[12th *July* 1832.]

No. 7. Duke of ARGYLL and Trustee, Appellants. — *Dr. Lushington — Tinney.*

ALEXANDER MACALISTER Esq. of Loup, and Factor loco tutoris, Respondents. — *Lord Advocate* (*Jeffrey*) — *Follett.*

Thirlage. — Circumstances under which, in the absence of any written title, a claim to thirlage, founded on prescriptive possession, was (affirming the judgment of the Court of Session) sustained. Circumstances under which the lightest thirlage, consistent with the facts of the case, was (reversing the judgment of the Court of Session) held to be constituted.

2d DIVISION.

Lord Mackenzie.

THE family of Argyll having acquired the lands of Kilarue, Tangietavil, &c., including the mill of Tangie, cum molendinis et multuris, by progress from the church, the Duke of Argyll, in the year 1741, disponed to M'Millan of Drumore "totas et integras terras de Kilarue, Tangietavil," &c. "cum molendino de Tangie, "cum omnibus multuris sequelis lie knaveship et lie thir- "lage ejusdem," &c. M'Millan, in 1767, conveyed the lands and mill, "with all and sundry multures, sequels, knaveship, and thirlage of the same," to Campbell of Barbreck, who thereupon obtained a charter of resignation from the Duke of Argyll's commissioners, in which the right to the multures and mill-services was repeated. These titles came by progress into the person of Alexander Macalister.

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It was alleged that during the period when the mill of Tangie was possessed by the Argyll family, and even prior to that time, the lands of Backs, and many other farms belonging to the Duke, were thirled to this mill, in so far as the tenants had immemorially used to carry their whole growing corn to the same, and to pay intown multures; but there was no special astriction to the mill of Tangie in the Duke's titles to these farms, which had been held in feu by the Argyll family since the year 1576, "cum molendino et multuris," and for a certain feu-duty, "pro omni alio onere," &c.

In support of this claim, Macalister and his factor loco tutoris raised an action of declarator against the Duke of Argyll, setting forth that the pursuer was heritably infeft, inter alia, in all and whole the lands of Ballivean, Drumnalia, Tangietavil, &c. &c. in the lordship of Kintyre, sheriffdom of Argyll, with the mill of Tangie, with all multures, sequels, knaveships, and thirlage thereof, with houses, biggings, &c., conform to instrument of sasine in his favour dated the 8th, and registered at Edinburgh the 25th days of August 1826; in virtue whereof he had good and undoubted right to the multures, sucken, and sequels in use to be paid to the mill of Tangie; that the lands of Backs, Aros, Lachnalarach, Skerobline, &c., belonging in property to his Grace George William Campbell Duke of Argyll, (the summons then enumerated other lands belonging to other parties,) were thirled and astricted to the mill of Tangie; and the defenders, their predecessors and tenants, had been in the immemorial use of bringing their whole growing corn (seed and horse corn excepted) to the said mill, and of paying the intown multures and bannock meal therefore, conform to use and

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wont; that the whole defenders above named, and their tenants in the said lands by their orders, had of late wrongously abstracted and withheld from the said mill the corns growing on their respective lands, whereby the pursuer, as proprietor of the said mill, was deprived of the benefit of said thirlage; and concluding that it ought to be found and declared, that the said lands, with the whole corns growing thereon (seed and horse corn excepted), are astricted and thirled to the aforesaid mill of Tangie, for payment to the pursuer, his heirs and successors, or to his or their tenants in the said mill, of the astricted multures, sucken and sequels, intown multure and bannock meal, knaveship, lock or gowpen, and water-barley, and that the pursuer and his foresaids had good and undoubted right to the said multures, sucken and sequels, intown multure and bannock meal, knaveship, lock or gowpen, and water-barley, now and in all time coming.

The Duke and his trustee stated a preliminary plea in defence against the relevancy of Macalister's title, and claimed to be assoilzied without going into a proof; 7th July, 1829. but the Lord Ordinary, having advised Cases, found

"that there does not appear to be sufficient ground for "deciding the cause in favour of the defenders hoc "statu; and therefore appoints the cause to be enrolled, "with a view to an order for proof or remit to the Jury "Court."

This interlocutor was acquiesced in, and thereafter a proof taken on commission, upon the import of which his Lordship again ordered Cases.

