

pursuer, who has no right to the barony of Kirkaldy. The case of Musselburgh, therefore, does not apply, as there the jurisdiction of the Baron had been expressly conveyed. Neither, it is apprehended, would it now be competent for the Baron of Kirkaldy to make such a prohibition, after the erection of the town into a Royal burgh. And, *3tio*, The former decisions, respecting this thirlage and the thirlage of Kelso, are not similar, as there the grain was imported, and to thole fire and water within the thirle, although made into malt, and grinded before the importation.

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Moreover, it was lately found, in the case of the Town of Perth, that the Magistrates and Council, as having right to the mills and astricted multure, could not prohibit the importation of ale or beer brewed without the liberties.—See No. 91. p. 16025.

Replied, The Town of Perth had no right to the thirlage of *invecta et illata*; neither had its charters given the power of a Baron to the Magistrates and Council.

“ The Lords sustained the defences, and assoilzied the defenders from the process.”

Act. Rae, Lockhart.

Alt. D. Græme.

D. R.

Fac. Coll. No. 44. p. 71.

1757. July 29.

MR. JOHN MACLEOD, Advocate, against WILLIAM ROBERTS.

The vassals of the barony of Muiravenside, belonging in property to Mr. Macleod, were immemorially astricted to the mill of the barony, for all their grain, except bear or barley, pease and beans, as to which they were exempted by their charters from paying multure for such part as they should have occasion to sell, or carry out of the barony, upon payment of a certain small feu-duty; but they were bound “ to carry and grind as much of the grain of bear, pease, and beans, at the said mill, as should remain unsold, and should be necessary to grind for their own daily use.”

William Roberts, one of the feuers, lately erected a barley mill upon the lands of Woodside, lying within the barony. Mr. Macleod, considering this to be an encroachment upon the thirle, brought a process against Roberts, concluding to have the mill taken down and demolished.

Pleaded for the pursuer, It is a point established by repeated decisions, particularly the late one of Urquhart against Tulloch of Tannachy, No. 96. p. 16028. that a corn-mill cannot be erected, upon any pretence, within the thirle of another mill.—It is implied in the servitude of astriction, that the proprietor of the lands astricted, as he is bound to grind his corns at the mill, so he is restrained from building a mill on the servient tenement as long as the thirlage subsists. And accordingly it is laid down in the law books, That where the heritor of a barony thirled to a mill, feus out a part of the barony *cum molendinis*, he is understood to discharge the astriction; but if no such clause is contained in the feu, the

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liberty of building mills does not pass to the vassal. Nor is it enough, that the person who takes it upon him to build a mill within the sucken of another, offers to find caution, that none of the grain thirled shall, at any time, be grinded at this new mill; as this might open a door to daily frauds, and occasion a multiplicity of law-suits. And if it would have been unlawful in the defender to have built a corn-mill on his possession, to the prejudice of the mill of the barony, neither can he be allowed to erect a barley-mill; for the difference between the two is very inconsiderable; and nothing is more easy than to make the same mill answer both purposes; as, in fact, the pursuer's mill, though properly a corn-mill, has frequently been employed by the vassals of the barony for manufacturing barley; and the mill now erected by the defender may, by a trifling alteration in the machinery, which can be done from time to time without the knowledge of the pursuer, be perfectly fitted for grinding meal; and therefore is equally inconsistent with the thirlage, as if the defender had erected a corn-mill within the barony.

Besides, the defender, as well as all the other vassals, are expressly obliged by their charters, to carry what bear they have occasion to grind for the use of their families to the mill of the barony; and the word *grind* cannot be taken in so confined a sense as to mean only the manufacturing of bear into meal, but must be understood to comprehend also the making it into barley; otherwise an opportunity would be given to the vassals of eluding the mill of the barony, by carrying their bear to other mills, upon pretence of making it into barley. Were this to be allowed, it would give occasion to daily abstraction; and under pretence of manufacturing barley, they would carry their bear to be grinded at other mills:

Answered for the defender: The mill in question is no encroachment upon the thirle. It is built for the single purpose of manufacturing bear into barley for the pot, and by its construction cannot grind the smallest quantity either of oats, bear, or pease, into meal, without a very considerable alteration in the machinery. When such alteration is attempted, the pursuer may complain; and as this alteration can neither be suddenly nor secretly performed, the pursuer, who lives in the neighbourhood, cannot fail to be soon acquainted with it. Besides, the defender is willing to find sufficient security, that no such alteration shall be made, and that he never shall grind any grain whatever into meal with this mill.

Even supposing this mill, by its present construction, could grind corn into meal; yet as this is only *per accidens*, and will be sufficiently guarded against by the security which is now offered, the mill ought not, upon that account, to be demolished. The manufacturing bear into barley has been but lately introduced into this country, and deserves to be encouraged, in place of being cramped by odious servitudes.

The defender acknowledges, that by his charter, he is obliged to carry to the mill of the barony such bear as he has occasion to grind for his family's use; but the word *grind* can never apply to the manufacturing of barley; more especially as it has never hitherto been conceived that barley was the subject of thirlage, or was comprehended under any astringent, however severe.

“ The Lords found, That a proper barley-mill for grinding French barley may be erected within a thirle; and therefore assoilzie from this action, and decern; but in respect of the petitioner’s offer to find caution, that he never shall grind any grain whatever into meal with the mill in question, they ordain him to find the said caution under the penalty of £.100 Sterling.

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Act. Fergusson.

Alt. Wight.

W. J.

Fac. Coll. No. 48. p. 79.

1757. July 29.

GEORGE LOCKHART of Carnwath, *against* SIR ARCHIBALD DENHOLM and WILLIAM TENNENT.

The lands of Crofthill, belonging to Sir Archibald Denholm and William Tennent, were thirled to the mill of Cleugh, belonging to George Lockhart, “ for all their grindable corns, so far as the proprietors or their tenants should happen to grind for their own proper uses allenarly.”

In 1748, a lint-mill was erected upon the astricted lands; and, under the same roof, was erected another mill, fitted for sheeling lint-bows, and also capable of grinding oats, and, with some alteration, barley.

An action was brought by Mr. Lockhart for demolishing this mill, as contrary to the astriction.

Pleaded in defence, *1mo*, A mill erected for promoting the trade and manufactures of the country ought not to be demolished, though there is a possibility that it may be used for grinding corn, when security is offered, under £.100 penalty, not to grind with it any quantity whatever of grain into meal: For this case is different from that of a mill built within a thirle, solely for the purpose of grinding corn. *2dly*, At any rate, the barley-mill may certainly remain, since it requires a different construction from a corn-mill, and cannot be used as such without an alteration; especially as the astriction in this case is of the lightest kind, only relating to corns grinded for the proprietor or his tenants’ use; and therefore does not comprehend barley for the use of the kitchen.

Answered: The mill in question has already been very prejudicial to the thir- lage; and though pretended to have been built only for lint-bolls, has really been chiefly used for grinding oats. It has been frequently decided, that a mill cannot be erected within the thirle, though caution were offered not to grind astricted corns; Lord Stair, B. 2. Tit. 7. § 23; 28th February, 1684, Macdowal against Macculloch, No. 4. p. 8897. observed by Fountainhall; and 26th December, 1752, Urquhart of Burdsyards, No. 96. p. 16028. And it can make no difference, that this mill is fitted for other purposes, as well as for grinding oats; otherwise a pretence would never be wanting to erect mills within a thirle.

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A mill for lint-bows and barley allowed to be erected upon lands astricted to another mill, upon finding caution not to grind meal, flour, or malt.