No. 40.

successor, but he is content to be liable to the fifth part of the payable rent till a valuation.

The Lords found the defender liable only for the fifth part of the payable rent till the valuation, and not by the tack-duty, unless he had been in use of payment of it, whereby he would be liable by use of payment till interruption.

Stair, v. 2. p. 779.

1680. *November* 24. RAMSAY *against* The TOWN of KIRKALDY.

No. 41.
Thirlage of *invecta et illata* tholling fire and water within a town was extended not only to malt made within the town's liberties, but to malt brewed within the same.

Sir Andrew Ramsay pursues the Town of Kirkaldy for abstracted multures of *invecta et illata*, tholling fire and water within the thirle of the West-mill of Kirkaldy, whereof he is heritor, conform to an astriction in these terms. The defenders alleged, that tholling fire and water could only be understood of bear made in malt within the thirle, for the steeping is the tholling water, and drying is tholling fire, and could never be extended to brewing within the Town, otherwise most of the towns having such thirlage, might crave multures of all the malt sold in their markets, which was never pretended by any, and would be of great damage to the lieges; and Craig doth interpret tholling of fire and water to be killing and cobling. It was answered, that the literal sense of tholling fire and water doth as well extend to brewing as making of malt, and is more suitable to the design of the thirlage, which might be evacuated, and import nothing, if it were only extended to malt made in the Town, which they might forbear; this being a distinct thirlage from the thirlage of *grana crescentia*, and by a distinct right, the true intent whereof hath been, that the Town should make use of no malt, but what was ground at the pursuer's mill; and therefore the brewing is mainly considered, so that the malt made within the thirle, though not brewed there, ought to be carried to this mill, and no malt should be brewed in the Town, but should be ground at this mill, or else they should be liable for multure, as if ground there, especially the multure being so easy, as but a peck of two bolls, and as the defenders contend for a peck of ten firlots. The Lords did, before answer, ordain witnesses to be examined by both parties, what hath been the ancient custom in this thirlage; which being advised, the import was, that some of the witnesses for the pursuer deponed, that it was the constant custom very ancient to get multures of all corns brewed within the town, but that the inhabitants used to steal it in, in the night time, and several witnesses deponed upon some instances of the seizing upon malt brought ground into the Town, and sometimes arrested by warrant of the bailies. The Town's probation did only bear, " that the witnesses did know no such thing."

The Lords having considered the probation, found that this thirlage did extend to malt brewed in the Town, though not malted in the Town or its liberties, but not to meal.

Stair, v. 2. p. 805.