The proof was held to establish —

1. That the possessors of all the farms libelled (with the exception of two farms, to which the proof did not

apply) had been in constant use to attend the mill of Tangie with all their corns, seed and horse corn excepted, and to pay the intown multures, down to about the year 1810, from a period as far back as seventy or eighty years before the date of the action.

2. That mill-services, such as carrying mill-stones, were occasionally performed during that period by these farms to the mill of Tangie.

3. That there were other mills of a lower rate of multure, which some of the tenants passed in going to the mill of Tangie; and Colonel Porter, one of the witnesses, deponed, "that Donald Bowie in Backs complained "of the hardship of being bound to the inconvenient "mill of Tangie, when Campbeltown mill was quite at "hand."

4. That in the tacks of some of these farms, the Duke of Argyll bound his tenants to pay a certain "quantity of multure meal" to himself, and to carry their corn "to any mill to which the farms are or shall be thirled," and to pay "the accustomed multures," &c. No thirlage to any other mill was proved; and it also appeared that some of the tenants had been summoned in processes for abstracted multures by the previous proprietor and tenants of the mill of Tangie, in which decree had not been pronounced, nor the Duke called as a party, the tenants having settled matters by paying for the abstractions.

The Duke led no proof to contradict the above; but an argument was founded on the leases granted by his Grace, in which he took the tenants bound to pay multure to himself. It was also maintained, that the clause binding the tenants to take their corns to the mill, "to which they are or shall be astricted," and to pay "the

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accustomed multure," inferred astriction, or a reserved power of astriction to some other mill belonging to the Duke, and not to the mill of Tangie; and it was further contended, that as there was no proof of the tenants having ever paid multure for grain sold out of the thirl, the only thirlage that in any event could be held to be established was of grana mollibilia.

But his Grace chiefly maintained —

1. That the terms of his titles to these farms contradicted the claim of thirlage; for not only did they contain no special astriction to the mill of Tangie, but the conveyance being cum molendinis et multuris, with a special feu-duty, bearing to be "pro omni alio onere," any thirlage previously constituted was thereby discharged; and,

2. That the claim of thirlage being founded neither upon any decree against the Duke, nor upon a special astriction to that mill in any of the titles produced, there was no basis whereon to establish such servitude by prescription.

8th March 1833. The Lord Ordinary, "in respect to all the lands "libelled belonging to the Duke of Argyll, excepting "Lachnalarach, and Skeroblin, finds, decerns, and "declares in terms of the libel; but in respect to the "said lands of Lachnalarach and Skeroblin, sustains "the defences, and assoilzies the defender his Grace the "Duke of Argyll, and decerns;" and found the defender liable to the pursuer in expences, so far as related to the action against him, subject to modification.

"*Note.*—The Lord Ordinary thinks the chief grounds "of thirlage established are, (1.) That the mill of "Tangie is held by titles derived from the Duke, with "multures, &c. (2.) That there is sufficient evidence

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" that these lands have paid heavy intown multures
" from time immemorial down to 1809 or 1810, and
" also performed mill-services, and occasionally paid
" for abstractions, there being no evidence at all to
" contradict that of the pursuer; from which the Lord
" Ordinary thinks it must be inferred, that the lands
" stood so astricted at the time the Duke conveyed the
" mill, with multures, &c. (3.) That in the tacks of
" many of the lands at least the Duke seems to have
" been in the practice of taking the tenants bound to
" carry their grain to any mill to which the farms are
" or shall be thirled, and to pay the accustomed mul-
" tures; which proves that there had been a thirlage,
" and none is shown to have existed to any other mill.
" The stipulation of dry multure to the Duke himself
" seems of no moment, for that is over the proper
" thirlage mentioned in these tacks in any view of it,
" and plainly was just part of the rent, independent of
" any mill. The astriction of certain lands in the
" charter of the mill seems equally unimportant, as
" these very lands are conveyed with the mill, and
" never could be the whole thirl. This clause must
" have been to prevent the tenants pretending the
" extinction of the thirlage quoad confusione."

The Duke reclaimed to the Court, but the Lords 17th June 1831.
adhered to the interlocutor submitted to review, refused the desire of the reclaiming note, and decerned and found additional expences due; it being understood that " Skeroblin" comprehends only " Skeroblinraid;"—and remitted the case quoad ultra to the Lord Ordinary, to proceed therein as to him should seem just. *

* 9 Shaw and Dun., 410.

