ruary 1695, Crawfurd, No. 5. p. 8898. Whatever was the opinion of Craig, the point has been otherwise settled since his time; and for this there appears good reason, because erecting mills within the thirle, on pretence of grinding only out-sucken corns, would open a door to daily frauds. No. 96.

With respect to the caution offered by the defender, answered, That the pursuer is not obliged to accept thereof, and it would occasion perpetual law-suits between the parties.

"The Lords found, that the defender could not erect a corn mill within the bounds of the pursuer's thirlage."

Act. *Ro. Craigie.* Alt. *H. Home.* Reporter, *Lord Dun.* Clerk, *Forbes.*

Fac. Coll. No. 54. p. 80.

*** Lord Kames reports this case:

Tulloch of Tannachy having a considerable estate in a fruitful corn country, adjoining to the town of Forres, purchased from the town a piece of ground, for the convenience of the erecting a mill for the service of his own estate, which was not subject to any thirlage. This was opposed by Urquhart of Birdsyards, proprietor of the mills of Forres, to which the town of Forres was thirled; and it was urged for him, that Tannachy could not build a mill within the thirle, which might be prejudicial to the thirlage. It was answered, that if a proprietor build a mill within his barony, for the service of his people, this implies, on their part, an obligation to frequent the mill; and also, that they shall erect no mill within the barony to hurt the superior's mill. But in this case the mills of Forres are not within the royalty; and if the town of Forres have voluntarily subjected themselves to be thirled to another proprietor's mill, the bargain must stand. But the town is no further limited in the exercise of its property; and therefore any inhabitant, or any proprietor of a part of the royalty, may erect a mill within his own property, upon the hope of business from strangers who are not thirled. And this must hold *a fortiori* where a gentlemen has an estate of his own sufficient to employ a mill.

The Court did not enter into the distinction, but decerned in Mr Urquhart's declarator, "that Tannachy cannot erect a mill within the thirle."

Sel. Dec. No. 43. p. 48.

1753. *November* 21. EARL of HOPETON *against* BREWERS of BATHGATE. No. 97.

History of thirlage.

Bathgate is known to be a very ancient barony, having a mill, which is the only mill of the barony; and all the charters of the barony, produced as far back as the 1663, in the process bye and bye to be mentioned, contain the following dispositive clause: "Totas et integras terras et baroniam de Bathgate, cum messuagiis maneriei loco, turre, fortalicio, &c. molendinis, terris molendinariis, multuris et eorum sequelis, &c. annexis, connexis, partibus, pendiculis, et pertinentibus quibuscunque, prædict. terrarum baroniæ et molendinorum." The Earl of Hope-

No. 97. ton, *in anno* 1736, purchased the barony, and the mill of the barony, the rent of which mill was 16 bolls malt, 13 bolls meal. And as, at this period, the whole barony was understood to be astricted to the mill, the landward part for *grana crescentia*, and the burgh of the barony for *invecta et illata*, the Earl paid the same price for the rent of the land, and of the mill. After the Earl's purchase, steel-mills for grinding malt came generally into use; and some of the brewers of Bathgate, which is the burgh of barony, set up steel-mills, and abstracted their malt from the mill of the barony. The Earl brought an action for abstracted multures against these brewers before the Sheriff of Bathgate; who having allowed a proof before answer to either party with respect to the possession, it was proved on the part of the pursuer: 1*mo*, That the brewers of Bathgate, as far back as memory could go, had been in constant use of grinding the malt they brewed at the mill of Bathgate; 2*do*, That one day of the week was regularly set apart for grinding the said malt; 3*tio*, That the brewers were in use to carry their malt to and from the mill; 4*to*, That the multure paid for grinding malt, was higher than out-town multure; 5*to*, That when any abstractions were discovered, the brewers were fined, and decerned for payment of the multure. On the other hand, it was proved for the defenders, that, in time of drought, when the mill of Bathgate wanted water, the brewers were in use to carry their malt to other mills; 2*do*, That sometimes, when there was no drought, malt was carried to other mills, but without specifying that such abstraction was known to the miller.

The Sheriff "Found it proved, that the inhabitants and brewers within the town and barony of Bathgate, had been in use of grinding the malt brewed by them within the said barony, at the mill thereof, and paid the ordinary astricted multures therefor; and that, whether the malt was made of bear that grew without or within the barony: And therefore found the defenders liable in payment to the pursuers, of the said multure of the hail malt brewed by them within the barony, in the years libelled, that was not grinded at the said mill, &c.: And found the quantity of malt so brewed and abstracted, relevant to be proved by the defenders' oaths, &c.: And found that the defenders, their having erected and used steel-mills within the town and barony of Bathgate, was unwarrantable and illegal; and prohibited and discharged the erecting or using the said steel-mills within the barony in all time coming."

