No. 59. mine these objections against the depositions, though material, because the second point decided the cause, whereby the Lords found, that Shirgarton, the defender, his author's charters by a tract of time, viz. in 1597, 1614, and 1619, bearing *cum molendinis et multuris*, (though in he *tenendas* only), *et pro omni alio onere* in the *reddendo*, did import a liberation from this thirlage, which, by the first vote, they found constituted by the charter 1541. See Stair, 7th December 1677, Henderson *contra* Arnot, No. 126. p. 10867; and 11th January 1678, Lord Balmerino *contra* Cockburn, No. 127. p. 10870. where the clause *pro omni alio onere* was found to amount to a liberation; as to the import of the clause *cum communi pastura*, in the *tenendas* of a charter, *vide* 25th November 1704, Town of Culross, (See APPENDIX.)

On the 27th of February 1705, Gartmore entered his appeal to the parliament against this interlocutor.

Fountainhall, v. 2. p. 262.

1706. *July* 11. DUNDAS *against* SINCLAIR.

No. 60.

An ancient charter of land *cum molendinis et multuris*, sustained to infer immunity from thirlage in favour of a succeeding heritor who derived no right from the obtainer of the charter.

Fountainhall.

*** This case is No. 14. p. 35. *voce* ACCESSIORUM SIQUITUR, &c.

1707. *February* 22.

The TOWN of EDINBURGH as Gubernators of Heriot's Hospital, *against* WILLIAM ALVIS, and Other Brewers in the Canongate.

No. 61.
A clause thirling all that tholes fire and water does not import that all malt brewed, but only what is kilned and cobled, within the thirle should pay multure.

The Canonmills being an ecclesiatic feu of the Canons of Holyroodhouse, came by erection into the Ballendens, Barons of Broughton, and was disponed by them, and the Earl of Roxburgh, as come in their right, in 1637, to the town of Edinburgh as feoffees in trust for Heriot's Hospital; and the feuers in Canongate, though astricted by their charters to these mills, yet of late years began to abstract, and go to Leith mills, belonging to Balmerino, or to the Stockbridge. Whereupon the town raises a process against them both, for declarator of their right, and for abstraction, and instructed the constitution of the thirlage by the Hospital's charter, and the vassals' own charters, by being the mill of the barony, by acts of Court, and by use and wont; and they denying the extent of thirlage, there was a mutual probation allowed both parties before answer, how far they have been in the immemorial use and custom of bringing all that tholes fire and water to these mills; and the defenders to prove that they have gone frequently, openly, and avowedly, in fair day-light, to other mills, or have been discharged and exeemed from the astriction by a person having right. And the probation coming this day

to be advised, it appeared that the town had not proved a clear forty years possession, so as to found upon prescription; so it came to this precise narrow point of law, What was the extent of these words in their charters, that they should bring to these mills omni grana sua quæ aquam et ignem patiuntur intra dictas terras ibidem terenda et molienda? From which words the town contended, that all malt imported by them within the Canongate, though grinded before it came in, if brewed there, must pay multure, seeing malt cannot be brewed there without tholling fire and water, and is cleared by the acts of the Baron Court. The Canongate brewers, on the contrary, alleged, that these words could import no more than but what was kilned, steeped, and cobled within the bounds of the thirlage; but, if it was malted and grinded before it came there, it had paid multure already to the mill where it was grinded, and could not *per rerum naturam*, undergo another grinding, and so could not be liable to a second multure to the Canonmills, where it was not grinded. And so Craig, Feud. p. 187. explains it, *quæ ustrina, furno vel clibano præparantur:* And Stair, Instit. p. 293. (303) says, these words of tholling fire and water are ordinarily interpreted of steeping and kilning, and not of baking and brewing; for though this servitude be severe and odious, yet that would make it a more intolerable burden. And in Sir Andrew Ramsay's case against the town of Kirkaldy, it was sustained allenarly on this ground, that he proved immemorial possession; and even as to flour, meal, and baking, it was refused, 11th December 1678, No. 39. p. 15981. and 24th November 1680, *inter eosdem*, No. 41. p. 15984.; and therefore the Hospital can never in justice require multure of that malt which is grinded at some other mill before it is brought within the Canongate. Answered for the town and Hospital, that this interpretation was *fraudem facere contractui, et contra bonam fidem*, by which vassals ought not to frustrate their master's casualties. For once allow this, the Canonmills, which presently pay £.150 Sterling of tack duty, shall be very little worth; for the brewers and baxters shall only buy grinded malt, and import it so within the thirlage, and then the mills shall get nothing. The Lords thought, if they did so, they used no more than their own natural right, of which they could not be restrained; and therefore, though they declared them thirled *quoad* all corns imported ungrinded; yet if it was malted and grinded ere it came within the Canongate, found it was not liable to pay any multure to the Canon-mills in that case. There was another point touched in the debate, that the brewers made use of iron hand mills in their own houses, which the Lords seemed to think an abuse; but it was not decided. It was a favourable topic that this affair prejuged an Hospital; but God will not have *ex rapina holocaustum*, we must not rob our neighbours to give it in charity to others.

No. 61.

Fountainhall, v. 2. *p.* 351.

