

possession of such a multure hath always imported thirlage, and not a coming to the mill, and payment at pleasure. No 123.

THE LORDS found, that 40 years possession of a dry multure was sufficient to constitute thirlage, without any other document or instruction.

Stair, v. 2. p. 360.

1676. June 7. LAIRD of PITTARRO (CARNAGIE) against STUART of Redmyre.

THE Laird of Pittarro pursues Redmyre and his Tenants for abstracted multures; and at first did insist upon a decret of the Lords, *in anno 1597*, obtained at the instance of Sir John Wishart, then heritor of the mill, against Irving of Redmyre, and Irving of Beltie, who were absent, and against one Keith coming; and upon an infestment granted by the Abbot of Arbroath of the mill, with astricted multures, used and wont, of the whole lands within the parish; which charter is near 400 years old; and upon an ancient retour upon a precept out of the Chancellary, direct to the Sheriff, cognoscing, that the whole lands within the parish were in use to come to the mill, and pay intown's multure: Pittarro produced the old infestment of the mill, and the decret, decerning the heritors and possessors present and to come, to bring their grain to that mill, and to pay their multures used and wont; but it being at first *alleged* for the defender, That these documents could not constitute a thirlage; because the Abbot, by his charter, had no power to thirle these lands, not being kirk-lands, or at all pertaining to the abbacy, as appeareth by ancient infestments produced; and for the decret, it was only in absence, and could be at most but a title for prescription:

THE LORDS found, that these documents could not constitute a thirlage; but were only a title for prescription, and behoved to have 40 years uninterrupted possession to constitute the thirlage.

After which Pittarro did insist upon a bond of thirlage, granted by Irving of Redmyre to Sir John Wishart, *in anno 1598*. To which it was *answered*, That this bond was *a non habente potestatem*, for it was not instructed that Irving, who granted it, was heritor of Redmyre; but, on the contrary, it bears his designation, in Redmyre. It was *replied*, That it bore also, that he thirled himself, and his tenants of Redmyre; and after so long a time, the pursuer was not obliged to instruct the right of property in him who constituted the servitude, it being clad with possession for many years thereafter, seeing he neither had, nor could require the proprietor's infestments, nor were there any registers of sasines at that time.

THE LORDS found, that the bond of thirlage, with possession, was a sufficient presumptive probation of the right of property in Irving, who granted the same,

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Thirlage found constituted by a decret in absence, decerning the heritors and possessors to pay the multures in all time coming, the decret not being objected to for 40 years; but the court assolizied from bygones, and services not contained in the decret.

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And there being a term assigned to either party, Pittarro adduced witnesses, and proved possession, but not continual. The defender produced an infeftment, granted by Irving of Beltie, of the lands of Redmyre, in June 1597, before the bond of thirlage; in which infeftment, Irving in Redmyre, granter of the bond, is subscribing as witness;

Which the LORDS found to exclude the bond of thirlage.

But the pursuer, at advising of the cause, insisting again on all his documents, especially upon this ground, that, albeit the Abbot's charter, and the old decret of thirlage, did not, of themselves, immediately constitute a thirlage, yet the decret having attained possession, albeit not continually, for 40 years, yet the decret in itself, though in absence, was a valid right, and 40 years being run without any process or document against it, it is now irreducible by the old act of Parliament anent prescription, and, therefore, doth constitute the thirlage, unless freedom had been recovered by 40 years withdrawing. It was *answered*, That it was clandestine, and collusive, and null, for want of probation; and it would be a dangerous preparative, if the taking of such a decret, in absence, against those who sometimes freely came to a mill, should constitute a thirlage. It was *replied*, That, albeit the decret was in absence, it was valid; and the absence could only give access to be heard in the second instance, if it was within 40 years; likeas, it was very formal, and bore a special probation, both by writ and diverse famous witnesses adduced by the pursuer, expressed in the compearance, though repeated only in general at the end; and that Irving of Beltie, whom the defender acknowledges, and hath proved to be heritor, and Irving in Redmyre, are both called.

THE LORDS found the said decret of thirlage, *in anno* 1597, to be valid, and to have proceeded upon sufficient probation against the heritor of Redmyre for the time, and that it had attained possession, and was not clandestine; and that now, after 40 years, it neither hath been quarrelled, nor taken off by prescription of liberty; and that it was a valid constitution of the thirlage, without necessity to prove 40 years continual possession of the thirled multures; and found that the pursuer did now prove possession to exclude prescription of freedom; and that the decret being against the heritor and possessor, without any reservation, therefore the heritor's own farm-bear was not excepted, but only teind and seed.

Fol. Dic. v. 2. p. 107. Stair, v. 2. p. 422.

