No. 2.
found to be an evasion of the servitude.

A process of abstracted multures before the Sheriff, was brought at the instance of Lord Fife and the tacksman of the mills, against Joseph King, merchant in Elgin, who contended, that he was not liable in multures for grain purchased by him in its unground state, and brought into the burgh after it had been ground at a mill without the thirl.

The Sheriff having assoilzied the defender, the cause was advocated, when the pursuer

Pleaded: The right of thirlage would be defeated altogether, if any person within the thirl were permitted to purchase grain without it, have it ground, and import it in that state, without paying multures. It is not merely upon such grain as is brought within the thirl to be manufactured, that the dues of thirlage are exigible; it is of no consequence whether it be ground within or without the thirl; in either way, the transaction is obviously entered into for the purpose of defrauding the thirlage; Ersk. B. 2. Tit. 9. § 25; Town of Musselburgh against Lord Tweeddale, 20th December 1743, No. 85. p. 16021. Magistrates against Bakers of Haddington, 19th June 1788, No. 121. p. 16071; Earl of Abercorn against Inhabitants of Paisley, 13th February 1798, No. 124. p. 16074.

Answered: It is only in the case of grain being bought without the thirl, and then imported, in order to be manufactured and consumed there, that multure is due. The decree in 1766 applies solely to 'grain unground' being bought without the thirl, and inbrought, and then converted to the use of the inhabitants; the commodity is still to be in the same state when it is 'in-'brought,' as when it was 'bought.' When meal is bought without the thirl, and imported in that state, multure is not due; Gray and Clerk against Raitt, 24th January 1749, No. 90. p. 16024. It makes little difference although the inhabitants first purchase the grain, and bargain with a miller to grind it before they import it.

The Court held, that effect must be given to this right of thirlage as long as it exists, and that if the argument of the defender was listened to, the right would be completely evaded.

Lord Ordinary, *Hermand.* Act. *Campbell.* Agent, *Jas. Laidlaw*, W. S.
Alt. *Monypenny.* Agent, *Mat. Montgomerie.* Clerk, *Pringle.*

F. *Fac. Coll. No.* 289. *p.* 660.

1808. *May* 17.

MAGISTRATES of FORFAR and ALEXANDER MALCOLM *against* WILLIAM POTTER.

No. 3.
A person bound by thirlage to

THE inhabitants of the royalty of the burgh of Forfar are, by a charter of novodamus of Charles II. and usage thereon, astricted to the wind and steel

No. 3. grind malt at a certain mill, and to give for the grinding a certain proportion of the malt grinded, has a right to repayment from the person receiving this multure of the duties paid to government on the malting of that proportion,—the duties being imposed subsequent to the constitution of the thirlage.

mills belonging to the corporation, for all malt they have occasion to grind. The multure is one peck for every six firlots of malt to the mill-master, together with a lippie to the miller; or the 25th boll to the mill-master, and one firlot to the miller.

By the statute, 12th Q. Anne, Stat. 2. C. 11. a duty of sixpence per bushel was laid on malt. It was ordained to be paid by the maker of the malt, and to be charged according to a measurement of it made by the excise-officer while it was steeping. In the year 1725, the tax was in Scotland reduced to threepence per bushel. During the reign of George II. the malt-tax in Scotland was raised to 3*s*. 11*d*. and 5-20*ths* of a penny per boll. In the year 1802, it was raised to 10*s*. and 15-20*ths* of a penny per boll. In the year 1803, it was raised to £.1. 2*s*. 15-20*ths* of a penny per boll.

In the last mentioned year, the brewers within the royalty of Forfar, conceiving that the burden of this duty, in so far as it was paid on the malt delivered as multure, ought to fall on the persons receiving this multure, applied to the Magistrates of the burgh for an order to that effect. This was refused; on which one of the brewers, William Potter, abstracted the malt grinded by him from the mills of the burgh. The tacksman of the mill, Alexander Malcolm, on this presented a petition to the Sheriff, praying that Potter should be ordained to deliver the multure on 150 bolls abstracted, according to the rate above mentioned. Potter admitted the right of thirlage and the abstraction, but refused to deliver the quantity of malt due as multure, unless the pursuer would repay him the duty which he had paid to Government upon it.

