SECT. II.

Whether a Party may be required to depone *super facto alieno?*—Whether Oath of Party must be special?

1665. *January* 5. ALEXANDER DUNBAR *against* ISOBEL RUTHVEN.

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IN a case pursued by Alexander Dunbar Bailie of Inverness against Isobel Ruthven, wherein a trust of some goods and moveables standing in her father's possession was referred to her oath, and it being *alleged* that it was *factum alienum*, and she could not depone; the LORDS found she ought to depone, it being libelled that the trust was consistent with her knowledge.

Fol. Dic. v. 2. *p.* 15. *Newbyth, MS. p.* 15.

1679. *December* 12.
INHABITANTS of KIRKCALDY *against* SIR ANDREW RAMSAY.

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SIR ANDREW RAMSAY having pursued the Inhabitants of Kirkcaldy for abstracted multures, for above twenty years, the quantities being referred to their oath, they depone that they abstracted none, but brought all to the mill, as they were obliged, but refused to depone upon this interrogatory, whether they had paid the multure now found due for all that they had, because it was to be presumed, that they would not go from the mill until they paid, and that Sir Andrew having set his mill to a tenant, they were only liable to him, and that it was not reasonable to put them to depone, that they had not paid such a small duty for so long a time, which may give occasion to many such processes.

THE LORDS ordained them to depone, whether they knew what they were resting of the multures, and what the quantity thereof was, but would not put them to the necessity to depone that all was paid after so long a time.

Fol. Dic. v. 2. *p.* 15. *Stair, v.* 2. *p.* 722.

*** Fountainhall reports this case. The first part of his report regards the subject of thirlage, and is referred to under that title.

1678. *July* 18.—IN the action pursued by Sir Andrew Ramsay Lord Abbotshall against the Town of Kirkcaldy, and feuars of the adjacent acres, the LORDS, 26th February last, found that the said heritors behoved to pay multure for their *grana crescentia* on these acres, notwithstanding that they brought the said grain into the town of Kirkcaldy, and it was grinded there. Against

No 24. which interlocutor they reclaimed, and desired to be farther heard, which was granted; and then they *alleged*, That no law, nor reason, could oblige them to pay twice multure for the same grain; and that, if they paid once upon the ground of the land, *esto* they imported it within Kirkcaldy, the pursuer could not exact another multure for the same again; and the clause of his infeftments thirling *omnia invecta et illata* within Kirkcaldy to his mill, must be understood *in sano sensu, et cum grana salis, viz. omnia invecta et illata grana* that did not grow upon the other thirled lands; for that having paid already, *ex natura rei* it became free whencesoever it came. To this we opponed the former debate; and being reported by Lord Justice Clerk, the LORDS adhered to their former interlocutor, and found, 'that the astriction of the acres, and other lands thirled by the pursuer's rights and infeftments, and of the *grana crescentia* thereon, is a different and distinct astriction from the astriction of the town of Kirkcaldie, and the thirlage of the *invecta et illato* thereto; these two astrictions being constituted at several times, by sundry authors, for several onerous causes, and for payment of different quantities of multures.' (What follows of this interlocutor is not in the principal minute, but was desired to be added thereto as exegetical, viz..) 'And find that they continue as separate thirlages, and not to be confounded, albeit *ex eventu* the mills to which both are due have centered, and come in the pursuer's person; and find, that the corns growing on the said acres, and other thirled lands, are liable to the pursuer in the multures contained in the pursuer's contract founded upon, in so far as concerns them who entered into the said contract; and in the pursuer's charter as to the rest; and that notwithstanding the said *grana crescentia* having paid as growing upon the ground, are brought by them within the town of Kirkcaldy; or if the corns growing be first taken to the pursuer's mill, and then after they are grounded there, and have paid, are carried into Kirkcaldy; in both which cases the LORDS find the *grana crescentia* must again pay as being *invecta et illata* within Kirkcaldy, conform to the pursuer's infeftments in the said astrictions, found to be distinct and separate in manner foresaid; and that they must pay in the same manner as they do for corns bought by them from strangers. And therefore repelled the defender's allegeance foresaid.' At reporting whereof the defenders *alleged*, This only could take effect as to the future, and they behoved to be assoilzied from bygones, since they were in a probable ignorance that once payment was sufficient; *2do*, Absolvitor as to what the heritors of those acres who are inhabitants of Kirkcaldy do spend and consume in their own house, since the interlocutor can only mean what they sold of their *grana crescentia*, not what they eated and drank thereof themselves. To this the interlocutor was opponed, and the answer to be seen in the minutes. This being reported to the LORDS on the 20th July, 'they repelled both, and sustained the pursuer's summons for their bygone abstractions, and found their *grana crescentia* liable again, if imported within the town of Kirkcaldy, albeit they be consumed,

