burgh of barony wherein corn was daily imported, of the growth of other lands, that *quoad invecta et illata* he might build a mill of his own, to which it might come, and which could not be construed to be in emulation of Greenock, seeing he was to take nothing of his thirlage from him; and Craig, speaking of mill-multures, thinks any heritor may build a mill on his own property, though his lands be thirled to another mill, providing he do no wrong thereto, but only take out-landish sucken, and not grind corns that are astricted. But this is a temptation to transgress, and the remedy the other has of pursuing them for abstracted multures, when the transgress is not sufficient. And the decision Skene and Dundas, No 5. p. 5008.; does not come up to this point; for there it was controverted whether Hallyards was thirled or not; and therefore the LORDS would not, *medio tempore*, ordain his mill to be summarily demolished; and therefore the LORDS discharged Carsburn to use either hand-mills or curns in prejudice of Greenock's astriction. No 5.

Fol. Dic. v. 1. *p.* 574. *Fountainhall, v.* 1. *p.* 674.

1710. *December* 19.

The MAGISTRATES of EDINBURGH, and the TACKSMAN of their Mills, *against* JEAN ALEXANDER, Relict of Bailie ADAM CLEGHORN, Brewer in Edinburgh. No 6.

A charter granted to a Royal Burgh, containing this clause, *una cum molendinis et cæteris pertinentiis suis*, was found to constitute a thirlage, and, of consequence, to restrain the brewers from using hand-mills for grinding malt, though the brewers founded on the common presumption of liberty, and on their *reddendo*, which was only watching and warding; but it was found incumbent on the Town to prove possession, for preserving their thirlage from the negative prescription.

IN the action at the instance of the Magistrates of Edinburgh, and the Tacksman of their mills, against Jean Alexander, for abstracted multures of malt, brewed within the liberties of the Town; the pursuers founded upon an ancient charter, granted by King Robert the Bruce to the Town of Edinburgh, bearing, 'Sciatis nos dedisse et ad feudifirmam dimisisse, et hac præsenti carta 'nostra confirmasse burgensibus burgi nostri de Edinburgh, prædictum burgum 'nostrum de Edinburgh, una cum Portu de Leith, molendinis et cæteris per-'tinentiis suis, tenend. et habend. eisdem burgensibus et eorum successori-'bus de nobis et hæredibus nostris libere, quiete, plenarie et honorifice per 'omnes rectas metas et divisas suas, cum omnibus commoditatibus, libertatibus 'et asiamentis quæ ad dictum burgum juste spectare solebant tempore bonæ 'memoriæ Regis Alexandri, predecessoris nostri ultimo defuncti, reddendo 'inde nobis et hæredibus nostris annuatim dicti burgenses, et eorum successo-'res, 52 mercas Sterling, ad terminos Pentecostes, Sancti Martini in hieme 'pro equali portione:' Whereby they *contended*, That a right of thirlage was clearly constituted in favour of the Town, confirmed and cleared by subsequent charters from the Sovereign, in the years 1603 and 1636, containing *novodamuses*, mills, and multures, and also by many acts of Town Council, from the year 1655 inclusive, till the year 1660, discharging any indweller within the freedom of the burgh, to pass from the common mills with their malt to grind at any other mill.

No 6. *Answered* for the defender, A simple charter *cum molendinis*, without so much as the usual words *cum multuris*, can never infer a new thirlage; especially considering, that this charter appears not to be the original erection charter of the burgh, from its confirming to the burgesses all their privileges, as possessed in the reign of King Alexander; and, therefore, could not, if the thirlage was constituted before, impose a burden upon the burgesses without their consent; seeing *jus meum auferri nequit sine facto meo*, or the methods of law. For, though the disposition of a mill conveys a thirlage constituted before, as an accessory, though not expressed, it never constitutes a thirlage. It is, indeed, essential to a mill, to take hire for grinding, to which all who grind subject themselves; but an obligement not to withdraw from the mill is not essential, but requires to be constituted as other adventitious rights. Mills are mentioned in this charter, not from a view to constitute a new thirlage, but only to convey the property, and, in consequence, any former astriction: Because, they are considered as *separata tenementa*, which do not pass as part and pertinent, except where united in a barony; and *non constat* that the Town's common good, lying without the Royalty, was erected into a barony: Yea, further, a clause, even *cum molendinis et astrictis multuris*, in the ordinary acceptation, doth not constitute a new astriction, but only multures formerly constituted; unless the proprietor of lands dispone his mill *cum astrictis multuris*, who is presumed to thirl thereby his own lands; but the King was not proprietor of the burgher-tenements. Nor is there any implied servitude upon the burgesses of Edinburgh to the mill of the burgh, more than upon any other heritors through the country. Their being united in a community is so far from rendering their condition worse in this matter, that the granting of the mills with the other common good, to be subservient to the community, argues for their freedom, and that they are in a manner the masters; the erection of a Town Council being for order's sake; consequently, their property is not presumed to be subjected by such a general charter; whatever effect it might have against the lands, and possessors of the common good, which the community, as masters, may thirl.

