N. B. The like judgment was given on the same day, in a similar question, between the above pursuers and William Cleghorn. No. 117.

Lord Ordinary, *Monboddo.* Act. *Elphinston.* Alt. *Alex. Fergusson.* Clerk, *Home.*

S. *Fac. Coll. No.* 131. *p.* 206.

1785. *January* 23. JAMES AYTON *against* JAMES BRUCE.

No. 118.
Whether the proprietor of a mill let in tack, taking the thirled lands into his natural possession, is exempted from the thirlage?

Mr. Ayton of Kippo let to James Bruce the mill and multures of these lands. Before the expiration, however, of this lease, he took a considerable part of the lands, which had formerly been possessed by tenants, into his own natural possession, and withdrew the produce from the mill. James Bruce, the miller, in an action at Mr. Ayton's instance, having claimed, on this account, a proportional abatement of his rent, Mr. Ayton

Pleaded: A possessor of lands cannot, for the sole purpose of preserving the multures in their former extent, be withheld from pursuing the mode of cultivation most beneficial to himself. Upon this principle it is, that either a tenant, or the proprietor on purchasing the tack, may convert his lands into pasture, during the whole period of the multurer's possession, though in this manner the expectation of the latter is entirely frustrated. 28th November, 1755, Grant against Milne, No. 98. p. 16034; 20th February, 1765, Slowan against Hawthorn, No. 106. p. 16052; 16th February, 1769, Wilson against Chalmers, No. 111. p. 16060. The present example seems precisely of the same nature; a proprietor of a mill, in consequence of the rule, *Quod res sua nemini servit*, being always exempted from thirlage on account of lands in his own possession, Erskine, Book 2. Tit. 9. § 36. To the influence indeed of this maxim the parties here seem to have been attentive; the multures, as ascertained by the lease, being those only "of the farm-meal of the lands, and what was consumed in the families of the tenants."

Answered: It is true, that the tacksman of multures is entitled to no deduction on account of the thirled lands having been thrown into pasture. His rent is presumed to have been fixed with a view to a change so usual in husbandry, while from the plentiful crops of grain, after the former mode of cultivation is resumed, an ample compensation is to be expected. But the landlord's taking his estate into his natural possession is to be viewed in a very different light. Such an event could not be in the contemplation of the parties when the agreement was made.

To exempt him on that account, from the multures which were payable by his tenants, would be extremely unjust. The clauses in this lease, framed with a view to the actual state of the lands, cannot import the multurer's accession to a contract so unequal. The maxim, too, *Quod res sua nemini servit*, is here entirely misapplied; the multures due to the miller in consequence of his lease, being his property, not that of the owner of the mill.

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