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'brewed, and baked there, for the feuar's proper use, and although they paid already as *grana crescentia.*'

Then the town of Kirkcaldy insisted in their declarator against Sir Andrew, and first upon that member thereof, that if they got not ready service when they brought their corns to said mill, either through want of water (which this mill wanted frequently in summer) or otherwise, that then it should be lawful for them to abstract, and go elsewhere, after they had attended 24 or 48 hours. *Answered,* If it was the fault of the miller, or his servants, then they had reason to abstract, but if it was the fault of the mill as being ruinous, or that in drought it had not water sufficient, or through great throng, then they behoved to wait nothwithstanding; or if they went elsewhere it did not liberate them from the multure, but only of the small duties payable to the servants, such as the bannock, the knaveship, &c. See Stair, tit. Servitudes, *in fine*; *et Argentræus,* and others there eited; as also the case of the mills of Machline, *voce* THIRLAGE; for 1*mo,* At the time when tbe feuars did first thirle themselves to the said west mill of Kirkcaldy, they should then have considered that inconveniency, and provided against it, which they not having done, but simply and absolutely thirled themselves; and this servitude being a part of their *reddendo* to their superior, and having got a cheaper and easier feu *intuitu* of this burden, it is ridiculous and out of time now to reclaim, and the law says well, *multa sunt quæ impedirent negotium contrabendum, quæ negotium jam contractum nec impediunt nec dissolvunt*; 2*do,* When persons are thirled to a mill which they know in the heat and drought of summer to have scarcity of water, they are obliged to be so provident as at times when the mill has sufficiency of water to make her go, to grind as much as may serve them the time she stands idle, and cannot go; and if they do not *sibi imputent,* blame not the mill. Else they may keep back their corn till they know the mill is in that condition, and not capable to serve them, and then make a simulate offer and abstract securely, and thereby elude their thirlage, which being *contractus bonæ fidei, omnis fraus et dolus maximopere abesse debet*; 3*tio,* If they have liberty to go away on this pretence that the mill is forestalled, and there are so many bags to be grinded before them, and their necessity requires a speedier dispatch; then, being a corporation, and factious, it were an easy matter for them to evacuate their thirlage by entering into a combination, and bring 100 or 200 bags all at once to the mill; and all, except four or five, to take instruments that they cannot get present service. This were a compendious method, if it were enough to liberate them; but the want of service they force themselves, or though it happen by accident, can never excuse their abstraction, but they must wait their turn, since the devil bides his time; and he that is first ready must be first served; and as in barbers shops he who is first wet is first shaven.

