

No. 115. Court paid no regard to these allegations, in fact, on either side ; but considered the question altogether as a point of law.

Act. *A. Crosbie.*

Alt. *A. Elphinston.*

Clerk, *Tait.*

Fac. Coll. No. 29. p. 52.

1781. *June 14.*

DAVID GREIG, Proprietor of the Mill of Milnathort, and his TACKSMAN,
against ROBERT REID and Others.

No. 116.

By use and wont the term "grindable grain" may infer the same as *grana crescentia*.

In this case, the charter and feu-contract, by which the pursuer acquired right to the mill, bore the astringency of all grindable grains, which, from the unfavourable nature of thirlages, is interpreted to mean only such grains as the tenant has occasion to grind ; but it was proved that the practice of the parties beyond the years of prescription had understood it to be the same as an astringency of *grana crescentia*. And the Lords, upon this use and wont, found " all the oats thirled, seed and horse corn excepted."

Reporter, *Lord Braxfield.*

Act. *John M'Laurin.*

Alt.

Clerk, *Menzies.*

D.

Fac. Coll. No. 57. p. 97.

1783. *December 2.*

TRUSTEES of JAMES MACDOWAL *against* RICHARD CLEGHORN.

No. 117.

Thirlage lost *non utendo.*

Local situation within a barony subjects not to thirlage, without prescriptive possession.

Mr. Macdowal was proprietor of the mills called Canonmills, those of the barony of Broughton ; and Mr. Cleghorn, proprietor of some lands situate within that barony, and on which a brewery had been erected. No astringency, however, to those mills was expressed in the title-deeds of the lands ; and there appeared not respecting it to have been any possession of thirlage.

An action of declarator having been instituted against Cleghorn, founded on an alleged presumption of servitude, arising from the local situation of the tenement ;

The Court were of opinion, That though the thirlage had been proved to have once existed, an immunity would have been established by disuse continued beyond the years of prescription.

It was further observed, That the effect of the connection between lands contained in a barony, and the mill of the barony, is only to afford a title for prescription of thirlage, and not of itself to constitute that servitude.

The Lord Ordinary having decerned in the declarator against the defender,

The Lords " altered that interlocutor ; and in respect it was not alleged or proved, that the barony-mill had been used by the defender, or his authors, within the years of prescription, assolizied the defender."

N. B. The like judgment was given on the same day, in a similar question, **No. 117.**
between the above pursuers and William Cleghorn.

Lord Ordinary, *Monboddò.* Act. *Elphinston.* Alt. *Alex. Fergusson.* Clerk, *Home.*
S. *Fac. Coll. No. 131. p. 206.*

1785. *January 23.* JAMES AYTON *against* JAMES BRUCE.

Mr. Ayton of Kippo let to James Bruce the mill and multures of these lands. Before the expiration, however, of this lease, he took a considerable part of the lands, which had formerly been possessed by tenants, into his own natural possession, and withdrew the produce from the mill. James Bruce, the miller, in an action at Mr. Ayton's instance, having claimed, on this account, a proportional abatement of his rent, Mr. Ayton

Pleaded: A possessor of lands cannot, for the sole purpose of preserving the multures in their former extent, be withheld from pursuing the mode of cultivation most beneficial to himself. Upon this principle it is, that either a tenant, or the proprietor on purchasing the tack, may convert his lands into pasture, during the whole period of the multurer's possession, though in this manner the expectation of the latter is entirely frustrated. 28th November, 1755, Grant against Milne, No. 98. p. 16034; 20th February, 1765, Slowan against Hawthorn, No. 106. p. 16052; 16th February, 1769, Wilson against Chalmers, No. 111. p. 16060. The present example seems precisely of the same nature; a proprietor of a mill, in consequence of the rule, *Quod res sua nemini servit*, being always exempted from thirlage on account of lands in his own possession, Erskine, Book 2. Tit. 9. § 36. To the influence indeed of this maxim the parties here seem to have been attentive; the multures, as ascertained by the lease, being those only "of the farm-meal of the lands, and what was consumed in the families of the tenants."

Answered: It is true, that the tacksman of multures is entitled to no deduction on account of the thirled lands having been thrown into pasture. His rent is presumed to have been fixed with a view to a change so usual in husbandry, while from the plentiful crops of grain, after the former mode of cultivation is resumed, an ample compensation is to be expected. But the landlord's taking his estate into his natural possession is to be viewed in a very different light. Such an event could not be in the contemplation of the parties when the agreement was made.

To exempt him on that account, from the multures which were payable by his tenants, would be extremely unjust. The clauses in this lease, framed with a view to the actual state of the lands, cannot import the multurer's accession to a contract so unequal. The maxim, too, *Quod res sua nemini servit*, is here entirely misapplied; the multures due to the miller in consequence of his lease, being his property, not that of the owner of the mill.

No. 118.
Whether the proprietor of a mill let in tack, taking the thirled lands into his natural possession, is exempted from the thirlage?