbot the time of the feu of the mill, was free of astriction; the tenant having the residue of the rent for entertaining of his family, and for defraying the charges of the labouring and servants fees, and other necessary expenses which could not be defrayed otherwise, but by selling some of the corns growing. It cannot be conceived, that the Abbot, or any other master, would astrict his tenants in these terms, that they should be liable for dry multures, except it were expressed, and that the astriction had been *granorum crescentium*. Yet the Lords did demur as to this point, in respect it was vehemently urged by that the astrictions in the terms foresaid ought to be understood of *grana crescentia*, otherwise it should be in the power of those who are astricted, to sell all their corns, and to buy meal for their family, and so to elude the thirlage. Albeit it was answered, That it was not to be presumed that feuers or tenants would do so, and if they did, they ought to be liable for abstracted multures effeiring to such quantities as were necessary, and they were in use to grind for their families.

Another point was agitated and debated amongst the Lords, viz. That the said decreets could not be obtruded to the defender, seeing neither he nor his author was called to the same, and *res* was *inter alios acta*; but the Lords did not decide these points, but recommended to some of their number to endeavour to settle the parties.

Dirleton, No. 293. *p.* 142.

1678. *December* 11. RAMSAY *against* The TOWN of KIRKALDY.

No. 39.
Prescription of multures by long freedom was found not inferred in favour of feuers in the

Sir Andrew Ramsay being infeft in the west mill of Kirkaldy, with the astricted multures thereof, the same being the mill of the barony belonging to the Abbot of Dunfermline, whereby the feus of the Abbacy about Kirkaldy were feued; there was thereafter a posterior thirlage of the Town of Kirkaldy to that mill, whereby multure was due for all victual which was brought within the Town, and tholled fire and water there. Sir Andrew pursues the feuers for abstracted

No. 93. *reddendo* of whose charters multures were contained.

multures of their corns, and likewise the townsmen for the multures of the victual that tholled fire and water within the Town, by being made malt, brewed or baked. It was alleged for the inhabitants of the Town, that they could not be liable for multure for the corn that grew in the ancient thirle, especially of those corns which grew upon their burrow roods, which could not be said to be *invecta*, having grown within the Town's liberties, and if they should be liable for multures of these, as *invecta*, they would necessarily be liable for double multures of the same corns, viz. one multure, as *grana crescentia*, within the first thirle, and then as *invecta* within the Town, being brewed or baked there; 2*do*, They could not be liable for the multure of meal, which they bought in their markets, albeit baked within their town, to which the clause of *invecta et illata* was never extended, but only to malt, which was either made in the Town, or brewed in the Town; 3*tio*, All multures may be increased or decreased by long possession, and the townsmen have been free of any multure of meal bought in their markets, and have only paid once multure for the grain growing on their burrow-roods. The pursuer answered, That he might justly claim multure of the corns that grew within his first thirle, if they were abstracted from the mill, which the defenders did not, nor could not deny, and offered him to prove that the burrow-roods were within his first thirle; and it is as true, that he may claim multure of *invecta et illata* of the Town, which by the constitution hath no limitation of the corns growing on their burrow-roods, but the true intent of the new thirlage *invectorum*, was, that all grain they made use of in their Town should be ground at this mill, and a multure paid therefore as *invecta*, otherwise the constitution of *invecta* might be rendered elusory and ineffectual, by serving themselves with the corns growing within the thirle of this mill, which is a large extent for their bringing these corns to the mill, and paying *grana crescentia* within the thirle, if they were liable for no further multure, the new thirlage *invectorum* had no effect, and therefore they ought to buy grain that was under no thirlage, and bring that grain to this mill, and pay multure for it, as *invecta et illata* within the Town; and though they brought in grain out of another thirle, there would be multure due for that grain to the mill out of whose thirle it came; and likewise a several multure due by the Town for the same grain, as *invecta et illata;* so that the pursuer had not to consider, whether the grain brought into the Town grew within his own thirle or another thirle, or upon lands free of all thirlage; but if it came to be made use of in the Town, it behoved to pay multure as *invecta*, and it was free for the Town to buy corns without the old thirle, and to bring them to the mill, which is the true intent of the new thirlage: To the *second*, the common interpretation of *invecta et illata* is not, that corns were brought within such a place, but that they tholled fire and water there, either by making of malt, brewing or baking: To the *third*, the pursuer offered to prove, that he had interrupted their being free of multure, or once paying multure, either by possession within 40 years, or doing diligence for that effect; 2*do*, He offered to prove, that the Town, by the *reddendo* in their charter, were obliged for these multures to this mill, which therefore no prescription could take away.

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The Lords found the pursuer's libel relevant, for giving him the multures of the feuers of the Abbacy within the old thirle, and of the burrow-roods, if the same were proved to be within the old thirle, and also to give him multures of the malt made or brewed within the Town, whether it grew within the old thirle or not, whereby if the Town bought victual out of the old thirle, they would be liable in double multure; and as to the meal bought in their markets, the Lords before answer ordained the custom of this and other mills to be proved by either party, and sustained the exception of prescription, and the reply of interruption, and the duply, that these multures were in the *reddendo* of the town's charter, and found that thereby they could not fall under prescription.

Stair, v. 2. p. 655.

1680. *June* 30. ADAIR *against* M'CULLOCH.

No. 40.
Distinction between thirlage constituted so as to affect the lands, and a personal contract relative to the multures.

Mr. Alexander Adair pursues M'Culloch of Mooll for abstracted multures from the mill of Drumore, and produces a contract betwixt him and Thomas Kennedy of Mooll, the defender's author, bearing, "Thomas to be obliged to bring his corns growing upon the third part of Mooll to that mill, paying the twenty-fourth grain, and not to hinder his tenants to come to the said mill, and to pay the sixteenth grain, as accords, with the mill services and knaveship used and wont;" and on the other part, Mr. Alexander, as donatar to the ward of Kinhilt, "grants liberty of fuel and heather to the possessors of Mooll out of a roum of Kinhilt's adjacent, according to which there was possession before this Mooll's right, which did perfect the thirlage as a real burden effectual against the singular successor, and does acknowlege use and wont, knaveship, and mill-services. The defender alleged *absolvitor*, because there can be here no real constitution of a real servitude of thirlage, because the pursuer's right was but temporary as donatar, and therefore it is but a personal contract of coming to the mill, during the donatar's right for fuel and heather, which is the mutual obligement, and presumed to be the cause, though the contract bears not expressly, for the which cause, seeing it bears no other cause of Mooll's obligement: And as to the tenants, it is but a permission as accords, which must relate both to the multures, knaveship, and services; and use and wont cannot constitute the service, except in the King's mills, neither is this thirlage completed by prescription. The Lords found there was no thirlage constituted, but a personal contract; and therefore assoilzied the defender as singular successor. The said Mr. Alexander did also insist for the teinds of the mill, conform to a tack by way of contract betwixt him and the said Thomas Kennedy, whereby the said Mr. Alexander set the teind of Mooll for £.100 yearly. The defender alleged *absolvitor*, because he had no right to the teind, and could not be burdened with his author's tack, which his author might have renounced, if it had not been by contract, and his personal obligement cannot burden his singular