

1773. February 11.

JAMES WEMYSS of Wemyss, *against* WILLIAM BAYNE in Halhill, CHRISTIAN MOYES his Wife, and ALEXANDER BAYNE their Son.

JAMES Earl of Wemyss, the pursuer's father, by charter, dated May 27. 1746, proceeding upon a recital of his having received L. 5 : 5s. Sterling from William Moncrieff miller at Methel-mill, disposed, in feu-farm and heritage, and perpetually demised; in favour of Moncrieff, his heirs and assignees whatsoever, heritably and irredeemably, under the reservations, provisions, and conditions after expressed; the waulk-mill of Methel, with houses, biggings, yards, and pertinents, with the water-gang of the said mill; and also that piece of land lying immediately be-north the same, bounded as therein described, particularly by the corn-mill-lead of Methel-mill, 'reserving to us, our heirs and successors, the hail water of the said waulkmill, in case of scarcity, to our coal-works at Kirkland, and the said corn-mill.'

By an after clause of same charter, and upon which the present question arose, it is provided, 'That, if it shall happen us, or our foresaids, to make water-works for draining coal, grinding corn, or otherwise, in that case, the said William Moncrieff, and his above-named, are, and shall be, bound to resign, *ad perpetuam remanentiam*, the foresaid waulk-mill, water, and water-gang, with the foresaid piece of land, in the hands, and in favour of us, our heirs and successors, upon repayment of the sum of L. 5 : 5s. Sterling.' By this feu-charter Moncrieff was to pay an annual feu-duty of L. 33 : 6 : 8 Scots, besides the public burdens.

Mr Wemyss of Wemyss, now become superior of these lands, brought an action against the defenders, as standing in the right of Moncrieff, the original grantee, by purchase, whereby, upon a recital of his 'having occasion to make sundry improvements upon the mill of Methel, water and water-leads before-mentioned; and of his finding it necessary for that purpose to have and resume the possession of the foresaid redeemable feu of the waulk-mill and pertinents;' and that he had divers times required the defenders to have resigned the said waulk-mill, &c. upon payment of the five guineas, of which tender had been made, and the same refused; he concluded, that they should be decerned, for their respective rights of liferent and fee, to renounce and resign the premises in his hands, upon payment of the five guineas, and to deliver an effectual disposition thereof, containing procuratory of resignation *ad remanentiam*. And the Lord Kennet Ordinary having pronounced sundry interlocutors, decerning in terms of the libel, the defenders reclaimed to the Court.

Pleaded; The condition does not exist upon which the redemption was to take place. The condition is in these words: 'Providing and declaring, that if it shall happen us and our foresaids, to make water-works for draining coal, grinding corn, or otherwise, then, and in that case,' &c. The first thing to

No 48.

A superior, who had his vassal bound to resign his feu, if it should happen the superior to make water-works for draining coal, grinding corn, or otherwise, found not entitled to insist for the surrender, where he had not previously purified the condition by erecting the works.

No 48. be done to purify that condition is, the raising water-works, which therefore must precede the redemption, to give the pursuer the command of the water of the waulk-mill. But, as this is not done, or any preparations made therefor, or any plan for water-works so much as concerted, the purposes expressed in the summons have no relation to any water-works whatever, nor to the uses for which the water-works, if raised, were to be subservient.

Answered; When the late Earl was feuing out his property, he was entitled to do it under such conditions as he thought proper; and, if the vassal accepted of his feu-right under these conditions, he is bound to submit to them. Although the reservation in the contract, of a power to redeem the lands from the vassal, is not absolute, yet it was certainly not the meaning of the superior, that the vassal should be allowed to judge of the propriety of his operations, or of the place where the works should be erected, or of the uses for which these works were intended. But, whenever the superior made intimation to him, that he was about to make water-works for mills, coal-works, or other operations, the covenant of parties certainly was, that the vassal was to make a surrender of the feu to the superior; although, were it afterwards to appear, that no such thing was intended by him, but only a pretence made to dispossess the vassal, he would certainly be well founded in a claim of damages, and to be again put into possession.—The erecting of water-works, upon the grounds of the lands in the feu-contract, would surely be a most sufficient reason for the superior's resuming the subjects; and, as it is very plain, that, until actual redemption, the superior was not at liberty to perform any operation whatever upon the property of his vassal; this clearly shews, that, upon a sound construction of the feu-contract, it was not necessary that the erecting of water-works should precede the redemption of the lands.

THE LORDS find the condition on which the defenders are bound to resign the subjects into the pursuer's hands has not yet existed; and remit to the Ordinary to proceed accordingly.

Act. M^cQueen.

Alt. Dean of Faculty.

Clerk, Tail.

Fol. Dic. v. 3. p. 161. Fac. Col. No 56. p. 140.