No. 118.

The Lords found the landlord liable in the same quantities of multure for the farms taken into his natural possession, which the tenants formerly were bound to pay.

Lord Ordinary, *Swinton.* Act. *H. Erskine.* Alt. *M'Cormick.* Clerk, *Colquhoun.*

C. *Fac. Coll. No.* 194. *p.* 305.

1785: *July* 21. DUKE of ROXBURGH *against* ROBERT MEIN.

No. 119.

The words *cum molendinis et multuris*, in the clause of *tenendas* of a vassal's charter, import, *per se*, a discharge of thirlage.

The predecessors of Mein had obtained from the proprietors of the barony of Roxburgh, of which their lands were a part, charters containing, in the clause of *tenendas*, the words "*cum molendinis et multuris.*" The Duke of Roxburgh, however, having sued Mein in an action of abstracted multures, contended, That the above expression, being confined to the *tenendas*, and not found in the dispositive clause, was not *per se* sufficient to confer immunity from the astriction; and urged, in support of his plea, the decision in the case of the Earl of Breadalbane against Macnab, No. 102. p. 16041.

But the Court were clearly of opinion, that the discharge was not less effectual than if the words in question had occurred in the dispositive clause, where, indeed, it was observed, they would not, from the nature of the right, have been so properly ingrossed. It was likewise observed, that the judgment in the case of Macnab, which was contrary to that now given, ought not to be regarded as a precedent.

The Lords assoilzied the defender.

Lord Ordinary, *Eskgrove.* Act. *Solicitor General, H. Erskine.*
Alt. *Cullen, Dalzel.* Clerk, *Home.*

S. *Fac. Coll. No.* 221. *p.* 349.

1788. *June* 17.

LORD MACLEOD *against* ALEXANDER ROSS and CHARLES MUNRO.

No. 120.

No multure can be demanded for grain due to the superior of the astricted lands, although he shall accept of a sum of money in lieu of it.

The lands of Culrossie, belonging to Alexander Ross, and those of Allan, the property of Charles Munro, were held feu of the Crown, for payment of certain quantities of grain, in lieu of which, for many years, a composition in money had been accepted of. The whole were thirled, *quoad omnia grana crescentia*, to the mill of Delny, belonging to Lord Macleod; and the heaviest rate of multure had been paid for all the grain raised on the grounds, with the exception of seed and horse corn only.

At last, an exemption was claimed corresponding to the quantities of grain exigible by the superior; and an action being instituted in the Court of Session, for ascertaining the rights of the parties, Lord Macleod

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. No. 120.

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.
Thirlage of *invecta et illata* does not.

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*