

feu-dutiës, minister's stipends, and all public burdens, because they behoved to sell corns for satisfying of these, and in so far the corns were not their own, and so they could pay for no more corns than their own, neither could they be liable for dry multure, unless it were constituted by writ; especially seeing the charger libels not upon the defenders infestment, or bonds of thirlage, but upon his own infestment, only generally, as infest in the mill of the barony.

THE LORDS repelled these allegiances, and sustained the decret for all the corns except seed, horse-corn, and teind which tholled not fire and water within the thirle. See THIRLAGE.

Fol. Dic. v. 2. p. 106. Stair, v. 1. p. 80.

1665. June 24.

COLONEL JAMES MONTGOMERY *against* WALLACE and BOUIE.

THE Colonel, as heritor of the mill of Tarbolton, having pursued Bouie for abstracted multures of Drumlie. It was *alleged* for Bouie and Wallace of Garricks, who had disponed to him with warrandice, absolvitor; because Wallace and his authors were infest in the mills and multures, before the pursuer's infestment of the mill. The pursuer *replied*, That the thirlage was constituted by a decret *in anno 1569*, against the tenants of Drumlie therein mention. The defender *answered*, 1st, That the heritor was not called; 2dly, That it did not appear that these tenants did dwell in Drumlie Wallace, there being two Drumlies lying contiguous, one called the Dinks Drumlie, the other called Drumlie Wallace; 3dly, That for any possession, they offered them to prove that it was interrupted from time to time by going to their mills. THE LORDS ordained witnesses to be examined, *hinc inde*, whether the tenants in the old decret did possess Drumlie Wallace or the Dinks Drumlie; 2dly, What possession the pursuer and his authors had; 3dly, What interruptions the defender and their authors had—Many witnesses being examined, *hinc inde*; it was clear, that since the year 1653, when Caprington the pursuer's author died, there was no possession, and there was not above 28 years possession proved before, because there was no witness of that age that could have been of discretion 40 years before the year 1653; but they found it proved, that the persons mentioned in the old decret, or some of them, were possessors of Drumlie Wallace; and also there was a tack produced, set by the pursuer's author to one of the tenants of Drumlie, wherein it was provided, that the tenant should relieve him of the multures, and did not express what mill.

THE LORDS found the old decret, although the master was not called thereto, was not sufficient alone; yet with a long possession thereafter, they found the same was sufficient to constitute the astriction, and found the interruptions by going to other mills were not so frequent and long but they might have

No 119.

No 120.

Thirlage found constituted by an old decret, against tenants, with 40 years possession conform, though the heritor was not called.

No 120. been private and clandestine, and the probation during memory, before this controversy, was found to instruct anterior possession, to complete prescription. See PROOF.

Fol. Dic. v. 2. p. 106. Stair, v. 1. p. 286.

* * * Newbyth reports this case :

IN an action of abstracted multures pursued by Colonel James Montgomery of Collfield against the Tenants of Drumlie, the LORDS found the depositions of the witnesses adduced for proving of Colonel James and his authors, their possession, albeit they did not prove 40 years possession fully, yet being joined with decreets of the date 1569, and other subsequent decreets, sufficient *ad victoriam causæ*, to decern against the tenants in the multures libelled, and found the astriction thereby sufficiently proved.

Newbyth, MS. p. 29.

1672. February 2.

JOHN FORBES of Culloden *against* The MAGISTRATES of INVERNESS.

No 121.
Possession of mills, taking multures with a greater measure than the statutory standard, for 40 years without interruption, found to have a prescriptive right to that measure; a thing regulated by custom.

IN a suspension and reduction of a decret, given by the Magistrates against Culloden's miller, fining him for using of measures, for the multures and other duties, which were more than Linlithgow measure, in respect that by the act of Parliament, that measure is to be standard for all Scotland; and that the miller did transgress the same, in taking multures for the corns grinded at Culloden's mill; as likewise, because, by a contract betwixt the feuars and the Town, the feuars, in case they transgress, in taking more for the multures than the quantity agreed on, or any other point of the contract, they submit themselves to the Magistrates of the Town; the reason of the suspension and reduction was, that the act of Parliament, *viz.* 115th act K. Ja. VI. 1587. anent measures, is only in relation to buying and selling, and bears an exception of private persons, rights by infestment, tack, or contract, which cannot meet this case of duties paid to millers of thirlage, which is a particular measure agreed upon, and whereof they have been in possession past memory of man, without interruption. THE LORDS sustained the reason founded upon 40 years possession, unless the chargers would prove interruption.

Fol. Dic. v. 2. p. 108. Gosford, MS. No 460. p. 239.

* * * Stair reports this case :

1673. January 2.—THE TOWN of Inverness having obtained an ancient infestment from the King of the King's-mill of Inverness, that was then situated near the Castle of Inverness, and transported by the Town to another place of the river; they did feu the same out to certain feuars, and, by an act of thir-