

1804. *May 23.*BAKERS OF DUNDEE *against* MAGISTRATES OF DUNDEE.

No. 125.

Exemption from thirlage of *invecta et illata*, whether it may be purchased by the inhabitants of a burgh from the Magistrates, as representing the community to which the dominant tenement belongs, under the act 39th Geo. III. C. 35. ?

The Town of Dundee having a right, by very ancient charters from the Crown, confirmed by Parliament, to a thirlage of *invecta et illata*, the Magistrates had erected two mills for manufacturing flour. The corporation of bakers, as well as the other inhabitants, being obliged to grind at these mills for a long period, had taken leases of them from the Magistrates.

In 1799, an act of Parliament was passed, (39th Geo. III. C. 35.) entitled, "An act for encouraging the improvement of lands in that part of Great Britain called Scotland." And it provides, that "whereas there is a kind of thirlage, known in the law and practice of Scotland, called a thirlage of the *invecta et illata*, to which sundry towns, burghs, burghs of barony, villages, or other places in that part of the kingdom, and the inhabitants thereof, are subject, which thirlage it is expedient to allow to be purchased by the persons subject to the same; be it therefore enacted, that if any inhabitant or inhabitants of such town, burgh, village, or place, shall be desirous to purchase an exemption from the said servitude of thirlage, and all and every the services and prestations incident thereto, to which the whole town, burgh, village, or place is liable, from the proprietor of such mill or mills entitled to the same, it shall be lawful and competent to them to apply, in manner above mentioned, to the Sheriff or Sheriff-depute of the county or stewartry in which such town, burgh, village, or place is situated, who shall take such proceedings, and summon a jury in such manner as is herein before particularly directed; which jury shall, by their verdict, fix and determine the full value in money of such right of thirlage in perpetuity; on which verdict and determination the Sheriff, or Stewart-depute or substitute, shall pronounce decreet against the person or persons so petitioning or applying to him, as aforesaid, for the sum so fixed and determined by such jury, on payment of which to the proprietor of the mill, such town, burgh, village, or place, or such inhabitant or inhabitants thereof formerly subject to such thirlage, shall thenceforth be forever freed and relieved from the same."

It is farther provided, That such proceeding may take place, and such exemption be purchased, in manner foresaid, notwithstanding the mill or mills to which such burgh, town, or village is thirled, be held by the proprietor or proprietors thereof, under a deed or deeds of entail, provided that the price paid for the same, in virtue of the determination of the jury and decreet of the Sheriff, hereby directed, shall be settled and secured in like manner as is directed in the case of superiorities sold to the vassals of entailed estates, by act made in the 20th year of the reign of his late Majesty King George II. entitled, "An act for taking away the tenure of ward-holding, &c."

When the last lease which the corporation had of these mills expired, being advised that the right of purchasing an exemption extended to this case, they (18th August, 1800,) presented a petition in name of the deacon and box-master of the corporation for this purpose.

This judgment was pronounced, (21st May, 1800 :) The Sheriff-depute having considered this process, and admission by the pursuers of their thirlage for wheat, appoint a jury to be summoned for the day of to give their verdict on the matters contained in this cause."

This interlocutor was removed into the Court of Session by advocacy, where it was conjoined with an action at the instance of the Magistrates for abstracted multures, which had also been advocated, and with a summons of declarator and damages brought by the corporation.

The Lord Ordinary reported the cause. Upon the right to purchase, the Magistrates

Pleaded : It is not every thirlage of *invecta et illata*, of which the statute authorises the claim of exemption, and the right of purchase ; it is only that kind of it to which " sundry towns, burghs of barony," &c. are liable, and it is to be purchased from " the proprietor of the mill" to which it is attached ; hence, too, the provision made for the case of those proprietors possessing their estates under a strict entail. This never could be the case in the thirlages belonging to Royal burghs. Thus, the particular case provided for by the statute is, where a town or populous village is subject to this burden in favour of some neighbouring proprietor, who thus obtained a benefit in proportion to the growing wealth and industry of the inhabitants of the servient tenement, not only without contributing any thing to the common advantage, but by laying a heavy tax upon improvement. But the case is different, where the inhabitants of a burgh lie under this burden in favour of the community : The expense of the police, and establishment of such an institution, increasing with the number of inhabitants, the revenues of the burgh in such a case cannot be paid more easily or more equally than by a thirlage.

The exemption claimed under the act must be total, not only with regard to every kind of grain, but also as to every individual within the thirle. The statute does not give the proprietor of the mill a right to commute the burden for an annual payment ; so that if partial sales were permitted, he might, on the other hand, be obliged to keep up the mill, when so few frequented it, that it would not repay the expense. Accordingly, it is declared, that the purchase is to be of the right of thirlage, and every the services and prestations incident thereto, or to which the whole town, burgh, or place, is subject ; and the proof is to be of the full value of the right in perpetuity." No single individual, nor any number of individuals, can acquire a personal exemption from thirlage ; consequently a whole corporation is in no better situation. Besides, as a corporation, they are not subject to the servitude, but only as individuals, and those only can purchase who are liable to it. Nor would the purchase benefit the inhabitants at large ; the corporation would in future charge as they do now, not only the ordinary price of the commodity, but also a sum equal to the multures which they have purchased.

Answered : The wise provision for enabling those who labour under the hardship of thirlage to purchase an exemption, upon payment of a fair price, was in-

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tended to be universal. By it all persons may now enjoy their lands, or in burghs their privileges as inhabitants, free from any future payment. It is the interest of the public, that this servitude in every case should be abolished. In the country, the tenant who improves the soil incurs an additional load of thirlage, by the additional grain which is produced. In towns, the inhabitants who seek for their subsistence by there exercising their industry, feel the burden upon the necessaries of life. There can be no difference between the case of a burgh thirled to its own mill, and a burgh thirled to the mill of an individual. The words of the statute make no such distinction; and the term "proprietor of the mill" cannot be considered as exclusive of the burgh itself, should it, in its corporate capacity, have acquired right to the property. The Legislature had in contemplation merely the abstract quality of property in the mill, without distinguishing whether the proprietor be an individual or a corporation. Adopting the general description of proprietor as equally applicable to both cases, the provision as to entails was added, that, where such existed, there should be no bar to obtaining the benefit so anxiously desired in every possible case.

The power of purchasing is not vested in the Magistrates of burghs, which it would have been if it had been intended that relief was to be granted only in the case of an application from the whole burgh; but, on the contrary, the power to purchase is given to any individual or individuals subject to the thirlage; and upon payment of the price fixed for the exemption, "such inhabitant or inhabitants shall thenceforth be for ever freed and relieved of the same," whether composing a corporation or not.

The Court thought the statute applicable to this case, where the claim of exemption was in effect total, but doubted if partial exemptions could be claimed by individual inhabitants, the burgh in general remaining under the astringency to its own mill. In this respect the statute seemed to require an explanation.

"The Lords, (23d May, 1804,) found the corporation of bakers have right, under the statute, to insist in the present action for purchasing the thirlage in question; repel the defences pleaded for the Magistrates of Dundee against the competency thereof; remit to the Lord Ordinary to hear parties further on the extent of the thirlage, and other points in the cause."

Lord Ordinary, *Cullen.* Act. Lord Advocate *Hope, George Jos. Bell.* Agent, *Jo. Peat.*
 Alt. *Craigie.* Agent, *Alex. Duncan, W. S.* Clerk, *Home.*

F.

Fac. Coll. No. 163. p. 366.

See PRESCRIPTION.

See GENERAL ASSIGNATION.

See MILL.

See APPENDIX.