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Thereafter, the Lord Ordinary, of consent, found, decerned, and declared, in terms of the libel, against the other defenders; approved of the auditor's report as to the expences against the Duke of Argyll and his trustee; modified expences to the sum of 316*l.* 0*s.* 8*d.*, and decerned for the same, together with the expence of extract.

The Duke and trustee appealed.

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Appellants.—It sufficiently appears from the evidence that the pursuer has no written title to any servitude of thirlage on the lands in question, and that the parole proof is inadequate to prove a prescriptive right. The Duke, therefore, should have been absolved in toto.

But, separatim, in any view the interlocutors complained of are erroneous, in so far as they find that the whole growing grain on the farms mentioned in the summons is subject to the thirlage.

This is quite manifest from the clear and recognised distinctions which exist between the different species of thirlage known in the law of Scotland.

The slightest degree of this servitude or restriction is that of grana molibilia or grindable grain, under which the party liable in the servitude to this extent is not bound to pay multure to the mill of the thirlage for all the grain growing upon his lands, but only for such portion of it as he has occasion to grind.

The second and higher degree of restriction is that of grana crescentia, under which all grain growing on the lands, whether requiring to be ground or not, is liable in payment of multures.

A third and still higher degree of the thirlage is that of invecta et illata, under which the tenant must not

only pay for the grain growing on his lands, but for any other grain which he may purchase and bring within the thirl. These different degrees of thirlage are perfectly distinct.

In all cases where the question is, to which of them the servient farm is to be subjected, even where there is a title in writing to thirlage, the presumption is in favour of the lightest. So that, even where a party has a written title to the thirlage of certain lands, unless the usage following on the title has explained its meaning into a servitude of invecta et illata, or of grana crescentia, the servitude will be held to be merely one of grindable grains.

Still more is this the case where there is no written title to the thirlage of any particular lands, and where the thirlage is attempted to be made out merely by prescriptive possession. In such a case the rule must be rigorously applied, tantum prescriptum quantum possessum. The fact, that tenants have been in use for forty years to pay multures for grain ground at the mill, or even to pay abstracted multures for grain ground at another mill, proves at the best nothing more than a servitude of thirlage on the grana molibilia. No inference can be drawn from this with regard to the existence of any servitude of grana crescentia. To establish that, it must be shown that for forty years the tenant has been accustomed to pay multures for grain growing on the lands, but neither ground at the mill of the thirl, nor at any other mill.

In any view, therefore, the only thirlage to which the lands are liable is that of grinding at the mill of Tangie all such grain as the tenants require to grind; but they are not liable to the thirlage of all growing

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grains whatever. If so, the interlocutor as regards expences ought to be altered, for the respondent has failed in one-half of his demand. 2 Ersk. 9. 22. 25. 28; Coltart, 13 Dec. 1768, (Mor. 16,058); Duke of Roxburghe, 21 July 1785, (Mor. 16,070); Brunton, 17 Jan. 1682, (Harcarse).

Respondents.—The writs founded on by the respondents, and the possession and usage had thereon, constitute a valid and effectual right and title in the pursuers to the mill of Tangie, with the multures, sequels, knaveship, and services thereto belonging, and are sufficient to warrant the conclusion of thirlage libelled in relation to the lands in question.

The evidence adduced by the respondents sufficiently instructs their averments and the conclusions of the libel, especially in the absence of any contrary evidence.

The judgments complained of are well founded in law and equity, and expences followed as a matter of course. 2 Ersk. 9. 21. 28. 29; 2 Stair, 7. 16; Elchies, voce Multures, No. 4.

Lord Wynford.—My Lords, this is an action which has been instituted by Alexander Macalister against his Grace the Duke of Argyll and his trustee. In this action the pursuer claims thirlage on all corn grown within a certain district,—seed and horse corn excepted. This service of thirlage is known in England. There are certain mills called soke mills, the owners of which have by custom a right to bring all the corn grown within the manor to be ground at their respective mills. Three descriptions of thirlage are recognized in the law of Scotland. The largest description of thirlage

