1793. *February* 26. JARDINE *against* DOUGLAS, SHARP, &c.

No. 123.

The servitude of thirlage was, in this case, found to have been transferred, although the proprietor of the mill was no party to the action of division.

Fac. Coll.

*** This case is No. 9. p. 14152. *voce* RUNRIDGE.

1798. *February* 13.

The MARQUIS of ABERCORN and WILLIAM LANGMUIR, *against* The MAGISTRATES and TOWN-COUNCIL of PAISLEY, LORD DOUGLAS, and Others.

No. 124.

A thirlage of *invecta et illata* over a burgh, found not to extend to malt imported in a ground state.

A thirlage of *grana crescentia* does not comprehend wheat, none having been sown on the lands at the time of their astriction.

In 1490, George Shaw, abbot of the monastery of Paisley, granted a charter in favour of the Magistrates and community, which, besides erecting it into a burgh of barony, contained a conveyance of a variety of lands in their favour. The *reddendo* provided, "That the said Provost, Bailies, burgesses, and community of the said burgh, and their successors, shall come with their grain whatsoever, in so far as they shall grind, to our mill of Paisley, and not to any other mill whatsoever, paying therefor to us multure to a thirty-one dish only, as men abiding furth of our lands, for all other burden, exaction, question, demand, or secular service which can any manner of way be justly exacted or required by any manner of persons, furth of the said burgh and barony, tenements, mansions, yards, and acres lying within the said burgh, with the pertinents."

Certain lands belonging to Lord Douglas and others, were also liable to a thirlage of *grana crescentia* to this mill, which now belongs to the Marquis of Abercorn.

In 1795, his Lordship and William Langmuir, lessee of the mill, brought a declarator of thirlage, concluding, *inter alia*, 1*st*, That the inhabitants of Paisley should pay dry multure for malt ground before it was brought into the burgh: 2*dly*, That those defenders, liable in a thirlage of *grana crescentia*, are bound to grind at the mill the wheat growing on their lands, as well as their other grain.

A proof was led, from which it appeared, that malt brought into the town before it was ground, to be used there, had uniformly been carried to the mills in question, when there was occasion to grind it; that dry multure had sometimes been paid for ground malt brought into Paisley; and that some of the persons astricted to the mill, had brought their wheat to be grinded there, under an impression that they were bound to do so; but in neither of these last cases, had the practice been by any means universal. The pursuers further admitted, that at the time the lands were astricted, no wheat was raised on them; and that no proper machinery for manufacturing it had been erected at the mill till about thirty-five years ago.

The Court, after a hearing in presence, *inter alia*, found 1*st*, That malt, when imported into the burgh of Paisley, and when there is occasion to use it there in

a grinded state, must be carried to the Seedhill mill, and is liable in multure-dues to the proprietor or tacksman, but that nothing is exigible when it is imported in a grinded state; and, 2*dly*, That none of the defenders are liable in a thirlage of wheat or flour." No. 124.

The pursuers gave in a reclaiming petition against this interlocutor, in so far as it was unfavourable, and

Pleaded, 1*st*, Persons astricted to a mill will not be permitted to do any deed merely on purpose to disappoint the thirlage; 20th December 1743, Town of Musselburgh against Marquis of Tweedale, No. . p. . But nobody, except with this view, would import ground malt, because it spoils unless brewed immediately, and, on this account, stands in a quite different situation from meal, which the inhabitants of a burgh may, for many reasons, wish to import, in preference to oats.

2*dly*, As the thirlage to which the lands of the defenders are subjected, is of all *grana crescentia*, there seems to be no reason for excluding wheat, unless a prescriptive immunity could be pleaded, which is not pretended.

Answered, 1*st*, It seems doubtful, whether the clause in the charter 1490, is sufficient to constitute a thirlage of *invecta et illata*, over the inhabitants of the town; Ersk. Book 2. Tit. 9. § 25. At all events, the claim for dry multure on malt imported in a grinded state, is inconsistent with the nature of this species of thirlage, which comprehends such grain only as "tholes fire or water within the burgh; an expression by which our law writers understand not brewing or baking, but drying or malting; Stair, B. 2. Tit. 7. § 19, 20; Mackenzie, B. 2. Tit. 9. § 26; Ersk. B. 2. Tit. 9. § 25. It isamis take,t oo, to suppose, that the importation of ground malt can proceed alone from a desire to avoid the thirlage. It loses nothing although kept a few days; and the same motives, of profit and expediency, which may induce the inhabitants to purchase meal or flour, instead of oats or wheat, may lead them to buy ground malt in preference to barley or malt which is not ground.

2*dly*, All servitudes are strictly interpreted; and as at the time the thirlage in question was constituted, there was no wheat raised on the astricted lands, nor proper machinery for it in the mills, it is impossible to suppose, that the astriction of wheat was in the contemplation of parties; 16th July 1760, Couston against Tenants of Pitreavie No. 104. p. 16047; 13th December 1768, Wright against Rannie, No. 109. p. 16057.

The Court, on the grounds pleaded for the defenders, and because in servitudes, possession is the chief rule to be attended to, unanimously adhered to the two branches of the interlocutor above stated.

Lord Ordinary, *Eskgrove*. Act. *H. Erskine, Walter Scott*. Alt. *Cha. Brown, Tait, Arch. Campbell* junior, *Fletcher*. Clerk, *Menzies*.

R. D. *Fac. Coll. No. 63. p. 144.*