The Sheriff-substitute found, (1st Nov. 1804,) 'That the defender is entitled 'to payment from the pursuer of the duties imposed on malt in the years 1802 'and 1803, for the malt he is bound to deliver as multure for what is grinded 'at the mill mentioned in process.' On an appeal to the Sheriff-depute, he '(20th Nov.) adhered to the interlocutor of 1st current; and as the quantity 'alledged to have been abstracted is not denied, decerned against the defender 'for the multure libelled of 150 bolls of malt.'

The cause was brought into the Court of Session by an advocation, in which the Magistrates of Forfar made themselves parties.

Potter founded his claim for repayment of the duties on two different grounds: 1*st*, The 25th section in the act of Queen Anne, above-mentioned, which gave an allowance for the tax to persons paying *rent*, and which he maintained applied to multure as rent; 2*dly*, On the equity of the case, independent of such clause.

The interlocutor of the Lord Ordinary was, 'Finds, that the 25th section 'of the 12th of Queen Anne, being the first act which imposed a duty upon 'malt, which grants a deduction or abatement of the duty in certain cases, is 'confined to rent reserved and payable in malt, and is specially limited to the 'tenants of lands subject to such rent; therefore finds that the said act can-'not be construed to extend to mill multures, which are not rent of lands, but

No. 3.

'the contract average wages of the work performed, including profit and 'capital employed; finds it admitted in the fifth page of the answers, that the 'practice of the sucken of the Forfar mills, has been in conformity with the 'above interpretation of the statute, from the period when the malt tax was 'first imposed by the 12th of Queen Anne, down to the year 1802; There-'fore advocates the cause, alters the interlocutors of the Sheriff, and finds 'that the respondent and defender is bound to pay to the complainer and pur-'suer the accustomed multures, at the rate of the twenty-fifth boll for the 'master, with one firlot to the miller, without any deduction or abatement on 'account of the duties payable, or to be paid, to Government; and in respect 'that it is not denied by the respondent that he has abstracted to the amount 'of 150 bolls of malt, finds him liable in multures and sequels on this quanti-'ty at the above rates, and decerns.'

This interlocutor was brought under review of the Inner-House by the defender.

There was an argument upon the first ground maintained by the defender, but as the Court did not go upon that, it does not appear necessary to report it.

On the second ground it was argued,

For the pursuers.—The pursuers simply demand, in terms of their title of thirlage, re-delivery or retention of the *ipsum corpus*, of a certain proportion of the malt they grind in return for the grinding. They are certainly not bound to take a smaller proportion, nor can their retaining this proportion, in terms of their right, subject them in any payment to the defenders, merely because a tax has been imposed on malt.

The only reason given why the tax should produce this effect, is, that it has raised the value of malt; but supposing this to be the case,

In the *first* place, there is no condition in the contract, constituting the right of thirlage, either direct or implied, giving such an effect to such a circumstance. It is not said there is any direct condition of that nature; and the words of the title of this thirlage, so far from implying it, plainly imply the contrary. The constitution of this thirlage may be regarded as a contract *de futuro*, to deliver a certain quantity of malt for a certain quantity of grinding. Now, it is necessarily implied in such a contract, that the things stipulated shall be delivered in kind, without any regard to the value they may happen to bear, or the causes that may effect that value. Whether malt should become dear or cheap, and from whatever cause, the contract was intended to remain exactly the same. It was never meant to have any modifications to suit such contingencies. All possible contingencies were risks within the contract. They could not be foreseen; they were in fact innumerable; but the parties were contented in general to take their chance of them all, and bind themselves absolutely to give in exchange to each other, the one his quantity of malt, the

No, 3. other his quantity of grinding. If then the defender should deliver less than the stipulated quantity of malt, or demand something more than the grinding in return for it, because malt has become dear from any cause, that is in truth a violation of the contract, since it provided and intended to provide, that though malt became dear, the same quantity of it should be delivered for the same quantity of grinding.

