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

No. 63. mill presumed, and not elided, by the clause *de molendinis et multuris* in the *tenendas* of a charter from the King.

predecessor of the lands of Mordicarnie and Star, a part of the lordship, *cum molendinis et multuris* in the *tenendas;* thereafter, *in anno* 1541, feued out to the Earl of Crawford another part, called the lands of Rathillet, with the mill thereof, and multures of Mordicarnie and Star; which right came, by progress, into the person of Mr. William Halkerston; who pursued a declarator of astriction against John Melvil, present heritor of Mordicarnie and Star, alleging that the defender's lands were thirled to his mill of Rathillet; because it was one of the mills of the united barony or lordship of Fife, and the King's mill; all the land of which lordship are presumed to be astricted to the mills thereof, unless immunity be clearly documented. For as, in general, it was never controverted, that the King's mill carries the astriction of his own lands, and all the lands of a barony have been found thirled to the mill thereof, (July 17, 1629, Newliston against Inglis, No. 20. p. 15968.) so the defender's lands are expressly thirled to the pursuer's mill, by the charter 1541, which bears, in the narrative, "That the lands and mill of Rathillet had been possessed by the Earl and his predecessors, as rentallers and kindly tenants, since the days of King James IV." which is as plain an evidence as can be, in so ancient a matter, that the defender's lands were thirled to the pursuer's mill; and that there was such a mill before the defender's charter, at least is sufficient to transfer upon him the burden to prove that there was none; especially considering, that the tenants of the defender's lands are proved to have gone some years, a matter of forty years ago, to mill, though they performed no services, and paid only for multure, as strangers, a peck of six firlots.

Answered for the defender: It appears not that, at the date of his charter 1535, there was any mill upon Rathillet, to which his lands could have been astricted, or that they were in use to go to any other mill of the lordship of Fife as such; so that then Mordicarnie was *terra libera*, and could not be astricted *in anno* 1541, after the King was denuded. And though it were to be presumed, that when both the defender's land and the pursuer's mill belonged to the King, these lands were thirled to the mill, and that, from the pursuer's possession of the defender's multures a great many years ago, it were presumed *retro*, that the King had the same possession before his granting either of the foresaid charters, the clause *cum molendinis et multuris* in the *tenendas* of the defender's charter may concur to elide such a presumptive astriction, and be a title of prescribing absolute immunity, or, being joined to long possession of freedom, by going to other mills, (which is the defender's case), may overbalance the presumption of an imaginary thirlage, not instructed to have been clothed with any possession for 100 years, and with very little thereafter; albeit such a clause could not infer exemption from a clear antecedent astriction; so a clause *cum molendinis et multuris*, even in the *tenendas* of a charter granted by the Sovereign, is found to import freedom from thirlage; January, 1692, Lord Newbyth *contra* Lady Whitekirk, No. 51. p. 15989. and December 7, 1665, Veach *contra* Duncan, observed by Dirleton, No. 31. p. 15975. *2do*, No mill can have the privilege of a King's mill as to

the multure of any lands, except where possession is instructed while the property stood in the King's person; February 5, 1635, Dog *contra* Mushet, No. 117. p.10853.; January 3, 1662, Stewart *contra* Fetters of Aberledno, No. 118. p. 10854. For, otherwise, all mills would be the King's mills, seeing all feudal rights, in Scotland, flow from the Crown, and some time or other were the Sovereign's property. It is a mere imagination to advance, that all parts of a barony are, by a natural servitude, thirled to the mill thereof; for, at this rate, no writ would be necessary to constitute any thirlage, and the whole nation would find themselves thirled; because all lands lie either in some lordship, barony, or stewartry, &c. and so behoved to be thirled to the mill of the respective jurisdictions. To give such a privilege to the mill of a barony, were to put it in a better case than the King's mill, which hath no claim to thirlage, without an express constitution, or proof of use of coming to it. There are a many of decisions declaring lands not astricted to the mill of a barony, where it is not formally constituted or conveyed as the mill of the barony; and presumptions *retro* are not to be admitted for servitude against liberty, as was decided betwixt Fullertoun of Crosbie and Baillie of Monktoun.—See APPENDIX. No. 63.

