

tion. As having then a common interest in Mr. Ranken's part of the wall in question, the other proprietors claim the power of putting a negative on his intended proceeding, by which so great an innovation would be effected; their title to exert that authority being recognised both in the Roman law and in the law of Scotland; L. 8. L. 27. § 1. L. 40. D. *De servitud. præd urban.*; Bankton, vol. 1, p. 677. § 11.

Answered: That the common right which has been now supposed, cannot be a right of property, is obvious. If it existed at all, it would be of the nature of a servitude. But the servitude, *oneris ferendi*, is the only one the law knows in such circumstances; L. 24. L. 33. D. *De servitud. præd. urb.* Stair, B. 2. Tit. 7. § 6.; and therefore the foundation of the opposite party's pretensions is altogether imaginary; for the authorities quoted to support them relate only to the right of common property.

The Lord Ordinary "repelled the reasons of advocacy, and remitted the cause in common form." And having advised a reclaiming petition, with answers, The Lords "adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Westhall*, Act. *Rolland*. Act. *Maconochie*. Clerk, *Menzies*.
S. *Fol. Dic. v. 4. p. 280. Fac. Coll. No. 152. p. 237.*

SECT. VI.

Servitude of a Damhead.—Moss.—Water-run in Coal Works.—
Astriction to a Smithy.

1677. July 20.

The LAIRD of GAIRLTON *against* The LAIRD of STEVENSON.

THE Laird of Gairlton, as heritor of the mill, called the Sands-mill, pursues the Laird of Stevenson, on whose ground was the end of the pursuer's dam-head, whereof he had been in immemorial possession; but, by a speat of water *in anno* 1674, the ground being washed away from the end of the dam, Gairlton extends the end of the new dam, and Stevenson impedes it; therefore Gairlton craves it may be declared, that he hath right to build his dam to the next adjacent ground thereto. The defender alleged absolvitor, because the suffering of a dam to be laid to his ground was of mere favour, and the occasion that the speats of water washes away the same; likeas, the pursuer hath no right to force him to admit of

No. 38.

Where one had the servitude of a dam-head on the ground of another, and the ground had been carried away by the water, he was found entitled to ex-

No. 38.
tend the dam
till it touched
firm ground.

his dam to be any longer, or to encroach upon his ground more than formerly; but the most he can require is, that the defender permit him to make up the breach made in his dam, the pursuer satisfying the damage the defender hath sustained through the sanding of his ground upon occasion of the said dam.

The Lords found the declarator relevant, that this dam had been 40 years, or immemorially, fixed to the defender's ground, to give him right to such a servitude upon the defender's ground, and that he was not liable for any damage occurring by speats, or any other accidents, without his fault, but that he might extend his dam till it touched the defender's ground, in such a way as might be least prejudicial to the defender; and appointed commissioners to visit the ground, and set the place where the dam should be fixed.

Fol. Dic. v. 2. p. 375. Stair, p. 545.

* * * Fountainhall reports this case :

Gairlton pursues a declarator, that he has right to repair his dam-head and mills. Alleged, it is on Stevenston's ground turned in by the speat of water. The Lords ordained before answer a visitation, albeit Gairlton offered to prove the place he intended to repair is the same where the dam-head had stood before, and that the nature of that servitude of a dam-head implied a liberty to alter the place when necessary, being without the defender's prejudice.

1683, *March 14.*—BETWEEN Sir John Seaton of Garmilton, and Sir Robert Sinclair of Stevenston, "The Lords found Garmilton could have no other servitude on Stevenston's land for his mill-dam, save what he has been in possession of; and assoilzied Stevenston from damages."

1683, *March 30.*—BETWEEN Garmilton and Stevenston.—"The Lords after the interlocutor of the 14th current, and found Stevenston liable to refund and make up Garmilton's damage, that the water ran not towards his mill as it was wont to do. Though all the servitude which Stevenston owed him in law was only a *nuda patientia* through his ground, and that the channel of the water was diverted *casu* and by speat, without any fact or deed on Stevenston's part, and could not be returned to the former channel."

Fountainhall MS. and. v. 1. p. 225, 231.

1748. *June 16.* DUGUID *against* FARQUHARSON.

No. 39.

An heritor reserving a moss, but disposing the grass, it was found, That he could only use the grass when his horses were employed in loading and carrying of peats, or with the horses that were necessarily used to carry victuals to the work people when employed in digging and casting the peats. See APPENDIX.

Fol. Dic. v. 4. p. 281.