This cannot be denied in general; and there is no reason why any exception should be admitted when malt becomes dear by the effect of a revenue statute, more than by any other cause. There is no appearance of such an exception in the contract of thirlage; on the contrary, the parties on both sides plainly take their chance of all events, whatever their nature may be. They did not foresee this perhaps; but neither could they possibly foresee a thousand events that have had, and may have, similar effects. Bad and good harvests, changes in the mode of husbandry, facilities or difficulties of importation or exportation, the increase or diminution of population, war and peace, distillery bills, and legislative measures of various sorts, may affect, and have affected, the price of malt just as much as a tax on making it; yet it never was imagined that these could justify a departure from the terms of contracts like this.

Nor have such contingencies only raised the price of malt, they have lowered it also as often. In particular, bounties on importation have done this in a way that forms an exact counter-part to the effect of taxation; yet the defenders never thought that they were bound to give more than the stipulated multure when this happened.

No instance can be produced in which our courts have interfered to alter the conditions of contracts *de futuro*, on account of mere hardship arising from contingent events. All such contracts contain a general undertaking of the risk of all events, at least of all which do not render performance impracticable. The business of a court of justice is to enforce them, not to alter them, according to the change of circumstances. This accordingly is notoriously the practice of our courts in regard to all contracts of feu, of tack, of annuity, of service, (White against Baillie, 29th Nov. 1794, No. 84. p. 10147.) and of sale *de futuro*. It is the rule, too, even in the English courts of equity,—See Fonblanque's Treatise of Equity, p. 122, 123, and 364.—Rudiments of law and Equity, p. 37.—Brown, Parliamentary Cases, 395.

The case of M'Lelland, 27th Jan. 1795, No. 75. p. 14247. is not only a decision on the general doctrine, but is exactly similar to the present in the circumstance of taxation.

In the next place, there is no provision implied in the statutes in favour of the defender's claim; on the contrary, the clause in the act of Queen Anne, giving, *per expressum*, an allowance of this sort to persons paying rent, sufficiently shews no general rule of that sort was held to be implied, *exceptio firmat regulam in casibus non exceptis*.

No. 3.

The statutes, with that only exception, simply impose the tax without any regard to the consequences. They are clearer in this respect than the statute that was so interpreted in the case of M'Lelland. Other revenue statutes have contained similar and more extensive exceptions; but all these express clauses shew that no such provision was held to be implied when not expressed. Besides the case of M'Lelland, which is in point, the general practice of our courts is no less decisive in regard to the interpretation of such statutes than to that of contracts; none of the statutes imposing taxes or bounties can be shewn to have received such an interpretation in relation to feus, tacks, sales, or contracts of any kind, notwithstanding the vast number of such statutes, and the innumerable multitude of contracts affected by them.

II. The defenders plea rests on the idea, that the price of malt is really raised both to the defender and pursuers to the full amount of the tax. But this is an error founded on a superficial view of the subject. For it is a known principle of political science, that a tax which raises the price of any of the necessaries of life, raises the price of labour in the same proportion, and consequently that of all other commodities as well as that one which is taxed,—that is to say, it lowers the value of money in general. This must accordingly be the effect of the tax on malt. If it raise the price of malt, it must raise the price of other things also, that is, lower the value of money in the same degree. This is confirmed by comparing the prices of malt and of wheat before and after the imposition of the various taxes on malt.—See *Combrune*.—See Prices at the Corn Exchange. In this way, the pursuers, though the malt they receive bears a higher money price than it did before the tax was imposed, yet are not any richer on that account, because money bears a smaller value, and consequently this larger price will buy no more than the smaller price would buy before. The pursuers, therefore, are not *locupletati* by the tax; and cannot be bound to pay over any thing to the defender. At any rate, it must operate in this way to a certain degree; and therefore the pursuers are not *locupletati* by the whole amount of the tax, nor can it exactly be said how much.

