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2do, Though the mill has not a marble millstone, and is not particularly intended for a flour-mill, yet it is fit enough for the purpose of grinding wheat. Much wheat in Scotland is grinded by mills of the same kind. But if it shall be thought, that the mill is not so proper for grinding wheat, the pursuer will be satisfied that the defenders be found liable to pay him a certain proportion in name of dry multure, without being liable for any other prestation.

"In respect it is acknowled by the pursuer, that the mill of Pitreavie is not fit for grinding wheat, and that no dry multure for wheat was ever in use to be paid, the Lords assoilzied the defenders from the multure of the wheat pursued for; and decerned."

Act. *Macqueen.* Alt. *Johnstone.* Clerk, *Forbes.*

P. M. *Fac. Coll. No.* 235. *p.* 429.

1760. *December* 2.

JOHN MILLER of Millheugh *against* ALEXANDER CORSE.

No. 105.
A mill erected within a thirle for the purpose of sheeling barley, but fitted likewise for grinding oats, peas, and other grain, into meal, ordered to be demolished, or put into such form as that it should not interfere with the mill of the thirle.

An heritor who was subjected in a thirlage to a neighbouring mill, erected a mill upon his own ground; and though the mill was chiefly intended for sheeling barley, yet it was so constructed as to be also capable of grinding oats and peas. The proprietor of that neighbouring mill, founding upon a doctrine inculcated in our law-books, that an heritor who is thirled cannot build a mill upon his own ground, entered a complaint before the Sheriff, concluding, that the mill should be demolished; or at least that the machinery should be so altered as to be incapable of any other operation but that of sheeling barley. This cause being advocated to the Court of Session, the first interlocutor was, "That the defender was not obliged to destroy any part of the machinery of his mill; but that he must find caution to the pursuer not to grind any oats or peas growing within the thirle, under the penalty of £.100 Scots *toties quoties*. In a reclaiming petition against this interlocutor, several of the Judges strenuously espoused the cause of liberty. It was observed, that there is nothing in a thirle-contract, expressed or implied, to bar an heritor thirled from building a mill within his own ground; and that the possibility of employing a right wrongously is no good reason for debarring the exercise of it. All that can be done in this case, or any similar, is, after the trespass is committed, to exact caution not to do the like in time coming. Now, the interlocutor complained of goes even further in favour of the complainer; for it obliges the defender to find caution, though there be no trespass committed; which is laying a burden upon him beyond what there is any instance of in any other case. To demand further that the mill be demolished, or rendered unfit for grinding corn, is the same as if one afraid of bodily harm, and not satisfied with caution of lawborrows, should insist to have the man put to death, or his right arm cut off.

Attending to the political history of Scotland, we find, that, till the union of the two kingdoms, the nation was divided into tyrants and slaves. When a Baron built a mill for the service of his people, it was thought audacious and contrary to allegeance for any of his vassals to interfere with him by building another mill. And, by the same influence, it was formerly held, that where a brewery is erected by the Baron, every one within the barony is thirled to that brewery, and cannot erect another. This slavish dependence upon the great, creating a prepossession in their favour, entered into our law, and was the foundation of the many decisions upon this head, all in favour of thirlage. But as our police is gradually tending to liberty, our law ought to be accommodated to that happy change of system, and our practice be made conformable to the true principles of law.

It was added, that to restrain this mill is wrong in point of utility; because such restraint will prevent the building of mills, which is hurtful to the public. Where an heritor is not thirled, the more mills he has to resort to the better for him. And to allow mills to be built any where, within as well as without the thirle, provided only that the thirle be not hurt by it, is undoubtedly beneficial to the public.

The plurality however altered this interlocutor, and the defender was ordained either to demolish his mill, or to alter its form in such a manner as to be incapable of grinding peas or oats. This decision is evidence of an attachment to former practice and authority, without attending to the change of manners and circumstances.

Sel. Dec. No. 230. *p.* 169.

*** This case is reported in the Faculty Collection:

The barony of Blantyre was thirled to the mill of that name, belonging in property to Miller of Millheugh. The deed of astriction specially mentioned oats and peas; and the proprietor of the mill likewise claimed a right to the thirlage of all other grain which the tenants and vassals had occasion to grind into meal.

Corse purchased some lands in that barony, and, in 1750, erected a mill within the thirle, chiefly for the purpose of sheeling barley, but which, with very little variation in the machinery, was fitted for grinding all sorts of grain, and was frequently made use of to grind oats and peas into meal.

