

No. 63. In this case, it was not clear in the debate, whether the lands were in use to go to the pursuer's mill, or freely to other mills, without being called in question by the pursuer or his authors.

Dalrymple, No. 54. p. 69.

1709. *July 22.*

The FEUERS of DUNDAFF *against* DAVID MADRIL of Muir-mill.

No. 64.
Out-sucken
multures.

In the process of declarator, at the instance of the Feuers of Dundaff against David Madril, for declaring the pursuer's lands free of any astriction to the defender's mill, called the Muir-mill, the pursuer's charter bearing this clause,—“ They always coming to the said mill with all corns grindable growing upon their lands, which they should happen to grind, and paying multures and knaveship, and doing other duties for grinding thereof used and wont, and upholding the said mill, mill-house, dam, and watergang thereto, conform to use and wont, and also bringing all other corns, as well malt as others, which they shall happen to bring within the bounds of these lands, to be grinded thereat, for out-sucken multure allenarly,”—the Lords found the said clause to import a thirlage, and that the pursuers could grind none of the foresaid corns at any other mill.

1709. *December 23.*—In the declarator of immunity from thirlage at the instance of the Feuers of Dundaff against David Madril, the Lords, 22d July last, having found, that the pursuers were astricted to the defender's mill, the pursuers now allege, That by the astriction they are only bound for in-sucken multure of such of the *grana crescentia* as they either by necessity or choice happen to grind; and that they are at liberty to export the growth of their ground; the reason of thirling corns imported, and freeing what is carried out, being, because in these muir-land places they have more profit by selling their oats in market than by making meal of them.

Answered for the defender: The pursuers can grind at no other mill any corns belonging to them, (seed and horse-corn excepted), whether growing upon their own lands, or brought within the same from other places; for, if they were permitted to sell or dispose upon the *grana crescentia*, and buy meal and malt elsewhere, for the use of their families, the thirlage would be quite eluded.

Replied for the pursuer: Thirlage is odious, and clauses of immunity are to be favourably interpreted; and the prejudicial consequence to the defender's mill, by allowing the pursuers a faculty to grind or not grind there, at their pleasure, is of no weight to overturn the express words of their charters; so the Lords decided, in March, 1682, betwixt the Earl of Cassilis and the Tenants of Maybole, No. 46. p. 15987.; and in the late case of Rathillet against Mordicarnie,

supra, did not regard the fancied inconveniencies to a thirle-mill, by favourably interpreting the astricted person's rights.

The Lords found, That the thirlage imports, that all grindable corns growing upon the pursuers' lands, in so far as necessary to the consumption of their families within the thirle, are astricted to be grinded at the defender's mill; but that the pursuers may freely export the superplus of the growth of their ground; and that, if the *grana crescentia* are not sufficient for their own consumption, what is imported for that end pays out-sucken multure.

Forbes, p. 349. & 371.

1714. February 23.

FEUERS and INHABITANTS of OLD ABERDEEN against ALEXANDER FRAZER of Powes.

In the declarator of immunity from thirlage to Gordon's mill, belonging to Mr. Alexander Frazer, at the instance of the Feuers of Old Aberdeen against him, the pursuers produced several ancient charters, *anno* 1560, 1568, 1573, and 1609, granted by the Bishop of Aberdeen to their predecessors and authors of the lands, bearing a *reddendo* of a feu-duty *pro omni alio onere*. The defender, for inferring a constitution of thirlage upon the pursuers' lands to his mill, produced a charter granted to his author, in the year 1557, by William, Bishop of Aberdeen, bearing, "totas et integras nostras terras de Cottoun cum molendinis ejusdem vocat *Gordon's Mill* multuris terris molendinariis toftis et croftis ejusdem et aliis suis pertinentiis solitis et consuetis quibuscunque jacen. infra parochiam divi Macharis et diocesis nostram Abredonensem;" and another charter, upon the proprietor's resignation, granted by the Bishop, in the year 1609, "cum astrictis multuris croftarum et rigarum aliorumque territoriorum veteris Aberdoniæ aliisque multuris solitis consuetis jacen. infra Baroniam veteris Aberdoniæ lie Skyre nuncupat divi Macharii et vice comitat. de Aberdeen." By which two charters, the defender contended, That a thirlage was sufficiently constituted for the reasons following; *1mo*, This was the Bishop's mill, to which our lawyers give a presumed astriction; Stair, Lib. 2. Tit. 7. § 16.; 7th December, 1665, Veach *contra* Duncan, No. 31. p. 15975.; *2do*, Which enforceth the presumption, the mill lies within an united church jurisdiction of Old Aberdeen; *3tio*, The charter 1609 *cum astrictis multuris* being upon resignation, presupposeth that the Bishop was only confirming and transmitting what was before granted, and plainly connects with, and explains, the older charter, bearing *cum multuris* in the general; *4to*, Had there not been a former astriction, the pursuers probably would have got their feu-charters *cum molendinis et multuris* at least in the *tenendas*, which none of them has; and *pro omnia alio onere* relates only to feudal prestations; *5to*, The Bishop, in the charter 1557, reserves liberty to grind his own corns multure-free, when at Aberdeen, except a penny to the servants; which privilege of exemption is a strong argument

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No. 65.

A charter granted by a Bishop *cum molituris*, of lands within his diocese, anterior to feu-charters of the lands in favour of others, bearing the *reddendo* of a feu-duty *cum omni alio onere*, and explained by a charter of the mill *cum astrictis molituris*, posterior to the charters of the lands, found to constitute a thirlage.