

1768. December 14. JOHN COLTART *against* JOSEPH FRASER.

THIRLAGE.

A clause *cum molendinis et multuris*, in the *tenendas* of a charter from a subject, operates a discharge of Thirlage.

[*Faculty Collection, IV.* p. 147; *Dictionary*, 16,058.]

AUCHINLECK. In a charter granted by a subject, there is no reason for making a difference between a dispositive clause and a clause in the *tenendas*. In a Crown-charter there is; for the Barons of Exchequer, though improperly, allow the writer of the charter to fill up the *tenendas* clause without observation or check. But a subject superior is supposed to have read over every word of the charter which he grants. The only difficulty is from the decision in the case of *M'Nab*. In that case, the Court was equally divided, and it was determined by President Craigie's casting vote. On the reclaiming petition, he changed his opinion; but, one of the Judges in the minority happening to be absent, the casting vote of the President could not be taken.

PITFOUR. I admit that *M'Nab's* case was narrowly determined, and therefore I do not lay great stress on that decision; *origines sunt repetendæ*. There is a great difference as to the import of a grant in the *tenendas* in a charter from the Crown, or in a charter from a subject. Such a grant in charter from the Crown is nothing. From a subject it is something; but it is scarcely sufficient to import a liberation from thirlage. The clause may mean, a grant of mills on the ground, or a power of building mills, or a liberation from thirlage. Which of those three is meant, must be gathered from circumstances, must be explained *rebus ipsis et factis*. When the vassal, notwithstanding the charter, still goes to the superior's mill and pays intown-multure, that acquiescence, on his part, proves *quid actum et tractatum*. If the vassal had, by writing, so declared his meaning, this would have been sufficient for establishing a restriction: And why should a declaration *rebus et factis* have less force. The judgment of Lord Stair is decisive: as to that decision, which is the first in Dirleton's Collection, it is differently stated by Lord Stair, and we must suppose that the Court did, in that case, first pronounce in favour of the clause *cum molendinis et multuris*, and then against it.

On the 14th December, 1768, the Lords sustained the defences, and assoilied from the multures demanded; altering Lord Coalston's interlocutor.

On the 9th March 1769, adhered.

*Act.* Ch. Brown. *Alt.* D. Armstrong.

*Diss.* Justice-Clerk, Pitfour, Barjarg, Stonefield, Hailes. Alemore and Coalston absent.