

1661. *June 27.* The TOWN of BERWICK and the GENTLEMEN of the MERSE
against SCOT of Haining.

THIS day there was a debate betwixt the Mayor of Berwick and the gentlemen of the Merse dwelling on Tweedside, against the Laird of Haining, upon a complaint given in by them against him, representing that how he by the draining of a loch, belonging to him, of a mile of compass, has defiled the pure water of Tweed with its stinking water, and scared the salmon fishings both upon the one and the other side of the river, which are valued to L.1000 Sterling per annum; thereby not only prejudging private men in their profit, but the whole country thereabout, and the King's customs in England, which are augmented by the exporting of salmon. This complaint being called, the parties were ordained to be heard before the Lords of Session,—first, to dispute upon the relevancy: where it was debated in law, if a man might, to the prejudice of his neighbour and the public, dispose upon his own property.

ALLEGED for Scot of Haining,—That it was against the freedom of dominion, which gave to every one the faculty to dispoise on his own as he pleased, and that the use of this dominion was as free and as ancient as the creation itself; for which many lawyers are cited; and that it were to evert the definition of dominion in law, and to take away the constitution of servitudes on men's properties, which are introduced either by paction or patience of the landlord, or by custom past memory of man; so that Haining being master of the ground and loch, and land lying adjacent thereto, he might *de jure* dispose on his own dominion, and drain the loch, by making a passage in his own land for conveying of the water in the loch, which fell in Ettrick, and by the means of it then into Tweed, forty miles distant from Berwick. So that two things came to be disputed: Whether *de facto* it was true that the stinking water of the loch of Haining could at such a distance so corrupt Tweed as to chase the salmon from haunting therein; 2. Whether *de jure* a man might do, for his own profit, to the prejudice of his neighbour. ALLEGED, that the freedom of *dominium* was universally true in law, *dummodo non fecerit ut alteri noceat*, and that it be not done *ex animo malitioso* to the prejudice of his neighbour; and that the prejudice redounding to the public was but a cloak to cover the private gain of the tacksmen of these fishings.

REPLIES pursuer,—It is not denied but the nature of *dominium* is to dispose freely on their own: yet there were some exceptions therefrom, as 1mo. *Nemo debet locupletari cum alterius jactura*; 2do. *Expedit reipublicæ ne quis re sua male utatur, et ne alterum lædat*: and that a man might in *suo libere agere*; but where the action terminates *in alieno* he might not *libere agere*. That Haining might do with his water what he pleased; but to immit his water *in alieno*, to their great loss and prejudice, it was denied. For this were several laws both in C. and D. cited. Then they subsumed that Tweed, as to the salmon-fishing, was *alienum*, and not Haining's, and that though *usus* of the river of Tweed (being *flumen publicum*) was *communis* by the law; yet as to the salmon fishing, which is *inter regalia*, it was *juris privati*, which could not be prejudged by the pursuer's draining of the water of his loch; it being notourly known that it did contain not the pure water of Tweed. And where it was alleged, that it was not *noxa perpetua*, nor to be a lasting thing, but that Haining would complete the said draining with-

in half a year, being begun in January last; REPLIED,—That it was *noxa perpetua*, for salmon being once scared out of a river by stinking water, they would never return again. It was generally observed this year was a very barren year of salmon. Then ALLEGED,—Though a master be free to do with his own, yet that right did cede to the public in the case of famine, plague, or war, where self-preservation by the law of nature doth paramount all men's private property; but that a man may not on his ground use his own industry, even though it be to the prejudice of his neighbour, if principally he do not intend that maliciously; for that interdict, *ne quid in flumine publico*, is express in the law, *quo minus navigationi obsit*: but that he may not lead the water of his own land into the public river of Tweed, whose use is common, and which dimits in the sea which is the latrons and receptacle of the universe, is *inauditum*. And where it is ALLEGED,—That in Scotland a man may not big in his own land to the prejudice of his neighbour's mill; *Imo*, it is denied; *2do*, there is a vast difference betwixt a mill and a salmon fishing, as to public utility. Then, as for steeping of lint in lochs, which is forbidden, and so alleged to be *declaratoria juris communis* by the Act of Parliament; ANSWERED,—The Act of Parliament anent the steeping, &c. is only but for such a particular time. But both as to the bigging of mills, and steeping of lint, and our case, there is a vast difference; for by the law *non potest amitti quod non est acquisitum. L. 2 c. De acqui. rerum dominio*. Men cannot be said to be prejudged of that which they have not in their possession. But till salmon be taken, they cannot be said be prejudged who owe the fishing; because by the law *qui jactum retis emit spem emit*; and so it is most uncertain. Nor *2do*. Is it possible to prove that Haining's loch scars the salmon or prejudges the tacksmen; because it falls not under sense; and none can give a reason why fish haunts or dis-haunts, but he that knows the wonders of the deep.

Act. Nisbet. *Alt.* Sir Andrew Gilmour.

MS. folio 50.

1661. November 17. SIR JOHN GIBSONE'S LADY *against* JAMES FLEEMING her Son.

THERE fell in a debate betwixt Sir John Gibsone's Lady, and Ja. Fleeming her son. The case was, Sir John's Lady paid to Patrick Scot L.100 Sterling, resting by Malcolme Fleeming her husband by bond, and did neither keep the bond uncanceled, nor yet take an assignation thereto. She being executrix to her said husband, and craving allowance of this in her summons of exoneration against her sons, to whom she was countable for her intromission; she alleged that, *officium nemini debet esse damnosum*, and that she truly paid that sum to Patrick Scot after her husband's decease, and produced a declaration under his hand to that effect. On the other hand it was contended, *quod non regulariter et jure fit, id dolo præsumitur factum esse*; she ought not to have paid it without a sentence, and she should have taken assignation thereto: but the bond being cancelled, *et apud debitorem reperitum, inducit liberationem debiti*. The Lords found in the Inner-House, that she ought not to have allowance of it, in respect it was cancelled.

Act. Nisbet. *Alt.* Lockhart.

MS. folio 51.