1758. *July* 19.

MACNAB of Macnab, *against* The EARL of BREADALBANE, and CAMPBELL of Auchlyne.

No. 102.
Lands found astricted, notwithstanding a clause *cum molendinis et multuris* in the *tenendas* of a vassal's charter.

In the year 1707, Mr. Campbell of Auchlyne got a wadset-right, from the Earl of Breadalbane, of the mill of Auchlyne, and mill-lands thereof, sucken multures, &c. and, amongst others, of the multures, sequels, &c. of the lands of Ewer, Auchesen, Craigchur, and Bovain, belonging in property to Macnab. Upon this title, Auchlyne having brought an action of abstracted multures against the tenants of these several lands belonging to Macnab, compearance was made for him in the process; which was conjoined with a declarator of immunity from the astriction, raised by him.

Pleaded for Macnab, That Alexander Macnab, his grandfather, having, in the year 1662, obtained from the predecessor of the Earl of Breadalbane, a charter of the above-mentioned lands, to himself, and the heirs therein mentioned, containing, in the *tenendas* thereof, the words *cum molendinis, multuris, et eorum sequelis*; and his father Robert Macnab having, in the year 1714, obtained from the Earl of Breadalbane a precept of *clare constat*, containing a clause of *novodamus*, for infefting him in the said lands, as heir to his father *cum molendinis, multuris, et eorum sequelis*; it was evident therefrom, that these lands were free from astriction to any mill belonging to the family of Breadalbane at both these periods. That although it was true, that the tenants in these lands had been in use to go to the mill of Auchlyne, and pay insucken multure for their corns grinded there, and to perform services to the mill; yet no astriction was thereby acquired, as the years of prescription were not run, in regard it was interrupted by abstractions, which were admitted to have been made in the year 1746; neither was the wadset right in 1707 a title of prescription, nor were the years of prescription run upon it.

Answered, That it appeared from the proof which had been adduced, that the tenants of the above-mentioned lands, for upwards of forty years from the time of leading the proof, which was in the year 1750, had been in the constant usage of carrying their corns to the mill of Auchlyne, and of paying a high insucken multure, and performing services to that mill; and even when they removed without the sucken, of carrying their last crop to be grinded at this mill, for payment of full multure, or otherwise of compounding with the miller for the multure of the corns they so carried off; such constant possession was sufficient to shew an astriction, especially as this mill was the mill of a barony: That much slenderer possession has been sustained by the Court to infer an astriction; particularly in a decision quoted by Lord Stair, in his institutes, Tit. SERVITUDE REAL, § 24. January 1692, Lord Newbaith against Lady Whitekirk, No. 51. p. 15989. and in two late cases, decided in the year 1740; the one, Brown against Fletcher of Ballinshoe, No. 79. p. 16018. and the other, Ferguson against Thomson, as to the astriction of the lands of Achtidonnel to the mill of Aden. That this con-

No. 102. stant possession shows the meaning of parties to have been, that the lands were to continue astricted, notwithstanding the clauses *cum molendinis et multuris* in the *tenendas* of the above-mentioned charters granted to Macnab; and that the rather, because it appears from the old tacks of this mill, that the rent thereof continued the same after the charter 1662 that it was before; and that it could by no means be supposed, that the Earl of Breadalbane, by granting the precept of *clare constat* above-mentioned, in the year 1714, intended to discharge an astriction to a mill, of which he was previously denuded, and to contravene the absolute warrandice contained in the wadset disposition granted by him in the year 1707.

Replied for Macnab, 1*st*, As no astriction of these lands appears anterior to the charter 1662, there arises from thence, and from the precept of *clare constat* in the year 1714, a legal presumption, that these lands were never thirled to that mill: That the charter 1662 had been granted in consequence of a submission entered into betwixt the predecessors of the Earl of Breadalbane and Macnab, concerning what should be paid for a renewal of the investiture in Macnab's favour, and what clauses should be therein inserted; which submission was produced: That although the learned arbiters therein named did not in form pronounce any decreet-arbitral; yet they are signing witnesses to the charter 1662, containing a clause *cum molendinis*; whence it seems plainly to have been their opinion, as well as that of the granter of the charter, that these lands had formerly been, and were afterwards intended to be held free from any astriction; and this opinion or intention is evidently and explicitly confirmed by the repetition of the clause *cum molendinis* in the subsequent precept of *clare constat* in the year 1714, as it cannot be supposed, that so important a clause could be inserted in these charters through inattention. 2*dly*, Even supposing these lands had been previously thirled to this mill; yet the legal and necessary import of these clauses in the charters is to liberate from such astriction; seeing it is agreed upon by all our lawyers, and settled by many repeated decisions of the Court, that a clause in the *tenendas* of a charter from a subject, containing *molendina cum multuris*, is sufficient to infer a liberation, even from a former astriction; Craig, Lib. 2. D. 8. § 11. Stair, B. 2. Tit. 7. § 24. Bankton, B. 2. T. 7. § 52. 7th December 1665, Veitch against Duncan, No. 31. p. 75975.; 1st December 1681, Macpherson against Macintosh, No. 43. p. 15985.; 17th January 1682, Bunton against Boyd, No. 44. p. 15986.; December, 1723, Russel against Waddel, No. 69. p. 16014. observed by Home; 4th January 1750, Harrower against Horn, No. 93. p. 16026. observed by Falconer; and in a late case, betwixt the tacksman of a mill belonging to Sir Thomas Wallace, and the Tenants of Lockhart of Lee. 3*dly*, That there was in this case no right acquired by prescription; because, in the *first* place, a title in writ is necessary, in order to be a foundation of prescription in thirlage, where the mill is neither a King's mill, nor did formerly belong to any ecclesiastical person—(PRESCRIPTION, Div. 3. § 7.) But here there is no such title produced as can in law be deemed the just foundation of any prescription. The wadset right in 1707 is no proper title. The wadsetter can be considered in no

