1681. *January* 6.

The HERITOR of the MILL of GLENASSEN *against* The TENANTS of SPADO.

No. 42.
In a summons libelling quantities of abstracted multures, the pursuer was not obliged to prove the quantity, the defender not having denied.

The heritor of the mill of Glenassen having pursued the tenants of Spado for abstracted multures, and litiscontestation being made, and probation led; at advising of the cause, the lands of Spado were found thirled, but nothing was proved as to the particular abstractions; which being objected, the pursuer answered, that he having libelled particular quantities, the defender proponed his defence without denying the quantities, which therefore freed the pursuer from proving thereof, so that they must be holden as proved; for when defenders acknowlege not the quantities, they do propone their defence denying the quantities. It was replied, That though defenders are not so cautious sometimes, as to expressly deny the libel or quantities, yet that never liberates the pursuer from proving, unless the nature of the defence import an acknowlegement of the libel or quantities, as lawfully poinded in a spuilzie, which acknowledgeth the defenders' intromission, but allegeth that it was warrantable, and so no spuilzie.

The Lords found, That the not denying the quantities did not acknowlege the same, yet they granted commission to take the defenders' oaths in the country, what were the true quantities of the abstractions.

Stair, v. 2. p. 828.

1681. *December* 1. M'PHERSON *against* M'INTOSH of Stroan.

No. 43.
Clause importing liberation from thirlage.

The late Marquis of Huntly having, *in anno* 1627, feued out the lands of Stroan for a feu-duty, *pro omni alio onere*, &c. *cum multuris* in the *tenendas;* Stroan continued notwithstanding to come to the mill of the barony, and *in anno* 1628, the Marquis took decreets against him for abstracted multures. In the year 1638 the Marquis feued the mill, with the multures of the lands of Stroan, *per expressum*, to M'Pherson of Ardbraylack, who pursued Stroan for abstracted multures.

The Lords found, That the feu-duty *pro omni alio onere*, with the clause *cum molendinis*, &c. though in the *tenendas*, did liberate Stroan's lands of the astriction, seeing thereby the disponer having so feued them without reserving the multures is presumed to have disponed them *ut optimas maximas*; but they found the pursuer's reply upon prescription relevant, and that it began to run after the decreet for abstraction in favours of the Marquis, and consequently to the pursuer.

The defender having proponed interruption, by carrying his corns to some other mill after the said decreet; and it being controverted, if for making up prescription, the pursuer must prove, that the whole corns of the lands alleged to be thirled for the space of forty years, were carried to his mill, so as the abstracting any part would make interruption; or, if it be sufficient that some considerable part of the corns yearly for forty years, was brought to that mill;

No. 43. The Lords ordained the matter of fact to be tried before answer to this point.

Thereafter the pursuer alleged, That the defender's feu had fallen by the forfeiture of his superior my Lord Argyle, to the Marquis of Huntly the donatar, who had confirmed the pursuer's feu of the mill *in anno* 1676.

Answered for the defender: That he had also a confirmation of his lands of Stroan, with a *novodamus* from the said donatar, prior to the confirmation of the pursuer's right of the mill.

Replied for the pursuer: Before the confirmation in favours of the defender, the Marquis promised by a letter to confirm the pursuer's feu of the mill, containing the multures of the lands of Stroan, which promise was equivalent to a disposition of these multures, which then stood in the Marquis' person by the gift of forfeiture.

The Lords found, That the posterior confirmation to the pursuer, though with a *novodamus*, did only extend to the feu of the mill as the pursuer had right thereto; and that the antecedent promise was not equivalent to a disposition, nor a *modus habilis* to convey the multures of the defender's lands, though the right of them was then in the Marquis' person.

Harcarse, No. 721. *p.* 203.

1682. *January* 17. MAJOR BUNTIN *against* ROBERT BOYD.

No. 44.

Found that a prior feu of lands, for a duty *pro omni alio onere cum molendinis* in the *tenendas*, (for these words are never put in the dispositive clause, except where a mill is already disponed) liberates from astriction, although the pursuer had the mill disponed after the feu of the lands, with the thirle multures of these lands *per expressum;* and since the feu the heritor and his tenants were in use to grind at the pursuer's mill, because that was *meræ facultatis*, so long as there was no compulsitor, or sentence for abstracted multures.

Harcarse, No. 722. *p.* 204.

1682. *March.* DUFF of BRACO *against* ABSTRACTERS.

No. 45.

Found that seed and horse corn pay no dry multure; but that threshing lot is not free (more than hynd's bolls) though it be not grinded at the master's mill; and found, That when teind is not drawn or paid *in ipsis corporibus* to the titular or tacksman, but in money, it should be liable to multure as the stock.

Harcarse, No. 723. *p.* 204.