No 124. 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 decreet 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 decreet, 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 decreet 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 decreet 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 mill-stones, and a decree above 40 years, where there was interruption by reduction raised against the decreet 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; 1*mo*, That this mill did belong to the Mendicant Friars, and came by progress to Mackenzie of Suddie, as his infeftment 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 decreet for multures *in anno* 1592, relating a former decreet 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

multure. The pursuer *answered* to the *first*, That it is a prerogative royal competent to no subject to infer astriction by possession, except by dry multure; and, for the act of sederunt, it is in favours of feuars, heritable possessors of the lands, and against the churchmen or their successors, but never in their favours to give them right to the lands they possess, much less to a thirlage of other mens lands; so that no possession of what endurance soever, though of in-towns multures, much less of helping of the dam, or leading millstones, which may be a mere favour, can infer astriction; and as for the decreets, they are in absence against the tenants only, without calling the masters, and therefore can give no right, neither can there be a title for prescription, because the same hath not been perfected by 40 years peaceable possession, in so far as there is produced a decreet of reduction *in anno* 1599, reducing the decreet produced, and the decreet related therein, which is mch much more than interruption. It was *replied*, That the decreet of reduction is in absence, and bears only to reduce the decreets called for therein, ay and while they be produced, and now they are produced. The pursuer *triplied*, That the decreet of reduction having stood unquarrelled for 40 years, any reduction thereof was prescribed by the act of Parliament; whereupon the defender offered to prove interruption within 40 years of the decreet of reduction, which was admitted to his probation, and a term assigned. But now the pursuer further insisted on his first ground, That albeit his decreet of reduction was yet quarrelable, yet it was an unquestionable interruption against the defender's right of thirlage, who instructed no right but possession, and decreets in absence are not validate by 40 years peaceable possession.

No 125.

The LORDS found, That possession, though by laying in of dams and leading of millstones, did not infer astriction, even in favours of churchmen possessing either after or before the Reformation, and that the decreets produced, not proceeding upon rights, but possession, and being interrupted by the decreet of reduction produced, did establish no thirlage; and therefore did declare the pursuer's lands free of the said thirlage.

Fol. Dic. v. 2. p. 105. *Stair*, 2. 542.

1677. *December* 7. HENDERSON *against* ARNOT.

No 126.
Infeftment in a mill bearing *per expressum* the multures of the defender's lands, with 40 years possession, found a sufficient constitution of

ROBERT HENDERSON having obtained a decreet for abstracted multures against Arnot of Greenside, before the Sheriff, he suspends, and raises reduction on this reason, That he is infeft in the lands of Greenside for a feu-duty, *pro omni alio onere*; and yet the Sheriff sustained the astriction upon the charger's infeftment, which was posterior to the suspender's; and albeit it bear an infeftment in the mill, with the multures, &c. of the suspender's lands *per expressum*, yet being posterior to the suspender's right, *ab eodem auctore*, it could not prejudge