No 132. Lords, before answer, allowed a conjunct probation, anent the custom of the mill, as to this privilege. There was also a deduction craved for the seed, horse-corn, and teind, that they might be free of the multure, and that nothing might pay but what they grinded for their own use and consumption within their own houses. But it was remitted to the Ordinary to try if *omnia grana crescentia* were astricted by their infeftments; for there be many various decisions of the Lords upon this point.

Fol. Dic. v. 2. p. 108. *Fountainhall, v. 1. p.* 764.

1727. *July* 5. Mr John M'Leod *against* Vassals of Muiravenside.

No 133.

A superior having feued out his barony to his vassals, astricting their *omnia grana crescentia* to the mill of his barony, the vassals, past memory of man, paid multure for the growing corns of all kinds, without any distinction betwixt stock and teind; but at last the vassals conceived that the stock only, and not the teind, (which never belonged to the superior) was included in the aforesaid astriction, they, for that reason, abstracted their teinds, and refused to pay multure for the same. It was *argued*, on the other side, That the words of the astriction carried teinds as well as the other growth of the lands, and therefore should the titular even draw the teinds, *ipsa corpora*, the vassal must be liable in an equivalent of dry multure. The Lords found, That the vassals, during the years of prescription, being in use to bring their whole corns growing upon their lands to be grinded at the superior's mill, without demanding any abatement upon account of teind, relevant to include the teind within the astriction. See Appendix.

Fol. Dic. v. 2. p. 107.

SECT. VIII.

Title requisite for a Servitude of Pasturage.

1629. *June* 25. Sheriff of Cavers *against* Turnbull.

No 134.
An infeftment of lands, *cum communi pastura*, not found suffi-

In a removing from the muir called Cavers-muir, the pursuer being infeft in that muir by the King *per expressum*, and the defender being infeft in his lands cum pascuis et pasturis, cum communi pastura, cum libero introitu et exitu, et cum omnibus libertatibus et pertinentiis dictarum terrarum, by virtue whereof

he had been in continual possession, and his predecessors, without interruption, of pasturing their goods, and of casting of fuel upon the muir libelled without interruption, the pursuer and his predecessors being *præsentes scientes*, and not controlling the same past memory of man, and that long before the pursuer's infeftment given to him of that muir *per expressum*. This infeftment preceding the pursuer's special infeftment and continual immemorial possession, was not sustained in this possessory judgment to defend the excipient against the pursuer's posterior right taken of the muir libelled *per expressum*.

Act. *Burnet.* Alt. ——. Clerk, *Gibson.*

No 134.
cient to carry a right to a common pasturage in a muir, in the property of which another was infeft *per expressum*, though he had been in possession conform; only the possession had been frequently interrupted *via facti* by the proprietor of the muir.

June 30.—THE Sheriff of Cavers and his predecessors being infeft *per expressum* in the muir of Cavers, by the space of sixscore years since, and pursuing removing therefrom, and the defender being infeft before the time foresaid of the pursuer's author's right, in his lands, cum pascuis et pasturis, et cum communi pastura, et cum libero introitu et exitu, et omnibus aliis libertatibus et pertinentiis, and conform thereto in continual uninterrupted possession of pasturing of goods going upon the saids lands, pertaining to him upon the said muir, and casting of fuel and divot thereon, having two several loanings from his lands to the said muir, his infeftment proceeding from the baron of Hawick and his lands being a part of that barony, and the baron being infeft in that barony *cum communi pastura*, before the pursuer's predecessor's special right, conform whereto the vassals of that barony, and in special the defender has had the foresaid immemorial possession of pasturage; this exception in this possessory judgment of removing was not found sufficient to defend against the pursuer's special infeftment, albeit posterior; but the said exception was repelled, in respect of the said special right of the property, which was preferred to the prior infeftment of commonty, the infeftment bearing only *cum communi pastura*, and not designing that privilege to be in the muir libelled; and also in respect that the pursuer offered to prove, that he had tilled and laboured diverse years sundry parts of the muir libelled, and diverse years had debarred the excipient's goods off the muir, and poinded the same, which was sustained; albeit the excipient *duplied*, that that part he had tilled in the muir, albeit that he contended that it was not *jure* done, yet he claimed no pasturage in that part, but in the rest; and as oft as the pursuer poinded the excipient's goods, yet at the same time he even returned and pastured; for those deeds being done *via facti, non juris*, by the pursuer, who was a great and powerful man in the country, to him who was but a simple man, cannot prejudge his anterior right, and cannot make an interruption, nothing being done or following thereupon judicially, nor allowed by a judge, without which it cannot be called lawful interruption; notwithstanding whereof the exception was repelled, and the reply sustained. This decision was once or twice controverted and done.

Act. *Stuart & Belshes.* Alt. *Advocatus & Burnet.* Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 108. *Durie, p.* 449. & 453