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1678. *November* 21.—IN Abbotshall's process of abstracted multures (18th July 1678), against the Inhabitants of Kirkcaldy, and others astricted to his mill, the Town produced an act of the Regality Court of Dunfermline, made by the Lord Fyvie, in explanation of his decreet-arbitral in 1603, appointing them only to be liable in once multure. *Alleged* for Abbotshall, That the said act is null, wanting a warrant; and Lord Fyvie was functus officio; and in 16[illegible], so long after, could not explain it, especially by a gloss of Orleans that destroyed the text; *2do*, The inhabitants contended, the interlocutor anent two multures concerned only the feuars, and not the grana forinseca; and that the clause, tholing fire and water, by the received opinion of lawyers, was only to be understood of corns which were imported ungrinded, and kilned and milled within the bounds of the thirlage; but did not extend to corns grinded (such as malt), and afterwards baked and brewed within the town. And Craig, p. 186.* calls aquam et ignem pati, id est, ustrino et clibano præparari; that is, kilning and cobleing, but not baking and brewing; else their meal for their pottage, and bear for their pot, might be multured, which were absurd. *Answered*, That they opponed the interlocutors; and if this were permitted, then they might grind all their corns before they brought them within the thirlage, and thereby render the pursuer's right of thirlage unprofitable, which is contra bonam fidem; and the Lords have already found what they consume in their own houses by baking or brewing, liable, and so it is res hactenus judicata. And for their borough acres, they are in no different condition from the other feu acres; and they must likewise be liable in the multure of ground malt; because, by Abbotshall's infeftments, all that tholes fire and water within Kirkcaldy, is thirled to his mill; but ita est, imported ground malt tholes fire and water there, *ergo*. For the Town, see 23d March 1624, M'Kenzie, *voce* THIRLAGE, and Bartolus, ad l. 15. D. De publican. Prohibitus abstrahere Bladum potest auferre farinam, because it is a different specification. This citation makes for Kirkcaldy's allegeance. See Wesembac, ad l. 77. V. S. whose opinion is contrary to Bartolus. This being reported to the Lords, on the 21st of November, they, before answer to that point anent the extent of the clause of tholing fire and water, ordained both parties to adduce what probation they can for clearing the custom of the town of Kirkcaldy; *1mo*, If the meal brought in, sold in the market, and made use of within burgh, was in use to pay thirle-multure; *2do*, If meal brought in on other days than on the market days, and made use of in the town, was in use to pay multure; *3tio*, If malt grinded, and thereafter brought into the town, and made use of there, was in use to pay multure. And as to the double multure, they adhered to their former interlocutor, notwithstanding of the answers to the queries by the Lord Fyvie, and his act and explanation. As also found the heritors of the borough acres, being within the thirle before the constitution of the last thirlage, to be in the same condition with the other feuars of the thirlage, unless the time of the constitution of the thirlage of the burgh, these acres had belonged to the burgh in pro-

* Edition 1655.

perty, as their own common good; in which case, they found the corns growing thereon, could not be understood to be invecta et illata to the burgh, seeing these acres belonged in property to the burgh. Thereafter, on the 11th December 1678, the said cause, by special warrant of the Lords, was called in præsentia, when the defenders *alleged* the corns growing on their borough-acres were a part of their borough, and they have been these 40 years bygone in possession of paying only once multure therefor. *Replied* for Abbotshall, The prescription ought to be repelled; 1*mo*, In respect of interruptions; 2*do*, Because they are astricted by the reddendo of their own charters of these acres. "THE LORDS found, If the pursuer Sir A. Ramsay can instruct, that the borough acres were thirled to the mill by the first constitution of thirlage, or before the constitution of the second thirlage, then that they are in the same case as the other feuars of the thirlage, and are liable for the thirlage of invecta et illata. And find the allegeance proponed for the town of Kirkcaldy, of their possession for the space of 40 years payment of once and single multure, relevant. And find both the members of the answer proponed for the pursuer, viz. interruption and a part of the reddendo relevant to elide the aforesaid allegeance." Then both the towns of Kirkcaldy and Abbotshall gave in petitions to the Lords, craving rectification of some parts of the interlocutors. THE LORDS having, on the 29th January 1679, advised both the bills and answers, "they found, That whatever acres did either belong to the town of Kirkcaldy, as a part of their common good, or did belong to any of the burgesses of the town before the constitution of the thirlage, super invectas et illatas, that the same are not liable thereto; and therefore assigned to the town to prove, that the time of the foresaid constitution of thirlage, the town and their burgesses, had certain acres belonging to them, as also the number of the said acres; and that the said acres were erected with the town, the time of the erection thereof into a burgh of barony or regality." Then the town of Kirkcaldy gave in a supplication, craving, That the Lords would sustain holden and repute borough acres by witnesses, sufficient and relevant to prove what were such. "THE LORDS adhered to their former interlocutor, and declared they would take, to their consideration what the town should produce for proving and instructing the points admitted to their probation." Thereafter the feuars of Balsusney acres presented a petition, craving a diligence to prove prescription of immunity from double multure. "THE LORDS, in respect of the interruption by the contract betwixt Abbotshall and these feuars in 1656, refused them a diligence." As also, because the town of Kirkcaldy would not condescend which of the two multures, the grana crescentia, or the invecta et illata, was prescribed, the LORDS, on the 25th of February 1679, upon report, "held the said defence of prescription as not proponed, and declared they will not allow them to found thereon hereafter."

