of the Corporation to the above effect, but only the subscription of four individuals; and that the terms of it had seldom or never been observed. It was questioned, moreover, Whether the Bakers had power to bind themselves as a Corporation, or to oblige their successors to extend a thirlage beyond the terms of its constitution and former use. The Lords found, That the obligation 1750 was a valid and subsisting deed, binding on the granters and their successors in the Corporation; but, in respect none of the inhabitants of Cupar, except the Bakers, were called in the action, reserved to them all defences competent.—See APPENDIX. No. 114.

Fol. Dic. v. 4. *p.* 369, 370.

1781. *February* 8.

DAVID BALLARDIE, Tacksman of the Mill of Ledcarsie, and the Proprietors of said Mill, *against* ALEXANDER BISSET, Proprietor, and WILLIAM BISSET, Tacksman, of the East-side of Meikle Fardel.

No. 115.
The mill of the thirlage having become insufficient, another was built in a different place. It was found, that the thirle was not bound to go to it.

Part of the barony of Fardel had been feued out to be held of the proprietor of the remaining parts of the barony, for payment of certain feu-duties; and, by the feu-rights, the lands feued were astricted to the mill of Redgodens, the mill of the barony of Fardel.

Mr. Mackenzie of Delvin was proprietor of the mill of Redgodens, and that part of the barony of Fardel not feued out; and he having purchased the mill of Ledcarsie, in the neighbourhood of the lands of Fardel, and which mill was turned by the same water that supplied the mill of Redgodens, thought it for his interest to allow the mill of Redgodens to go to ruins.

The sucken thirled to the mill of Redgodens were, 1*mo*, The part of the barony of Fardel, Mr. Mackenzie's property; 2*do*, The parts of that barony that had been feued out, particularly the defender Mr. Bisset's lands of Meikle Fardel; and, 3*tio*, Some lands the property of Mr. Kinloch of Gordie and Mr. Mercer of Lethindy.

An agreement took place between Mr. Mackenzie and Messrs. Kinloch and Mercer, in consequence of which, Mr. Mackenzie sold them the thirlage of their own lands; and he prevailed upon the tenants of his own part of the barony of Fardel to go to the mill of Ledcarsie, in place of the mill of Redgodens; but Mr. Bisset refused to frequent the mill of Ledcarsie with the grain of his lands of Meikle Fardel, which was thirled to the mill of Redgodens; and, after that mill had been allowed to go to ruin, Mr. Bisset went to other mills with the produce of his lands, and continued so to do until Mr. Mackenzie's death, which happened about nine or ten years after the mill of Redgodens had been demolished; and, during that period, no action was brought to compel Mr. Bisset to frequent the mill of Ledcarsie, in place of the mill of Redgodens.

No. 115.

After Mr. Mackenzie's death, an action was brought before the Sheriff by the tacksman of the mill of Ledcarsie, who had formerly been tacksman of the mill of Redgodens, against the possessors of Mr. Bisset's lands of Meikle Fardel, concluding, that they should be ordained to frequent the mill of Ledcarsie, in place of the mill of Redgodens; and found liable in certain quantities of grain, as the amount of the multure abstracted by them since the mill of Redgodens had been demolished.

In this process, appearance was made both for the tenant and proprietor of Mr. Bisset's lands. They acknowledged that they were thirled to the mill of Redgodens, the mill of the barony of Fardel, of which their lands were part; but they contended, that they could not be compelled to frequent any other mill, though said mill was the property of the proprietors of the parts of the barony of Fardel not feued out.

It was answered for the tacksman of the mill of Ledcarsie, and the proprietor of that mill, who sisted himself as a party, That said mill had been purchased by the proprietor of the mill of Redgodens, to which Mr. Bisset's lands were thirled, and was as convenient for said lands as the mill of Redgodens was; and, therefore, these lands ought to be held as thirled to the mill of Ledcarsie, as coming in place of the mill of Redgodens, which had been allowed to go to ruin.

The Sheriff repelled the defences, and ordained the defenders to depone upon quantities abstracted.

