servants fees, extortions, thefts, insufficient grinding, &c. all which is prevented by hand-mills, or thankful service at other places. The first design of coalition of societies, and of the uniting and dwelling in towns, was for mutual assistance, and carrying on trade and commerce; and mills were erected on the prospect of casual hire, and accommodation of our neighbours, without any compulsitory astriction, but only a premium for their labour and pains. *Duplied*, That the Magistrates of Edinburgh have as much power within their own jurisdiction as a Baron has within his territory: Now, it is known, that the lands of a barony are naturally astricted to the mill thereof, as was decided 17th July 1629, Newliston against Inglis, *voce* PRESCRIPTION; so that a Baron's mill, and that of a Burgh Royal, are *in omnibus* of the same nature and equiparate in law: And it was no wonder that the ancient law knew nothing of thirlage, for then all rights were allodial; but it came in with the feudal customs, and many vestiges of it appear in our old statutes. And Heringius, a German Lawyer, in his tract, *De Molendinis*, says, the inhabitants may be discharged under a penalty *ne ad alia eant molendina, et sic collectam defraudent*; and, in 1681, the LORDS found a vassal, though wanting the clause *cum bruariis* in his charter, yet could not be hindered to set up a brewery on his feu at the Dean; and though watching and warding be the common *reddendo in feudo burgario*, yet that noways excludes other services. And it were hard to rob the Town of so considerable a branch of their common good as their mills, which are set for 10,000 or 12,000 merks, *communibus annis*; but if the Town brewers be declared free, or allowed hand-mills, their profit would not support the fabrick of the mill, and they would not be worth keeping in repair.—THE LORDS, by plurality, found King Robert's charter, and the subsequent ones, do import a constitution of thirlage upon all the brewers within the royalty, and the same, as a necessary consequence, carries a restraint upon all the Town brewers from using hand-mills, or any other engines or machines for grinding malt within the burgh, as being a plain invention to defraud and disappoint the thirlage; but found the Town behoved to instruct as much possession as would preserve the right from prescribing *negative*; whereas, if the Lords had found no constitution, then they would have been necessitated to prove forty years peaceable possession to introduce a thirlage by prescription; but there was no use for this long prescription, the LORDS having found the charters inferred a sufficient constitution *per se*.

Fountainhall, v. 2. p. 610.

No 6

1713. *November* 22.

WILLIAM CUNNINGHAM of Craigens *against* THOMAS KENNEDY of Pannel.

No 7.
An heritor was found entitled to build a dam-dyke, both ends of

IN a process of declarator, at the instance of William Cunningham against Thomas Kennedy, and the counter declarator, at the instance of the latter

No 7.
which rested on his own ground, above a mill belonging to an inferior heritor; the water returning into the same channel.

against the former, the LORDS found, that Thomas Kennedy could build a dam-dyke on the water of Lochre, for gathering of the water to his own mill, above the place where William Cunningham had a mill upon the said water; both the ends of the dam-dyke being made to rest on Thomas Kennedy's own ground; and it being so built, as not to divert the water that comes over it, or goes from his mill, from returning to the channel of the water, and going to William Cunningham's mill, below.

Albeit it was *alleged* for William Cunningham, That he, beyond all memory, had been in possession of the free course of the said water to his mill, without any dam-dyke above upon it; and Thomas Kennedy's building one now was *novum opus*, which would hinder William Cunningham of that *aquæductus*, so far as necessary to the going of his mill, acquired by the positive prescription. To clear that *jus aquæductus* may be so acquired, he cited l. 3. § 4. *D. De aqua quotidiana et æstiva*, l. 1. § . *in med. D. De aqua et aquæ pluviæ arcend.* And a recent case of Thomas Aitkenhead of Jaw against Russell of Elrig, (not reported).

In respect it was *answered* for Thomas Kennedy, Albeit the master of a lower tenement is obliged to receive therein the water flowing off the higher tenement, it was never before pretended, that the master of a superior tenement was obliged to let the water run free; Donell, lib. 11. c. 9. l. 15. c. 47. L. 1. § 12. *D. De aqu. et aquæ pluv. arcend. et opus aliquod in suo faciente novum non potest nuntiari*, l. 2. *D. De operis novi nunciatione.* Nor can any prescribe a right to hinder another to do *in suo* what he pleases, especially what depends *ex mera facultate.* The water's having always run free, can neither be called Craigens' nor Thomas Kennedy's possession of the free course of the water, possession being rather *facti* than *juris*; and *jus aquæductus*, and a free water-course, quite different things. So that this case hath no affinity to that of Jaw and Elrig, where it was not a declarator of the free course of the running water, but of a water-gang, made by way of ditch, proceeding furth of the Loch of Elrig, to which Jaw had an express title by charter and sasine; whereas, Craigens cannot pretend to infeftment in the free course of the water of Lochre.

It seemed also to weigh with the Lords, that this running water was but *flumen privatum*, or a burn, which is considered as a part of the lands it runs through; and, therefore, the heritor of the lands can dispose of it at pleasure, by damming up, or otherwise, for his own use, *qui hoc facit in suo*, provided the natural course be not diverted, so as to hinder the water to turn into the former channel, when it comes to the bounds of the heritors of the lands below.—*See* PROPERTY.

Forbes, MS. p. 4.

See THIRLAGE.

See APPENDIX.