1716. *December* 4.

MONTEITH of Milnhall *against* The FEUERS of Abbotscarse.

No. 66.
A feu-charter bearing a certain feu-duty *cum omni alio onere*, but not bearing a clause *cum molendinis et multuris*, altho' bearing a clause of absolute warrandice, imports not an exemption from thirlage.

In a declarator of astriction at Milnhall's instance against the feuers of Abbotscarse, the Lords having found, that the documents produced by him were sufficient to astrict the constitution of the thirlage before the year 1533, this point now comes to be discussed, viz. Whether the defenders' charters of their lands, (granted in the said year), though without the clause, *cum molendinis*, &c. either in the dispositive part, *tenendas*, yet bearing a *reddendo pro omnio alio onere*, with a clause of absolute warrandice, anterior to the feu of the mill, liberate from that astriction?

And here it was alleged for the feuers: That the said clause, *pro omni alio onere*, is of far greater force and effect than a plain discharge would have been; and that, because it was a real right, notour and public, in the same manner as all real rights were at that time; and that it would have been strange, if, immediately upon granting such a charter, the granter should have pretended to an actriction of these lands he had disponed to be bruiked *libere et plenarie*, &c. and with a feu-duty *pro omni alio onere*.

Answered for Milnhall: That though the disponing of lands even without the clause *cum multuris*, implied a conveyance of the multure where there was no anterior thirlage constituted, and prevents the effect of any posterior astriction, which is all the Lords ever found, yet that does not either convey to multures, or liberate from thirlage, which was formerly constituted, anterior to the date of the charter; for, in that case, the lands and multures being separate, the mill and multures are a separate tenement, and therefore a charter of the lands does not convey the multures, unless they be expressed; and if such a charter could have conveyed the multures, all debates upon the import of the clause *cum multuris* in the *tenendas* alone, or joined with the clause *pro omni alio onere* in the *reddendo*, would have been superfluous; the very stating that as a question, by all our lawyers, whether such clauses do import a liberation, is a sufficient proof that a charter, without such clauses, can import none.

Replied for the feuers: That if the multures were disponed, there would be no occasion for this argument; and it would have been incongruous to have disponed or conveyed any such thing, where there was no view of building a mill upon the ground of the lands feued. It was sufficient for the obtainer of the charter to have his lands conveyed to him free of all burden, and without retention of any thing to the granter, and without revocation, or any exaction demanded, or any service, that so they might be at liberty to use the fruits as they thought fit; nor is there any distinction here conceivable but the lands themselves and the fruits thereof; since he cannot be said to enjoy and possess his lands freely, who is obliged to allow another to possess the fruits, or who is astricted to pay a certain burden or proportion out of the same.

No. 66. Duplied for Milnhall: 1*mo*, That there is no arguing from presumptions in this case, where the thirlage is liquidly constituted *ab ante*; 2*do*, That the presumptions are against the feuers; for the thirlage being so clearly constituted, it is impossible to imagine, that if the granter had designed to convey the multures, he would not at least have mentioned them in the *tenendas*; So that, 3*tio*, The clause *pro omni alio onere* cannot give liberation, except the clause *cum molendinis et multuris* be at least in the *tenendas*; because, 1*st*, *unumquodque eodem modo dissolvitur quo colligatum est*; and therefore, since the thirlage was constituted and established by a right to the multures *per expressum*, it could not be taken away but by as express a discharge: *Next*, Since what is prestable by the *reddendo* is only for what is disponed, the clause *pro omni alio onere* can avail nothing; where the multures are not disponed, the meaning only being, that the vassal shall pay no more *reddendo* for what is disponed: So that, *lastly*, *pro omni alio onere* is nothing else but *pro omni alio onere feudali*. If, indeed, the thirlage had been only constituted by the *reddendo* of feuers' charters, it might have been with more reason pleaded, that a posterior charter, leaving out the multures, and bearing the clause *pro omni olio onere*, inferred a liberation; because, in that, the multures might in some sense be reckoned among the *onera feudalia*; but that is not the present case, and the same reason will not apply.

Triplied for the feuers: 1*mo*, That all our lawyers, and particularly Hope, Tit. MILLS AND MULTURES, are against this interpretation; and he there quotes a decision of the case plainly *in terminis*, where the Lords found, that the granter of such an infeftment should warrant the lands feued ab omni alio onere, and that multures are onus et realis servitus, et quod censebantur remitti, nisi contrarium fuisset conventum virtute clausularum specialium reservativarum.—(See APPENDIX.) And so, 2*do*, 26th November, 1631, Oliphant against Marshall, No. 22. p. 15969. the Lords, in so many words, found feu-duty *pro omni alio onere* did import a liberation from the thirlage. And, 3*tio*, Shortly thereafter, viz. 11th January, 1678, that this point of our law might be fixed in another process, betwixt Lord Balmerino and Cockburn, No. 127. p. 10870. the Lords found the feuers not thirled by their charters bearing a feu-duty *pro omni alio onere*. 4*to*, This seems clear from the decision in the case of Henderson against Arnot, *anno* 1677, No. 126. p. 10867.