Miller complained to the Sheriff, insisting that Corse had no right to erect a mill of this kind within the thirle, and that he ought to be obliged to demolish it.

The Sheriff "found it proved, That the mill complained of was a mill fit for grinding, and had accordingly grinded, peas and corn into meal, and was in every respect a meal-mill, although it was likewise proper for grinding some kinds of barley; and therefore found the complaint proved, and ordained the defender either to demolish the said mill, or to put it into such a shape as that it should not be fit for grinding peas and corn into meal."

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The cause having come by advocation to the Court of Session, the Lords, upon the 31st July, 1760, pronounced the following interlocutor: "Find, That the defender is not obliged to destroy any part of the machinery of his mill; but that he must find sufficient caution to the pursuer, not to grind any of the oats or peas growing within the thirle of the pursuer's mill, under the penalty of £.100 Sterling, *toties quoties;* and, upon the defender finding caution, as said is, assoilzie him, and decern."

Pleaded in a reclaiming bill for the pursuer: It has long been an established rule in the law of Scotland, That no man, whose lands were thirled to another's mill for grinding his oats, peas, or any other species of grain, could erect a mill of the same kind upon the thirled lands, without the consent of the heritor of the dominant mill. This restraint was understood to be inherent in the servitude of thirlage; and the chief security to the heritor of the dominant mill, for the enjoyment of the rent and profit arising from the thirlage. This appears from the decisions of the Court, as well as the opinions of our lawyers, as far back as they can be traced; Laird of Ludquhairn *contra* Earl Marshall, No. 65. p. 13982.; 1622, Hardiesmill, No. 14. p. 15964.; Lord Stair, B. 2. Tit. 7. § 23.; 28th February, 1684, Macdowal of Loggan *contra* Macculloch, No. 4. p. 8897.; and 28th February, 1695, Crawfurd of Carsburn *contra* Sir John Schaw of Greenock, No. 5. p. 8898.; also 26th December, 1752, Captain Urquhart of Birdsyards *contra* Tulloch of Tannachie, No. 96. p. 16028. in which case an offer of caution was refused; Bankton, v. 1. p. 689.; Erskine, B. 2. Tit. 6. § 1.

The whole of these decisions and authorities tend clearly to establish this doctrine, that the servitude of thirlage does virtually imply a restraint upon the proprietor of the servient tenement, from building a mill thereon which can interfere with, or be prejudicial to the dominant mill: The building another mill within the thirle must not only be detrimental to the dominant mill by withdrawing the benefit of the out-town multures, but it must even be prejudicial with respect to the multures of the thirle; for it is in vain to imagine that the caution proposed can give any effectual security against abstractions. The grain of the sucken has no visible marks by which it can be distinguished from the grain of out-townsmen; and it is morally impossible, that the miller of the dominant mill can be so constantly upon the watch as to discover the many frauds which must happen by the abstraction of the thirle from the mill of the barony to this new erected mill. The pursuer purchased his right to this mill, and paid an adequate price for it, upon the faith that no other mill of the same kind could lawfully be erected within the thirle to interfere with him. This was the general notion and sense of the country at the time; and, if any alteration was now to be made in the law with regard to this matter, it would be productive of much confusion and uncertainty, and very prejudicial to the interest of most of the boroughs, and many of the heritors in Scotland.

Answered for the defender: The general structure of all these mills is the same: Raising or lowering the upper-stone, or perhaps shifting one stone for an-

