No. 109.
neral does not comprehend wheat, where the mill is not properly constructed for grinding it.

factured their wheat, with their other grain, at that mill; but some mills with marble millstones for grinding wheat having been erected in the neighbourhood, and they having carried their wheat to these, the pursuer brought a process against them for abstraction.

Pleaded for the defenders: The mill being a common corn-mill, is not fit for grinding wheat, and therefore that species of grain cannot be understood to be comprehended under the astriction; so it was found, 16th July, 1760, Couston *contra* Tenants of Pitreavie, No. 104. p. 16047.

Answered for the pursuer: Wheat was in use to be sown in the defenders' farms prior to their tacks, and yet they became bound to grind all their *grindable corns* at this mill. As the words comprehend wheat, so the practice of the defenders in carrying their wheat to the mill for several years after their tack, shews their sense that they were bound to grind it there. This being the case, it ought not to exempt them from the thirlage, that mills were afterwards erected of a better construction for grinding wheat. Improvements may be made upon mills of every kind; but that ought not to defeat contracts of thirlage entered into when such improvements were unknown.

In the case of Pitreavie, though it appeared that wheat had been sown in the land about a century before, yet it had been discontinued for a considerable time previous to the commencement of the tacks.

"The Lords assoilzied the defenders."

Act. *Arch. Cockburn.* Alt. *Rob. Sinclair.* Clerk, *Gibson.*

A. R. *Fac. Coll. No. 82. p. 146.*

1768. *December* 13.

JOHN COLTART, Writer in Dumfries, *against* JOSEPH FRASER of Little Cocklick.

No. 110.
Effect of a clause *cum molendinis et multuris* in the *tenendas* of a charter from a subject.

In 1554, the forty-nine merk two shilling land of Kirkpatrick-Durham, with the mill thereof, and astricted multures, were feued by the abbacy of New-abbay, or Sweetheart, to the Earl of Nithsdale.

These lands had been alienated by the family of Nithsdale at different periods. The lands of Drumconchra being part of them, had been early feued to M'Lellan of Barclay, and came into the person of the defender in 1754.

The pursuer having acquired right to the mill in 1763, brought a declarator of astriction against the owners of the several lands comprehended under the forty-nine merk two shilling land of Kirkpatrick-Durham.

By the defender was produced a charter from the Earl of Nithsdale, 1706, containing a *novodamus*. In the *tenendas* were the words, *cum domibus, molendinis, et multuris*, and the feu-duty was declared to be *pro omni alio onere*. There was likewise produced a charter of resignation from the Crown, 1715, with the *tenendas* in the same terms. In the title-deeds of the other lands, the thirlage was expressly reserved.

No. 110.

It was proved, that the tenants of Drumconchra were in use to grind their corns at this mill, and to pay in-sucken multure; that, in one instance, they had assisted to repair the dam-dike, in another to lead the millstone, and, in a third, to provide thatch to the mill. There were likewise produced for the pursuer three decrees of Lord Nithsdale's multure-court; one in 1713, in which the tenants of these lands were called, but judicially passed from by the lessee of the mill; another in 1725, in which they were decreed in a fine for contumacy; and a third in 1726, from which it appeared they had judicially acknowledged the abstraction, and engaged to satisfy the tacksman of the mill. All the particulars proved were within thirty-eight years preceding 1754, when the defender acquired the lands. From that time the defender had forbid his tenants to attend the mill.

Pleaded for the defender: A charter from a subject-superior, with mills and multures in the *tenendas*, imports a discharge of the thirlage.—"The most ordinary way," says Lord Stair, "of taking off thirlage, is by granting a charter containing mills and multures in the *tenendas*;" New Edit. p. 305. § 24. That the thirlage was meant to be discharged in this case is the more presumable, 1*st*, Because the charter declares the feu-duty to be *pro omni alio onere*; and, 2*dly*, Because, in the charters of all the other lands within the thirle, the thirlage is expressly reserved.

