1704. PRINGLE of TORSONSE *against* BORTHWICK of STOW.

No. 58.

Where an attempt was made to build a mill within a thirlage, the Court interdicted procedure in the building during the dependence of the process for trying the question.

*** This case is mentioned, in Hague against Haliburton, No. 38. p. 10726. *voce* PRESCRIPTION.

1705. *January* 26. SIR JOHN GRAHAM of Gartmore *against* JAMES URE.

No. 59.
Clause importing liberation from thirlage.

Sir John Graham of Gartmore pursues James Ure of Shirgarton, for declaring, that the lands of Shirgarton are thirled and astricted to the pursuer's mill of Ardenbeg. The first question here was, If Gartmore had any constitution of thirlage by charters to instruct these lands to be thirled? For evidencing whereof, he produced a charter by King James V. in 1541, feuing out the lands of Shirgarton, Ardenbeg, and others, to Robert Master of Erskine, with the mill thereof, with a progress down to the pursuer; and this being one of the King's mills, it makes an undoubted constitution of thirlage, even as a disposition of a barony, *cum molendino ejusdem*, does import, that the lands and tenants of the barony are astricted to that mill. Answered, *Non constat*, that this was a barony; and when they were both in the Master of Erskine's hands, it was no proper thirlage, when an heritor's tenants go to his own mill, for *res sua nemini servit*. The Lords found Gartmore's author's charters and other rights produced, did sufficiently found and instruct a constitution of thirlage of Shirgarton's lands to his mill of Ardenbeg. The second question was, If the thirlage be constituted *scripto*, whether Shirgarton and his authors had obtained a liberation therefrom? As to which he contended, That servitudes being odious, liberation was not only by express discharges, but even by tacit necessary consequences, as Craig, Lib. 2. Dieg. 8. shews; and that he had more; for the Earl of Mar had, in 1597, disponed the lands of Shirgarton, to Buchanan of Arnprior, Ure's author, not only with the clause *cum molendinis et multuris* in the *tenendas* of the charter, but likewise *pro omni alio onere* in the *reddendo*. It is true, the clause *cum molendinis* inserted in the *tenendas* of a charter granted by the King, is reputed but words of style, and gives no right, unless it be in the dispositive part, as was found, 3d January 1662, Stuart *contra* the Feuers of Aberlednoch, No. 118. p. 10854; but in charters granted by subjects, who are presumed to notice more exactly what they give, that clause must operate something; and so has Dirleton observed, 7th December 1665, Veitch *contra* Duncan, No. 31. p. 15975. where the Lords found the clause *cum molendinis*, imported a freedom from the astriction, though it was only in the *tenendas*; and more lately, in January 1682, Major Buntin *contra* Boyd, No. 44. p. 15986. where