

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."