*** Forbes reports this case.

In the process for abstracted multures and declarator of astriction, at the instance of the Administrators of Heriot's Hospital and their tacksman of the Ca-

No. 61. nonmills, against the Brewers in the Cannongate: The pursuers claimed as the subject thereof all malt brewed within the thirle, though made and grinded else where, by virtue of a clause in the defenders' charters, viz. " quod omnia grana sua quæ aquam & ingnem patiuntur infra terras, adportabunt ad dicta molendina, ibidem terenda seu molienda, pro solutione, &c.

Alleged for the defenders: That the said clause in the charters doth not extend to malt made or grinded without the thirle, though brewed there. Because, 1*mo*, Malt grinded without the thirle cannot be properly termed *grana infra dictas teras*: And the clause imports the astriction of such grain as after tholling fire and water is to be carried to a mill, which agrees not to malt brewed; unless one could fancy that draff were to be grinded over again. Besides, this preternatural servitude upon the product of another's ground, is to be strictly interpreted: And the Lord Stair asserts that tholling fire and water doth not extend to baking or brewing, Instit. Lib. 2. Tit. 7. § 20. where positive prescription has not over-ruled the case. It was also so decided November 24, 1680, Ramsay against the Town of Kirkaldy, No. 41. p. 15984.: Though baking be a tholling fire and water with a witness. 2*do*, If these words were to be understood in the rigorous literal acceptation, all meal and flower, rice, french barley, knocked bear and mustard, brought into this populous place, behoved to pay multure; which were absurd and intolerable.

Replied for the pursuers: Proprietors may astrict their tenants to their own mill, and where thirlage is expressly reserved in a feu charter, (which is but *perpetua locatio*) that reservation is to be most amply interpreted in favours of the Master. For albeit thirlage acquired by long possession and acts of court against persons who are not vassals to the proprietor of the mill, are strictly to be interpreted as being a restriction of property; yet when the *pleno jure dominus* gives off the *dominum utile* to his vassal, reserving to himself his ancient right, that reservation should admit of a more large interpretation; the superior being presumed in consideration thereof to have gotten a less price; as a reserved liferent is in the construction of law, a frank tenement; whereas a constituted liferent is a servitude that suffers a strict interpretation; besides, the preservation of mills (which thirlage is the great mean of) is carefully provided for in our law; whereby a person is not allowed to build a mill even upon his own ground, so as to make the water of an upper mill restagnate. As to the clause of tholling fire and water, the same doth certainly comprehend brewing, whereby the grain tholes fire and water to an eminent degree. And this is the opinion of Spottiswood, under words MILLS and MULTURES, and of Craig; though my Lord Stair seems to say the contrary. So that our lawyers are divided in their sentiments about the import of this clause. 2*do*, If in any case the words may admit this extensive signification, it must be here, where brewing is the very subject of the thirlage; and if that were excepted the defenders might easily evacuate the servitude by steeping and kilning their bear in hired malt kilns without the barony, which would sink the Hospital's rent two thousand pound Scots *per annum*, and so necessarily diminish the number of the poor children that are entertained there. 3*tio*, By acts of the Baron Court of

the Canongate, and of the Town Court of Edinburgh who are barons of the Canongate, this astriction hath been asserted, and all within the bounds have been discharged to buy any grinded malt but what is grinded at the Canonmills. Nor was the matter ever called in question before. And it is a mistake to think that thirlage is so odious, when it is so natural and inherent to the mill of the barony, especially of Kirklands, or to the King's mills: And it has been found by decisions to extend further than was expressed, June 26, 1635, Laird of Waughtoun against Hume of Ford, No. 25. p. 15971. No. 61.

Duplied for the defenders: We are not to carry servitude so high, as to defeat liberty and property. And though what is only brewed within the thirle be found free, the Canonmills will have an effectual thirle of the landwart Barony of Broughtoun, and such as can be more conveniently served there than else where, and of grain steeped within the thirle. Nor are we to give charity by way of injustice; for the divine law forbids even to favour the poor man in his cause. 2*do*, It is absurd to say that any superior can by his acts of court subject his vassal to an extravagant servitude not provided in his charter. And as to the authority of Craig, and of Spottiswood, (who expresses his opinion something obscurely) it cannot be sufficient to take away the defender's interest; seeing my Lord Stair and Sir George Mackenzie (who wrote after these Gentlemen, when the matter was better understood, and the principles of liberty and property against the ancient Longobardick servitudes more asserted) lay it down as a principle, that tholling fire and water imports only steeping and kilning.

The Lords found that the clause thirling all that tholes fire and water, doth not import that all malt that is brewed within the thirle should pay multure, but only that which is kilned and cobled within the thirle.

Forbes, p. 134.

1797. *March* 14. NEWMAINS *against* BEMERSIDE.

Where the teinds originally belonged to the person who constituted the thirlage, the teinds are understood to be astricted. No. 62.

Fountainhall.

*** This case is No. 38. p. 10727. *voce* PRESCRIPTION.

*** See Countess of Rothes, No. 426. p. 11256. where teinds, not *decimæ inclusæ*, found free of multure.

1708. *November* 24.

MR. WILLIAM HALKERSTON, (or HAXTON), of Rathillet, *against* JOHN MELVIL of Mordicarnie.

No. 63.
Thirlage to the King's

The lordship of Fife having fallen to the Crown, by the forfeiture of Murdoch Earl of Fife, King James V. *in anno* 1535, granted a feu-charter to the defender's