* * Dirleton reports this case:

THE Abbot of Arbroath, by an ancient charter, having feued the mill of Conveth, in these terms, *cum pertinen cum multuris totius parochiæ de Conveth*; the feuar of the said mill, in the year 1597, did obtain a decret of the Lords

of Session, against some heritors of the said parish, *in foro* as to some of the defenders; but in absence as to others, and in special as to the heritor of Redmyre being called. And now Carnegie, younger of Pittarro, having pursued for abstracted multures, the heritors and tenants of Redmyre, and having founded both upon the said charter of the mill, and the said decret, it was *alleged*, That the defender's right bears no astrictio; and as to the said charter, it must be understood of the multures belonging to the Abbot, and of the lands belonging to, or holden of him; and that the lands of Redmyre do not hold of the Abbot, but of the laird of Drum, who holds the same of the King, and that the Abbot could not astrict any land but his own; and as to the said decret, that it was a latent decret, in absence against the defender's author; and that notwithstanding thereof, the defender and his authors had been in possession of liberty, in so far as, though they came sometimes to the pursuer's mill, being nearest and most convenient, and the multure being as easy as at any other mill; yet the going to a mill being *facultatis*, wherein astrictio cannot be shown, they had used and were in possession of the said liberty to go to other mills.

It appeared, that the said defence being proponed in the foresaid decret 1597, for those who were compearing, was repelled, in respect the said charter was so ancient, and was so expressly of the multures of the whole parish; and after so long a time it was not necessary to debate the Abbot's power to astrict the said whole parish. And the foresaid charter does bear, that the Abbot did give to the feuar the said mill, in the same manner, and as freely as one Umfridus had the said mill and multures, by a grant and right from King William; and it was presumable, that the said King, who might have thirled the said lands holden of himself, did give the mill and multures.

The said decret likewise, 1597, did mention the production of a refour before the Sheriff, and the verdict of an inquest concerning the said multures.

The LORDS having among themselves debated, and considered, that the said decret 1597, though in absence, was a valid decret; whereby the defender's author is decerned, in all time coming, his tenants, cottars, and successors, to pay the multure therein mentioned; and that the said decret was a standing decret by the space of 40 years, and never questioned, there was no necessity to debate upon any other grounds, than that the pursuer had thereby a right to the said multures; seeing the defenders did not deny, that they were in use to come to the mill, but pretend a liberty and use to go likewise to other mills: And it cannot be said, that he had the said liberty, the contrary appearing by the said decret which was never questioned, and now cannot be questioned being proscribed; and yet the Lords assoilzied from bygones and services not contained in the said decret.

It being *alleged* that the farm should not be thirled, the LORDS found, That the growing corns being astricted by the said decret, there ought to be an exception but of teind and seed; and that the tenants were liable for such

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corns as belonged to themselves, and the master for his farm. *In præsentia.*—
See THIRLAGE.

Dirleton, No 351. p. 166.

For Pittarro, Act. *Sinclair & Lermonth, &c.* For the Defender, Alt. *Lockhart & Falconer.*
Clerk, *Monro.*

* * * Gosford also reports this case :

In a pursuit at Pittarro's instance, against the Earl of Marshall, for abstracted multures, founded upon a bond and a decret against the then heritors not compearing, and against others compearing upon probation, for all growing corns, except teind and seed, it was *alleged*, That the lands was given by the heritors after they were denuded, and, for the decret, it was only for no compearance; and, notwithstanding, the Earl and his tenants were in use to go to other mills yearly, and never quarrelled, and when they came it was voluntary. It was *replied*, That the bond was a thirlage, because the granter was then in possession; and the decret being before the defender's right, was a constitution, and coming sometimes was sufficient, unless they could prove prescription of a freedom by 40 years immunity. The LORDS found, That the decret never being quarrelled, and coming and paying the thirled multures, which was different from what was paid by strangers, both as to knaveship and carriage, and entertainment of the carriage, that it was now constitute right clad with possession but assoilzied from bygones.

Gosford, MS. No 858. p. 542.

1677. July 17.

ROSS against M'KENZIE,

No 125.

Thirlage of kirk-lands to a mill not inferred by paying of in-town multures, laying in dams, leading millstones, and a decree above 40 years, where there was interruption by reduction raised against the decret within the 40 years.

Ross of Kilravock pursues a declarator of freedom from astriction to a mill belonging to M'Kenzie of Suddie, who alleged the astriction on these grounds; *imo*, That this mill did belong to the Mendicant Friars, and came by progress to Mackenzie of Suddie, as his infestment bears, and therefore immemorial possession of in-towns multure is sufficient to infer astriction; for payment of dry multure, without any further, infers astriction and ancient possession of the King's mills, who must be no loser by the neglect of his officers or the loss of his evidences; and there is like reason as to the mills belonging to kirkmen, and therefore possession ten years before the Reformation, or twenty years after, is, by act of sederunt, sustained as a right; but here the defender produces a decret for multures *in anno* 1592, relating a former decret two years before, proceeding upon an inquest, by which it was found, that the defender and his authors were not only in possession of the multures of these lands, but of leading of millstones, and mending dams, which is amongst the severest points of astriction, and can never be presumed voluntary deeds more than dry