

gift proving ineffectual, Sir James Carmichael of that ilk, treasurer-depute, got it settled and secured, so as they were put in peaceable possession of it: Whereupon they, in gratitude, by their act in 1647, narrating the foresaid mortification, and his being instrumental in settling it, gave him and his heirs, *in perpetuum*, the presentation of one of the beadmen, providing he do it within six days after the vacancy is intimated to him. My Lord Hyndford, as the said Sir James's heir, pursues a declarator of his right against the hammermen; and that they should alimant a poor man presented by him.

ALLEGED,---Prescribed both in the positive and the negative way; my Lord's predecessors having never presented, nor they having received nor admitted any by the space of forty years bygone; and so it is lost *non utendo*.

ANSWERED,---Prescription could not begin to run but from the death of the person last presented, and the intimation of the vacancy; which was never done.

2do, ALLEGED,---The gift is now *ob causam datam causa non secuta*. The bishop's rents, which was the fund out of which they were paid, having ceased by the restitution of episcopacy in 1662, they cannot be liable to alimant his beadmen out of their own private pockets; for, *sublata causa, tollitur effectus*. But, if my Lord will prevail with the Queen, who has now the bishop's rents, to revive their old gift, they will willingly accept his presentation, otherwise no law can make them liable.

ANSWERED,---That mortification of £100 sterling out of the bishop's rents was not the sole motive of granting this gift; but it bears also, for other onerous causes; and so cannot cease with its partial cause, but must be a perpetual right.

The Lords repelled both their defences, and declared. Yet severals were for trying what beadmen the incorporation had, or if they were wholly decayed; and if there were any still remaining, and out of what fund and stock they were maintained.

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1709. February 16. BRUCE of KINNAIRD *against* ELPHINSTON of QUARREL.

BRUCE of Kinnaird having a coal adjacent to Elphinston of Quarrel's coal; Quarrel, by an interposed trustee, gets a tack of Kinnaird's coal, and works a level partly through Kinnaird's ground, and partly through his own, to carry off the water from both their coals; but, this tack expiring in October last, Quarrel bigs up and closes the mouth of the said coal-level, by which the water, in speats, does regorge and restagnate on Kinnaird's coal, and is in hazard of drowning it. Kinnaird gives in a summary complaint to the Lords, craving,—That Quarrel may be ordained to remove the said stop, open the level, and let out the dam; and reponne all things as they were *in statu quo* in October last, at the expiring of the tack; there being *periculum in mora*, and he *in damno vitando*; whereas Quarrel was *in lucro captando*, that he, having the sole going coal in that part of the country, might have all the sale, and none to compete with him to keep down the price to a reasonable rate.

ANSWERED,—The coal-level now in controversy is all in Quarrel's ground, and was wholly made and wrought by himself, at his own expense, and for his conveniency, whereof Kinnaird ought not to plead the benefit; for, *quilibet potest facere in suo in propriam utilitatem*, and for his own advantage, though it conse-

quentially tend to the detriment of his neighbour, providing it be not done *in æmulationem vicini*. But so it is, if I did not stop the current of this water, it would much prejudice and wrong my own coal; and, in such a competition, where it must either wrong you or me, law and reason permit me to consult my own interest, and prefer myself first. Put the case, I farm a loch or other marshy ground from my neighbour heritor, by a lease of several years' endurance, and, by cutting through my own ground adjacent thereto, I drain the said marsh, and make it good pasture and meadow. When the tack is ended, may not I fill up my ground and ditch I had cast?—And will he pretend to say, You cannot, for it overflows my ground, and turns it to marsh again. He cannot hinder me to improve my own property, seeing I do him no injury, leaving his ground as I got it. If it wronged him, without any advantage resulting to myself, it should not be permitted; for *malitiis non est indulgendum*: but if I improve my own land thereby, he cannot complain. See the case of *Haining draining his loch into Tweed, and thereby prejudging the salmon-fishing*, observed both by Sir George M'Kenzie and Stair, in 1661.

REPLIED,---This attempt of Quarrel's being new, it must be stopped *novi operis nuntiatione*; and the Roman law introduced, in such cases, where there was appearance of damages, *cautionem de damno infecto*: and I crave no more but that my coal may continue in the same state and condition it was in when he had it in tack, at the time he left it; and not ruin me, that, *cum mea jactura, ipse locupletetur*, and get all the sale of the country; for inferior ground owes a natural servitude to the superior for carrying off its water, and can no more be stopped than an inferior mill can make the water regorge to set the upper mill in back water.

The Lords thought, if the level was sufficient to carry off the water coming from both coals, then it should not be dammed up. But, seeing it was strongly alleged, that, in winter, and in time of speats, it could not serve both; therefore they appointed a visitation to be made on the ground of both lands, to see if the level could serve both, and left Quarrel at liberty to remove the stop or not, as he pleased; but, with this certification, if he was found in the wrong when the report should come to be advised, they would modify Kinnaird's damages against him.

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1709. *February 1.* JANE BURNET and Her HUSBAND against ALEXANDER ARBUTHNOT, *alias* MAITLAND, of PITRICHIE, and YOUNG of AULDBAR.

LORD Forglen reported Jane Burnet and her Husband against Mr Alexander Arbuthnot, *alias* Maitland, of Pitrichie, one of the Barons of Exchequer, and Young of Auldbar, as representing Burnet of Craigmyle, her brother, on this ground,---That Craigmyle, her father, granted her a bond, in 1667, when she was an infant, for 3000 merks, and thereafter, in 1677, another for 4000 merks; and she craves payment of the sums in both bonds, the last being only an additional provision, (such as her other sisters got,) and does not bear to have been in satisfaction of the first, and therefore both must subsist.

ALLEGED,---Though they can instruct the last bond was granted *in lecto*, and so reducible, and the first was never a delivered evident, and so null; yet they