In the last place, it will be observed, that the value of the grinding has been raised by taxation as well as that of the multure, since all the materials of the mill have been taxed. But if allowance is to be given for the effect of taxation, this must form a set-off against the demand of the defender; for it would be unjust to give an allowance on this ground to one party in a mutual contract, and deny it to the other. It is indeed not easy to ascertain the amount of the counter-claim; but that only shews the impracticability of regulating the effects of contracts by continual interferences of courts upon the variations of circumstances.

Argument for the defender.

No. 3. I. In the *first* place, the contract of thirlage was by no means a contract of hazard; on the contrary, when the parties substituted multure in kind for multure-money, they discovered an obvious intention of avoiding hazard by removing that which they saw resulted from fluctuations in the value of money. The hazards resulting from bad or good seasons, and such other natural causes, they must have had in view, and could not obviate, nor was it necessary, since such hazards in course of time compensate each other, and produce a fair average. But the risk of an act of the legislature inverting, by neglect, the rights of private parties without any advantage to the public, they certainly could not have in view; they must have supposed there was no such risk. An equitable interpretation of the contract must therefore relieve the defender against the effect of such an event. What distinguishes this event from other events affecting the price of malt, is this circumstance, that risk of these events was within the contract, but the risk of this event was not.

It never has been the practice of courts merely to enforce contracts according to the letter, but to give them an equitable interpretation according to the true intent of the parties. The exercise of this equity is a great branch of jurisprudence, and many rules are laid down in it by our writers. Nor has it been the practice to refuse relief by this equity against hardship arising from supervening circumstances, unless the risk of these circumstances was a risk within the contract. The passages quoted by the pursuer allude to this latter case only. But in cases like the present, the courts both of Scotland and England have a different rule. See Brewster against Kitchel, Salheld, p. 198, and Carthew, p. 439.—Hopwood against Barefoot, vol. ii. Modern Reports, p. 238.—Bradbury against Knight, Douglas's Reports, p. 624. In all these cases the Judges of England were clear, that even where payment was expressly stipulated to be without deduction for taxes, yet if a future tax should be imposed, of a nature quite different from any that existed before, allowance must be given for this tax; but in this case no tax at all, no malt existed at the date of the contract of thirlage. The practice relative to leases and feus, &c. is not in point; for, in these contracts, the supervening circumstances, occasioning hardship, have either been within the risk of the contract, such as the fall in the value of money; or the effect of them has been so remotely consequential, that it could not found an equitable claim, and, besides, so imperceptible and uncertain, that it was impracticable to give redress. But here it is quite direct; and the amount of it is quite clear.

But, *secondly*, the equitable interpretaion of the statutes is in itself, independently of the equitable interpretation of the contract of thirlage, fatal to the plea of the defender. When the legislature impose a tax on any commodity, they always mean to impose it ultimately on the consumer; for the convenience of the Revenue, they sometimes take it immediately from the manufacturer or dealer; but then it is understood and intended, that the manufacturer and dealer shall relieve themselves by taking repayment from the person to whom

No. 3.

they dispose of it, till, at last, the burden of the tax rests upon the consumer. It is clearly the intention of the legislature that this shall happen in all cases. It accordingly happens almost universally by the ordinary course of trade; and, looking to this, the legislature must be presumed to have taken for granted that it would happen in all cases, with the exception of cases expressly provided for. Parliament never could mean that, in any case, it should rest, without relief, upon the manufacturer or dealer, or that the amount of the tax, paid by the consumer, should be intercepted by a person who had not advanced it. The present, however, is a case where the operation of the ordinary course of trade is obstructed, and is not sufficent for giving that relief to the person primarily advancing the tax which the statute intended he should receive. In this case, if the contract and statute be strictly interpreted, the tax will be received by a person who never advanced it; and the person who has advanced it remain without relief. It is necessary, therefore, for a Court of equity to interfere, in order to give a full execution to the true meaning and intent of this statute, by compelling that person to pay it over to the manufacturer, or person who has advanced it to Government.

