1766. *July* 30. SIR WILLIAM MAXWELL of Calderwood, *against* ROBERT STRANG, &c. Portioners of Jacktown, &c.

THIRLAGE.

The clause of "Use and Wont," interpreted by possession.

[*Sel. Dec. No.* 246; *Dictionary*, 16,057.]

SIR William Maxwell is superior of the lands of Jacktown and others. His vassals are thirled to his mill by a clause of the following tenor:—"*et cum astrictis multuris molendino meo, constructo aut construendo, infra viginti libratas terrarum mearum de Drippis et Jacktown mei molendini solvi, solitis et consuetis.*" A charter bearing this clause is produced, of date 1562; so that, two hundred years ago, this thirlage appears to have been constituted by former usage. Although the charters do not specify the kind of thirlage, yet, by custom, a thirlage of *omnia grana crescentia* has taken place as to oats, with the exception of seed and horse corn. It is certain that neither the superior, nor his vassals, nor their predecessors, ever had any right to the teinds of those lands. The teinds belonged formerly to the Bishop of Glasgow. They were gifted in 1617, by James VI., to the College of Glasgow, and they are still the property of the College; and such teinds, not being saleable, must so continue. Past all memory the teinds have not been drawn, but rental bolls have been accepted in lieu of the parsonage, and small sums of money in lieu of the vicarage teind. The delivery in kind having proved inconvenient, the College has, of late, been in use to receive a conversion in money, according to the College-fiars annually struck. In mutual declarators between Sir William Maxwell and his vassals, the question occurred, Whether the vassals are thirled for this teind, while, instead of the *ipsa corpora*, or rental bolls, the vassals pay a composition in money to the College, and so retain the *ipsa corpora?* In this question the Court was uncommonly divided: The substance of the argument on each side, is as follows:

ARGUMENT FOR THE VASSALS:—

When lands are astricted to a mill, the teinds thereof are not comprehended, unless those teinds either belong to the heritors or the proprietors of the mill prior to the astriction. The reason is, that no person can be understood to astrict to a mill what does not belong to himself, and over which he has no power. Hence Lord Stair says, *B.* 2, *tit.* 7, § 17, "Thirlage of lands to another man's mill doth not infer a thirlage of these lands, though acquired by the heritor who thirled these lands." And he cites a decision, *27th July* 1635, *Laird of Innerwick* against *Hamiltons*, where it was so found. Upon the same principles it was determined, *18th November* 1697, *Garden* against *Watson*, observed by Fountainhall: There, in a thirlage of *omnia grana crescentia*, deduction having been sought for teind, was allowed, as the right of teind was in the heritor's person: and, in two cases, teinds were found to be a deduction, without distinguishing whether they belonged to the owners of the lands

astricted or not. Durie, 21*st March* 1637, *Cuthbert* against *The Town of Inverness*: and Stair, 7*th June* 1676, *Pittarrow* against *Stewart*. In the present case, the College of Glasgow has right to the teinds, and may draw yearly the tenth sheaf; and therefore Sir William Maxwell cannot demand the multure of that teind. No transaction between the predecessors of the vassals and the superior could impose a servitude upon the fruits of the ground, in so far as those fruits did not belong to them; and as no deed of theirs could astrict the teind, so neither can it be presumed that any such thing was intended by the parties. Teinds are a *separatum tenementum* distinct from the stock; and, therefore, when Sir William's predecessors feued out the stock, and astricted the vassals at the same time to his mill, the astriction must be held to be of the tenement feued out, namely, the stock. To suppose that the teind was thirled while possessed by the vassal, and yet that it was free whenever levied by the titular, is to suppose an astriction in favour of the superior which yet depends totally on the will of a third party, the titular. Nothing but an express agreement can create a right so anomalous, and there is here no such agreement. In such case, usage will signify nothing; for, if the teind is a subject not thirled, the going to the superior's mill will be *res meræ facultatis*, whereby no right can be established. Were the titular to draw the teinds, there could be no demand of thirlage: by selling the teind, they would not make it liable in thirlage: and, whether they draw it and then sell it, or make an annual bargain with the heritors instead of drawing and selling it, the case is still the same.

ARGUMENT FOR THE SUPERIOR:—

Although the teind itself could not be thirled to the prejudice of the College, yet the possession of the teind, while in the vassals, might be thirled: and this thirlage would subsist as long as their intromission subsisted. A thirlage constituted of *omnia grana crescentia* properly comprehends all sort of corn, seed and horse corn, and teind not excepted. But, were a person sued for the multure of those, he would have this plea in equity, That it could not have been the intention of the parties to astrict seed corn necessary for sowing the ground; horse corn, required for the use of the horses on the ground; and teind deliverable to the titular: for this would be in effect to demand impossibilities. But if one should neither sow corn, nor keep horses, nor deliver teind to the titular, the case would alter: the obligation implied in the general clause would become prestable, and, as the whole corn might be brought to the mill, the whole would be considered as thirled. The argument, that no person can be presumed to astrict to a mill what belongs not to himself, does not apply. It supposes that the astriction is the act of the vassal; whereas that is the act of the superior, being the condition of his grant to the vassal: Besides, why may not one astrict his possession? This was all that has been done in the present case, and the uninterrupted practice explains it to have been done. Neither does it vary the case, that, according to the superior's argument, the teind might at one time be thirled, and at another time not, as possessed by the vassal or by the titular; for even a thirlage of the stock may fluctuate, and cease or revive by turns. Thus, if a vassal thirles his lands to another's mill, whenever the fee opens to the superior in consequence of ward or non-entry, the thirlage ceases, but will

