

# APPENDIX.

## PART I.

---

### THIRLAGE.

1777. *June 19.*

The MAGISTRATES and TOWN COUNCIL of CUPAR, and JOHN THOMSON,  
Tacksman of CUPAR MILLS, *against* WILLIAM LEEDS and Others,  
Bakers in Cupar.

THE Magistrates of Cupar brought an action of declarator, against the Bakers of that town, founding first upon a charter to the town, by King James the First, *anno 1422*, in the tenendas of which is the following clause, ‘ Tenen et ‘ haben dictum, burgum nostrum de Cupro, &c. cum duobus molendinis, ‘ supra aquam quæ proprius dicto burgo situuntur, et eorum multuris, et ‘ eorum sequelis;’—and, *2dly*, an obligation signed by certain Bakers of Cupar, proceeding on the narrative, that upon a petition from them, ‘ The ‘ Town Council of the burgh of Cupar, had contracted with a skilled person, ‘ for building and erecting a new flower mill, with French burrs, at a considera- ‘ ble expense; therefore, and for the encouragement of said work, and some ‘ way to compensate for the extraordinary expense, to be disbursed by the ‘ Town Council thereanent, bind and oblige us, and our successors, freemen ‘ Baxters of said Incorporation, not only to pay the ordinary multures, for all ‘ wheat that shall be grinded by us, and taken and vended within the said ‘ burgh, but also to pay dry multure for all the flower not grinded at said ‘ mill, that shall be bought by us or our said successors, and baken and ven- ‘ ded within the burgh,’ &c.—This obligation also contains a clause, by which the subscribers bind themselves and their foresaids, to take every new member bound at his admission, to come under the above obligation: *3dly*, The magistrates founded on the possession of the thirlage.

#### No. 1.

Whether thirlage can be augmented or created, against a corporation in consequence of an agreement betwixt the proprietor of a mill, and the individuals of that incorporation?

See No. 114.  
p. 16062.

No. 1. Pleading by the Bakers, against the first ground, that in this charter, which is the only title of prescription produced, the magistrates have only a right to two mills, whereas they have now three, and it must be presumed that the third one, or flower mill, is of a later erection, as it could not well have existed in the 1422. In the second place, as the right to these mills, with their multures and sequels, is only contained in the clause of tenendas, and is not mentioned in the dispositive clause of the charter, that deed cannot even afford a title of prescription. For as thirlage requires a clear title, as well as unequivocal possession, and as prescription cannot follow but upon such a title, or at least one *habilis ex facie ad transferendum*; so as the mills in this charter are not conveyed, but are only contained in the tenendas clause, which is merely an operation of form by the clerks, or writer of the deed, and neither supposed to be considered or compared by the Crown, in granting such a conveyance, it is impossible that any right of prescription can follow in consequence of that clause. It has even been repeatedly found, that the mention of the clause *multuris et sequelis*, in the tenendas of a charter, even from a subject, was insufficient *per se*, either to give right to an astringion, or to import a liberation of the granter's lands, from an antecedent restriction, 1738, Duke of Douglas against Baillie, mentioned in M'Nab against Campbell, 19th July 1758, No. 102. p. 16041; 17th November 1759, Yeaman against Dunbar, No. 103. p. 16044. Much less could such a clause have that effect in a Crown Charter, as it is well known, that the whole clause of tenendas is considered so much as a matter of style, that it is seldom or never revised. But further, the clause founded on could never *per se* constitute any thirlage whatever. For as any person may acquire a right to mills, without any thirlage or astringion being annexed to these mills, and multures and sequels are words of style in every conveyance of a mill; unless an astringion could be *aliunde* instructed, such terms could never be considered as a constitution of the right. Neither is the title in this case at all supported by possession: For although it may be true, that the bakers did grind their wheat and other grain in the town mills, yet, that could have been only from choice and conveniency. Nor had they any inducement to go to another mill since. Until within the last twenty years, there was no difference betwixt the insucken and outsucken, which renders all idea of an astringion to these mills inconsistent. Neither can it be established that dry multure was ever at any time paid.

Answered by the magistrates, The charter 1422 is not the original charter granting this thirlage to the town of Cupar, but only confirms the rights already belonging to that burgh. In charters of such antiquity, it frequently happens that the subjects conveyed, are more fully specified in the clause of tenendas, than in the dispositive clause. This is taken notice of by Mr. Erskine, B. 2. T. 3. § 23. Of this too an instance in point occurs, in the charter by Robert II. to the Town of Perth, in the tenendas clause of which some of their most valuable possessions are contained. It has also been found, that