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where the lord of the district, the person who has this right, claims certain dues on all corn brought within his district, wherever brought from; and is called thirlage on grana invecta et illata. This thirlage is not claimed in the suit now before your lordships. Another thirlage is upon grana crescentia,—that is, dues upon all the corn which is grown in the district, whether it be grindable corn or not, — that is, the claim in the present action. The third right of thirlage is for corn which is ground within the manor. This last thirlage has always appeared to me to be very reasonable, and I see very good foundation for the custom on which it depends. In ancient times none but the lord had means sufficient to build a mill upon the land, and it was natural enough for him to say, I will not erect this mill unless you agree to bring to be ground at it all the corn which you have occasion to grind; and it was equally natural for the tenant to enter into an agreement, founded on obvious mutual convenience, that if the lord would build a mill he would bring all such corn as he should grind to that mill. Up to that extent the right of thirlage is reasonable; but I confess I never could see any ground for carrying thirlage beyond that extent; and therefore I will never advise your Lordships to sustain a higher thirlage than on grindable corn, except where the right to such higher thirlage is proved by the clearest evidence. I am glad that my opinion in this case agrees with the learned writer on the law of Scotland who has been quoted to your Lordships. He says that you are not, when thirlage is proved, to presume the largest thirlage, but ought to confine it to the smallest, unless the evidence carries it to higher; and then you are to go no further than to

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give that species of thirlage which is clearly made out. My Lords, two questions have been raised in this case. First, whether any thirlage be due; secondly, whether, if any be due, it is due for all corn grown in their own district, except seed and horse corn, or only for corn ground within the district. The defender (the appellant) says, you are entitled to no thirlage at all, because a right of this description cannot be supported by parol testimony only, you must have some written evidence to support it; to which the respondent replies, I admit that in cases in general that is true, but I insist that as this land formerly belonged to the church, thirlage may be proved by parol testimony. I insist further that my parol testimony is supported by a written document. Now, although by the general rule of the law of Scotland thirlage must be made out by written evidence, there is an exception to that general rule in favour of the claim of thirlage over lands where the mill had belonged to the church. (There is also one as to lands belonging to the Crown.) In the Institutes of Erskine, one of the ablest works on Scotch law, this exception is said to have been made, in consequence of the destruction of the titles and muniments of the church at the Reformation; I at first thought, that the exception should be confined to lands now belonging to the church, but the reason given for the exception proves that it ought to apply to lands that did belong to the church formerly, although they are now lay lands. It has been proved that this mill was once church property, and therefore parol evidence is sufficient to prove the rights appertaining to it. Now, my Lords, that some thirlage is due, there is, in my opinion, abundant evidence. Many witnesses have been examined who speak of the payment of thirlage; and

there is no testimony affecting their evidence. It was objected that this was not carried back far enough, for by the law of Scotland the prescription requires a proof for forty years. But these witnesses, in my opinion, do carry it back forty years. One of the witnesses, who is eighty years of age, speaks of having known thirlage paid since he was twenty years of age; that is 60 years. Another witness, who is also of the age of eighty, speaks of having known it paid considerably more than fifty years. In addition to this, there is a paper put in,—viz. a list of the dues payable to this mill, —which is proved to be in the handwriting of a clergyman, who was the factor, who transacted the business of this estate; and he, in that paper, carries back the testimony with respect to thirlage that was due to this mill certainly for a much longer period than forty years. But they have a written title, for the Duke of Argyll, in 1741, made a grant of this mill, with all the thirlage thereunto belonging; and they say, that is a written title sufficient, if they show the lands at that time paid thirlage; and they have adduced witnesses who have proved that those lands paid multures as long as they can recollect, although these witnesses cannot carry their evidence back to 1741. If they prove that it has been paid during all their time, and there is no evidence to show that there was any period when it was not paid, that raises a presumption that it was paid in 1741, and that this multure was a multure referred to in 1741, and that is the ground upon which the Judges below decided this case. My Lords, I therefore think it is clearly made out that these lands were liable to some thirlage to this mill; and that brings me to the other question, what thirlage were they liable in? Was

