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