

1704. PRINGLE of TORSONSE *against* BORTHWICK of STOW.

No. 58.

Where an attempt was made to build a mill within a thirlage, the Court interdicted procedure in the building during the dependence of the process for trying the question.

* * This case is mentioned, in Hague *against* Haliburton, No. 38. p. 10726. *voce* PRESCRIPTION.

1705. *January 26.* SIR JOHN GRAHAM of Gartmore *against* JAMES URE.

No. 59.
Clause im-
porting libe-
ration from
thirlage.

Sir John Graham of Gartmore pursues James Ure of Shirgarton, for declaring, that the lands of Shirgarton are thirled and astricted to the pursuer's mill of Ardenbeg. The first question here was, If Gartmore had any constitution of thirlage by charters to instruct these lands to be thirled? For evidencing whereof, he produced a charter by King James V. in 1541, feuing out the lands of Shirgarton, Ardenbeg, and others, to Robert Master of Erskine, with the mill thereof, with a progress down to the pursuer; and this being one of the King's mills, it makes an undoubted constitution of thirlage, even as a disposition of a barony, *cum molendino ejusdem*, does import, that the lands and tenants of the barony are astricted to that mill. Answered, *Non constat*, that this was a barony; and when they were both in the Master of Erskine's hands, it was no proper thirlage, when an heritor's tenants go to his own mill, for *res sua nemini servit*. The Lords found Gartmore's author's charters and other rights produced, did sufficiently found and instruct a constitution of thirlage of Shirgarton's lands to his mill of Ardenbeg. The second question was, If the thirlage be constituted *scripto*, whether Shirgarton and his authors had obtained a liberation therefrom? As to which he contended, That servitudes being odious, liberation was not only by express discharges, but even by tacit necessary consequences, as Craig, Lib. 2. Dieg. 8. shews; and that he had more; for the Earl of Mar had, in 1597, disposed the lands of Shirgarton, to Buchanan of Arnprior, Ure's author, not only with the clause *cum molendinis et multuris* in the *tenendas* of the charter, but likewise *pro omni alio onere* in the *reddendo*. It is true, the clause *cum molendinis* inserted in the *tenendas* of a charter granted by the King, is reputed but words of style, and gives no right, unless it be in the dispositive part, as was found, 3d January 1662, Stuart *contra* the Feuers of Aberlednoch, No. 118. p. 10854; but in charters granted by subjects, who are presumed to notice more exactly what they give, that clause must operate something; and so has Dirleton observed, 7th December 1665, Veitch *contra* Duncan, No. 31. p. 15975. where the Lords found the clause *cum molendinis*, imported a freedom from the astriction, though it was only in the *tenendas*; and more lately, in January 1682, Major Buntin *contra* Boyd, No. 44. p. 15986. where

