

“ 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.

No. 100.

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.

No. 101.

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.

No. 101. *2dly*, If the mill in question were constructed in such a manner, that it could sheel barley alone, there might be some pretence to defend it ; though it might be doubted, in this case, if even the making of barley for the use of the proprietor and his tenants is not comprehended under the astringtion ; but this mill, at the same time that it is fit for making barley, is also fit, by a small alteration, for grinding oats into meal ; and is therefore directly contrary to the astringtion.

“ The Lords assoilzied the defenders from this action, upon their finding caution not to grind meal, flour, or malt, in their mill in time coming, under the penalty of £.100 Sterling.

Act. Burnet, Lockhart.

Alt. Wight.

Clerk, Kirkpatrick.

W. J.

Fac. Coll. No. 49. p. 81.

* * * Lord Kames reports this case :

William Tennent, thirled to the mill of Cleuch, the property of Mr. Lockhart of Carnwath, erected a mill within the thirle, for the purposes, as he said, of sheeling barley and lint-bows. Carnwath brought a process, subsuming, That Tennent had no privilege to build a mill within the thirle ; and therefore concluding, that he ought to demolish the same. The Lords were generally satisfied that this process was without foundation, and that a proprietor thirled may erect any building upon his land, save a corn-mill only. But as the defender offered caution, under a penalty, not to employ his mill for grinding corn, the Court, upon that medium, assoilzied.

The following considerations occurred to me at advising the cause.—That a mill cannot be built within the sucken, because it may be employed to disappoint the thirlage, I always thought a very lame inference. Law allows full liberty to do every act that is in itself lawful ; and punishment or reparation ensues then only when a wrong or injury is committed. Here is a good ground for building the mill, viz. dressing lint-seed and barley ; and it is not a good reason for demolishing the mill, that possibly it may be misapplied. How will it sound in a court of justice, that a gentleman ought not to wear a sword, because he may employ it to commit murder ? This is so evident, that I am apt to suspect a different foundation for that limitation upon property which once certainly existed, namely, the tying up a proprietor's hands from erecting a mill upon his own land, if it be thirled. Of old, mills, being expensive, and of difficult construction, were justly favoured. It was thought to require the privilege of a monopoly to encourage men to lay out their money upon works so generally useful. And hence it came to be an established point, That other mills could not be built within the thirle. Mills at present require no extraordinary encouragement, because they may be erected at a very small expense ; and therefore it is full time that this monopoly were at an end. The more rivalry the better for the lieges.

Scl. Dec. N. 131. p. 186.