No. 78.

Clouden and the defender's lands were part of the ancient barony of Holywood, pertaining to the abbacy of Holywood, and of the defenders' coming immemorially to the mill of Clouden, and paying the high in-sucken multure, and performing services, found the lands astricted to the said mill. In the reasoning, the Court was of opinion, That the coming to a church-mill, without any constitution in writ, is as effectual to constitute a thirlage as the coming to the King's mill, notwithstanding that the contrary had been formerly determined, which was thought to be erroneous. In this case, the defenders' lands were church-lands; yet the Lords were of opinion, that this made no speciality; for the ground of the decision lies in this, That churchmen being presumed to have lost their rights at the Reformation, the law did presume the same from a 13 years possession before the Reformation, which afterwards, when it came to be impracticable to prove possession before the Reformation, by witnesses, was by act of sederunt, 16th December, 1612, altered into 30 years possession after the Reformation; and therefore 30 years possession after the Reformation was in all views held equivalent to a title in writing.

Fol. Dic. v. 2. *p.* 462.

1740. *June* 17. BROWN *against* FLETCHER.

No. 79.
Thirlage inferred from circumstances.

The following circumstances were found sufficient to infer astriction, viz. 1*st*, 40 years use of coming to the mill, and paying in-town multure, though a very small matter more than was paid by the out-sucken; 2*dly*, A paction between the miller and the tenants, whereby the miller quitted his knaveship, upon the tenants' passing from meat, which they had been in use to get from the miller when they came to the mill, and from sieves which the miller had been in use to furnish them, neither of which the out-sucken ever got; 3*dly*, The tenants' paying for the multures of sold corns; and, *lastly*, Two tacks, whereby the heritor took the tenants bound to carry their corns to the mill in question, though of a late date, one being set in 1712, the other in 1721, and by a singular successor.

Kilkerran, No. 4. *p.* 573.

*** This case is reported by Lord Kames:

Fletcher having abstracted his corns from the mill of Glaswell, Brown, the proprietor of the mill, brought a declarator of astriction, with a separate conclusion against the tenants of Ballinsho for mill-services. A proof being admitted, before answer, the pursuer brought sufficient evidence, that the possessors of Ballinsho had, as far back as could be remembered, frequented the mill of Glaswell with all the corns they had occasion to grind, paying in-town multure; the mill-master, on the other hand, carrying their corns to the mill, and furnishing them sieve,

No. 79.

riddle, and canvas, beside entertainment. There were also several tacks produced by the proprietors of Ballinsho, taking tenants bound to frequent the mill. But no evidence was brought of mill-services.

At advising this proof, the defender relied upon the opinion of Craig, Lib. 2. Dieg. 8. § 7.; of Stair, B. 2. Tit. 7. § 17.; and the authority of several decisions concurring, that the immemorial use of frequenting a mill, and of paying in-town multure, is not sufficient to constitute a servitude of thirlage. The pursuer did not controvert this principle; but observed, that what was sufficient to constitute a thirlage, and what was a sufficient presumptive evidence of such a constitution, were different points; that Craig and Stair, in the cited passages, treat only of the former; whereas the latter is the present case. The pursuer and his authors were all infeft in the mill *cum multuris usitat. et consuet.* which is evidence that some lands have been thirled. And what better explanation can there be of a general clause, than immemorial possession of the multures of Ballinsho; which is presumptive evidence, of the strongest kind, that the lands of Ballinsho were meant in the several infeftments.

"The Lords found there is sufficient proof of the astriction of the grindable corns growing upon the defender's lands to the pursuer's mill, for payment of the multure and knaveship therein specified; upon the mill-master's carrying the tenants' corns to the mill, and giving them sieve, riddle, and canvas, and entertainment during the time they are labouring their corns. But that the tenants are not liable to bring home the millstones, clean the mill-dam, repair the mill nor mill-houses, nor to perform any other service."

Rem. Dec. v. 2. *No.* 12. *p.* 24.

1740. *December* 19. MILLER *against* CLELAND and Others.

No. 80.
Grindable corns.—Mill-services.

Where the astriction was of all grindable corns growing on the lands that should thole fire and water for sustenance of house and family, it was found to comprehend grain made into farm-meal.

Found, That personal services of bringing home the millstones, and keeping up the dams, were inherent in a thirlage established by constitution; but that furnishing thatch to the mill was not, nor could be, exacted without special constitution or possession.

But afterwards, November 17, 1741, Bruce Stuart of Blairhall *contra* Colonel Erskine, *infra*, it was found, That mill-services were inherent in a thirlage established by constitution, as well that of furnishing thatch to the mill as other services.

Kilkerran, No. 5. *p.* 573.