

tended comuners condescended on by Balmanno to be examined *ex officio*, and before answer, not upon the terms of the communing, but if they were comuners in that affair, and who others were present, and where they met, and what evidences they can give of their having been employed as comuners; and, if that be sufficient to clear the Lords, then they declare they will hear Glendoick why they should not be examined on the terms of the communing, and what they shall import to make him liable either *actione quanti minoris* to give a greater price, or receive his money laid out, and quit the bargain; and likewise allowed Glendoick to condescend on such as he knew to be comuners in that affair, to be examined in the same manner with Balmanno's, if he thought fit.

Vol. I. Page 799.

1697. December 10. AIKENHEAD of JAW against RUSSELL of ELRIG.

The Lords determined in the mutual declarators depending betwixt Aikenhead of Jaw and Russell of Elrig. Jaw acquired the property of a mill from the Earl of Calander, but the aqueduct of the same runs out of Elrig Loch, and through the ground of Elrig on both sides, which lands belonged to the Duke of Hamilton, and were sold to Russell in 1650. Russell erects a new mill on his own lands, a little above Jaw's mill, and makes sluices both on the loch and the mill-lead; whereupon Jaw, *novi operis nuntiatione*, interrupts him, and raises a declarator, that Elrig should demolish his mill, and could not divert the natural course and channel of the water to the prejudice of his more ancient mill, nor make the water flow otherwise than it was wont to do through his aqueduct, whereof he had been in the continual and uninterrupted possession. Elrig opposed his declarator, That it was lawful for him to build a mill upon his own ground, *et uti jure suo*, it not being *in æmulationem vicini*; and that the aqueduct was, *quoad* both sides, on his ground, and he had been in the constant possession thereof; and the drawing the water into his own mill did not prejudge him; and, *esto* it did, it was but *per accidens*, and he was not liable for the damage: and the aqueduct passing through his ground, he might stop it as he pleased.

ANSWERED for Jaw,—That he had prescribed the servitude of the mill-lead by forty years' peaceable possession, which was as sufficient to give him right as Elrig had to the property.

REPLIED,—Any possession he had was precarious, and by tolerance of the heritors of Elrig; in so far as it was agreed betwixt them, that Jaw should have the use of the aqueduct, and for that cause Elrig should have his corns ground multure free.

DUPLIED,—This can only be proven *scripto vel juramento*, against his express infestment, not only in the mill, but its leader. TRIPLIED,—His old infestments bear only, The mill with its pertinents: It is true, his last charter from my Lord Calander, in 1668, bears likewise the aqueduct; but Calander, not being heritor or superior of Elrig, could not give it.

The Lords found it relevant for Elrig to prove, by witnesses, that Jaw grinded his corns multure-free; and that it was understood he had this exemption for allowing Jaw the use of the aqueduct, so as there was a *synallagma*, and the

one was the mutual cause of the other, so as to infer an interruption of the prescription of the servitude upon Elrig; and to prove that Jaw's possession was merely precarious and by tolerance; and that Jaw had failed on his part, by exacting culture from Elrig and his tenants. But Jaw may offer to repair the damages *quoad* bygonos, and to serve him *gratis* in time coming.

De Molendinis Structis in æmulationem vicini; vid. Sneiderwin ad sec. 2. Instit. de Rer. Div.; Hering. de Molendinis; and Dirleton, voce Molendinum.

Vol. I. Page 801.

1697. December 21. The DONATAR to MOWAT of BUQUHOLLIE'S ESTATE
against Ross.

THE Donatar to the recognition of Mowat of Buquhollie's estate pursuing a declarator, compearance is made for one Ross in Aberdeen, who has an ancient wadset on that estate, which though base and never confirmed by the superior, yet they contended it ought not to fall under the recognition; because that being incurred by an alienation made by Sir George Mowat to Magnus Mowat, the apparent heir to the first granter of the wadset, and his infesting himself base thereon, Sir George's right to the lands was allenary by a comprising, to which the wadset, (being clad with long possession before the leading it,) was clearly preferable, and therefore the appriser's deed ought not to prejudice the wadset; but the conveyance to the lineal heir of the first debtor makes the predecessor's right to revive; and, if he had disposed to his heir, who was *alioqui successurus*, a base infestment taken thereon would not have inferred recognition; so neither can the appriser's disposition to the apparent heir make the lands recognosce, he not being a stranger, but of the blood of the first vassal.

ANSWERED,---Feudal delinquencies are now plainly established by law, arising from the nature of the holding, where it is a principle, that, where lands return by recognition, the superior is bound to acknowledge no rights affecting the feu save only these which are acknowledged or confirmed by himself; and the former vassal was fully denuded by this apprising, for it was many years expired; and so the appriser was turned the only proprietor, and the King's immediate vassal, by whose base alienation of the whole there is no manner of doubt but the recognition was incurred; and though it was to the heir of the former vassal, yet he was not Sir George Mowat the appriser's heir.

The Lords found this base wadset, though more ancient and preferable to the apprising, yet could not defend against the donatar to the recognition; and repelled the allegiance of its returning again to the lineal heir.

But the Lords took notice of another defence proponed,---That Forbes of Corse, the donatar, by his back-bond, declared the gift was taken to the behoof of the creditors; and it being ANSWERED,---That was only in favours of such as were expressly therein named,---

The Lords ordained the back-bond to be produced, that they might consider the precise tenor of the same.

Vol. I. Page 803.