even general words of style in the clause of tenendas, are sufficient for prescription; Fullarton against Earl of Eglintown, 7th February 1672, No. 109. p. 10843. observed by Stair; and a late case Duke of Queensberry against Lord Stormont. It is impossible then to doubt of the title to prescription, when there is a complete right by a charter from the Crown, to the mills, multures and sequels, as explained by immemorial possession. Neither will it avail the makers to contend that the words multures and sequels, do not import a thirlage. For when mills are granted to a burgh with multures and sequels, and when they have been in the immemorial possession of that thirlage which is usual in burghs, no room is left to doubt of the import of the grant, any more than in the case of a barony, where it has been found that even a written astriction is not necessary, if the lands have been in use to pay in-town multures to the mill of the barony. This is also confirmed by an observation of Mr. Erskine. With regard to the observation that it cannot be presumed, that a flour mill was one of the two mills conveyed by the charter 1422, it is not in the power of the magistrates to show at what time that mill was erected, and it might even have been previous to the date of that charter, as it appears by the most authentic records, particularly by the reddendo of religious houses, that wheat grew in this country long before that time; and it has not been denied, that the bakers and other inhabitants of the town have immemorially carried their wheat to these mills, as well as their other grain.

Pleaded by the Bakers: With respect to the obligation 1750, this deed was not subscribed at any of the meetings of the members of the corporation, called for that purpose, but was carried about from hand to hand, and the subscriptions of the bakers privately solicited. It is signed by only four of the corporation, which then consisted of seven members; so that it can be considered as no better than a private deed unauthorised by any act or resolution of the corporation, or afterward ratified by any frequent act there. And none of the new members, had, agreeably to the terms of it, ever ratified this obligation, or indeed had ever become bound to do so; but, notwithstanding, had been in the practice of frequently importing flour, vended and baked by them in the burgh, without ever having paid any dry multure. Instead also of being an onerous deed, it was merely a gratuitous and irrational one, upon the part of the individual bakers who subscribed it, entered into sometime after the improvement of the mills had been determined upon; and by which alteration in the mills, the town were so great gainers, that although a very trifling sum was expended, their annual income from that quarter, was about two thirds increased. Although there was a conclusion in the libel, that all oat meal brought into the town should be subjected to dry multure, it could not be pretended that, in consequence of the obligation 1750, or of the practice of the burgh, any multure was exigible.

No. 1.

Answered: The transaction 1750, cannot be proved by the books of the corporation, as nothing appears to have been marked in them for a number of years, before and after that period, although various transactions about letting their lands, &c. were agreed to by the corporation during that time; yet, there cannot be any doubt, as the deacon and majority of the corporation had signed it. As to importation of flour, it had been so trifling as to escape the notice of their miller, otherwise the dry multure would have been exacted from it, in terms of their obligation.

The Lord Ordinary had decerned in terms of the libel. The Court, upon advising a petition with answers, adhered to his judgment: But upon reconsidering the case in a reclaiming petition, with answers, they pronounced the following interlocutor, 19th June 1777, ‘ Find *1mo*, That the defenders, the ‘ bakers of Cupar, are thirled and astricted to the common mills of Cupar, with ‘ all wheat and other grain brought by them within the liberties thereof, accord- ‘ ing to use and wont, and are liable to the accustomed insucken multures for ‘ the same, payable by others who are astricted to these mills; and, *2do*, That ‘ the obligation in the year 1750, granted by the bakers of Cupar, is a valid ‘ and subsisting deed, binding on the granters and their successors, members ‘ of the incorporation of bakers of Cupar; and that in terms thereof, they are ‘ liable to the pursuers in payment of dry multure, for all flour imported by ‘ them or baken and vended within the said burgh, or liberties thereof. But ‘ assoilzie the defenders from the conclusion of the libel, respecting the pay- ‘ ment of dry multure for oat meal brought by them within the burgh; and ‘ also in respect none of the other inhabitants of Cupar except the bakers are ‘ called as parties in this action, the Lords reserve all defences competent to ‘ them, against their being subjected in the conclusions of the pursuers libel, ‘ and with this explanation, and these variations, adhere to their former inter- ‘ locutor reclaimed against, refuse the desire of the petition, and decern.

Lord Ordinary, *Elliock*. Act. *Ilay Campbell, E. M'Cormick*. Alt. *G. Wallace*. *D. Rac.*

*D. C.*

1807. July 1.

EARL OF FIFE *against* KING

No. 2.

Purchasing grain unground, and then getting it ground at a mill *without* the thirl, and bringing it in to be consumed *within*,

THE Earl of Fife is proprietor of the King's Mills of Elgin.

By a decree of the Court in 1766, it was found, ‘ That all corns and grain of ‘ whatever kind which shall be bought without the thirl, unground, by the in- ‘ habitants of the burgh of Elgin, or of the lands above specified, and inbrought ‘ by them to any part of the said burgh or lands, and converted to their own ‘ proper use, by brewing or baking, the same are astricted and thirled to the ‘ said mills.’