Of this decreet, three of the brewers brought a suspension, and repeated a declarator of immunity with regard to the malt brewed by them, founded principally upon certain quotations from our writers, who, they said, lay it down as a principle, that immemorial possession of coming to a mill, unless it be the king's mill, doth not infer an astriction. Craig, L. 2. Dieg. 8. § 7. Stair, Tit. Servitudes Real, § 17. Sir George M'Kenzie, Tit. Servitudes; which is confirmed by a decision, 13th July, 1632, Tenants of Muckhartshire, No. 116. p. 10853. in which it was found, That an infeftment in the mill of a barony, *cum astrictis multuris usitatis et consuetis*, with immemorial use of frequenting the mill by the whole

inhabitants of the barony, was not sufficient to astrict them, without producing a prior constitution of the thirlage. No. 97.

In answer to these authorities, the pursuer gave the following historical deduction of the origin and constitution of thirlage, which he thought necessary for explaining the principles that govern this case. Long after agriculture was known in Scotland, the quantity of corn raised was so small as to be manufactured in hand-mills, commonly called querns. But corns being multiplied by greater skill, or rather greater attention to husbandry, and the inhabitants of this country taking themselves for food more to grain, and less to meat, a quern was found a slow, and therefore a troublesome machine. This introduced water-mills, such as we now have; and as the ignorance, as well as scarcity, of good artificers, made the building of a water-mill an expensive undertaking, a baron, or other gentleman, who undertook such a work for the benefit of his people, expected no doubt in return, something for his pains; nor would his people grudge a high multure, which relieved them of the great labour and expense of querns. It is natural to suppose, that for a long time after mills were introduced, there was scarce any notion of thirlage as a servitude. Mills were so scarce originally, that an opportunity seldom offered of using any other mill than that erected by a proprietor for his own people: And the custom of living in villages near which the mill would be erected, did naturally confine every village to its own mill. But after people came to be scattered through different farms for the convenience of agriculture, and the profit of water-mills came to be understood, smaller proprietors built mills merely for profit; and, in order to gain custom, probably lowered the multure. This brought on interferences; and as old families who had going mills built for the use of their people, could not but grudge to lose the benefit of their mills, the practice commenced of confining people to their landlord's mill, which was a rational restraint, considering that such mills had been erected for their use.

Having premised this short sketch of the origin of thirlage, what falls next in order, is to examine in what manner it was constituted. This will not be difficult to clear, considering the circumstances of this country in old times, and the connection betwixt a baron and his people. It was anciently the law of Scotland, that the cattle pasturing upon the land, as well as the corn produced upon it, belonged to the landlord. The tenant's cattle, for this reason, could be poinded for the landlord's debt, and the tenants were reckoned his people, and under his power, though not slaves as originally. In these circumstances, no formality could be necessary to constitute thirlage, other than the order of the baron or landlord, perhaps signified by an act of Court for the greater solemnity, commanding all his people to grind their corns at his mill. And accordingly it is inculcated in all our law books, that a single act of Court is a sufficient constitution of thirlage. It may be said perhaps more accurately, that there was no necessity for any formality in a constitution of thirlage when water mills were first introduced; for when a landlord was at the expense of a water-mill for the convenience of his people, it was implied in such an undertaking, without a covenant, that the land-

No. 97. lord was to have the certainty of some retribution for laying out his money, and upholding the mill; and as he could have no retribution, other than a high price for manufacturing his people's corns, he could have no certainty of this profit, if his people were at liberty to frequent other mills. Hence it is, that in old times, when hand-mills were yet in use, it was understood to be law, that the people in every gentleman's land who had a mill, were thirled to that mill. This is evident from the statutes of King William, Cap. 9.; where, upon supposition of such an universal servitude, certain regulations are laid down for enforcing the same, and for ascertaining the *modus* of the thirlage.

And this leads directly to the present point. If a single act of Court is sufficient to constitute a thirlage, or if the landlord's will is sufficient, whatever way promulgated to his people, must not the constant practice of frequenting the mill, and of paying in-town multure, be a sufficient presumptive evidence, that there has sometime or other been an act of Court, or at least an express declaration of the landlord's will, that his people should be tied to his mill: The thing cannot admit of a rational doubt. We are not here talking of prescription, but merely what is to be understood a sufficient presumptive evidence of such original constitution. And when the debate is reduced to this narrow point, no man can doubt that the constant practice of going to a landlord's mill, time out of mind, and paying the high duties there exacted, is sufficient evidence. And after all, what better evidence than use and wont can be demanded of a constitution of thirlage, which might have been without writ, and which *de facto* was introduced long before writ was common; and supposing an act of Court to be necessary, yet as this servitude was introduced long before we had any public records, as there is no law requiring such acts to be recorded, and as the private records of a baron court were seldom safe from the injuries of neighbours, or of time; there is really no place for requiring a more pregnant evidence of astriction than use and wont.

And if we call in aid the above mentioned statutes of King William, by which it appears that very landlord had his people thirled to his mill, the argument concludes with irresistible force for the pursuer. Upon this principle it is sufficient to say, with regard to the mill of an old barony, that the whole inhabitants ought to be subjected, unless they can show an immunity. Hence it is, that feuers come to be subjected equally with tenants, supposing the mill to have a more ancient existence than the feus. A proprietor who feus out a bit of ground subjected to the thirlage, certainly does not intend to let down the rent of his mill; and, therefore, the ground feued remains astricted as formerly, unless the contrary be expressed in the feu right.

