hindered him to acquire a right of commonty by possession and prescription; and he cannot allege that he hath any other right by express infeftment; and therefore, being so much more pregnant than the defender, there ought to be no cognition, but he preferred in probation. No. 4.

The Lords repelled the defence, in respect of the libel and reply; but granted commission to one of their number to examine witnesses for the pursuer, *omni exceptione majores*. After which, the defender passing from his compearance, the Lords declared they would give the extract of the interlocutor to the pursuer, and give his libel and reply by way of condescendence and declaration of the manner of the property and of his possession to his probation.

Stair, *v.* 1. *p.* 106.

1673. *December* 12. PITTARO *against* STEWART of Redmyre. No. 5.

FOUND, That a bond of astriction of multures did not prejudge the singular successor in the lands, unless the creditor of the bond acquired possession conform, before the singular successor's right; and that, till then, it was but a personal right.

Fol. Dic. v. 2. *p.* 373. *Harcarse*, (APPENDIX), *No.* 3. *p.* 1.

*** Stair reports this case:

THE Laird of Pittaro being infeft in the mill of Conveth, with astricted multures, pursues Stewart and his tenants for abstracted multures; and, for instructing the astriction, did produce an infeftment of the mill, *in anno* 1596, from the abbot of Arbroath, bearing expressly the whole multures of the parish of Conveth, with a decreet against the heritors and possessors, mentioning a retour of the sheriff, bearing, that that parish was astricted to that mill; whereunto it having been formerly answered, that the defender being infeft without astriction, these grounds could not infer an astriction against him;

The Lords found, That the writs produced did not constitute a thirlage, but were only a title for prescription, that if thereby the pursuer and his authors had possessed 40 years, without interruption, the same would be sufficient.

The pursuer now further produced a bond granted by Archibald Irving, whereby he ratifies the decreet, and obliges him and his tenants, and possessors of Redmyre, to observe the thirlage in all time coming; which alone is a bond of thirlage sufficiently constituting the same, much more when joined to the former grounds. It was answered, That this bond of Irving's cannot constitute a thirlage, because Irving is designed thereby *in* Redmyre, and not *of* Redmyre; and albeit he had most fully and formally constituted a thirlage as heritor, yet that cannot constitute the same, unless it were otherwise proved that he was heritor for

No. 5. the time; otherwise, it were easy to introduce thirlage by colluson of pretended heritors, where lands ordinarily come to mills of their own accord, without astriction. It was replied, That the bond being so ancient, and possession commonly since, the pursuer cannot be put to instruct any further, that that person was heritor from whom he derives no other right.

The Lords found, That the designation, "in Redmyre," did not import Irving to be a tenant, in respect of the tenor of the bond, bearing, "that he obliged him to cause his tenants of the lands of Redmyre to bring the corns of his lands of Redmyre to the mill," &c. unless the defender prove that there was another heritor for the time; and found this bond a sufficient constitution of thirlage, being clad with possession; but did alter nothing of their former interlocutor in relation to the Abbot's charter and decreet.

Stair, *v.* 2. *p.* 239.

*** Gosford also reports this case:

IN an action, at the Laird of Pittaro's instance, for abstracted multures, as being infeft in the mill of Conveth, by a right flowing by progress from the Abbot of Arbroath, astricting the whole parish to the said mill, as likewise a bond granted by one Irving, in Redmyre, from whom David Stewart derives his right, whereby he is obliged to cause his tenant bring the corns grindable to the said mill, it was alleged, That the defender and his authors were infeft in the lands of Redmyre, free of any astriction, and had been in the use of going to other mills, and that the bond granted by Irving could not be a ground of thirlage, because he was therein designed only *in* Redmyre, which did make him an indweller, but not an heritor; albeit he had been heritor, yet that bond, being only personal, could not bind a singular successor to the lands. It was replied, That the said bond being very ancient, wherein by the style then current, heritors might be designed *in* such lands, as well as *of* such lands, the obligator's part being to cause his tenants of the said lands come to the mill, doth clear, that he was heritor, and not an indweller; and albeit his bond was a personal bond, yet it was sufficient to bind his singular successor to a thirlage, which is only a real servitude. The Lords did find, That the bond, being conceived as said is, did import that the granter was heritor of the lands, unless they could instruct, that at the time of the granting there was another heritor infeft; and he being heritor, that a personal bond was sufficient, not only against the granter and his heirs, but singular successors, provided the pursuer could allege, that he and his authors had been in possession of the multures.

Gosford MS. No. 647. *p.* 397.