1678. *January* 11. Lord Balmerino *against* Cockburn.

No 127.
An act of thirlage of a baron court, with 40 years possession, found sufficient by prescription even against feuars who had a right freeing them from the servitude, of an older date than the act.

The miller of Leith-mill, with the concourse of the Lord Balmerino his master, pursues James Cockburn before my Lord's baillie, for the multure of malt brewed by the said James in his brew-house; whereupon there is suspension raised at the instance of James Cockburn and Sir James Stansfield heritor of the brew-house, on these reasons; 1*mo*, That the brew-house being upon the yard-heads of Leith was not held of my Lord, nor within his bailie's jurisdiction; 2*do*, That the decreet was in absence for exorbitant quantities, and was null, because the heritor of the brew-house was not called. Both these the Lords repelled, upon this reply, That it was offered to be proved, that the yard-heads of Leith was part and pertinent of the barony of Restalrig, whereof a sasine is produced; and that this process was not to constitute a thirlage, which was already constitued by act of thirlage *in anno* 1628, bearing, that the Lord Balmerino, upon warning given to all the feuars and tenants of the barony of Restalrig, had thirled their corns, and all they should bring in for their own use, to his mill of Leith; and therefore found no necessity to call the heritor, but the tenants, for abstracted multures; but allowed the heritor to compear and defend: Who now compearing, *alleged*, That he was infeft in the brew-house for a certain feu-duty, *pro omni alio onere*, which without a clause *cum molendinis* did ever liberate feuars from thirlage; so that acts of the superior courts could not induce the same, albeit the heritor for the time had been compearing, unless he had subscribed the act; likeas the defender and his authors have been in custom to go to other mills, and preserve their liberty. The charger *answered*, That this being the mill of the barony, the tenants are certainly thirled, and the feuars ceased not to remain thirled, seeing they feu by a rental, which was with the burden of the multure, unless they obtain a clause *cum molendinis*.

The Lords found the feuars not thirled by their charters, bearing a feu-duty *pro omni alio onere*, and that the act of thirlage did not constitute thirlage alone, but that it was a sufficient title for prescription; and found, that if the pursuer prove that he was 40 years in possession of the multures, conform to this act, that the thirlage was thereby constituted, unless the defender prove interruption, not by any partial or clandestine abstraction, but by going to other mills with their whole grist for one or more years together. See Thirlage.

Fol. Dic. v. 2. *p.* 107. *Stair, v.* 2. *p.* 589.

*** Fountainhall reports this case:

Balmerino pursues for abstracted multures. *Alleged*, There is a difference between arable ground and a brew-house, for which last he would pay no multure unless it were in the body of his charter; and their acts of a baron court could not bind him the heritor of a brew-house, not being cited, nor consenting, but

they grinded elsewhere. THE LORDS found the act of thirlage *per se* could not be sufficient, unless it were made appear, that the ground of the brew-house, viz. in Leith yard-heads, lies within the barony, though these acts may be a title to begin prescription, and clad with 40 years possession made a complete thirlage; as also, found interruption relevant thus, that the defender had carried away considerable quantities of corns to other mills yearly, for 40 years together, or the whole corns of one year. No 127.

Fountainhall, MS.

1681. *January.* EARL of HADDINGTON *against* FEUARS of MELROSS.

No 128.

FOUND, that immemorial possession of coming to an abbot's mill did not induce a thirlage, unless the pursuer had bond, act, or rollment of Court, or decreet of abstraction, before the 40 years possession, to be a title of prescription; and that the abbot's charter of the barony *cum molendinis et multuris*, was not a sufficient title against the vassals, who had their feus from the abbot free of astriction.

Fol. Dic. v. 2. *p.* 105. *Harcarse*, (THIRLAGE, SUPPLEMENT) *No* 7. *p.* 295.

1681. *January* 21. GRIERSON *against* GORDON.

No 129.
Thirlage was found to carry the multure both of stock and teind by prescription of possession, and also of all sold corns, but not to reach seed or horse-corns.

GRIERSON, as heritor of the mill of Glenassen, pursues Gordon of Spadoch for abstracted multures, who *alleged*, That the fifth part of the grain must be free for the teind, which is always multure free, unless the thirlage had been consented to by the church-men; 2*do*, That he can be liable for no multure of the seed or horse corn; 3*tio*, That he can be liable for no multure of any grain as abstracted, but such as he grinds at other mills, and not for what he sells.

It was *replied*, That prescription is equivalent to consent; and it is offered to be proved, that the whole grain growing on the defender's land, without any abatement for teind, paid multure.

This reply the LORDS found relevant; but found no multure due for seed, or horse-corn; but found multure due for all that was sold. See THIRLAGE.

Fol. Dic. v. 2. *p.* 107. *Stair, v.* 2. *p.* 839.

*** The same case is mentioned by Harcarse:

FOUND, that where the minister hath not the teinds in victual, but in money, if the tenant grind the same, he ought to grind it at the master's mill, and pay multure therefor.

Harcarse, (THIRLAGE, SUPPLEMENT) *No* 6. *p.* 295.