Replied for the pursuer: Whatever might be pretended for the necessity of possession to astrict the King's lands to his own mill, where there is no evidence of the astriction in writ, possession is not necessary here, where the thirlage was expressly constituted by the charter 1541; yea, it is impossible to prove possession immediately subsequent to so old an evident, except by decrees or acts of Court, which are not required to the preserving a right of thirlage. Therefore, seeing the pursuer has proved acts of possession, as far as the memory of man can reach, the thirlage once constituted by the charter aforesaid cannot be lost for not proving possession within forty years thereof, which is presumed *retro;* for, otherwise, hardly could any ancient right be secure. The decision betwixt Crosbie and Monktoun doth not meet; for there, the Lords would not presume one year *retro* to perfect the positive prescription, where law requires a positive proof of forty years; but here, a servitude once constituted is preserved, by acts of possession as ancient as the memory of man, from falling by the negative prescription; and the presumption *retro* necessarily takes place, it being impossible to prove, by witnesses, things without the compass of man's memory. The defender's use of paying out-town multure only, without being liable to mill-services, doth not destroy the thirlage, but only diminishes the effect of it.

The Lords found the defender's lands of Mordicarnie and Star to be thirled to the pursuer's mill of Rathillet; but found the defender and his tenants liable to pay for multure a peck of six firlots, as strangers paid.

1709. *January* 19. & *February* 1.—In the declarator of thirlage at the instance of Rathillet against Mordicarnie, the Lords, November 24, 1708, having found the defender's lands thirled to the pursuer's mill, the defender alleged, That the thirlage cannot extend to farm-duty, horse corn or seed, nor to grain that the tenants can spare

No. 63. to sell over and above their rent and family exigence; because, 1*mo*, This is only a presumptive thirlage, founded on the Sovereign's privilege, and possession presumed *retro*; and quod contra juris communis regulas introductum est, non est extendendum, but, as all privileges, is to be strictly interpreted. Again, thirlage constituted by use or custom must be regulated by use or custom; for then, tantum præscriptum, quantum possessum, seeing the effect cannot exceed its cause. And the pursuer cannot prove that his authors or predecessors were ever in possession of multures for the defender's farms, or for spare bolls sold by the tenants. Nor can it be presumed *in dubio*, that either the master would consent to impose a dry multure upon himself for his farms, or upon his tenants, or that tenants would subject themselves to such a dry multure, without express paction. And dry multure cannot be avoided, if either the master's farm or the tenants' spare bolls be thirled; seeing both these must be sold in the market to merchants who often live at a great distance, and neither will nor can bring them to the thirle-mill. Besides, the defender can be liable to no other thirlage than as it was constituted when his lands belonged to the King in property, at which time no part of the farms could be thirled; seeing *res sua nemini servit.* Again, the defender and his tenants can be in no worse case by this presumed thirlage than if they had been expressly astricted to grind their corns at the mill of Rathillet, which would only have extended to such corns as they had occasion to grind for the use of their families; because *in dubio, respondendum pro reo et pro libertate*; so, January 21, 1681, Grierson *contra* Gordon, No. 129. p. 10871. express consent or prescription seemed necessary to infer a thirlage of farms or corns sold by the heritor; and July 11, 1621, Keith *contra* Tenants of Peterhead, No. 13. p. 15963. tenants were only found liable for abstracted multures of corns grinded by them at other mills than that to which they were astricted. 2*do*, *Et separatim, dato non concesso*, that the defender and his tenants had been liable to such an astriction as the pursuer pretends to, it is prescribed *non utendo*, since it was never claimed within the memory of man. And as they have prescribed immunity from performing mill-services, the natural consequence of thirlage, much rather may they prescribe immunity from such an odious servitude as dry multure.

