1766. *June 25.* DUKE of BUCCLEUGH *against* VINT and Others.

No. 107.
Whether a thirlage comprehends malt?

The lands and barony of Dalkeith belonged anciently to the Earls of Morton; and were disponed by them to the family of Buccleugh, about the year 1642.

These lands had been erected into a barony and a regality; and, in the Duke's charter, the village of Dalkeith is declared to be the burgh of regality, and all the jurisdictions, rights, and privileges, pertaining to any barony or Lord of regality, are conferred in the most ample form.

The families of Morton and Buccleugh had successively feued out certain portions of land in and about this village; and the vassals had been in use to grind their malt at the mills of Dalkeith. Some of them having carrried their malt to other mills, a process of abstraction was brought by the Duke of Buccleugh, who contended, that he was entitled to multure upon all malt consumed within the barony.

Pleaded for the pursuer: 1*mo*, He has an express grant of this barony and regality, with all the privileges that attend such grants; and the charters from the Crown, for ages back, have contained the following constitution of the astriction: "Totas et integras terras, dominium, baroniam, villam, et burgum baroniæ de Dalkeith, cum totis libertatibus, et una cum molendinis de Dalkeith, tum granarum quam fulonum, cum multuris dict. molendinarum, granarum, et terris molendinariis integrorum eorund. molendinorum respectivé." So that the Duke has the most solid of all titles constituting the thirlage over the feuers and inhabitants of the village to the mills of Dalkeith; and such a title, joined with possession, is held as a sufficient constitution of the astriction. See 4th January, 1740, Fletcher of Bonshaw *contra* Brown of Glasswell, No. 79. p. 16018.; and Earl of Hopeton *contra* The Brewers of Bathgate, in 1753, No. 97. p. 16029.

2*do*, The vassals, particularly those deriving right from the family of Buccleugh, are all expressly astricted by a clause of the following tenor in their charters: "Ac etiam præfatus ejusque antedict. seu tenentes ac possessores dict. tenementorum, aliorumque, astringentur molendinis de Dalkeith, et tenebuntur *molere omnia sua grana*, (sometimes only *sua grana*), in iisdem molendinis, ac persolvere multuras, aliasque divorias, debitaque servitia pro iisdem pro rata, sicuti cæteri feudifirmarii tenentes, et inhabitantes dict. burgi de Dalkeith, persolvere et præstare in usu sunt vel fuerunt." This astriction, from the nature of the tenements, which are mostly a house and a yard, or a house only, must import a thirlage of *invecta et illata*, though all that is here demanded is multure for what is consumed within the town. See Lord Bankton, B. 2. T. 7. p. 688.; Mr. Erskine, B. 2. T. 9. § 16.; and Hamilton *contra* Miller, 27th December, 1717, No. 67. p. 16012.

Some of the old charters bear a *reddendo pro omni alio onere*; but that cannot have the effect to liberate the vassals from thirlage; for, in the *first* place, the Court

No. 107. has repeatedly found, that such a clause will not free from astriction, without a clause *cum molendinis et multuris;* 17th July, 1629, Lord Newliston, No. 20. p. 15968.; 26th November, 1631, Oliphant, No. 22. p. 15969.; and in the late case, in 1753, of Lord Hopeton *contra* The Brewers of Bathgate, No. 97. p. 16029.

But, in the *second* place, even though the feuers had got their original charters without any clause of astriction, yet, whatever exemption they might have had originally, they have lost it now, by taking their charters with the astriction for above 100 years back, and paying multures to the mill during that time.

3tio, Beside these clauses of astriction in his own and his vassals' title-deeds, the Duke has acts of the barony and regality courts, establishing the astriction, and ordaining that all corns tholling fire and water within the burgh should pay multure at the mills thereof. These acts both found a title, and prove possession, no contrary practice being proved; and though possession alone will not constitute a thirlage, without a title, yet this title is attained as well by acts of court as by charters, both which occur in the present case.

4to, These three titles of astriction, any one of which would have been sufficient, have been supported by an immemorial possession on the part of the Duke, as appears not only from a variety of sentences pronounced against such as abstracted their grain from the mills of Dalkeith, by the barony and regality courts, but also from the express acknowledgement of the defenders in this case, who admit that they and their predecessors have immemorially grinded their malt at the Duke's mills. Neither can the vassals coming to the mill be considered as *voluntatis et non necessitatis;* for where there is a regular constitution of the thirlage in the charters, supported by repeated acts of court, the acknowledged uniform practice of grinding their malt at the mill will, in law, be imputed to their subjection, and not to their choice; to their obedience, not to their civility. And though it appears that the maltsters in Dalkeith had been in use of making malt for sale, without the thirle, and also for the gentlemen in the neighbourhood, without payment of any multure, yet, whatever effect that might have in a general claim, for a thirlage of *invecta et illata*, it can have no influence in the present claim for the multure of what is grinded, brewed, and consumed, within the thirle, especially as it does not appear that this usage was known to the Duke or his managers; at the same time as, in general, the title-deeds of the inhabitants contain an astricting clause, the defenders not producing their title-deeds, shows that they contain the same clause; and, consequently, they could not prescribe a right contrary to their own titles; Lord Bankton, B. 2. T. 7. § 689.