revive whenever the vassal is reinstated; 11*th December* 1666, *Earl of Cassilis* against *The Tenants of Dalmorton.* Thus, again, a wadsetter may thirle the lands wadset, during his possession, but upon redemption they will become free: the same is the case as to liferenters and tenants. As the tacksman of lands may thirle his corn, so may a tacksman of teinds thirle his possession of the teind. Had the vassals a tack of their teinds, they might have thirled them while possessed under the tack; nor does it make any difference whether they have a tack or not, so long as they possess. The case might be attended with more difficulty were the vassals hereafter to acquire a right to the titularity of their teinds; for then they might plead that they could not be presumed to have astricted a right which was not in them at the time. That, however, can never be a question between the parties; for the vassals can never purchase College teinds. The decision, *7th July* 1635, *Hamilton of Innerwick*, is not in point; for, there, the practice had been either to draw the teind or to allow a deduction from the thirlage on account of it. The superior, in support of his proposition, urges the following decisions:—Harcus, *voce* Multure, *No.* 723, "where the teind, if not drawn, or paid *ipsis corporibus* to the titular or tacksman, but in money, was found liable to multure, as their stock;" and Stair, 21*st January* 1681, *Grierson* against *Gordon*,—where it was offered to be proved that the whole grain growing on the defender's land, without any abatement for teind, paid multure; and the Lords found this plea relevant.

On the 1st August 1765, the Lords found, "that, as the teind, payable to the College of Glasgow, is payable in rental bolls of meal, therefore that the oats for said meal must be grounded at the pursuer's mill, and that the same is liable to pay intown multure."

On the 27th November 1765, the Lords found "that the teinds of the vassal's lands are not astricted to the superior's mill.

On the 26th June 1766, the Lords found "that the vassals are not entitled to any deduction from their thirlage to the superior's mill on account of the teind, and remitted to the Lord Ordinary to proceed accordingly."

On the 30th July 1766, they finally adhered to the last interlocutor.

For Sir William Maxwell, A. Lockhart. *Alt.* A. Wight.

OPINIONS.

Auchinleck. Lands and teinds, two separate estates. I do not understand a thirlage which is ambulatory. An heritor cannot astrict what he does not give.

Kaimes. I argue on the principle that servitudes are established *patientia et usu.* Thus *servitus itineris* is upon a presumed agreement. The thirlage here is of grinding at the superior's mill what corn the vassals have occasion to grind, and they have been in use to bring their teind.

Pitfour. A mistake to suppose that thirlage must be perpetual. When teinds were drawn by churchmen before the Reformation, there could be no thirlage of teind. Suppose the heritor should have a tack of teinds, why may he not thirle his possession?

COALSTON. For the vassals. No act or deed of an heritor can astrict a tenement to which he has no right.

GARDENSTOUN. Immemorial possession regulates thirlage. No argument shall convince me of the contrary, nor shall any argument convince me against an express stipulation.

PRESIDENT. My doubt is on account of teind and stock being *separata tenementa;* and, so standing the case, I cannot presume any thing from possession.

Diss. Auchinleck, Coalston, Kennet, Elliock, President.

1766. *July* 30. CAPTAIN CHARLES BARCLAY MAITLAND of Tillicutry and OTHERS, Heritors of that Parish, *against* ROBERT MAY, Feuar in Drimmie, and OTHERS, also Heritors of that Parish.

KIRK-YARD.

The Court of Session, as Commissioners of Teinds, have no power to fix a New Church-Yard for a Parish.

THE pursuers insisted, in an action before the Lords-Commissioners for valuation of teinds, for transportation of the Church of Tillicutry, and concluding "that the new church-yard should be the burial place for the said parish in time coming, and that the inhabitants should be decerned and ordained to bury in the said new church-yard in all time coming."

On the 30th July 1766, "the Lords decerned in the transportation of the church, but assoilyied from the conclusion as to the church-yard."

The President thought that the Court had no power therein.

1766. *August* 1. MAGISTRATES of EDINBURGH *against* ROBERT GARDINER, Esq. late Commissary of the Army in Scotland.

CAUTIONER.

One, who had for some time been Treasurer of an Hospital, being called upon by the Managers to find caution, and a cautioner having become bound for him "that he shall make just compt of the revenue of the said Hospital so far as the same shall be intromitted with by him,"—*found* that the cautioner was liable for a deficiency previously existing.

THE Magistrates and Town-Council of Edinburgh are governors of the Trinity Hospital. In 1762 they appointed George Pitcairne treasurer of the hospital, but neither exacted caution from him nor any regular obligation to account. The treasurer of Heriot's Hospital proved bankrupt, and, as he had