1632. *December* 7. LAIRD of PENNIEMUIR, &c. *against* ———

No. 3.
In conformity with the above.

THE Laird of Penniemuir, and Sir Andrew Fletcher of Innerpeffer, pretending them to be infeft in a certain part of the lands of Doune, seek a declarator against sundry to hear and see it declared, that the common muir belongs only to the said barony, and portioners thereof, and to hear and see the defenders specially summoned to desist and cease from pasturing and casting within the said muir. It was excepted, for Mr. Alexander Wedderburn, heritor of ———, That no declaration can be granted against him, because he produced a writ granted to his father, *in anno* 1604, by the Earl of Crawfurd, then heritor of the said barony, and author to the pursuer, of liberty to him, his heirs and assignees, to have committed in the said muir of Doune, and, by virtue thereof, have been in possession since the granting of the said servitude. To which it was replied, That licence was personal, and wanted charter and sasine, and so was no real right against the singular successor; 2*do*, That the lands of Kinkene lie not contiguous to the muir; 3*tio*, That the Earl of Crawfurd was rebel when he granted the servitude. The Lords found the exception relevant, notwithstanding of the reply.

Fol. Dic. v. 2. *p.* 373. *Auchinleck MS. p.* 213.

1662. *February* 26. JOHN KINNAIRD *against* LAIRD of FENZIES.

No. 4.
What extent of possession requisite?

JOHN KINNAIRD pursues a declarator of property of a mire or marsh, in the Carse of Gowrie, against the Laird of Fenzies, who had his land on the other side thereof, alleging, that he and his predecessors and authors have been forty years in possession of the mire, as proper part and pertinent of the barony of Rossie, and that the same is severally kend and known by march and meith, and a dike inclosing it from the defender's lands. It was alleged for the defender, That he, his predecessors and authors, these forty years, have been in possession of the said mire, by doing all the deeds libelled by the pursuer, which must give them right at least of common pasturage fail and divot therein; and therefore craves the defence to be found relevant, and admitted to his probation, at least that a cognition might be by an inquest, conform to the act of Parliament, and witnesses led, *hinc inde*. The pursuer replied, That he offers him to prove, that, by the space of forty years, he, his predecessors and authors, possessed the said mire, not only by the deeds libelled, but also did divide the same in several parcels to each tenant in the barony, and was accordingly possessed by them, which is sufficient to show that they bruiked the same as property, and not a promiscuous commonty. And as for the defender's allegeances of commonty by pasturage, &c. the same ought to be repelled, because the pursuer offers him to prove, that he interrupted and debarred the defender from time to time, which

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