Replied for the pursuer: 1*mo*, Thirlage simply constituted being a servitude upon the fruits of the ground that are grindable, either into malt or meal, whereby they are said to thole fire and water, it must affect the whole fruits or growing corns, except such as are appropriated to other uses than for malt or meal, as seed and horse corn. For now *multura* is not granted simply *pro molitura*, but thirlage is a beneficial servitude upon another's property, which sometimes is sold dear enough. My Lord Stair lays down for a rule, that thirlage, simply expressed, without mention of *omnia grana crescentia*, extends to all corns growing upon the ground abstracted to other mills or sold; and so it was decided, June 26, 1635, Laird of Wauchton *contra* Home of Ford, No. 25. p. 15971. It is to no purpose to urge, that this is only a presumptive thirlage; for, wherever a thirlage is once found, it hath all the consequences naturally arising from it; and, therefore, so

hath this as well as any other indefinite astriction. Again, if the pursuer's thirlage were restricted to what shall actually be grinded within the thirle, it would be of no value, and could be easily evacuated by selling the growth of the ground, and buying meal and malt. The pursuer doth not here seek dry multure; for by that we understand a certain quantity of multure precisely payable, without respect to the quantity of the growth of the ground; whereas, the pursuer claims no special quantity of multure, but only that the growing corns which are destined to thole fire and water should pay the ordinary multure, conform to the decision, January 14, 1662, Nicolson *contra* Feuers of Tillicoultry, No. 119. p. 10856. Besides, there is the same reason for the astriction of the farm, in this case, as if it were payable in meal; and farm meal would be certainly astricted. And though, while the King remained proprietor of the lands, the farm payable by the tenants was not astricted, or rather the astriction thereof could not take place, because it was payable to him who had the right of astriction, yet how soon the defender's lands were feued out, the thirlage took effect as to the farm-duty payable by the tenants to the feuer, who was not heritor of the mill. For where a Baron thirles his lands to his own mill, the farm, so long as in the tenant's hands, is thirled, though, by the accidental circumstance of being paid to the master, (who cannot exact thirle from himself), it becomes free. And, therefore, if a money-rent be paid in lieu of farm, the whole grindable corns in the tenant's hands remain astricted. 2*do*, The servitude itself being found constituted, and preserved from prescription, the natural consequences of it are likewise preserved; except as to bygones preceding forty years, as it is in annual prestations. There is a great difference betwixt mill-services and the astricted multure; for suppose the former are generally consequences of thirlage, they are local, and, being of a different kind from multure, could not be preserved by possession of the multure, though possession of the multures of a part preserves and keeps up all multures arising from the nature of the right. As to the case betwixt Keith and the Tenants of Peterhead, it is singular, and contrary to subsequent decisions; and yet it doth not meet the case; for there the tenants were not found liable for the farm bought by them from their master, and sold to others; because the master was liable for the multures thereof himself. No. 63.

Duplied for the defender: The decisions founded on by the pursuer are not to the purpose; for, in the Laird of Wauchton's case, there was a thirlage of an heritor's whole lands, and the *invecta et illata* constituted in writ, under which it is no wonder that farms or corns sold were brought; and, in that of the Feuers of Tillicoultry, the Baron was infeft in the mill of the barony, and proved forty years possession of multures. There is not the same reason for farm-victual being liable to thirlage as there is for farm-meal; because, this is extended to farm-meal, in respect the tenants are undoubtedly thirled *quoad* all corns growing upon the ground which they have occasion to grind; but as tenants have no occasion to grind farms payable in victual, so, to put them under such a necessity, were to make them liable to dry multure, which is absurd. It is frivolous to object,

No. 63. that the thirlage would be of no value, if the masters' farms and the tenants' spare bolls were exeemed; seeing the thirlage is of the same value as at its first constitution; and nothing hath occurred since to make the same heavier upon the defender; seeing *incommodum non solvit argumentum*, cases must be decided according to the principles of law, without respect to inconveniencies that may attend the decision; so, November 24, 1680, Sir Andrew Ramsay *contra* Town of Kirkaldy, No. 41. p. 15984. it was found, that a thirlage *quoad invecta et illata*, could not hinder the town to furnish their families with bought meal, upon pretence that the thirlage would thereby be evacuated.

