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 prejudge 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. *Vol. II. Page* 493.

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

are willing to acknowledge the last bond, although containing the greatest sum. But then the first must be reputed as included therein, seeing the second bears an express clause, that it is in satisfaction of all she could ask or crave; so the second is a clear innovation and change of the first, and an implicit implement and revocation thereof; and so can never subsist as distinct and separate debts, seeing *debitor non præsumitur donare;* as was found, *29th June* 1680, *Young* against *Paip*; and in 1688, the *Lady Yester* against *the Earl of Lauderdale;* and, *November* 1685, *Robertsons*; and, more lately, *Earl of Northesk* against *Carnegie of Phinhaven.* And, for confirming that the second bond absorbs the first, this very pursuer did raise an action on the last bond, without any mention of the first, bearing, she had no other maintenance for her education but that sum; which shows they had not the confidence then to claim both debts; and, whatever might be pretended, if the sum in the first bond had been greater than the second, yet there can be no pretence where the second bond contains a larger provision than the first.

ANSWERED,---That, in provisions by parents to children, as their estates grow, so they augment their portions; and they are all sustained as *distinctæ liberalitates*, as Justinian decides, *l.* 7, *C. de Dot. Promiss.* conform to which, Dury observes, the Lords frequently decided in his time. And the first bond bears to be given by him as tutor and administrator to his daughter, and to be justly resting owing; which imports a clear ground of debt: and the clause, *in satisfaction*, does not recal the first bond unless it had expressly mentioned it, or had bore to be in satisfaction of her portion natural, or bairn's part of gear: and it excepts what he, of his own good-will, shall farther give her; which may well enough be applied to the first bond. And the pursuing for the last bond allenarly was not a passing from the first, especially seeing it was not then in their hands.

REPLIED,---The clause bearing to be as administrator, and justly resting owing, are but words of style; for a father, both *jure naturæ et ex lege*, is bound to portion his daughter; and, unless they say she had a *separatum peculium adventitium*, coming to her *ex bonis maternis*, or otherwise than by her father, the first bond can never sustain; and that is the case of Justinian's law 7, above cited; and the exception of his good-will must not, with Janus, look back to a bond ten years prior; but, in natural sense, imports what he may freely bestow on her further after that bond, but not what was given before.

The Lords, in this circumstantiate case, found the first bond included in the second; and decerned allenarly for it and its bygone annualrents; and that the first bond was annulled and revoked by the clause of satisfaction contained in the second, and the other grounds above-mentioned.

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1709. *February* 18. The DUCHESS of BUCCLEUGH *against* HARY SCRIMZEOR of BOWHILL.

THE deceased Mr David Scrimzeor having been, for many years, receiver of the Duchess's rents; and at his death debtor in a considerable balance of £19,000 Scots. And having cognosced the debt before the Commissaries of