As this servitude requires a title in writing, the thirlage having been discharged, could not be of new created by the practice of going to the mill. Besides, the practice of going to the mill is not proved for forty years, and, on other accounts, deserves little regard. There was little grain sown in these farms till lately; and they having been for more than thirty years in the hands of trustees, who lived at a distance, the tenants might have been awed or deceived by the managers for the family of Nithsdale; and it was during that period the usurpation seems chiefly to have taken place.

Neither ought any weight to be laid upon the decrees; for, 1*st*, Lord Nithsdale having alienated both property and superiority of the lands, his Bailie could have no jurisdiction over the possessors; 2*dly*, The owners of the lands were not called; 3*dly*, In one of the decrees, the tenants were passed from, which might have been on account of their being liable; 4*thly*, In another, it would appear they had paid no regard to the court, for they were decreed in a fine for absence; which fine never was exacted.

Answered for the pursuers: The words *cum molendinis et multuris*, in the *tenendas* of a charter, do not necessarily import a discharge of thirlage. It is the purpose of the dispositive clause, to specify the particulars meant to be conveyed. The clause of *tenendas* is solely meant for pointing out the superior, and the species of the holding. A number of supernumerary words are indeed, from custom and anxiety, thrown into this clause; but these ought to operate no further than they are warranted by the dispositive clause. It is an agreed point, that, in charters from the Crown, the words *cum molendinis et multuris* in the *tenend.* clause have no

No. 110. effect whatever. In charters from subjects, they are regarded in the same light, if it appear that the possessors of the thirled lands have been in the practice of attending the mill, after the date of the charter. So it is laid down by Lord Stair, p. 305. § 24.; and so it was found, July, 19, 1758, M'Nab, No. 102. p. 16041.; and again, November 17, 1759, Yeaman, No. 103. p. 16044. The words *pro omni alio onere* respect only burdens that may affect the lands, not such as may affect the fruits; Bankton, v. 1. p. 688. § 52. & 53.

The proof, in this case, would be sufficient even to constitute a thirlage, especially as the mill belonged to churchmen. But as the question here is not with regard to the constitution of a thirlage, it is unnecessary to enter into a nice discussion of the proof. The thirlage having been constituted before, the proof is only to show, whether it was meant by these words in the charter to discharge the thirlage Lord Stair says, that, in such case, usage of grinding the corns at the mill for seven years only, immediately subsequent to the date of the charter, is sufficient to show that an immunity was not designed. Here the attendance on the mill is proved for near 40 years; and, taking it altogether, seems quite irreconcileable with the supposition, that it was the understanding either of the granter or grantee that the thirlage was discharged by this charter.

Observed from the Bench: In the case of M'Nab, the Court was equally divided, the President having been against the judgment.

"The Lords assoilzied the defender."

Act. *Armstrong.* Alt. *Chas. Brown.* Clerk, *Kirkpatrick.*

Fac. Coll. No. 83. p. 147.

*** The pursuer having appealed, the House of Lords, January 28, 1774, "ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed, with £.100 costs."

1769. *February* 16. CHALMERS *against* WILSON.

No. 111. Grounds turned into grass.

Among sundry articles of deduction pleaded by the tacksman of a mill, one was, that the proprietor having bought up many of the tacks upon the estate, kept great part of it in grass, which was in tillage when the mill was let, whereby there was a short-coming of the multures, in contemplation of which he had agreed to pay the rent.

Answered: The profits of a mill being casual, the tenant is understood to run his risk of a diminution, upon account of the chance of increase; and it has been decided, that the proprietor of a mill does not incur the warrandice of the tack, in consequence of the tenants throwing their grounds into grass; July, 1731, M'Fadzen *contra* Earl of Cassills, No. 73. p. 16016.

"The Lords repelled the claim of deduction."

Act. *Rolland.* Alt. *Blair.*

G. F. *Fac. Coll. No. 87. p. 338.*