

Pleaded : The exemption from thirlage that occurs with regard to grain payable in kind to the superior, is of the same nature with that respecting seed and horse corn, and liable to the same limitations. Both the one and the other take place, because the grain thus set apart is necessarily applied to a use incompatible with its being manufactured by the farmer. Hence, if by any change in the mode of husbandry, a less quantity of grain comes to be used in maintaining the farm cattle and horses, the possessor of the lands is not at liberty to dispose of the surplus without paying the accustomed multures. And in the same manner, if instead of receiving his feu-rents in kind, the superior of the lands shall accept either of meal or of a composition in money, the vassal cannot any longer withdraw a proportional quantity of grain from the thirle. Indeed, in the present case, the uniform practice of paying the heaviest rate of multures for the whole corns, without any exception on account of the feu-duties, must be deemed equivalent to an express agreement to this effect ; 26th June, 1766, Sir William Maxwell, No. 108. p. 16057.

Answered : There is a material distinction between the exemption from thirlage in the case of seed and horse corn, and that which takes place with respect to grain due in kind to the superior of the astricted lands. In the former, the exemption does not arise from any positive limitation of the servitude, but because it is impossible to follow out the cultivation of the land without employing some part of the produce for these purposes ; but in the latter, the reason obviously is, that a vassal cannot, by any agreement of his, impose a restriction on the right of his superior ; and hence, after making a composition with him, he is entitled, as his assignee, to the same privileges. In the case quoted on the other side, admitting it to have been well decided, the circumstances were somewhat different, as the teinds due to the titular, the subject of dispute, were, in consequence of a valuation, payable in meal ; 7th January, 1709, Halkerston of Rathillet against Melville of Murdocairney, No. 63. p. 16003.

The Lords at first sustained Lord Macleod's claim. But after advising a reclaiming petition with answers, they altered that judgment, and found, " that the defenders were at liberty, without being liable in any multures, to carry out of the thirle, unmanufactured, a quantity of grain equal to that due by their respective feu-charters to the Crown."

A petition preferred for Lord Macleod was afterwards refused.

Lord Ordinary, *Monboddo.*

Act. Solicitor-General, *Geo. Fergusson.*

Alt. Blair, *Abercromby.*

Clerk, *Sinclair.*

C.

Fac. Coll. No. 22. p. 37.

1788. June 19.

The MAGISTRATES and TOWN-COUNCIL of HADDINGTON against The BAKERS of that TOWN.

No. 121.

The Magistrates of Haddington, in an action of declarator against the bakers of that burgh, maintained, That the Town had a right to the thirlage of *invecta et*

Thirlage of *invecta et illata* does not.

No. 121.
extend to
meal or flour
imported by
the inhabi-
tants of a
burgh, and
grinded be-
fore it is pur-
chased.

illata; and that they were liable for the multure of flour which in that state they had purchased out of the thirle, and imported.

The existence of the thirlage was established by the Town's charters, and other documents.—With respect to its extent, the defenders

Pleaded: The phrase "tholling fire and water," in the definition of the thirlage in question, is interpreted by "steeping and kilning," in opposition to "baking and brewing;" Stair, B. 2. Tit. 7. § 20; Erskine, B. 2. Tit. 9. § 25. And accordingly, in a case similar to the present, it was found, 24th January, 1749, That the thirlage did not comprehend flour purchased when ground and then imported within the thirlage; Town of Perth against Rait and others, No. 90. p. 16024.

Answered: In the words of Lord Bankton: "If meal or ground malt is brought within the thirle, and sold again in kind, it falls not within the thirlage; but does if manufactured into bread or ale; or otherwise it should elude the thirlage, and render it ineffectual; whereas the same extends to what is brewed or baked." B. 4. Tit. 7. § 49.

The Court gave judgment agreeably to the decision above mentioned in the case of the Town of Perth; and

"Found, That flour-meal and grinded malt bought by the defenders, after being grinded, and then imported by them into the burgh of Haddington, was not subject to the thirlage in question."

Lord Ordinary, *Alva.*

Act. *C. Brown.*

Alt. *M. Ross.*

Clerk, *Sinclair.*

S.

Fac. Coll. No. 24. p. 40.

1789. June 14. DAVID SMITH *against* TRUSTEES of DR. THOMAS YOUNG.

No. 122.
How far thir-
lage is extin-
guished, in
consequence
of the owner
of the mill
becoming
proprietor of
the astricted
lands, or *vice*
versa?

The lands of Kinvaid were anciently thirled to the mill of Drumsay, at a time when they belonged to different owners. In 1726, the grandfather of Mr. Smith of Methven became proprietor of both.

Even after this event, however, the tenants of the lands continued uniformly to pay the usual multures: And on this footing matters remained till the year 1765, when the lands of Kinvaid were sold, without any mention of the thirlage, to the late Dr. Young. At this time, in some of the leases which were excepted from the warrandice, the payment of multures was expressly stipulated, while in others a reference was made to the possession held by the preceding tenants, all of whom actually paid them.

A doubt having occurred, whether the lands were to be considered as still astricted; Mr. Smyth brought an action for payment of the multures, against Mr. Oliphant, and several other persons whom Dr. Young had appointed his trustees. The defenders

Pleaded: The servitude of thirlage must be completely done away, when the property of the mill and of the lands is united in the same person, agreeable to the maxim, *quod res sua nemini servit*. In this manner, when the pursuer's grandfather became purchaser of the mill of Drumsay, and of the lands of Kinvaid, the incum-