

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.*