Answered by the defenders, to the *1st:* Even supposing the clause *cum molendinis et multuris* in the Duke's charter could constitute a thirlage over the Duke's property lands, yet, with regard to lands belonging to vassals, who had, *ab ante*, obtained charters containing no astriction, but a *reddendo, pro omni alio onere, exactione, et servitio seculari*, it could only carry the right of superiority, but would not establish any astriction upon them. But it is apparent that the clause, *cum*

multuris, in the Duke's charter, was not meant to constitute or convey any thirlage; it is a clause contained in every charter disponing lands and a mill, and will carry multures arising from prior astrictions, but can never be understood to constitute a thirlage which was not before in existence. The only proper way of constituting an astriction, is by a special agreement with the proprietor whose lands are to be thirled, or by making the astriction a condition or burden in the original charter. This clause, therefore, in the Duke's charter, could not constitute, and was not meant to constitute, any thirlage; but only to give the Duke's predecessor an ample right to the lands and mill in common form.— No. 107.

To the 2*d* title of astriction founded on: That it does by no means appear that the vassals' feu-rights do generally contain a clause of astriction, either *quoad omnia sua grana*, or *quoad sua grana*. The most ancient feus granted by the family of Morton, which have been recovered, either bear no special *reddendo*, but refer to the former rights, or contain a certain *reddendo*, *pro omni alio onere, exactione, aut servitio seculari*; and though some of the later charters, particularly those granted by the family of Buccleugh, contain the clause of astriction founded upon by the Duke, yet, as to this, in the *first* place, the defenders can by no means allow, that it is either just or lawful for a superior, when he renews investitures, to throw clauses into charters containing burdens not mentioned in the original rights; but, in the *second* place, as, from the writs produced, it appears that the feu-rights granted by the family of Morton do not uniformly contain a clause of astriction, it is incumbent on the Duke to prove, that the particular subjects possessed by the defenders are, by their own rights, liable in a thirlage of *invecta et illata*, as there is no ground for alleging that the town in general is subject to such thirlage.

At the same time, even though it were true, that the charters uniformly contained an astriction of *sua grana*, or *omnia sua grana*, yet that would not subject the defenders to a thirlage of *invecta et illata*. In some cases, where there was no landward property, the Court have found, that an astriction of a village was of the *invecta et illata*, because there were no *termini habiles* for any other astriction: But there is no room for any such presumption in the present case, as the original feus consisted of ten, twenty, or thirty acres of land; so that the thirlage of grindable grain, or, at most, of *grana crescentia*, could only be understood; and the practice of the maltsters, in making malt for the gentlemen in the neighbourhood, and selling malt, without paying any multure, shows clearly, that a thirlage of *invecta et illata* was never understood to be implied under the words *sua grana* in some of the charters.

It is objected, that it has been often found, that a charter containing a *reddendo pro omni alio onere, exactione, aut servitio seculari*, does not import a liberation from thirlage; but all that these decisions import is, that such a *reddendo*, without the clause *cum molendinis et multuris*, does not imply an exemption from a thirlage formerly constituted, though the direct contrary was found in some of the later cases mentioned in the Dictionary, under the same title, agreeably to the doctrine laid

No. 107. down by Lord Stair, L. 2. Tit. 7. § 17. But the question here is not, whether such a clause would liberate from a thirlage, previously and formally constituted? but, Whether or not there has been a thirlage of *invecta et illata* constituted upon the aggregate body of the feuers and inhabitants of Dalkeith? which appears evidently not to have been the case, both from the charters produced, and from the practice of the maltsters, who paid no multure for the malt which was made and sold out of the thirle, and only out-town multures for what they brought to be grinded at the mills of Dalkeith.

As to the *third* title of astriction founded on by the Duke of Buccleugh, the acts of the barony and regality courts, the defenders have no occasion to dispute, that acts of a baron-court may be available to constitute a prescriptive right of thirlage over those who are subject and liable to the acts of court; but this can have no influence in the present case, when this single circumstance is attended to, that all the acts of court referred to are some hundred years posterior to the original feus granted by the family of Morton; and if the vassals were not in these subjected to such a thirlage, it will be difficult to maintain that the superior, by after acts of his court, could subject his vassals, or those possessing under them, to such an oppressive thirlage, in direct contradiction to the tenor of their rights, especially as such acts pass in absence of the feuers, though their consent is considered to be absolutely necessary; Lord Stair, B. 2. T. 7. § 17.

With regard to the decrees of the baron-court, which are referred to as evidence of the possession of the thirlage here claimed, it is to be observed, that these sentences, at the same time that they were illegal and oppressive, do by no means apply to the present question; because it does not appear from them that the persons complained of were feuers and inhabitants of the village. It is more probable that they were tenants of the property lands, and astricted to the mill by their tacks.

The next evidence of possession upon which the Duke founds is, the acknowledgment of the defenders, of their being in use to grind their malt at the Dalkeith mills; but, with regard to this, there is no principle of law more firmly settled, than that the use of grinding at a mill, however constant and uniform, and for whatever length of time it may have taken place, will not of itself establish a thirlage, and make that *necessitatis* which more naturally is *voluntatis*, from motives of interest and convenience. See Lord Stair, p. 302. And as, in this case, the Duke's mills of Dalkeith were the nearest mills to the places of the defenders' residence, and at which, from the constant supply of water, they were always certain of having ready service, upon payment of out-town multure only, which was considerably lower than at the others mills in the neighbourhood: In these circumstances, the defenders coming with their malt to the mills of Dalkeith, falls more naturally to be considered as *voluntatis*, and not *necessitatis*, especially as it is material to observe, that neither out-town multure nor mill-services, which are the distinguishing characteristics of thirlage, were ever attempted to be exacted.

" 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-