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the thirlage on grana crescentia, or only on grindable corn? I have already stated to your Lordships, that, in my humble judgment,—and I am borne out by the authority of Erskine in that respect, and by a judgment of this House since I have had the honour of sitting here,—your Lordships should not extend it to the larger claim of thirlage, unless that larger claim be made out by evidence so clear and satisfactory that it can leave no doubt on your Lordships' minds. What good reason there could be for the origin of the custom, that a man should be obliged to pay for grinding corn which he never means to grind, but to sell in its entire state for exportation, to be used for purposes that may not require grinding, in other places out of the district, I never could see. Now the question is, then, is the higher thirlage made out? for I admit that the higher thirlage is sanctioned by the law of Scotland; and, therefore, if it is clearly and satisfactorily made out, your Lordships will affirm the judgment entirely. But I cannot state to your Lordships that I think it is clearly and satisfactorily made out. I have looked at all the evidence with the utmost attention. One witness unquestionably does state that the custom was to pay for corn that grew within the district; but he mentions no instance of any claim of thirlage being insisted upon, except when the owners of the corn had passed the mill by, and carried their corn to be ground at some other mill; this neutralizes his evidence. But would your Lordships support such an odious claim? for thirlage is an odious claim when it goes beyond grindable corn. On the testimony of one witness the fact must have been notorious through the district, and if true might have been proved by many witnesses. We cannot say that a fact is

satisfactorily proved, which must, if it exists, be known to many, and is only spoken to by one witness. The respondents have not been able to extract any proof in support of this evidence from any other witness who has been examined in the cause. There is an old document referred to, namely, the account given by the clergyman of those lands which paid thirlage. I have looked at that account, and it merely states that they are to pay thirlage, but not what kind of thirlage they are to pay. I think there is evidence in the cause, which weighs much stronger than the evidence of one witness giving an opinion without stating any fact to support it; and that is, the claim made in 1790. It is a mistake to hold that it was a claim for grana crescentia. The claim is made for grana crescentia, or "at least,"—that is the form of the summons,—"or at least grindable corn." Now, my Lords, certainly where such words as these have been inserted, "or at least grindable corn," where the claimant does not absolutely insist on grana crescentia, but lets himself down by tendering "at least grindable corn," your Lordships will take his lowest estimate of his claim. But, my Lords, I do not stop at the summons. You must look at the answers that are put in by the different tenants. If they had, in the year 1790, admitted thirlage for grana crescentia, I should humbly have moved your Lordships to have held, that there was sufficient evidence of thirlage for grana crescentia; but that is not so. The tenants admit that the lands are bound to pay a thirlage for grindable corn, and confine it expressly to grindable corn. Now, my Lords, if they confined it to the grindable corn in 1790, will your Lordships extend it beyond that now, particularly seeing that the persons who claimed thirlage

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at that time did not insist upon the thirlage of grana crescentia, but upon the thirlage of grana crescentia, "or at least grindable corn." I cannot therefore but think that the balance of evidence in this case is strongly in favour of the lower rate of thirlage. My Lords, it is important to observe, that the Lord Ordinary in his interlocutor, confirmed by the Court above, does not touch the question of the precise kind of thirlage, but merely allows some thirlage, without saying whether it is thirlage of the one kind or of the other kind; and the learned Judges in the Court above were not called on to decide that the thirlage was granted for grana crescentia, but that there was a thirlage. The Court have, however, by granting the whole conclusions of the libel, which includes grana crescentia, imposed that heavy thirlage. I suspect this point was not raised in the Court below; because, if it had been made, I should suppose that the learned Judges would have given some judgment upon it, which they have not done. I therefore humbly submit to your Lordships, that this appeal should be allowed, because, as I have stated, this summons claims a right which, if your Lordships allow this judgment to stand, imposes the thirlage upon grana crescentia. I move your Lordships therefore, for the purpose of preventing that right being established, to allow the appeal, with a direction that the owner of this mill, the respondent in this case, is entitled to thirlage upon grindable corn only. My Lords, with respect to the costs, I should submit to your Lordships, that there should be no costs in this case, because part of the appeal is allowed, and therefore it is not usual to give costs; and as the decree in the Court below was with costs, and as your Lordships

cannot, I think, sustain the whole judgment, but will be of opinion that so much of it as sustains a thirlage for grana crescentia should be reversed, I would move your Lordships, that so much of the judgment of the Court below as gave costs against the appellant be reversed.

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The House of Lords declared, "That the thirlage in question in this cause was due for grindable corns only; and "it is ordered and adjudged, that the several interlocutors "complained of in the said appeal, in so far as the same are "inconsistent with this declaration, be and the same are "hereby reversed; and it is further ordered and adjudged, "that the several interlocutors complained of in the said "appeal, in so far as they give expences to the respondents "in this cause, be and the same are hereby also reversed; "and it is further ordered, that the cause be remitted back "to the Court of Session in Scotland, to proceed further "therein as shall be consistent with this judgment, and "as shall be just."

SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL, — Solicitors.