

(See APPENDIX.) And, *2do*, The Earl of Athol had no power to discharge this astringtion, had he declared it ever so expressly. It does not appear, that he ever was superior of the lands of Grange; and any right he pretended to those lands was reduced at the instance of Lord Cupar. At any rate, as he never had nor pretended a right to the mill of Blacklaw, the astringtion established in favour of John Drummond, the proprietor of that mill, in 1559, could not be impaired by any charter of other subjects granted by the Earl in 1589.

The Lords found, That all the *grana crescentia* are thirled; but that there is no evidence, that the *invecta et illata* are thirled; and found, That the charter from the Earl of Athol does not exseem Gellatly and Chalmers."

Act. *Ferguson*, Alt. *And. Pringle, Lockhart*. Repoter, *Woodhall*, Clerk, *Gibson*.

Fac. Coll. No. 1098. p. 353.

1760. July 16. COUSTON, *against* TENANTS on the ESTATE of PITREAVIE.

The tenants upon the estate of Pitreavie were astringted to the mill of the barony, and their tacks contained the following clause: " Binds and obliges him, and his foresaids, not to abstract any of his victual from the wood-mill of Pitreavie, but astringts himself thereto during his possession of the said lands, in the surest form." When these tacks were granted, none of the tenants were in use to sow wheat. Of late, however, some of them have sown wheat, and have been in use to carry it to be grinded at other mills. Couston, the miller, brought a process against the form abstracted multures.

Pleaded for the defenders: That at the time the astringtion was constituted, no wheat was in use to be sown in the barony; and consequently, the thirlage could only reach such grain as then grew upon the lands: That in all such cases, when a new species of grain has begun to be sown, it cannot be comprehended under the astringtion. It is pleaded, That a tenant might thus disappoint the thirlage altogether, by altering his method of sowing. This may be a detriment to the proprietor, but will not alter the general rule; for the tenant may in like manner elude the thirlage, by laying down his whole lands in grass; and there is no reason why the same thing may not be done with regard to wheat.

2do, The mill in question is by no means fit for grinding wheat. It is a common corn-mill, which, though it may bruise the grain to pieces, is absolutely unfit for making sufficient flour. The tenants must therefore be at liberty to carry their wheat to other mills, where it can be properly grinded.

Answered for the pursuer: The clause of astringtion in the tacks comprehends victual in general; and therefore, though at first no wheat was in use to be raised, must certainly be understood to be astringted when any of it is raised. If the defenders' doctrine were well founded, it might be in their power, by changing the grain sown upon their lands, to disappoint the thirlage altogether.

No. 103.

No. 104.
Thirlage of victual in general, does not comprehend wheat, where the mill is not properly constructed for grindnig it, and no dry multure in use to be paid.

No. 104.

2do, Though the mill has not a marble millstone, and is not particularly intended for a flour-mill, yet it is fit enough for the purpose of grinding wheat. Much wheat in Scotland is grinded by mills of the same kind. But if it shall be thought, that the mill is not so proper for grinding wheat, the pursuer will be satisfied that the defenders be found liable to pay him a certain proportion in name of dry multure, without being liable for any other prestation.

“ In respect it is acknowledged by the pursuer, that the mill of Pitreavie is not fit for grinding wheat, and that no dry multure for wheat was ever in use to be paid, the Lords assoilzied the defenders from the multure of the wheat pursued for ; and decerned.”

Act. *Macqueen.*Alt. *Johnstone.*Clerk, *Ferbes.**P. M.**Fac. Coll. No. 235. p. 429.*1760. *December 2.*JOHN MILLER of Millheugh *against* ALEXANDER CORSE.

No. 105.

A mill erected within a thirle for the purpose of sheeling barley, but fitted likewise for grinding oats, peas, and other grain, into meal, ordered to be demolished, or put into such form as that it should not interfere with the mill of the thirle.

An heritor who was subjected in a thirlage to a neighbouring mill, erected a mill upon his own ground ; and though the mill was chiefly intended for sheeling barley, yet it was so constructed as to be also capable of grinding oats and peas. The proprietor of that neighbouring mill, founding upon a doctrine inculcated in our law-books, that an heritor who is thirled cannot build a mill upon his own ground, entered a complaint before the Sheriff, concluding, that the mill should be demolished ; or at least that the machinery should be so altered as to be incapable of any other operation but that of sheeling barley. This cause being advocated to the Court of Session, the first interlocutor was, “ That the defender was not obliged to destroy any part of the machinery of his mill ; but that he must find caution to the pursuer not to grind any oats or peas growing within the thirle, under the penalty of £.100 Scots *toties quoties*. In a reclaiming petition against this interlocutor, several of the Judges strenuously espoused the cause of liberty. It was observed, that there is nothing in a thirle-contract, expressed or implied, to bar an heritor thirled from building a mill within his own ground ; and that the possibility of employing a right wrongously is no good reason for debarring the exercise of it. All that can be done in this case, or any similar, is, after the trespass is committed, to exact caution not to do the like in time coming. Now, the interlocutor complained of goes even further in favour of the complainer ; for it obliges the defender to find caution, though there be no trespass committed ; which is laying a burden upon him beyond what there is any instance of in any other case. To demand further that the mill be demolished, or rendered unfit for grinding corn, is the same as if one afraid of bodily harm, and not satisfied with caution of lawborrows, should insist to have the man put to death, or his right arm cut off.