1682. *January* BUNTEIN *against* BOYD.

No 130.
Coming to mills belonging to subjects, without title in the master of the mill, does not infer thirlage.

Where a party has a charter with a clause *cum molendinis*, payment of insucken duty does not infer thirlage.

MAJOR BUNTEIN, as having right to the lands of Kilbraid, having pursued Robert Boyd of Pittincross for astricted multures, as being thirled to the mill of Kilbraid; *alleged* for the defender, That the pursuer produces no title to instruct the constitution of the servitude of coming to a mill, albeit immemorial; being *actus meræ facultatis* will not infer a servitude, except in the case of the King's mills; albeit the servitude had been constituted, yet the defender cannot be liable, because he had obtained a charter from the Earl of Kilmarnock the pursuer's author, containing a *novodamus*, and bearing in the *tenendas* the clause *cum molendinis et multuris*, which is sufficient to liberate the defender from any such astriction, Craig, lib. 2. dieg. 8, § 12. *Answered*, That the lands of Pittencross being a part of the barony of Kilbraid, the defender and his predecessors have been in constant use to grind their corns at the mill of Kilbraid, and paid the insucken multures past all memory; and the charter bearing the *novodamus* cannot liberate the defender from the astriction, seeing the clause *cum molendinis et multuris* is only in the *tenendas*, and not in the dispositive part of the charter; as also, since that charter, the defender and his tenants did grind the corns at that mill, and paid the insucken multures as formerly. THE LORDS found, that the defender having a charter of *novodamus*, with the clause in the *tenendas cum molendinis et multuris*, and a certain duty *pro omni alio onere*, prior to the pursuer's right to the mill, and there being no constitution of the thirlage in writ, the paying of the insucken duty doth not presume thirlage; and therefore suspends the letters, and finds the defender free of thirlage.

Fol. Dic. v. 2. *p.* 105. *Sir P. Home, MS. v.* 1. *No* 111.

*** A similar decision was pronounced, 14th March 1635, M'Kay against Menzies, No 5. p. 1815., *voce* BREVI MANU.

1682. *December.* GORDON of Midstreath *against* Ross of Tillisnaught.

No 131.

A BARON having feued a piece of land *cum molendinis et multuris*, and thereafter feued a mill, with the express astriction of the multures of these lands; and the heritor of the mill having possessed the astricted multures of these lands for the space of 40 years and upwards, he pursued the feuar of the lands for abstracted multures.

Alleged for the defender; That his right to the lands *cum molendinis*, was anterior to the pursuer's right to the mill.

Answered for the pursuer; That he hath prescribed a right to the astriction, by 40 years uninterrupted possession

Replied for the defender; The feuar of the land having granted a temporary bond of thirlage to the pursuer's author, obliging himself to bring his corns to the mill during his life, these years ought not to come *in computo* to make up prescription, seeing, during that space, the feuar of the land was not at liberty to go elsewhere, and so could not be understood to have voluntarily acquiesced to, or acknowledged the pursuer's posterior right of thirlage. Again, the possession ought to be ascribed to the bond as the proper title, and not to the infeftment in the mill: Besides, it is offered to be proved, that the pursuer's author had made use of the bond; and the bond being only a temporary right, could not be a title of prescription. No 131.

Duplied for the pursuer; That he denied any such bond was made use of; and *esto* it had, his possession ought to be ascribed to his infeftment, which was the more sovereign title; 2*do*, The pursuer being a singular successor to the receiver of the bond, and the bond not being transmitted or made over to the pursuer, he had no other title but his infeftment to ascribe his possession to.

THE LORDS, before answer, ordained trial to be taken in what way and manner the bond was used, and by which of the pursuer's authors.

Harcarse, (PRESCRIPTION) *No* 761. *p.* 215.

1697. *February* 5.

MUIRHEAD of Braidsholme *against* The FEUARS of UDDINGSTON.

No 132.
Found in conformity to Forbes against Magistrates of Inverness, No 121. p. 10858.

MERSINGTON reported Muirhead of Braidsholme against the Feuars of Uddingston, for abstracting their multures from his mill of Calder. *Alleged*, By their feu-charters they are only astricted to a peck of each load of meal, whereas he exacts much more by his multure-dish. *Answered*, His measure is indeed somewhat more than the Linlithgow peck, but it is conform to the Glasgow measure, which is the rule and standard not only in his mill, but in all the mills round the country, and that by which the heritors receive their farms. *Replied*, the Linlithgow measure is the general authorised rule by the acts of Parliament. THE LORDS considering that every mill had its own customs, they found it relevant to augment the quantity, if they proved 40 years peaceable possession, in exacting no less. Then, 2*do*, The feuars craved to be free, unless they got the preference to all out-town sucken in grinding their corns, especially seeing they were infeft in the mill as well as Braidsholme *quoad* the great multures, and he had only the power of inputting a miller, and uplifting the small duties of the lock, knaveship and bannock; and yet his miller preferred those who were not thirled, at least served them according as they came to the mill, whereby they suffered prejudice both in the time of drought and frost. *Answered*, By the disposition none had a preference but the Earl of Angus, who was their superior; and it was the most equal method to serve them as they came. THE