Replied for the pursuers, King Robert Bruce's charter runs in the express terms of an original charter, giving, granting, disponing, and perpetually confirming, *&c.* And the clause, with all the commodities and liberties pertaining to the Town in King Alexander's time, doth not hinder it to be an original, especially as to the mills. Nor doth it import, that the charter bears not *cum multuris;* for a disposition of mills carries the multures, especially where mills are disponed, as here, *cum suis pertinentiis*, in a short charter, when the simplicity of the age did not use many words to express the same; multures being the proper pertinents of mills. So that the pursuers are under no necessity to instruct, that the thirlage was constituted before the said charter; *2do*, It is a mistake, that a disposition of mills doth not carry the servitude of multures not constituted before; for the whole lands of a barony are naturally a-

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stricted to the mill thereof, without any thirlage in writ, and nothing but an infeftment of any land thereof, *cum molendinis et multuris*, can secure against such a thirlage; July 17th, 1629, the Laird of Newliston against Inglis, *voce* PRESCRIPTION. And the erection of a Burgh Royal, with a disposition of mills, as a part of the common good thereof, hath as great a privilege as any erection of a barony. Besides, the Town's mills, being a part of the Royalty of the burgh, are in the case of the King's mills, to which thirlage is sufficiently instructed by simple coming to the mill, without any adminicle in writ; and here the constitution of thirlage by the foresaid charter is cleared and fortified by acts of the Town Council, and a continual acquiescence of the brewers, till of late that the defender began to abstract.

Duplied for the defender, The parallel doth not hold betwixt a barony and a burgh; for it is upon the Baron's right of property of the lands, and his presumed inclination to have his own tenants go to his own mill, that the presumption of thirlage is founded; since greater jurisdictions, as a lordship, county, or stewartry, afford no such presumption. As the Magistrates and Town Council of a burgh (who are not proprietors of the burgher-tenements, but only administrators of the common good) could not constitute a servitude by their deed; so no presumption can arise from it. Besides, it seems unnatural for a burgh to be thirled, it being designed for habitation and trade, and liable to no burdens but what are imposed by Parliament. Again, though the disposition of a barony will carry mills, if any be, as a pertinent, and sasine taken on the lands will include a mill, without any distinct specific symbol; yet it cannot be conceived that a Baron is under a necessity to thirl his lands to his mill. On the contrary, it was found not sufficient to thirl lands, that they were part of a barony, whereof the mill belonged to the pretender to the thirlage; July 12th, 1621, Douglas against Earl of Murray, *voce* PRESCRIPTION; and July 13th, 1632, Earl of Morton against Feuars of Muckart, IBIDEM; though, indeed, less proof in such a case will be sustained to infer a thirlage. As to the case of Newliston and Inglis, as it is a very singular decision; so my Lord Stair, Book 2. Title 7. § 17. supposeth plainly that this thirlage had been constituted before, and that disponing a part of the lands of the barony did not infer a liberation, unless there had been clauses to that purpose; 2*do*, There can be no reasoning from the parallel of the King's mills, without proving immemorial possession. Besides, that privilege being restricted to the King's property, can never be extended to burghs.

THE LORDS found, that, by the charter granted by King Robert the Bruce to the Good Town of Edinburgh, a thirlage within the Royalty to the Town mills is constituted; by which the Good Town is enabled to restrain and hinder the brewers to make use of hand-mills, or other engines, or do any other thing whereby the said thirlage may be prejudiced and diverted.

Fol. Dic. v. 1. *p.* 574. *Forbes, p.* 453.