other view than as having a temporary pledge for so much money, in whose favour a right by prescription could not be created. The chief interest in this mill remained with the Earl of Breadalbane; and no prescription could run in his favour, as he could not create a right in another to be the foundation of a prescription for his own behoof. And, in the *second* place, the years of prescription are not run even from the date of the wadset right in 1707; and far less are they run from the year 1714, the date of the precept of *clare constat*. No. 102

Duplied: To the *first*, The mill in question is the mill of a barony, and therefore the legal presumption is, that these lands lying within the barony are astricted to it; and it appears from the proof, that the possessors of these lands have immemorially carried their corns to this mill, and paid the high insucken multure, and performed other heavy services, such as are usual in the strictest thirlage; which sufficiently proves, that they must have been antecedently bound thereto; Stair, B. 4. T. 15. § 4. and 7.—To the *second*, This resolves into a *quæstio voluntatis*: What is the meaning of those words thrown into the *tenendas* of a charter? It must be admitted, that they are sometimes inserted without any view to infer a liberation from a former astriction; and this is particularly to be presumed when they are thrown in with a heap of other words, which have no particular view applicable to the circumstances of the lands, and which plainly have been copied at random, as words of style. The meaning of the parties, which must decide this question, is clearly discovered from the whole circumstances of the case. The tenor of the clause founded on, which contains a great variety of the usual words of style, without any meaning whatever, shews plainly, that it must have been copied from another charter, as words of course, and intended singly to give the vassal the lands, with all the advantages and privileges they formerly possessed; but not to give them any new privilege, especially so important a one as that here contended for. But what puts the matter out of doubt in this case, and demonstrates that no such thing could have been intended, is, the full evidence that has been brought of the constant immemorial possession of this astriction recently after granting these charters, and as far back as the memory of man can go; and that too attended with circumstances which never take place but in the strictest thirlage. The charter 1662, in which this clause is inserted, is not granted in consideration of any onerous cause given by the vassal to the superior, for discharging the former astriction; and it will never be understood, that the superior meant to discharge this servitude by these general words, or thereby to convey to the vassal a part of his rent, beside contravening the warrandice he was under to the tenant of the mill, whom he was bound to secure in possession of the multures, for which the rent was paid. It is further evident from the submission referred to, that there was no view of the vassal's being freed from the astriction to which his lands were formerly subject, else it would have been mentioned in the submission; and the arbiters signing witnesses to the charter is a clear proof, that no more was transacted between the parties than what had been expressly submitted to them. With regard to the

No. 102. clause in the precept of *clare constat* in 1714, it is evident, that it likewise must have been copied, *per incuriam*, from the former charter; as it cannot be imagined, that the Earl, after disponing the mill, with the multures of these lands *per expressum*, in the wadset-right 1707, could mean to give away these multures to the vassal of the lands in a precept of *clare constat*, when he was getting no consideration for them. The authorities and decisions quoted for the pursuer do not contradict what is here pleaded; on the contrary, they tend to illustrate it, and to confirm the rule laid down by Lord Stair, That a dubious clause of this kind ought to be constructed from the subsequent uniform conduct of the parties, the surest evidence of their intention. And this rule the Court again followed in a very late case, between the Duke of Douglas and Mr. James Baillie, whose lands were found astricted, notwithstanding a clause *cum molendinis et multuris* in the *tenendas* of his charter, in respect of the immemorial use of grinding their corns at the Duke's mill, and paying insucken multure. To the *third*, There was little occasion to have recourse to the plea of prescription in this case, which is only necessary when a thirlage is imposed *a non domino*. But here it was established by the ancient proprietors of the lands, the family Breadalbane, from whom the property devolved to the pursuer. The Earl's infeftments in the barony and mill go back for several ages preceding the date of the wadset-right, and are sufficient titles of prescription, founded upon the immemorial possession of this servitude; and if prescription was necessary, the years of it were run after the date of these infeftments, long before the wadset was granted; so that there could be no objection either to the title, or the course of prescription.

"The Lords found the lands astricted."

Act. *D. Græme.* Alt. *Ferguson.*

Fac. Coll. No. 126. *p.* 231.

1759. *November* 17.

PATRICK YEAMAN of Blacklaw, *against* GEORGE DUNBAR, and Other Heritors and Tenants of the lands of Grange.

No. 103.

The indefinite astriction of lands to a mill by the proprietor of both, imports the thirlage of *omnia grana crescentia.*

The lands of Grange and Blacklaw anciently belonged to the abbacy of Cupar, and were astricted to the mill of Blacklaw, as were all the other lands of the abbacy to that and other mills belonging to it.

Various acts were made in the Court of the abbacy before 1562, respecting the thirlage of the abbacy-lands in general; by some of which the tenants were made liable in dry multure for their corns which they disposed of without grinding, and even obliged to pay a smaller multure for the corns they brought in to the lordship.

Clause *cum molendinis* in the *tenendas*,

In 1559, the lands and mill of Blacklaw were feued out by the abbot and convent to John Drummond of Colquhillie. The description in the dispositive clause