Quadruplied for Milnhall, to the 1*st* decision quoted: That in that case the thirlage had been before constituted by infeftment, and so was more of the nature of an *onus feudale*, which might have been some reason for extending the clause in that case to multures: Moreover, it is principally to be noticed, that there, at granting the feu-charter, with the clause *pro omni alio onere*, there was no standing constituted thirlage; for he who had formerly right to the multures, had acquired the property before granting the feu-charter, by which acquisition the Lords found the thirlage became extinct, and that the proprietor had done no new deed either by tack or decree whereby the thirlage would of new have been constituted; so that this decision nowise agrees with the present case. To the 2*d*, It made rather

against the feuers; for there the Lords found, that a charter with the above clause was not sufficient to satisfy an obligation by which the Earl Marshall was obliged to dispone the lands free of thirlage; which they could never have found, if the clause *pro omni alio onere* had inferred liberation; and though the Lords there found Marshall's obligation to dispone the lands to be holden feu for a certain duty therein mentioned, to be paid therefor allenarly, did oblige him to convey the lands free of thirlage, yet it is plain their Lordships thought there was a difference betwixt that clause in an obligation and the like clause in the *reddendo* of a charter: That, in the last case, it did not free from thirlage, but in the first it did; and the reason of the difference is obvious from what is already said, that such a clause in the *reddendo* concerns only the *onera feudalia*, because these are the only *onera* which fall to be expressed in the *reddendo* of a charter; whereas an obligation should be extended to all lands of *onera*, because all of them fell to be expressed in the obligation. No. 66.

To the *3d*, answered: *1mo*, That the Lords do not there find that the clause *pro omni alio onere* imported a liberation, but that the charters with that clause did not thirle the feuers. *2do*, In that case, there was no astriction proved prior to the date of the charter.

To the *4th*, answered: That there the import of the clause *pro omni alio onere* did not at all enter into the debate, the feu-charter with the clause being anterior to the thirlage; neither did they find that that clause did import a liberation; but found the feu *pro omni alio onere* did import a liberation, *i. e.* the feu-charter, such as it was, bearing indeed that clause, but, at the same time, such as would have imported a liberation, whether the clause had been in it or not.

On the other hand, the pursuer, Milnhall, having insisted upon a decision in the case Newliston against Inglis, the 17th of July 1629, No. 20. p. 15968. which he alleged was directly for him; and another of late in Fraser's cause against the Feuers of Aberdeen, where the Lords plainly found, that the clause *pro omni alio onere* did not liberate;

It was answered for the feuers: That Newliston's case was but single; and, according to the Lord Stair's opinion, p. 292. (302.) expressly contradictory to another which very soon followed; but as he observes the lands feued out before the feu of the mill had been previously thirled to that mill, and probably by a real right, *i. e.* either some prior infeftment of the vassal *cum astrictis multuris*, or the Baron's own charter from the crown, *cum astrictis multuris baroniae*, which differences the case from this, where none of the documents from which this astriction is pleaded relate to any real right of astriction in the person of the first granter.

Lastly, to fortify this clause of the charters, the feuers insisted upon another, viz. the clause of absolute warrandice, warranding the lands to be bruiked freely without any retention, &c.; and it seemed to be yielded, that, by the common law, "qui uti optimæ maximæ sunt aedes, tradit, non hoc dicit servitutem illis deberi; sed illud solum, ipsa saedes liberas esse, h. e. nulli servire," L. 90. D. De verb. sig. and L. 169. D. Eodem, Haec adjecti, "uti optimus maximusque est, hoc significatum ut liberum præstetur prædium;" and the same no doubt takes place

No. 66. with us, since there was never a clause of warrandice pleaded not to import warrandice against a servitude due from the lands disponed.

Answered for Milnhall: That whatever was the import of a clause of absolute warrandice in the civil law, (which depended on several niceties), it is certain, that, among us, that clause hath no such effect; yet the import of warrandice can go no further than use, securing to the purchaser the thing disponed; and consequently, it being once established, that, where a thirlage is anteriorly constituted, the multures are so far separate tenements, they are not understood to be conveyed, unless expressed: The warrandice cannot extend to the multures, because they do not fall under the conveyance; agreeable to which, as the Lord Stair observes, it has not been extended to servitudes of pasturage, or the like, nor, says he, to thirlage; and takes notice of the known case Sandilands against Haddington, the 21st of January 1672, where the Lords found, That warrandice did not extend to multures, although their lands were conveyed *cum multuris* in the *tenendas*, (*voce* WARRANDICE.)

"The Lords found, That the clause *pro omni alio onere* in the first charter, with a clause of absolute warrandice, there being no clause therein *cum molendinis et multuris*, did not import an immunity from the thirlage."

Act. *Rob. Dundas.* Alt. *Graham.* *M'Kenzie*, Clerk.

Bruce, No. 40. *p.* 52.

*** See Henderson against Arnot, 7th December, 1677, No. 126. p. 10867. *voce* PRESCRIPTION. See also Balmerino against Cockburn, 11th January, 1678, No. 127. p. 10870. *voce* PRESCRIPTION,—where a feu-duty *cum omni alio onere* was found to import a liberation from thirlage. See Newliston, No. 20. p. 15968. and Oliphant, No. 22. p. 15969.

1717. *December* 27. HAMILTON of Grange *against* MILLER and AULD.

No. 67.

Gargunnock, proprietor of the village of Saltcoats, in the year 1703, feued out some houses, and some parcels of ground, 40 or 50 feet square, adjacent to the houses, of no other use but to be kail-yards; and, in the disposition and feu-rights, "thirles the feuers to come to the mill of his barony with their grindable corns and malt, and to pay the multures and services conform to the use of the barony." The import of this thirlage being called in question, the feuers argued, That it imported only *grana crescentia*. The proprietor of the mill argued, That the nature of the subject points it out to be a thirlage of *invecta et illata*; for nothing being feued out but a house and a small parcel of ground, fit only for a yard, and that recovered from the sea, which, even supposing it fit for tillage, would not afford a handful of multure in a year; it must be no thirlage at all, or a thirlage of *invecta et illata*. The Lords found the feuers liable in payment of multure, not