The Lords found, That the thirlage of the defender's lands to the pursuer's mill was to be understood with the exception, not only of seed and horse-corn, but also of so much of the victual payable by the tenants in name of farm as is not consumed in the heritor's family residing within the thirle; but that the astriction reacheth what of the farms is so consumed: And found, that any excresce bolls more as may be a sufficient maintenance for the tenants and other inhabitants upon the ground, being sold by them, are free of thirlage; but that they could not elude the thirlage, by selling the *grana crescentia*, and buying meal to maintain their families: And that foreign corns bought in place of any of the growth of the ground sold, must pay multure: Yet it was found, that if the tenants, by reason of the scantiness of the crop, not having corns sufficient for the maintenance of their families, be obliged to buy for that use, these bought corns are free of astriction.

Forbes, p. 283. & 301.

*** Fountainhall reports this case:

Haxton of Rathillet pursues a declarator of thirlage to his mill, *contra* Melvil of Mordicarnie; and for his active title, he produces his own infeftment, with a charter under the Great Seal from King James V. in 1541, to the Earl of Crawfurd, of the said mill of Rathillet, bearing expressly the lands of Mordicarnie and Star to be thirled and astricted thereto. Alleged, *Non relevat* that your charter mentions my lands, unless my rights bore the astriction as well as yours; but *ita est*, the lands of Mordicarnie were feued out by the King, in 1535, seven years before your charter, without the least mention of any astriction to your mill, (which *non constat*, if it was then built); but, on the contrary, my right bears, *cum molendinis et multuris*. Answered, Both the pursuer's mill and the defender's lands of Mordicarnie were anciently the property of the Earl of Fife, and by forfeiture of Murdoch, the last Earl, in King James I.'s time, the same devolved to the Crown; so this becoming one of the King's mills, what hindered him to thirle his lands of Mordicarnie to his own mill of Rathillet, as the mill of the barony? and your clause of the mill and multures can never exeem, not being in the dispositive part, but only in the *tenendas*; and it is plain from Craig, Feud. Lib. 2. Dieg. 8. that *in molendinis regiis* no constitution is required, but use of coming to the mill; and

by the Lords' decisions, 3d January, 1662, Stewart *contra* Feuers of Aberlednoch, No. 118. p. 10854.; and 5th February, 1635, Doig *contra* Mushet, No. 117. p. 10853.; and, before all these, Balfour, in his Practicks, Tit. MILLS AND MULTURES, tells of an ancient decision, 5th February, 1521, The King's Comptroller *contra* The Tenants of Rothsay, where 30 years use of coming to the King's mill was found sufficient *. Replied, *Non constat* this was one of the King's mills; and though, of old, most of the lands of Scotland were the King's, till he gave them out among his Barons at Scoon, yet now they are in private men's hands, and have been so for many ages; and coming to a mill is *actus voluntarius et meræ facultatis*, and never gives a right, though it were *per centum annos*, liberty being *juris naturalis*, and thirlage odious, and not to be extended; and therefore Mordicarnie ought to be assoilzied from this invidious declarator of astriction. The Lords found the thirlage sufficiently astricted by the charter of Rathillet in 1541; and that Mordicarnie's right, though prior, gave him no exemption, seeing the clause of mills and multures was only in the *tenendas*; but to know the use and custom, whether of coming to this mill, or of open, avowed, publicly going to other mills, they allowed a conjunct probation to either party; which, coming to be advised this day, the Lords thought neither of the parties had fully proved, the pursuer not having distinctly proved 40 years peaceable possession, nor the defender 40 years immunity and exemption from coming to that mill, and going at his pleasure to other adjacent mills; and therefore decerned in Rathillet's declarator of thirlage, and found Mordicarnie's lands astricted to his mill; but that the quantity proved was only a peck of six firlots, which is only the 24th curn, a very easy duty; and found them free of all other services, of bringing home millstones, &c. because proved, they were never exacted, except only cleansing the aquæduct or mill-lead. Some thought this constitution but a presumptive thirlage, and more easily taken off, unless there had either been decrees against them as abstracters, or acts of Court thirling them when they withdrew, or seizing on their corns *via facti*, when they were intercepted going to other mills; but the plurality found, *ut supra*. No. 63.

1709. *Jannary* 7.—In the cause between Rathillet and Mordicarnie, the thirlage being constituted, the extent of it was this day debated; and deduction being craved for teind, seed, and hore-corn, these three were yielded. Then the feu-payable by Mordicarnie to the Crown, consisting of victual by the *reddendo* of his charter, was declared free of multure. The deductions remaining were for the farm and rent payable by the tenants to the master and the heritor of the ground.

