

*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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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.

No. 65. for this being the Bishop's mill, and that he understood no other exemption but in that particular place.

Alleged for the pursuers: The servitude of thirlage, being always reckoned most odious, requires a very express constitution, which is not in the charter 1557, seeing it bears only *cum multuris*, without the word *astrictis*. And freedom is to be supposed, not from the general presumption where servitude is not expressed, but also that the Bishop is not to be presumed to have burdened his own lands with a servitude. The reason of the decision, 7th December, 1665, Veach *contra* Duncan, was, because the Bishop of St. Andrew's had, by his precepts, and other acts, expressly thirled his tenants, which indeed, of itself, was a good constitution of thirlage; *2do*, It appears not from any charters produced, that the defender's mill is the mill of the barony; for, *1mo*, The designing a mill to lie within a barony doth not make it the mill of the barony, where neither the multures of the barony are disposed nor the mill designed to be the ancient mill of the barony; *2do*, Although the charters from the Crown designing a mill as the mill of the barony, or lying within it, may be a ground to presume that these lands were erected into a barony, because flowing from the authority that has power to erect, no such presumption can be drawn from charters of that nature granted by other superiors, unless the erection charter were produced. And ecclesiastic mills have no privilege; 13th July, 1632, Earl of Morton, No. 116. p. 10853.; 12th December, 1673, L. Pittarrow *contra* Stuart, No. 5. p. 14530.; *3tio*, If the pursuer's lands be not astricted by the charter 1557 *per se*, though the charter 1609 had not followed, they were free till that last charter supervened; and if free, any new right granted by the Bishop to the defender's author cannot explain a former charter to infer a new burden upon the pursuers' lands without their consent; *4to*, By the Bishop's reserving to himself a freedom from multures, no freedom from astriction was intended, but that corn for the use of the Bishop's family was to be grinded free of all multure whatsoever, except a small acknowledgment to the servants.

Answered for the defender: It is needless to notice the allegiance, that thirlage is odious; for, at the beginning, it was not so unfavourable, because the building of mills was thereby encouraged. The decisions cited for the pursuers are marked in so few words, that the matter of fact therein seems not to be fully understood; and in that betwixt L. Pittarrow and Stuart, the defenders must be supposed to have had previous rights without astriction.

The Lords found, That the charter 1557 being anterior to any charter in favours of the pursuers, and explained by the charter 1609, constitutes a thirlage; and that the feu-charters *pro omni alio onere* betwixt the charters 1557 and 1609 are not *media impedimenta*, but that the last charter 1609 could explain the former charter 1557 in prejudice of the intermediate feu-charters.