*** Fountainhall reports this case.

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1710. *December* 20.—THE Magistrates of Edinburgh, and their Tacksmen in the Canonmills on the Water of Leith, pursue Jean Alexander, a brewer within the Town, for abstracted multures since 1705; for whom it was *alleged*, That freedom is presumed, and that she was under no restriction by her charter; but, on the contrary, her *reddendo* was only watching and warding; and she repeated a declarator of immunity. *Answered*, The Town had raised against her and others a declarator of astriction, which is founded, *first*, on a charter granted by King Robert the Bruce, about the 1320, in these terms: *Sciatis nos dedisse et concessisse burgensibus nostris burgum de Edinburgh, cum Portu de Leith, una cum molendinis et cæteris suis pertinentiis; 2do*, On a charter from King James VI. in 1603, and another from King Charles I. in 1636, (commonly called their Golden Charter,) bearing, *Duodecim illa communia molendina dicti burgi cum eorum multuris et sequelis*, knaveship, sucken, and thirlage; and, last of all, produced sundry acts of the Town Courts for 150 years back, *viz.* beginning at 1555, enacting penalties against the abstracters and contraveners, to prove their use and possession; and, particularly, an act of Council in 1660, on a complaint of Bailie Denholm, ordaining all hand-mills to be broken, and the users to be fined, as wholly destructive of the thirlage; and which, in the Highlands, are called querns, and are destroyed by the heritors, when found within the bounds of their mills and thirlage. *Replied*, These charters and acts may very well astrict tenants and vassals of the Town's common good lands and borough acres, *quoad* their *grana crescentia*, but can never be extended to the brewers within the Royalty, who possess their houses, and are free of any such astriction, there being no such servitude known in the Roman Law; and it is odious and unfavourable to introduce new ones. And King Robert's charter is not the original erection of the burgh, but only a confirmation, and only names MILLS *ex stilo*, and bears nothing of multures; and they had no such mills then as they possess now, but are a late purchase and acquisition from the Barons of Broughton; and the two late charters may give the Town right to exact multures of any malt brought voluntarily to be grinded at their mills, but can never constitute a thirlage on the burgesses who import victual, seeing they want the clause of *invecta et illata;* and, instead of advancing the common good, the Magistrates, by this pursuit, chase the brewers out of the town to the shire, to the undoing the real interest of the burgh, being deprived of so many able persons formerly bearing scot and lot, and their stent heavily falling on the remaining burgesses left behind; so that there are upwards of thirty breweries now standing waste, who have retired to the country, and erected breweries there: And it can be proved, that of twelve bags of malt sent to the Town mills, (notwithstanding all the pretences of an easy multure,) they get not back ten, what by multure,

servants fees, extortions, thefts, insufficient grinding, &c. all which is prevented by hand-mills, or thankful service at other places. The first design of coalition of societies, and of the uniting and dwelling in towns, was for mutual assistance, and carrying on trade and commerce; and mills were erected on the prospect of casual hire, and accommodation of our neighbours, without any compulsitory astriction, but only a premium for their labour and pains. *Duplied*, That the Magistrates of Edinburgh have as much power within their own jurisdiction as a Baron has within his territory: Now, it is known, that the lands of a barony are naturally astricted to the mill thereof, as was decided 17th July 1629, Newliston against Inglis, *voce* PRESCRIPTION; so that a Baron's mill, and that of a Burgh Royal, are *in omnibus* of the same nature and equiparate in law: And it was no wonder that the ancient law knew nothing of thirlage, for then all rights were allodial; but it came in with the feudal customs, and many vestiges of it appear in our old statutes. And Heringius, a German Lawyer, in his tract, *De Molendinis*, says, the inhabitants may be discharged under a penalty *ne ad alia eant molendina, et sic collectam defraudent*; and, in 1681, the LORDS found a vassal, though wanting the clause *cum bruariis* in his charter, yet could not be hindered to set up a brewery on his feu at the Dean; and though watching and warding be the common *reddendo in feudo burgario*, yet that noways excludes other services. And it were hard to rob the Town of so considerable a branch of their common good as their mills, which are set for 10,000 or 12,000 merks, *communibus annis*; but if the Town brewers be declared free, or allowed hand-mills, their profit would not support the fabrick of the mill, and they would not be worth keeping in repair.—THE LORDS, by plurality, found King Robert's charter, and the subsequent ones, do import a constitution of thirlage upon all the brewers within the royalty, and the same, as a necessary consequence, carries a restraint upon all the Town brewers from using hand-mills, or any other engines or machines for grinding malt within the burgh, as being a plain invention to defraud and disappoint the thirlage; but found the Town behoved to instruct as much possession as would preserve the right from prescribing *negative*; whereas, if the Lords had found no constitution, then they would have been necessitated to prove forty years peaceable possession to introduce a thirlage by prescription; but there was no use for this long prescription, the LORDS having found the charters inferred a sufficient constitution *per se*.

Fountainhall, v. 2. p. 610.

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1713. *November* 22.

WILLIAM CUNNINGHAM of Craigens *against* THOMAS KENNEDY of Pannel.

No 7.
An heritor was found entitled to build a dam-dyke, both ends of

IN a process of declarator, at the instance of William Cunningham against Thomas Kennedy, and the counter declarator, at the instance of the latter