Teind, seed, horse-corn, and corn paid as rent, found free of multure. See No. 28. p. 15974.

* Balfour's words are as follow:—" Gif ony tenant or occupyaris of ony landis, and thair forbearis, has bene in continual use, be the space of threttie zeiris, in coming to ony miln pertenand to our Soverane Lord, and in paying thair multuris to the fermoraris of the samin miln, or utheris havand right thairto, gif thay pass away fra the said miln, thay aucht and sould nevertheless pay the said multuris after the modification of the Judge."

Balfour, p. 494.

No. 63. The Lords generally agreed, that this was not liable to multure; but some urged this exception, that if the master dwelt within the thirle, and consumed his rent in meal and malt, in so far it ought to pay multure; but not for what he sold or brought into his house from other parts not within the thirle. Others yielded, if he laboured a mains, or any other part of his own lands, in so far as he possessed he should be thirled; but what he had in tenants' hands, who paid him farm, he could not be liable, as Dury observes, 11th July, 1621, Keith *contra* Tenants, N. 13. p. 15962. where the master's farm is multure free, unless he grind it at another mill, which is not to be supposed that he would go by his own. Some asked, What if he bring corns for the use of his own house from other lands belonging to him, lying without the thirle? but it was thought that these could not pay multure. It was contended, If the farm was declared multure-free, then the thirlage might be rendered altogether elusory and ineffectual, for the tenants might sell the remainder, and buy meal for the use of their families, and plead it was not liable. Others thought this would fall under the head of dole and fraud, and the corns surrogated in the place would be liable. The Lords, by plurality, found the master's farm simply free of multure, whether he consumed it in his own family or not; for they urged, whilst the lands were in the King's property his rent was multure-free, and so should his vassals and feuers, unless they actually laboured some of the lands themselves.—*Vid.* This restricted, 1st February, 1709, (*infra*).

The next question was, If the tenant should pay multure for what excresce of corns he had after sowing the ground, paying his master's rent, and maintaining his own family—Suppose he has a boll or two which he carries to the market, and sells, to pay his oak and iron, his servants' and shearers' fees, if that should be multure-free? The Lords inclined to think so; but it was not decided at this time.

See it *infra*, 1st February, 1709. *Vide* Dirleton's decisions, 3d July, 1675, Bairdener, No. 38. p. 15980.; 26th June, 1635, Waughton, No. 25. p. 15971.; and Stair, 23d January, 1673, Bairdener, No. 122. p. 10861.

1709. *February* 1.—In the cause between Rathillet and Mordicarnie, mentioned *supra*, the Lords this day reviewed that part of their interlocutor, finding the master's farm simply free of multure; and now, by plurality, they restricted the exemption to what he sold; but if any part of it was consumed in his family within the thirle, they found that liable. The next point decided was, If the tenant had any superplus bolls more than paid his rent, and sold them in the market, to buy oak and iron, &c. if that excresce should be liable in multure? and the Lords found it was not, seeing the multure is truly *pro molitura*, and being relatives *mutuo se ponunt tollunt*; and if he have no use for it in the maintaining of his family, but only to pay his country debts, ought not to be subject to multure.

Fountainhall, v. 2. p. 464, 479, 486.

*** Dalrymple also reports this case:

No. 63.

1704. *December* 27.—Rathillet's author being infeft in the mill of Rathillet, and *per expressum* in the multures of Mordicarnie and Star, *in anno* 1541, he, as having a connected progress from them, pursues a declarator of astriction against Mordicarnie, heritor of these lands.

The defender alleged, 1*mo*, *Non apparet* that ever the defender's lands were astricted to the pursuer's mill; 2*do*, *Esto* the same had been anciently astricted, yet these lands being feued out, in the years 1527 and 1536, in favours of the defender's author *cum molendinis et multuris*, they became free of that servitude.

