

1750. *November 17.* URQUHART *against* TULLOCH.

The question was stated in a bill of suspension, How far one is at liberty to build a mill upon his own property, which lies within the thirle of another heritor's mill? For the affirmative, the authority of Craig was referred to, Lib. 2. Dieg. 8. § 8. which seems to be very express. For the negative, the authority of Stair, Tit. SERVITUDES REAL, § 23. which is no less express, that the building of a mill within the thirle, on pretence of getting voluntary or out-sucken multure may be stopped, as the use of querns may be; and two decisions observed by Fountainhall, one of February 28, 1684, M'Doual against M'Culloch, No. 4. p. 8897; and another, February 28, 1695, Crawford of Carsbarn against Sir John Shaw of Greenock, No. 5. p. 8898.

The Lords, on report, as the point merited a judgment, "Remitted to the Ordinary to pass the bill."

And when afterwards the suspension came to be discussed, the Lords "Suspended the letters, and found that the building could not proceed."

*Kilkerran, No. 15. p. 577.*

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1751. *February 6.* BUCHANAN of Glins, *against* CUNINGHAM of Bandalloch.

Duncan Buchanan of Cashlie 1657, disposed the lands of Middle-Cashlie to John Logan, who became bound to bring his whole grindable corns to the disponent's mill of Gartinstary: "And the said Duncan Buchanan bound him to cause the miller, or tenant who possess the mill and mill lands of Gartinstary, in any time thereafter, to content and pay to the said John Logan, his heirs and successors, who possess the said town and lands of Middle-Cashlie, pertaining to him, six pecks teind meal yearly, in all time thereafter, forth of the said mill of Gartinstary, and lands thereof, conform to use and wont; to be paid into the said John Logan's town of Middle-Cashlie." He also disposed the lands of Easter Cashlie to Duncan Buchanan in Harperstane; with the same thirlage, and the same obligation on the disponent; only it is not subjoined to the clause of thirlage, but placed before it, and subjoined to the receipt of the price.

He also disposed the mill of Gartinstary 1671 to John Buchanan; whose right came into the person of John Buchanan of Glins.

Glins pursued Cuningham of Bandalloch, heritor of Easter and Middle-Cashlie, who claimed deduction out of his multure, of the said payment due out of the mill to his lands.

Pleaded for the pursuer: This obligation for teind meal is personal, and cannot affect singular successors: There is no teind payable out of the mill; and supposing it to be for the mill-lands, the defender has no right to the teinds thereof.

Pleaded for the defender: The meal is made payable out of the mill to the lands;

No. 94.

If a mill can be built within another heritor's thirle?

No. 95.

Lands being thirled, and the miller bound to pay a certain sum to these lands it was found a real quality of the thirle.

No. 95. so that by stipulation the burden is real: It would not avail though no reasons could be given for calling it teind-meal; but probably the case has been, the teinds were not thirled, and yet to prevent disputes about abstractions, it has been agreed to bring them to the mill, for which the miller was to pay this duty.

The Lord Ordinary, 14th December 1749, "Repelled the defence founded on the three firlots of meal yearly claimed by the defender."

On bill and answers, The Lords found the obligation a real quality of the thirle.

Act. *Macdoual.*

Alt. *Lockhart.*

Clerk, *Pringle.*

*D. Falconer, v. 2. p. 230.*

1752. December 26.

CAPTAIN CHARLES URQUHART of Birdsyards, *against* ALEXANDER TULLOCH of Tannachy.

No. 96.  
None but the proprietor of a thirlage can erect a corn mill within the bounds thereof, nor is caution to be received that he will grind only corns not thirled.

The lands of Tannachy are thirled to no mill; but there being no place proper for erecting a mill on these lands, Alexander Tulloch, the proprietor, purchased a small piece of ground lying within the royalty of Forres, and began to erect a corn-mill thereon.

The burgh of Forres, and whole territory thereof, is thirled, both for the *grana crescentia* and *invecta & illata*, to the mills of Forres, belonging in property to Urquhart of Birdsyards; who, as soon as Alexander Tulloch began to erect the mill, obtained a suspension of the work, and brought a declarator to have it found that Alexander Tulloch had no right to erect a corn-mill within the bounds of the pursuer's thirlage.

Pleaded for the defender, That, from the nature of property, a proprietor is authorised to do whatever he pleases *in suo*, and consequently to build mills on his own lands, unless restrained by law. Now, there is no such restraint implied in the servitude of thirlage, as appears from Craig, Lib. 2. Dieg. 8. § 8.; at least, whatever may be the case where a superior feus lands to his vassal, and reserves the astriction to his own mill, yet, where thirlage is acquired by contract or prescription, as in the present case, over lands not held of the proprietor of the mill, the proprietor of the astricted lands, if there is nothing special in the contract or possession, cannot be restrained from erecting mills thereon for grinding corns not thirled. And the defender offered to bind himself under a penalty not to grind at the new mill any corns astricted to the pursuer's mills, and to find caution for that effect.

Answered for the pursuer, That the servitude of thirlage implies in its own nature a restraint upon the proprietor of the servient tenement from building a mill thereon; and thus far his property is limited. This is expressly asserted by Lord Stair, Tit. SERVITUDES, § 23. and has been so found by the Lords as often as the question has been brought before them, particularly in two cases observed by Fountainhall, 28th February 1684, Macdoual, No. 4. p. 8897. and 28th Feb.