No. 102. clause in the precept of *clare constat* in 1714, it is evident, that it likewise must have been copied, *per incuriam*, from the former charter; as it cannot be imagined, that the Earl, after disponing the mill, with the multures of these lands *per expressum*, in the wadset-right 1707, could mean to give away these multures to the vassal of the lands in a precept of *clare constat*, when he was getting no consideration for them. The authorities and decisions quoted for the pursuer do not contradict what is here pleaded; on the contrary, they tend to illustrate it, and to confirm the rule laid down by Lord Stair, That a dubious clause of this kind ought to be constructed from the subsequent uniform conduct of the parties, the surest evidence of their intention. And this rule the Court again followed in a very late case, between the Duke of Douglas and Mr. James Baillie, whose lands were found astricted, notwithstanding a clause *cum molendinis et multuris* in the *tenendas* of his charter, in respect of the immemorial use of grinding their corns at the Duke's mill, and paying insucken multure. To the *third*, There was little occasion to have recourse to the plea of prescription in this case, which is only necessary when a thirlage is imposed *a non domino*. But here it was established by the ancient proprietors of the lands, the family Breadalbane, from whom the property devolved to the pursuer. The Earl's infeftments in the barony and mill go back for several ages preceding the date of the wadset-right, and are sufficient titles of prescription, founded upon the immemorial possession of this servitude; and if prescription was necessary, the years of it were run after the date of these infeftments, long before the wadset was granted; so that there could be no objection either to the title, or the course of prescription.

"The Lords found the lands astricted."

Act. *D. Græme.* Alt. *Ferguson.*

Fac. Coll. No. 126. *p.* 231.

1759. *November* 17.

PATRICK YEAMAN of Blacklaw, *against* GEORGE DUNBAR, and Other Heritors and Tenants of the lands of Grange.

No. 103.

The indefinite astriction of lands to a mill by the proprietor of both, imports the thirlage of *omnia grana crescentia.*

The lands of Grange and Blacklaw anciently belonged to the abbacy of Cupar, and were astricted to the mill of Blacklaw, as were all the other lands of the abbacy to that and other mills belonging to it.

Various acts were made in the Court of the abbacy before 1562, respecting the thirlage of the abbacy-lands in general; by some of which the tenants were made liable in dry multure for their corns which they disposed of without grinding, and even obliged to pay a smaller multure for the corns they brought in to the lordship.

Clause *cum molendinis* in the *tenendas*,

In 1559, the lands and mill of Blacklaw were feued out by the abbot and convent to John Drummond of Colquhillie. The description in the dispositive clause

No. 103. without possession of immunity, does not discharge an astriction.

of the charter is this: "Totas et integras terras nostras de Blacklaw, Cotyards Ester et Wester, cum suis pertinen. nec non molendinum nostrum de Blacklaw, cum terris molendinariis, multuris siccis et liberis, lie ring bear, ac omnibus aliis pertinentiis, proficuis, custumis, et libertatibus, dicto molendino spectan. seu de more vel consuetudine terrarum nostrarum spectare deben. jacen. infra terras seu dominium nostrum de Cupro, et vicecomitatum de Perth." But in the precept of sasine, the description is in these words: "Totas et integras terras nostras de Blacklaw, una cum molendino ejusdem, terrisque molendinariis, multuris astrictis, liberis, et siccis, omnium et singularum terrarum nostrarum supra aquis de Yliff et Arichyt."

The property of the lands and mill of Blacklaw came by progress from Drummond to Patrick Yeaman; and the lands of Grange were acquired by George Dunbar and others; two of whom, John Gellatly and William Chalmers, derived right to their shares thereof from the Earl of Athol by charters, which in the *tenendas* described the lands as granted cum molendinis, multuris, et eorum sequeliis.

Patrick Yeaman brought a process against the heritors and tenants of Grange, for having it found, that their lands were astricted to his mill of Blacklaw, both as to their *omnia grana crescentia* and the *invecta et illata*, and for payment of abstracted multures.

Pleaded for all the defenders, except Gellatly and Chalmers, That they acknowledged the astriction; but that it only extended to such of their growing corns as they had occasion to grind, and not to their other corns which they had occasion to sell, far less to the *invecta et illata*. The astriction specified in the feu-charter of the mill being only general, without mention of *grana crescentia*, or *invecta et illata*, must be taken in the construction easiest for the inhabitants of the sucken; as thirlage, like other servitudes, being considered in law as unfavourable, cannot be extended by implication. The old acts of the baron-court of Cupar are not authenticated, only a copy being produced. But supposing them genuine, these acts are only so many vestiges of the tyranny of the Popish clergy; and however rigorous, do not expressly declare the whole growing corns to be astricted; and the obliging the people to bring the *invecta et illata*, must have been an illegal exacting, since the acts only require them to pay outsucken multure for the same, instead of the highest multure, as usual; and all these old acts are entirely in desuetude, and cut off by prescription. Further, as the charter of the mill grants the multure *de more vel consuetudine*, use and wont must be understood to be the *modus* of the astriction, agreeable to the opinion of Craig, Lib. 2. D. 8. § 7.; and Lord Stair, Book 2. Tit. 7. § 18.; and from the evidence of witnesses, it appears, that the tenants of Grange have been in use to sell part of their corns, and only to pay multure for what they grinded.

Answered for the pursuer, Where a proprietor astricts his lands to a mill indefinitely, he is understood to astrict the whole growth of the lands, and not merely such part thereof as may be consumed by the inhabitants; Stair, Tit.