other, which is the work of two or three minutes, is all the difference required in grinding one grain or another, or in making the mill fit for grinding oats, or sheeling barley. Every barley mill must be so constructed as to be fit for the purposes of grinding; for, besides the sheeling, there is a second operation precisely the same with that of grinding oats into meal, viz. grinding the refuse of the barley, with such particles of the grain itself as are crushed or broken in the sheeling, into meal, which, though of a coarser kind, makes a considerable article in barley-mills. If, therefore, the defender is intitled to have a barley mill, of which there can be no doubt, it must be such as can answer every purpose of manufacturing the barley, whether by sheeling, grinding, or otherways: And no mill can be contrived that can grind the refuse of the barley, but what will also grind oats into meal, without any alteration of the machinery. Every proprietor of land has a natural right to set up a mill within his own property, for uses that do not interfere with the astriction. The erecting of a mill is, in itself, no encroachment upon the right of the dominant mill, but the abuse thereof, by grinding the grain that falls under the astriction: And accordingly Sir Thomas Craig is clearly of opinion, that any heritor thirled to the mill of another, may erect a mill upon his mill property, provided he uses it only for grinding corns not thirled; Lib. 2. Dieg. 8. § 9. Some of the old decisions, indeed, have gone the other way; but the only intention of the Court in these cases was to prevent the abuses that might be committed, of covering abstractions of the corns truly thirled, by means of these other mills. The only expedient which had then occurred, was demolition of the mill thus built within the thirle. But another expedient has since been devised, which is equaly efficacious, and more agreeable to justice, and that is, finding caution, under a penalty, that nothing prejudicial shall be done to the mill of the thirle. It is true, that in the case of Captain Urquhart, caution in general, not to grind any of the thirle-corns, was offered and refused; but when this question came again under consideration in the two latter cases of Mr. John Macleod against Roberts, and Lockharts of Carnwath against Sir Archibald Denham, both determined upon the 29th of July 1757, the Court admited of caution, not indeed in general, which, in case of contravention, would only have been the foundation of an action of damages, but for such a determined penalty, *toties quoties*, as was thought a reasonable security to the proprietor of the mill. (Nos. 100. and 101.)

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Replied for the pursuer: The two cases last mentioned were different from the present. In the case of Macleod against Roberts, the mill was constructed solely for the purpose of manufacturing bear into pot-barley, and could not grind oats into meal without a considerable alteration in the machinery; and so the Court seems to have understood, as appears from the words of the interlocutor, which finds, "That a proper barley-mill for grinding french barley may be erected within a thirle," &c.—whereas, in the present case, it is not denied, and was proved before the Sheriff, that the defender's mill is in every respect fitted for the purposes of grinding corn and pease into meal, and is usually so employed. In the other case, of Carnwath against Sir Archibald Denholm, the mill was intended for dressing lint, and sheeling lint-bolls, and was erected upon the encou-

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ragement of the trustees for the improvement of manufactures. The machinery of this mill was indeed proper for grinding oats; but it had been erected entirely for another purpose, and upon the encouragement of the public; and therefore caution was thought sufficient.

The Lords, upon the 4th December 1760, altered their former interlocutor, and "found it proved, that the mill complained of was a mill fit for grinding, and had accordingly grinded, pease and corn into meal, although the said mill was likewise proper for grinding some kinds of barley, and therefore found the complaint proven, and ordained the defender, either to demolish the said mill, or to put it into such form as that it should not be fit for grinding pease and corn into meal, so that it might not interfere with the pursuer's right of thirlage, and that betwixt and the 1st day of March then next; and decerned."

And, upon advising another reclaiming petition and answers, 21st Jannary 1761, "The Lords adhered to their last interlocutor, and refused the desire of the petition; but remitted to the Lord Ordinary to hear parties procurators farther in the cause, and particularly on this point, how far the mill can be rendered incapable of grinding corn into meal, without being totally demolished; and to determine and report as he should see cause."

Act. *John Miller & Advocatus.* Alt. *Lockhart.* Clerk, *Hume.*

Fac. Coll. No. 8. *p.* 13.

1765. *February* 20.

WILLIAM SLOWAN *against* HUGH HAWTHORN of Castlewig.

No. 106.

A tacksman of a mill not entitled to deduction out of the rent for the multure of part of the thirled lands possessed and laid in grass by the proprietor of the mill.

Hawthorn had let to Slowan the mill of Busbie, with multures, suckens, &c. During the currency of the tack, Hawthorn purchased the lands of Drummoral, being the most considerable farm within the thirle, took them into his own possession, and laid them in grass.

At the end of the tack, Hawthorn having pursued Slowan for arrears of rent before the Sheriff-depute of Wigton, Slowan craved deduction for the multures of the lands of Drummoral; which was denied by the Sheriff. Slowan presented a bill of advocation; and that having been refused, he preferred a petition to the whole Lords, pleading, that it was against equity he should be obliged to pay rent for multure which had been withheld from him by the heritor himself; and that, if the heritor might do this with one farm, he might do the same with the whole lands within the thirle, and so ruin the tenant at his pleasure.

The Lords "adhered to the Lord Ordinary's interlocutor, and refused the bill."

Petitioner, *Robert Campbell.*

A. R. *Fac. Coll. No.* 9. *p.* 16.