This doctrine opens a very remarkable distinction betwixt mills lately erected, and those which have been of an old standing. A man who acquires a land-estate made up of separate parcels, which were originally parts of other baronies, and builds a mill upon it for the first time, cannot subject his feuers, nor even his tenants who have standing tacks. An old barony, which has had a mill upon it, not

only time out of mind, but as far back as the title-deeds go, is in a very different situation. There the presumption will readily be admitted, that the people of the barony have been astricted to the mill; and use and wont of going to the mill is legal evidence of the astriction. No. 97.

The matter appears now ripe for examining the decisions, which, in the main, will appear perfectly agreeable to the above doctrine, carrying only along a distinction suggested in the preceding chain of reasoning. If the land and the mill appear never to have been the property of the same person, the use and wont of going to that mill by the inhabitants of that land will not infer a thirlage, however ancient the use and wont has been, because, as the inhabitants of that land have never been under the power of the proprietor of that mill, their going there will be attributed to conveniency and not to legal constraint, unless some written document appear: And upon this case there are many decisions. But, upon the present case, where the lands are in a barony, and the mill, the mill of the barony, it was found, 17th July, 1629, Laird of Newliston against Inglis, No. 20. p. 15968. that it is not necessary to produce any writing to constitute a thirlage to a mill of a barony; and that a feu-charter, containing a feu-duty *pro omni alio onere*, is not sufficient to liberate from the astriction. In this case, there has been use and wont of going to the mill, though not expressed in the decision, which brings it very near the present case. But, in the reasoning, the Lords appeared to have gone further, by laying it down for a rule, that all the inhabitants of a barony are naturally subjected to the mill of the barony; in which they have had an eye to the above-mentioned statutes of King William. In like manner, a Baron pursuing for abstracted multures from the mill of his barony, the Lords found possession alone a sufficient foundation for the claim, without producing any constitution in writ, 14th January, 1662, Nicolson against Feuers of Tullicoultry, No. 119. p. 10856.

It is a very different case, where a Baron feus out his own mill, without mentioning astricted multures, or multures used and wont. There it is not presumed that the Baron intended to astrict his people to the feuer of the mill, but to give them their liberty, in order to improve his own rents. And therefore acts and decreets of the Baron Court by the Bailie alone, without the authority of the Baron, even joined to 40 years possession, will not constitute the servitude in favours of the feuer of the mill; because the act of the Bailie cannot hurt his master. This was found, 12th July 1621, Douglas against Earl of Murray, No. 113. p. 10851.

Of the many decisions upon record, that only the Earl of Morton against Tenants of Mukartshire is contradictory to the doctrine above laid down. But by proving too much, it proves nothing. The Court was of a very different opinion in the case Brown against Fletcher of Ballinshoe, No. 79. p. 16018. where it was found that an infeftment of a mill, "*cum multuris usitatis et consuetis*, with 40 years possession of thirled multures, was sufficient to constitute a thirlage;" or rather, more accurately speaking, to presume an antecedent constitution. And here there

No. 97. was not another circumstance favourable to the astriction; no appearance that it was a barony-mill; no appearance that the lands and mill ever belonged to the same person; and the thirle multures claimed were extremely moderate.

It holds what is laid down by our authors, that thirlage is not inferred merely from the use of coming to the mill and paying in-town multures; supposing only the fact which the writers had in view, namely, that the lands and mill belonged to different proprietors. None of these writers apply the maxim to a barony, especially an old barony, neither do they apply it to a case like the present, where along with the lands a mill is disponed "*cum multuris et eorum sequelis.*"

The letters were found orderly proceeded at the Earl's instance, and he was assoilzied from the declarator of immunity."

Sel. Dec. No. 54. p. 68.

1755. *November* 28.

JOHN GRANT, Tacksman of the MILL of RUTHVEN, *against* JAMES MILNE of Bottarie.

No. 98.
No multure is due by a tenant, if his whole farm be kept in grass, and neither he nor his family reside on the grounds astricted.

James Milne was astricted by his tack to the mill of Ruthven, and bound to pay certain multures for all corn, either produced from his farm or brought in for the use of his family.

The representative of Milne being pursued for abstracted multures, objected, That Milne had, during his possession, kept his whole grounds in grass; and that neither he nor any of his family had resided on the farm, and consequently that no multure could, in terms of his tack, be due.

The Lord Ordinary "assoilzied the defender," and the Lords adhered, although it was pleaded for the tacksman of the mill, That multures, when ascertained by custom, and known to the tenant of lands subjected to thirlage, are to be considered as part of the rent; that a tenant is, from the nature of his tack, supposed to reside on the lands let to him; and consequently, that such tenant may not diminish this rent, or elude the purposes of his tack, either by converting the whole of his corn-grounds into grass-grounds, or by residing elsewhere than on the lands let to him.

Petitioner, *Miller.*

D. *Fac. Coll. No.* 166. *p.* 248.