No 117.
the astricted and thirled multures of the whole barony. This found sufficient title to pursue for abstraction, if the lands are part of a barony which had been once the King's property.

tures of the said whole Lordship; and the defender *alleging*, That the pursuer's sasine of the mill foresaid, and thirled multures therein contained, cannot furnish this action, except that the pursuer could qualify and prove, that either the defender was thirled to the said mill, by some clause of his infeftment, which astricted his lands thereto, or else by some other act and constitution of thirlage, or other lawful writ, which might astrict him to the said mill; this exception was repelled, in respect of this reply, which the Lords sustained, and admitted to the pursuer's probation, viz. That the mill libelled is the sole and only mill of this barony belonging to the King's Majesty, and that the defender's lands libelled are a part of the said Lordship, and that the heritors thereof have been in use past memory of man, to come and grind their corns of the saids lands at the said mill, as thirled thereto, and to pay therefor the quantities of the multures acclaimed, and to cast the mill-dams, and to lead the mill-stones, and to repair the mill; which use and consuetude in the King's mill is sufficient, albeit more is required in mills pertaining to private persons; which reply being proved, the Lords found as sufficient to constitute a perpetual thirlage, as any writ or constitution, being in the mill of the King's barony.

Act. ——. Alt. *Dunlop.* Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 105. *Durie, p.* 749.

*** Auchinleck reports this case:

John Doc infeft in the mill of Cessintullie, with the multures, pursues certain vassals of the barony of Cessintullie (which is a part of the King's property) for abstracted multures. It is *alleged* no process, except it were libelled *per expressum*, the defenders were astricted either by their infeftments, or by lawful acts of thirlage. To which it was *replied*, That it is sufficient that the pursuer was infeft by the King in the said mill, with the said multures, used and wont, and this is the mill of the barony whereunto the defenders have been in use to come in time bygone. The Lords repelled the exception, in respect of the reply, and this was the King's mill of the ———, but in other private men's mills, astriction is requisite, either by infeftments, or acts of thirlage, as was found in the action pursued by James Crawford against the Feuars of Muckhart, No 108. p. 10853.

Auchinleck, MS. p. 130.

No 118.
In a thirlage to the King's mill, where no writ was shown, but the thirlage constituted

1662. *January* 3. Stuarts *against* Abstracters of Multures.

In an action for abstracted multures pursued by James and Robert Stuarts, against the Heritors and Tenants of the lands astricted to his mill of Aberlemnock, it was *alleged* for the defenders, That there was no astriction shown, and

No. 118.
by possession, the teind was found not to be thirled, which belonged not to the King when he granted the infeftment of the mill.

that they were infeft in their lands *cum molendinis et multuris*, long before the pursuers or their authors their infeftments in the mill. It was *answered*, That the mill is a mill of the King's property; and the pursuer offered to prove, that he and his authors have been in immemorial possession of the astricted multures libelled; so that *in molendino regio*, possession immemorial is equivalent to a legal constitution of a thirlage, by the law and practice of this nation, whatever be the law of other mills.

THE LORDS repelled the allegeance.

It was also further *alleged*, That the teinds should not be astricted by any such possession; because teinds being *separatum jus* from the stock, though tenants have been in use to carry their whole grains *in cumulo* to the mill, during the time of tacks, or otherwise; that could not prejudge the titular to draw his teind, or carry it away after apprising of tacks, or when he had power otherwise to do the same; so that, unless the titular had thirled the teinds, either by a constitution, or that he and the tenants had carried the teinds to the mill *eo nomine*, and not confusedly with the stock, without distinction of stock and teind, they could not be thought thirled by never so long a possession. It was *answered*, That there is *eadem ratio* in the matter of thirlage, as to the teinds and as to the stock. It was *replied*, That there is *diversa ratio*, as in the exception.

THE LORDS sustained the allegeance, and found teinds free, unless they suffer fire and water within the lands of the thirlage: They found also horse-corn free, for sustentation of horses that labour the ground. *In præsentiâ.* See THIRLAGE.

Fol. Dic. v. 2. p. 107. Gilmour, No 12. p. 11.

*** Stair reports this case:

1662. *January* 8.—JAMES STUART, as being heritably infeft in the mill of Aberlemnock, pursues the feuars of the barony for abstracted multures of their corns growing within the barony, or which tholed fire and water within the same. The defenders *alleged* absolvitor, because they are infeft in their lands feu of the King, long before the pursuers infeftment; which infeftment bears *cum molendinis et multuris* in the *tenendas*. The pursuer *replied*, That albeit that clause were sufficient liberation amongst subjects, yet this is a mill of the King's property, whereunto thirlage is sufficiently constituted by long possession, of coming to the mill, and paying in-town's multures and services, (as in Craig's opinion) and hath been so found by the Lords, 5th February 1635, Dog *contra* Mushet, No 109. p. 10853. The defender *answered*, That albeit thirlage to the King's mills may be constituted without writ, yet cannot take away an express exemption granted by the King.

THE LORDS repelled the defence in respect of the reply; because they thought that this clause being but in the *tenendas*, past of course, and when signatures

No 118. are past the King's hand, or Exchequer's, they bear only *tenendas*, &c. without expressing the particular clause, which is afterwards extended at the Seals.

The defenders *alleged* further absolvitor from the multure of the teind, because that was not thirled, nor had the King any right thereto when he granted the infeftment of the mill. The pursuer *replied*, The defence ought to be repelled, in respect of the long possession *in molendino regio*, because the defenders, and their tenants, past 40 years, paid multures of all their corns promiscuously, without exception of teind; likeas there are several decreets produced, for abstracted multures of all the corns without exception. The defender *answered*, That the reply *non relevat*; for albeit long possession may make a thirlage of the King's own barony, yet that cannot be extended to other mens rights of their lands and teinds, which cannot be thirled without their own consent, or decreets against themselves called, nor do the decreets bear teind *per expressum*.

The Lords found the defence relevant, notwithstanding of the reply, except such teinds that thole fire and water within the barony; and likewise sustained the defence for the corns eaten by the defenders upon the ground, in the labouring, &c.

Stair, v. 1. *p.* 76.

No 119. Infeftment in the mill of a barony, with 40 years possession of multures, was sustained as a good title to pursue for abstractions.

1662. *January* 14. John Nicolson *against* Feuars of Tillicultry.

John Nicolson, as baron of the barony of Tillicultry and mill thereof, pursues the feuars of Tillicultry, for a certain quantity of serjeant corns, and for their abstracted multures, for which he had obtained decreet in his barony-court, which was suspended. The defenders *alleged*, That his decreet is null, as being in vacance time; 2*dly*, As being by the baron, who is not competent to decern in multures or thirlage against his vassals; 3*dly*, The decreet was without probation; the baron neither producing title, nor proving long possession; and as to the serjeant-corn, nothing could constitute that servitude but writ. The charger *answered*, That barons need no dispensation in vacance, and that baron-courts use to sit in all times, even of vacance, by their constant privilege; and that the baron is competent judge to multures, or any other duty whereof he is in possession. And as to serjeant-corn, in satisfaction of his decreet, he hath produced his infeftment as baron of the barony, which gives him right of jurisdiction, and so to have serjeants, whose fees may be constituted, and liquidated by long possession.

The Lords found the reply relevant, the charger having 40 years possession as to the multures, and the pursuer declared he insisted not for the King's feuduties in kind, but for the teind, seed, and horse-corn.

The defenders *alleged* absolvitor, for as much of the corns as would pay the