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I have set down the debate and progress of this cause with much brevity and disorder, because I have all the informations, interlocutors, bills, answers and deliverances ad longum.

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In regard the town of Kirkcaldy adduces burgesses of their burgh as witnesses for proving some of the articles admitted to their probation, the case betwixt my Lord Halton and the Citizens of the town of Dundee (17th January 1679), may be made use of. See 19th December 1678, Oliphant; and December 1672, Culloden. See Haddington, 23d March 1624, Urquhart. See WITNESS.

1679. *June* 6.—IN Sir A. Ramsay of Abbotshall's cause, against the town of Kirkcaldy, (*vide* 21st November 1678), the town gave in a bill, complaining, that Abbotshall had unwarrantably extracted his act upon his own process, whereas he should have done it upon theirs, and that he had confounded the defenders' several interests together, and yet was adducing witnesses on this act, and therefore craved it might be rectified, and the receiving of the witnesses stopped. THE LORDS having called for Mr William Lauder, and Adam Christie, the two clerks, and hearing their declaration, how justly and fairly Abbotshall's act was extracted, conform to the minutes, they refused the desire of their bill. Thereafter, on the 16th of July 1679, the town of Kirkcaldy having adduced some witnesses for proving their exemption of ground malt from payment of multure, it was *objected* against them, that the days of compearance of the witnesses, both in the act and diligence, was the first of June, and yet their execution against these witnesses was not given till the 21st of June. This being reported to the Lords, they refused to examine or admit these witnesses, and because they were cited after the days of compearance in the act and diligence, albeit it was only alleged to be a mistake of the messenger, or that he could not get them sooner, they being in the King's host. Thereafter, on the 26th of July, the town attempting to adduce other witnesses, it was *objected* against them, that they were defenders called by Abbotshall in his summons, as transgressors and abstractors from his mill; and so being direct parties, could not be admitted to bear testimony in causa propria, where commodum reportare queunt, and may depone for their own exoneration and liberation. *Answered*, Abbotshall had called many of the inhabitants as defenders, which might be done of purpose to anticipate and preclude them of their mean of probation, &c. This being reported, the LORDS desired to know, whether Abbotshall referred the debt and abstractions to these defenders' oaths, or if he would prove it scripto, et per testes, against them; (and witnesses, by act 1669, can only prove multures five years back); and if he referred it to their oath, then ordained them, first to depone as to the debt acclaimed in the pursuer's summons of abstractions, and then thereafter they would admit them as legal, habile, and unconcerned witnesses for the defenders. This distinction was thought metaphysically subtle; however, Abbotshall eluded it, by electing the other member of the alternative, in offering to prove his libel against these aliunde than by their oath. Mr Style, in his Practical Register *voce* Witness, shows that the English law considers, if they be only convened as parties, to take away their capacity of being witnesses As to burgesses deponing ' in causa universitatis,'

he rejects inhabitants from testimony, if they be free of the incorporation. Balfour, in his Pract. tit. Probation by Witnesses, tells, the Lords went a greater length, and decided, if a man's name be inserted in the summons, though he be not cited, yet he cannot be adduced as a witness in that cause, which seems hardly determined. Yet see Sir G. Mack. Crim. tit. of Exculpation, where he shows the Lords followed a course like this decision in Kirkcaldy's case. It was further *objected* against many of the town's witnesses, that they were burgesses and inhabitants in the town, and were maltmen, baxters, or brewers within the same, and so interested; and Halton's case against Dundee's, was quoted (*de quo, voce* WITNESS). "THE LORDS admitted them cum nota, reserving to their own consideration, at the advising, what weight they would lay upon these witnesses." I hear that in January 1679, in the case of Beatson of Polguild, and Beatson of Kilrie, the Lords repelled witnesses, because the party adducer of them, his advocates, agents, or others in their names, had expiscated and enquired at them, what they could say in the cause. This seems hard, and not relevant; for how shall a man know whom to call as witnesses, if he do not try, or cause try them, what they know thereanent; but to instruct, teach, or inform them what to say, or to bid them depone thus, and thus, is a subornation, and a sufficient ground in law whereupon they ought to be cast and repelled. And of this opinion is Langfranc. Balbus, decis. 184. quem omnino vide. See 21st July 1680, Arbuthnot; and 12th December 1689, between these parties. See WITNESS.

