

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. *Macdoul.*

Alt. *Lockhart.*

Clerk, *Pringle.*

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

1752. December 26.

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

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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 Birdyards; 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, Macdoul, No. 4. p. 8897. and 28th Feb.

ruary 1695, Crawford, No. 5. p. 8898. Whatever was the opinion of Craig, the point has been otherwise settled since his time; and for this there appears good reason, because erecting mills within the thirle, on pretence of grinding only out-sucken corns, would open a door to daily frauds.

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With respect to the caution offered by the defender, answered, That the pursuer is not obliged to accept thereof, and it would occasion perpetual law-suits between the parties.

“ The Lords found, that the defender could not erect a corn mill within the bounds of the pursuer’s thirlage.”

Act. Ro. Craigie.

Alt. H. Home.

Reporter, Lord Dun.

Clerk, Forbes.

Fac. Coll. No. 54. p. 80.

* * Lord Kames reports this case :

Tulloch of Tannachy having a considerable estate in a fruitful corn country, adjoining to the town of Forres, purchased from the town a piece of ground, for the convenience of the erecting a mill for the service of his own estate, which was not subject to any thirlage. This was opposed by Urquhart of Birdsyards, proprietor of the mills of Forres, to which the town of Forres was thirled; and it was urged for him, that Tannachy could not build a mill within the thirle, which might be prejudicial to the thirlage. It was answered, that if a proprietor build a mill within his barony, for the service of his people, this implies, on their part, an obligation to frequent the mill; and also, that they shall erect no mill within the barony to hurt the superior’s mill. But in this case the mills of Forres are not within the royalty; and if the town of Forres have voluntarily subjected themselves to be thirled to another proprietor’s mill, the bargain must stand. But the town is no further limited in the exercise of its property; and therefore any inhabitant, or any proprietor of a part of the royalty, may erect a mill within his own property, upon the hope of business from strangers who are not thirled. And this must hold *a fortiori* where a gentleman has an estate of his own sufficient to employ a mill.

The Court did not enter into the distinction, but decerned in Mr Urquhart’s declarator, “ that Tannachy cannot erect a mill within the thirle.”

Sel. Dec. No. 43. p. 48.

1753. November 21. EARL of HOPETON *against* BREWERS of BATHGATE.

No. 97.

History of
thirlage.

Bathgate is known to be a very ancient barony, having a mill, which is the only mill of the barony; and all the charters of the barony, produced as far back as the 1663, in the process by and by to be mentioned, contain the following dispositive clause: “ Totas et integras terras et baroniam de Bathgate, cum messuagiis maneriei loco, turre, fortalicio, &c. molendinis, terris molendinariis, multuris et eorum sequelis, &c. annexis, connexis, partibus, pendiculis, et pertinentibus quibuscunque, prædict. terrarum baroniæ et molendinorum.” The Earl of Hope-