a charter bore, *cum molendinis* in the *tenendas*, et *pro omni alio onere* in the *reddendo*, it was found to infer a full liberation from thirlage, even though it was the mill of the barony; and Stair seems to favour this opinion, Lib. 2. Tit. 7; and Dury observes, 26th March 1631, Oliphant *contra* the Earl of Marischal, No. 22. p. 15969. that a bond to dispone lands for a feu-duty *pro omni alio onere*, when it came to be extended, it behoved to be *cum molendinis et multuris*, and import a liberation from the *onus* of any thirlage. Answered for Gartmore: It is certain that many idle superfluous words are congested into the *tenendas*, without ever being headed by the parties, and mention mills, dovecotes, and fishings, where in the whole ground there are none of these; and, in No. 31. p. 15975. the Lords found such was the force of a prior astriction in writ, that a subsequent charter bearing *cum molendinis* in the *tenendas*, and that the party had been long free, yet the astriction was not thereby dissolved: and, in January 1692, Lord Newbyth *contra* the Lady Whitekirk, No. 51. p. 15989. that clause *cum molendinis* in the *tenendas* was not found to operate liberation, because the party for seven years after that clause did come to the mill, and paid unsucken multures; and here Shirgarton had come for more than twenty years after his pretended charter of liberation, as appeared by the depositions of the witnesses taken by the steward-depute of Monteith. Replied, That voluntary coming to a mill though for 100 years, will not import astriction, unless there be decreets or acts of court, and other compulsitors, that being *meræ facultatis*, as was found, 5th February 1635, Doig, No. 117. p. 10853; and 14th March 1635, Mackay, No. 5. p. 1815; and the probation was wholly unwarrantable and null, being, 1^{mo}, Led by an inferior judge, to lie *in retentis*, which was *nobilis officii*, and above his power. 2^{do}, It was taken *spreto mandato*, after an advocation was intimate. 3^{tio}, It was irregular, not being sworn in that form of words, "as they should answer to God," which was found a nullity in December 1685, Craigy *contra* Moody, *voce* WITNESS. 4^{to}, Each deposition is not signed, but only the bottom of the page for all; which was likewise a nullity in the commissary of St. Andrew's case, and also between Mr. Andrew Massy regent in the College of Edinburgh, and Mr. Scot. Duplied, That the steward had acted warrantably in refusing the advocation, because, by a special deliverance of the Lords, all advocations of that cause were discharged, except passed by the whole Lords in session time, and by three Lords, if in time of vacance, and this was passed by one, to whom the said deliverance had not been shown; and though some of the usual words in oaths are here omitted, yet equivalent ones are expressed; such as, that they were deeply and solemnly sworn, which is all that is essential to an oath; and the signing at the foot of the page, is the custom not only of that Court, but of the greatest part of the inferior Courts in Scotland, which may draw in question and overturn many probations both ancient and later; which preparative, it is hoped, the Lords will not introduce: And this probation having been *in re antiqua*, and of very old men, all now long ago dead, it cannot be renewed, but must be a convictive evidence of the defender's acquiescence in the thirlage till of late. The Lords had no need to deter-

No. 59. mine these objections against the depositions, though material, because the second point decided the cause, whereby the Lords found, that Shirlarton, the defender, his author's charters by a tract of time, viz. in 1597, 1614, and 1619, bearing *cum molendinis et multuris*, (though in he *tenendas* only), *et pro omni alio onere* in the *reddendo*, did import a liberation from this thirlage, which, by the first vote, they found constituted by the charter 1541. See Stair, 7th December 1677, Henderson *contra* Arnot, No. 126. p. 10867; and 11th January 1678, Lord Balmerino *contra* Cockburn, No. 127. p. 10870. where the clause *pro omni alio onere* was found to amount to a liberation; as to the import of the clause *cum communi pastura*, in the *tenendas* of a charter, *vide* 25th November 1704, Town of Culross, (See APPENDIX.)

On the 27th of February 1705, Gartmore entered his appeal to the parliament against this interlocutor.

Fountainhall, v. 2. p. 262.

1706. July 11. DUNDAS *against* SINCLAIR.

No. 60.

An ancient charter of land *cum molendinis et multuris*, sustained to infer immunity from thirlage in favour of a succeeding heritor who derived no right from the obtainer of the charter.

Fountainhall.

* * This case is No. 14. p. 35. *voce* ACCESSIORUM SIQUITUR, &c.

1707. February 22.

The TOWN of EDINBURGH as Gubernators of Heriot's Hospital, *against* WILLIAM ALVIS, and Other Brewers in the Canongate.

No. 61.

A clause thirling all that tholes fire and water does not import that all malt brewed, but only what is kilned and cobled, within the thirle should pay multure.

The Canonmills being an ecclesiastic feu of the Canons of Holyroodhouse, came by erection into the Ballendens, Barons of Broughton, and was disposed by them, and the Earl of Roxburgh, as come in their right, in 1637, to the town of Edinburgh as feoffees in trust for Heriot's Hospital; and the feuers in Canongate, though astricted by their charters to these mills, yet of late years began to abstract, and go to Leith mills, belonging to Balmerino, or to the Stockbridge. Whereupon the town raises a process against them both, for declarator of their right, and for abstraction, and instructed the constitution of the thirlage by the Hospital's charter, and the vassals' own charters, by being the mill of the barony, by acts of Court, and by use and wont; and they denying the extent of thirlage, there was a mutual probation allowed both parties before answer, how far they have been in the immemorial use and custom of bringing all that tholes fire and water to these mills; and the defenders to prove that they have gone frequently, openly, and avowedly, in fair day-light, to other mills, or have been discharged and exeemed from the astriction by a person having right. And the probation coming this day