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N. B. From this time to the beginning of July, there was a surcease of business in the Session, so that there was only reading of bills in the Inner House during all that time, in respect of the commotion in the West; and that many of the subjects were, by command of the Secret Council's proclamations, attending the King's army; but that affair being ended, the Lords entered again to business, though with much tenderness, that no advantage might be taken in respect of any's absence or unpreparedness.

1679. *December* 12.—In Sir A. Ramsay of Abbotshall's pursuit for abstractions, (6th June 1679,) against the Feuars of Balsusney and others; when they came to depone, they refused to answer this interrogatory, whether they were resting owing any multure for the corns that grew on these lands and acres, because they were willing to depone they had brought their corns to the mill, and that was sufficient presumption of their payment of the multure, seeing the Miller would not let them go without payment. *Answered*, Though the Miller should pass them for nothing, yet that could not prejudge Abbotshall the pursuer. *2do*, The fallacy in shunning of this interrogatory lay in this, that they had brought their corns to the mill, and paid the Kirkaldie multure of *invecta*, but not the multure due *tanquam grana crescentia*. This being reported, "THE LORDS found it is not enough for them to depone that they brought their corns to the mill; but ordained them likewise to depone if they were yet resting any multure;" conform to to the act 1669 anent prescriptions.

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1680. *February* 11.—Abbotshall *contra* the town of Kirkcaldy, (12th December 1679.) This point being reported by the Lord Craigie, how long the inhabitants were obliged to attend for service at the mill before they took away their corns; "THE LORDS found that the explanation of the decreet arbitral hath no effect; and find the clause of the said decreet-arbitral, 'in case of the 'mill's not being able to serve, that they may go to other mills.' not to extend to the ordinary accidents of frost or drought, but to other extraordinary accidents; but found, that the inhabitants ought to be served with all diligence, in order as they come to the mill; and in case of the concourse of many together *sine æmulatione et collusione qualicunque*, that those who came last may go to other mills, paying the astricted maltures to the said pursuer's mill, and the small duties, knaveship &c. to the mill where they go." See the like decided in the mills of Mauchline, *voce* THIRLAGE. Then the Magistrates of Kirkcaldy gave in a bill against this interlocutor; but the Lords 'refused the bill and adhered.'

Fountainhall, v. 1. *p.* 8. 25. 49. 68. & 84.

1717. *July* 10. CALLANDER *against* WALLACE.

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A party was required to depone specially on the way and manner in which he had paid.

JOHN CALLANDER of Craigforth pursues Hugh Wallace of Ingliston, for an account of iron-work, chimneys, &c. furnished to him in 1685, and referring the libel to his oath, he depones, he owed him nothing upon that account; and being urged to be more special, refused to say any more. Whereupon Callander gives in a bill, craving he might be re-examined, and ordained to condescend more particularly, if or not he received the goods libelled, and how he paid it; for *in generalibus latet dolus*.—THE LORDS thought there might be an error in the interrogatories; for, where the question is, are you resting owing such a debt? the special interrogatories for expiscating the matter of fact must be premised, before you come to the general, else one may be ensnared in a contradiction. But the LORDS suspected the case here was, that Ingliston got these goods furnished to him when he was cash-keeper to King Charles, and so capable to get Callander payment of what the public owed him; and that Ingliston looked upon them as freely gifted, and therefore thought he had freedom to swear he owed him nothing; and that Callander finding he can be no more serviceable to him, craves payment thereof.—THE LORDS ordained Ingliston to be re-examined, seeing parties ought not to depone upon law, but only *super facto*; not whether they think them themselves obliged in law, but whether they received such goods, or sums, and on what account, and in what terms, or how they paid, or can exoner themselves of it, as gifted, or otherwise? And the LORDS, at advising, will consider how far the qualities adjected are proper and pertinent, and prove themselves without any further yea or not.

Fol. Dic. v. 2. *p.* 14. *Fountainhall, v.* 2. *p.* 380.