"The Lords found, That the pursuer has not instructed that the defenders in this cause, or the tenements in which they live, are subjected to the thirlage of *invecta et illata;* and therefore found, that the defenders are at liberty to grind their malt where they choose."

No. 107.

Act. *John Dalrymple.*

G. F. *Fac. Coll. No.* 38. *p.* 262.

1766. *June* 26.

SIR WILLIAM MAXWELL of Calderwood *against* His VASSALS.

No. 108.
The clause of use and wont interpreted by possession.

Sir William Maxwell of Calderwood having granted many feus, several of which had existed above two centuries, thirled his vassals to his mill by a general reference of multures used and wont. This general clause was interpreted by possession to be *omnia grana crescentia*, with no other exception as to the oats, but of seed and horse-corn.

The teinds of Sir William's estate belonging to the College of Glasgow, the vassals had been in use, past memory of man, to pay to the College certain bolls of oat-meal instead of the *ipsa corpora*, which led them, as aforesaid, to bring all their oats to their superior's mill, the teind included. But coming, in process of time, to be more cunning lawyers, they formed this argument, That the family of Calderwood could not be understood to thirle to his mill the tithe which did not belong to him, but to the College; nor was it in his power to thirle that subject, had he intended it. When this matter came before the Court, it was admitted, that the College could not be barred by any agreement between Calderwood and his tenants from drawing their tithe *ipsa corpora*. But then it was contended, that while meal is paid, there is nothing to hinder the vassals from binding themselves to grind at their superior's mill the corn from which that meal is produced. That this can be done by a written contract is undeniable; and it is in effect done by a contract, when done by prescription; because prescription in servitudes rests upon no other foundation than a presumption that a covenant had actually been made.

"Found, That as the teind payable to the College of Glasgow is payable in rental bolls of meal, therefore, that the oats for said meal must be grinded at the superior's mill, and must pay in-town multure according to use and wont."

Sel. Dec. No. 246. *p.* 319.

1768. *December* 13.

JAMES WRIGHT, Tacksman of Milntoun-mill, *against* THOMAS RANNIE, Tenant in Huntlaw, and JAMES PRINGLE, Tenant in Limpuckwells.

No. 109.
Thirlage of victual in ge-

The defenders, by their leases, were bound to grind all their *grindable corns* at Milntoun-mill; and, for some time after the commencement of their tacks, manu-

No. 109.
neral does not comprehend wheat, where the mill is not properly constructed for grinding it.

factured their wheat, with their other grain, at that mill; but some mills with marble millstones for grinding wheat having been erected in the neighbourhood, and they having carried their wheat to these, the pursuer brought a process against them for abstraction.

Pleaded for the defenders: The mill being a common corn-mill, is not fit for grinding wheat, and therefore that species of grain cannot be understood to be comprehended under the astriction; so it was found, 16th July, 1760, Couston *contra* Tenants of Pitreavie, No. 104. p. 16047.

Answered for the pursuer: Wheat was in use to be sown in the defenders' farms prior to their tacks, and yet they became bound to grind all their *grindable corns* at this mill. As the words comprehend wheat, so the practice of the defenders in carrying their wheat to the mill for several years after their tack, shews their sense that they were bound to grind it there. This being the case, it ought not to exempt them from the thirlage, that mills were afterwards erected of a better construction for grinding wheat. Improvements may be made upon mills of every kind; but that ought not to defeat contracts of thirlage entered into when such improvements were unknown.

In the case of Pitreavie, though it appeared that wheat had been sown in the land about a century before, yet it had been discontinued for a considerable time previous to the commencement of the tacks.

"The Lords assoilzied the defenders."

Act. *Arch. Cockburn.* Alt. *Rob. Sinclair.* Clerk, *Gibson.*

A. R. *Fac. Coll. No.* 82. *p.* 146.

1768. *December* 13.

JOHN COLTART, Writer in Dumfries, *against* JOSEPH FRASER of Little Cocklick.

No. 110.
Effect of a clause *cum molendinis et multuris* in the *tenendas* of a charter from a subject.

In 1554, the forty-nine merk two shilling land of Kirkpatrick-Durham, with the mill thereof, and astricted multures, were feued by the abbacy of New-abbay, or Sweetheart, to the Earl of Nithsdale.

These lands had been alienated by the family of Nithsdale at different periods. The lands of Drumconchra being part of them, had been early feued to M'Lellan of Barclay, and came into the person of the defender in 1754.

The pursuer having acquired right to the mill in 1763, brought a declarator of astriction against the owners of the several lands comprehended under the forty-nine merk two shilling land of Kirkpatrick-Durham.

By the defender was produced a charter from the Earl of Nithsdale, 1706, containing a *novodamus*. In the *tenendas* were the words, *cum domibus, molendinis, et multuris*, and the feu-duty was declared to be *pro omni alio onere.* There was likewise produced a charter of resignation from the Crown, 1715, with the *tenendas* in the same terms. In the title-deeds of the other lands, the thirlage was expressly reserved.