Equitable extension of laws in this way is equally agreeable to the principles of the Roman law, Pandect. L. 12 and 13, *De legibus*;—of the English law, Blackstone, vol. 3. page 430, and of our own. Thus the act 1695, C. 24, relating expressly to apparent heirs, was extended to heirs entering *cum beneficio*. The act 1661, C. 24. relating expressly to creditors doing diligence against real estate, to creditors doing diligence against personal estate. The act 1661, C. 62. in the same way, though expressed in favour of posterior apprisers, has been extended in favour of personal creditors and heirs of entail; and, though expressed against apparent heirs, it has been extended against presumptive heirs. Farther, though expressed only as to expired apprisings, it has been extended to apprisings during the currency of the legal.

The maxim, *exceptio firmat regulam in casibus non exceptis*, has no sort of application here. For there is no general rule in the statute from which the provision relating to rent is an exception; on the contrary, it is a provision for the purpose of explicating the general rule, that the tax shall not rest ultimately on any person but the consumer. The case of thirlage, though it may not be included under rent, is yet so exactly analogous to it that it is utterly impossible to suppose that the statute meant to make any distinction between them.

As to the counter claim of the pursuers, it is too indirect and uncertain to be regarded. If a direct and definite tax had been imposed on grinding, that would certainly have afforded a fair claim for relief to the pursuer; but the remote effect of taxes, of quite a different nature, cannot be taken into consideration; at any rate, it is more than compensated by the indirect effect of the very same revenue statutes, on which he founds, in enhancing the price of malt. These fall more heavily on the grower, and the maltster, than on the miller, and must have an indirect effect much greater on the price of malt than on that of grinding.

No. 3. II. The argument of the pursuer, on this point, proceeds on *postulates* that cannot be conceded; and, though they were, still it is erroneous. It cannot easily be supposed that a rise even in a necessary of life would raise the price of labour, while the demand for labour, and the quantity in the market remained the same. A scarcity raises the price of necessaries, but not that of labour. Then malt liquor is not a necessary of life even in London, far less in Scotland; and it is particularly observed by Adam Smith, Vol. 3. page 282, that a tax on it does not raise the price of labour. But, further, if the price of labour were raised by the rise on malt occasioned by the tax, this rise on the price of labour must operate on malt itself, as well as on other things; so that it too would be raised in the same proportion as other things, by a secondary rise over and above the first effect of the tax. The price of it would still therefore bear the same proportion to other things that it did before, after deduction of the whole rise of price occasioned by the tax. The pursuers then receiving their multure in malt, after they have repaid to the defenders the tax advanced on it, will still have the same value, in all respects, that they would have had if the tax had not been imposed; so that if they do not repay the tax advanced by the defenders, they are clearly *locupletati* to that amount by the operation of the statutes imposing this tax. The accounts of prices of wheat and malt, when accurately examined, will be found to afford an inference exactly contrary to that drawn from them by the pursuers. They shew, so far as can be judged, that the price of malt was increased by the full amount of the taxes on malt, while that of wheat was not affected by those taxes.

The majority of the Court adopted the reasoning of the defenders argument upon the interpretation of the statutes; and upon that ground principally rested their opinions in favour of the defender. They disregarded altogether the argument of the pursuers on political economy.

The minority adopted the argument of the pursuer on the interpretation of the contract, and of the statute, and thought that the argument as to price was good, at least to some extent.

On advising the first reclaiming petition for the defender, with answers, the Court 'Adhered to the interlocutor of the Lord Ordinary.

The defender presented a second reclaiming petition, which was answered. On advising this petition and answers, a hearing in presence was ordered; and, after the hearing, the judgment of the Court was: 'Alter the interlocutor 'complained against; repel the reasons of advocation; and remit the cause 'simpliciter to the Sheriff.'

Against this judgment the pursuers presented a petition, which was answered.

On advising this petition, and answers, the Court finally adhered to the interlocutor complained of.

Lord Ordinary, *Justice Clerk.* Act. *Jeffrey* et *Forsyth.* Alt. *Cranstoun.* *Jas. Adamson* and *Thos. Scotland*, W. S. Agents.

M. *Fac. Coll. No.* 39. *p.* 136.

*** The case of Mackenzie, 12th January 1697, No. 19. p. 7867, was cited by the defender on the first branch of his argument, p. 10, as an instance in the Scotch law, analogous to that of Brewster, &c. cited from the English law.