

1675. July 22.

SIR GEORGE KINNAIRD *against* Mr JOHN DRUMMOND of Meginch.

No 123.
Forty years
payment of a
dry multure,
without inter-
ruption, infers
a servitude,
without any
document.

IN a pursuit at John Hutton's instance, as having a tack of the mill of Auchmuir from Sir George Kinnaird of Rossie, against the Laird of Meginch, for payment of six firlots of ring bear yearly, whereof the defender's author, Sir Peter Hay of Meginch, had been ay in continual use of payment; it was *alleged* for the defender, That his author's use of payment could not infer a servitude upon his lands, to pay any multure to the pursuer's mill; because, he was noways astricted by infestment, or act of Court; and a naked possession is not sufficient in law to constitute thirlage to any mill, unless it were within the King's property, which hath only that privilege, but not the mill of any subject. It was *replied* by the pursuer, That the defence ought to be repelled; because he held the said mill of Auchmuir of the King, and the said ring bear being constantly paid, which was a dry multure, continual possession, past 40 years, was a sufficient title.—THE LORDS did repel the defence; and found, that, albeit the use of going to mills, past memory of man, and paying multures for corns ground thereat, could not be a title to infer a servitude, except the mills were of the King's property, upon that ground, that the going to any other mill might be for convenience and voluntary, whereas, all servitude upon lands ought to have a title; yet continual payment of dry multure, where corns are not brought to mills, necessarily supposes a constitution of a servitude, and payment by the space of 40 years, with uninterrupted, gives a legal title by prescription.

Fol. Dic. v. 2. p. 105. Gosford, MS. No 790. p. 497.

. Stair reports this case :

1675. July 23.—SIR GEORGE KINNAIRD, and one Hutton his tacksman of his mill, pursue Mr John Drummond, and his Tenants of Meginch, for six firlots of ring bear, which is a dry or stocked multure for the bear, with a privilege of being first served, and which bear the pursuer and the millers had been in possession of above 40 years. The defender *alleged*, Absolvitor; because there is no astriction of his lands of Meginch libelled or instructed, and use of payment was never found sufficient to constitute thirlage, except in King's mills of the King's property. It was *answered* for the pursuer, That, albeit the use of payment doth not ordinarily infer astriction, because it is interpreted not to be *necessitatis*, but *voluntatis*; but where it is a dry multure, by which the multure of bear is liquidated and stocked to such a quantity, which is payable for the land, though there were no crop upon the land, and beyond which nothing can be demanded for the multure of the greatest crop of bear, 40 years

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.