No. 103. SERVITUDES REAL, § 18; Sir George Mackenzie, Tit SERVITUDES, § 24; and 26th June 1635, Waughton against Home, No. 25. p. 15971. This holds more especially, where a proprietor astricts his own lands to his own mill; for it being the same thing to him, whether the tenants pay that part of their victual-rent to himself, or to the tacksman of the mill, the presumption lies, that he would naturally chuse the astriction of *grana crescentia*, as what is least liable to be defrauded by abstractions. Accordingly, here the ancient acts of the abbacy-court show, that in those days the tenants were obliged to pay the multure of all their growing corns to the mill, as well as to pay free multure for the *invecta*; which cannot be called oppressive, as the abbacy could not have any inducement to oppress their own tenants of the lands in favour of their tenant in the mill; and their taking a lesser multure for the *invecta*, proves no oppression was intended. But exclusive of the acts, the clause in the original feu-right of the mill sufficiently explains and establishes the thirlage in the same sense. The grant of the astricted multures of the whole lands, shows the whole growing corns were astricted; the free multures show, that where the inhabitants purchased corn elsewhere, they were bound to bring them to be manufactured at the mill; and the dry multure refers to such as should be paid for grain sold and exported out of the thirle. These words, therefore, leave nothing to be settled by use or custom; and it appears from the proof, that the practise of selling part of the growing corns, without paying multure, had only crept in of latter years, far within prescription; and consequently was only an illegal abstraction, which is now complained of.

Pleaded, *separatim*, for Gellatly and Chalmers, It is *triti juris*, that a conveyance of lands, with mill, multures, and sequels, liberates from an astriction; as appears from Lord Stair and other writers, and from sundry decisions, observed by Harcarse, *(supra,)* particularly 17th January 1682, Burton, No. 44. p. 15976. and a latter case in 1723, Russell against Waddell, No. 69. p. 16014. The defender's charter from the Earl of Athol, so far back as the year 1589, bearing such a clause, must therefore import a discharge of their astriction.

Answered for the pursuer, 1*st*, The clause *cum molendinis*, in the *tenendas*, even of a charter from a subject-superior, who remains proprietor of the mill, is not understood to discharge an astriction formerly established, unless so explained by possession, as these words are frequently thrown into that clause with other words of style, *per incuriam*; Stair, Tit. SERVITUDES REAL, § 24. The decisions cited by the defenders were given in cases where the clause was explained by possession; but, in the present case, the defenders and their predecessors, having constantly acquiesced in the astriction since their charters, cannot claim immunity thereupon; agreeable to a late decision in 1738, between the Duke of Douglas and Baillie of Begbie, where a clause in the *tenendas* of Begbie's charter from the Duke's predecessor, *cum molendinis*, and a special *reddendo pro omni alio onere*, were not found sufficient to discharge the astriction, as Begbie's tenants had still continued to grind their corns at the Duke's mill, and pay insucken-multures.

(See APPENDIX.) And, 2*do*, The Earl of Athol had no power to discharge this astriction, had he declared it ever so expressly. It does not appear, that he ever was superior of the lands of Grange; and any right he pretended to those lands was reduced at the instance of Lord Cupar. At any rate, as he never had nor pretended a right to the mill of Blacklaw, the astriction established in favour of John Drummond, the proprietor of that mill, in 1559, could not be impaired by any charter of other subjects granted by the Earl in 1589. No. 103.

The Lords found, That all the *grana crescentia* are thirled; but that there is no evidence, that the *invecta et illata* are thirled; and found, That the charter from the Earl of Athol does not exeem Gellatly and Chalmers."

Act. *Ferguson*, Alt. *And. Pringle, Lockhart.* Repoter, *Woodhall*, Clerk, *Gibson.*

Fac. Coll. No. 1098. *p.* 353.

1760. *July* 16. COUSTON, *against* TENANTS on the ESTATE of PITREAVIE.

No. 104.
Thirlage of victual in general, does not comprehend wheat, where the mill is not properly constructed for grindnig it, and no dry multure in use to be paid.

The tenants upon the estate of Pitreavie were astricted to the mill of the barony, and their tacks contained the following clause: "Binds and obliges him, and his foresaids, not to abstract any of his victual from the wood-mill of Pitreavie, but astricts himself thereto during his possession of the said lands, in the surest form." When these tacks were granted, none of the tenants were in use to sow wheat. Of late, however, some of them have sown wheat, and have been in use to carry it to be grinded at other mills. Couston, the miller, brought a process against the form abstracted multures.

Pleaded for the defenders: That at the time the astriction was constituted, no wheat was in use to be sown in the barony; and consequently, the thirlage could only reach such grain as then grew upon the lands: That in all such cases, when a new species of grain has begun to be sown, it cannot be comprehended under the astriction. It is pleaded, That a tenant might thus disappoint the thirlage altogether, by altering his method of sowing. This may be a detriment to the proprietor, but will not alter the general rule; for the tenant may in like manner elude the thirlage, by laying down his whole lands in grass; and there is no reason why the same thing may not be done with regard to wheat.

2*do*, The mill in question is by no means fit for grinding wheat. It is a common corn-mill, which, though it may bruise the grain to pieces, is absolutely unfit for making sufficient flour. The tenants must therefore be at liberty to carry their wheat to other mills, where it can be properly grinded.

Answered for the pursuer: The clause of astriction in the tacks comprehends victual in general; and therefore, though at first no wheat was in use to be raised, must certainly be understood to be astricted when any of it is raised. If the defenders' doctrine were well founded, it might be in their power, by changing the grain sown upon their lands, to disappoint the thirlage altogether.