It was answered, 1*mo*, The defender's lands are a part of the lordship of Fife, which was the King's property, and the mill of Rathillet the King's mill, within the same lordship, and consequently presumed to be thirled, without any further constitution; for all lands lying within a barony are presumed to be thirled to the mill of that barony; 17th July, 1629, Newliston *contra* Inglis, No. 20. p. 13968.; much more is the King's property presumed to be thirled to his mills; 2*do*, Being once thirled, the clause *cum molendinis et multuris* operates no liberation, unless it were in the dispositive clause; whereas, it is here only in the *tenendas*, which comes neither under the observation of the Sovereign, nor of his Ministers in the Exchequer, but is added in the Chancery of style, as was found, 3d January, 1662, Stewart *contra* The Feuers of Aberledno, No. 118. p. 10854.

It was replied: That neither the feuers of a barony nor of a King's property are presumed thirled, unless there be a constitution or long possession; 29th June, 1665, Heritor of Kethock-mill *contra* The Feuers of the Barony, No. 32. p. 15975.; 5th February, 1635, Doig *contra* Mushet, No. 117. p. 10853.; and the forecited case, Stewart *contra* The Feuers of Aberledno; in all which possession was required; 2*do*, A feu of lands *cum molendinis et multuris* only in the *tenendas* liberates, because the *tenendas* are explicative of the dispositive clause, and the style could not express mills and multures, unless it were a natural consequence of the feu granted without reservation of the multures.

It was duplied: The presumption lies for the King, and every Baron, that they would improve their property to the best advantage; and it being in the power of an heritor to thirle his lands to his mill, he cannot be presumed to neglect such an easy and plain advantage; and possession may fortify the presumption, and therefore is noticed in several decisions; but the practiques do not proceed upon possession; and in this case there is also a speciality, that the feu of the mills does expressly contain the thirlage of the defender's lands.

"The Lords found the thirlage was presumed anterior to the charters of either party, and that the defender's feus from the King *cum molendinis et multuris* in the *tenendas* did not liberate his lands from that servitude."

No. 63. In this case, it was not clear in the debate, whether the lands were in use to go to the pursuer's mill, or freely to other mills, without being called in question by the pursuer or his authors.

Dalrymple, No. 54. p. 69.

1709. *July* 22.

The FEUERS of DUNDAFF *against* DAVID MADRIL of Muir-mill.

No. 64.
Out-sucken multures.

In the process of declarator, at the instance of the Feuers of Dundaff against David Madril, for declaring the pursuer's lands free of any astriction to the defender's mill, called the Muir-mill, the pursuer's charter bearing this clause,—"They always coming to the said mill with all corns grindable growing upon their lands, which they should happen to grind, and paying multures and knaveship, and doing other duties for grinding thereof used and wont, and upholding the said mill, mill-house, dam, and watergang thereto, conform to use and wont, and also bringing all other corns, as well malt as others, which they shall happen to bring within the bounds of these lands, to be grinded thereat, for out-sucken multure allenarly,"—the Lords found the said clause to import a thirlage, and that the pursuers could grind none of the foresaid corns at any other mill.

1709. *December* 23.—In the declarator of immunity from thirlage at the instance of the Feuers of Dundaff against David Madril, the Lords, 22d July last, having found, that the pursuers were astricted to the defender's mill, the pursuers now allege, That by the astriction they are only bound for in-sucken multure of such of the *grana crescentia* as they either by necessity or choice happen to grind; and that they are at liberty to export the growth of their ground; the reason of thirling corns imported, and freeing what is carried out, being, because in these muirland places they have more profit by selling their oats in market than by making meal of them.

Answered for the defender: The pursuers can grind at no other mill any corns belonging to them, (seed and horse-corn excepted), whether growing upon their own lands, or brought within the same from other places; for, if they were permitted to sell or dispose upon the *grana crescentia*, and buy meal and malt elsewhere, for the use of their families, the thirlage would be quite eluded.

Replied for the pursuer: Thirlage is odious, and clauses of immunity are to be favourably interpreted; and the prejudicial consequence to the defender's mill, by allowing the pursuers a faculty to grind or not grind there, at their pleasure, is of no weight to overturn the express words of their charters; so the Lords decided, in March, 1682, betwixt the Earl of Cassilis and the Tenants of Maybole, No. 46. p. 15987.; and in the late case of Rathillet against Mordicarnie,