The defenders brought the cause into this Court by advocation; and the Lord Ordinary advocated the cause, and found the defenders liable in multure to the mill built by the late Mr. M'Kenzie of Delvin, upon the estate of Ledcarsie, in place of that formerly at Redgodens, in the barony of Fardel; and ordained them to thirle thereto accordingly, in time coming." And to this interlocutor the Court adhered, on advising a petition for the defenders, with answers.

A second reclaiming petition was presented, insisting, that the single point to be determined, was a question in law, viz. If the proprietor of lands, thirled to one mill, could be forced to frequent another mill to which his lands were not thirled.

The petitioners admitted being thirled to the mill of Redgodens, the mill of the barony of Fordel, of which their lands were part; but, as they never had frequented the mill of Ledcarsie, and were not thirled to that mill, they contended they could not be bound to frequent the same, although the mill of Ledcarsie belonged to the same proprietor to whom the mill of Redgodens belonged.

The petitioners argued, That thirlage was a predial servitude, and was so considered by every writer on the law of Scotland; and that all predial servitudes were real, not personal rights: That the proprietor of either dominant or servient tenement, acquiring other properties, could not alter the servitude in any particular: That it was the *utilitas prædii dominantis*, that must be the rule and measure of a servitude, the advantage thence arising, though accruing to the proprietor of the dominant tenement, being in no other respect personal to him, than as consequential of his right of property in the dominant tenement.

This principle, it was contended, was clearly laid down in the Roman law; *Inst. De servit. præd;* and in the law of Scotland, Bankton, B. 2. Tit. 7. § 1. Mackenzie, B. 2. Tit. 9. § 1. Erskine, B. 2. Tit. 9. § 5. and § 18. No. 115.

To oblige the possessors of lands thirled to one mill, to go to another mill, was imposing a new servitude, without the consent of the proprietor of the servient tenement, which could not be. The proprietor of a mill, with a thirlage, cannot retain the mill and sell the thirlage; and he can as little transfer a thirlage, by purchasing another mill. It is matter of no consequence to a thirle, who is proprietor of the mill to which they are thirled. The mill is the tenement to which the thirle are bound, and it cannot be changed without the approbation of the thirle, no more than a servitude of fuel out of a particular moss, or of pasturage over certain grounds, could, at the pleasure of the proprietor of such moss or grounds, be changed or transferred to other mosses or grounds of his property.

The respondents argued: Though thirlage is commonly called a servitude, it is a very anomalous sort of servitude. Most other servitudes consist *in patiendo aut non faciendo;* but thirlage consists entirely *in faciendo*, as the person thirled must bring his victual to the mill to be ground. It is a general rule, that all servitudes shall have a *causa perpetua;* but this is not the case in thirlage, as it may have effect, though the mill, which is an artificial matter, may not exist. M'Dougal against M'Dougal, 28th February, 1684. No. 4. p. 8897. It is, therefore, an abuse of terms, and an inaccuracy of expression, in the writers on our law, to call thirlage a servitude.

Thirlage is more properly to be considered as a contract, and every contract implies a *bona fide* execution; and, if it is so implemented, law will not permit any of the parties contractors to harrass the other, by insisting too rigorously upon the strict letter of the contract. In this case, the contract between the parties was sufficiently implemented by the pursuer's furnishing the defenders with a proper mill to grind their grain at, in every respect as convenient for them as the mill of Redgodens was; and, therefore, in justice, the defenders ought to be obliged to thirle to the mill of Ledcarsie.

Upon advising the second petition for the defenders, with answers, this interlocutor was pronounced: "8th February, 1781, The Lords find, that the petitioners are not thirled to the mill of Ledcarsie, and cannot be compelled to frequent the same; therefore assoilzie the petitioners from the conclusions of the libel, and decern."

And to this interlocutor the Court adhered, 9th March, 1781, on advising a petition for the pursuers, with answers for the defenders.

N. B. In this case, the parties differed somewhat in their state of the fact; the pursuers contending, that the mill of Ledcarsie was, in every respect, as convenient for the defenders' lands, as the old mill of of Redgodens was; and, in some particulars more so, of which they offered a proof; while the defenders, on the other hand, alleged, that the mill of Ledcarsie was not so convenient. But the

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. Elphingston.* 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 astriction 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 astriction 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 astriction, 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, assoilzied the defender."