

upon finding caution *de damno infecto* for ten years; to which it was answered, That seven years was a much shorter term than the time the river in question had run in its present course; and also, that there was little ground for the opposition made by the Duke of Gordon, as there was a large tract of beachy ground, through which the river run betwixt it and his property; whereas, in the present case, the river had already damaged valuable ground of the Town's, and much greater damage was imminent, if the whole water was turned into one channel;

No 16.

THE LORDS adhered.

Act. *W. Grant & Lockhart.* Alt. *Ferguson, Burnett, & J. Grant.* Clerk, *Hall.*

*D. Falconer, v. 2. No 11. p. 12.*

1749. *January 7.* LYON and GRAY against The BAKERS of GLASGOW.

No 17.

THE Bakers of Glasgow had a charter from the Archbishop, 26th May 1655, granting them the mills of Partick, on the water of Kelyin, one end of the dam for serving which rested on the opposite heritor's land.

Walter Gibson, provost of Glasgow, built a mill on the opposite bank at Donaldshill, inferior to the Bakers' mills, but above the place where their aqueduct returned the water used by them into the river; and on that occasion, granted an obligation, 2d September 1692, that his dam, which rested on their ground, should not cause any prejudice to their mills, mill-dam, &c. or that he should repair the same.

A person having a mill-dam on a river, may use more water than he has formerly used, though to the prejudice of the heritor of an inferior mill.

The Bakers, for serving the increasing consumption of the city, had occasion to build more mills, and divide their aqueduct into several leads, and alter their sluice, by which means it was alleged they drew more water, so that there came not so much over the top of the dam as could serve the Donaldshill mill as it had done formerly; but there was no heightening of the dam-dyke.

William M'Cun, proprietor of the Donaldshill mill, raised an action against the bakers, which was carried on by his successors John Lyon and James Gray.

*Pleaded* for the pursuers; A river betwixt conterminous heritors is their property, as the *alveus* is, and one of them cannot divert it into his grounds to the prejudice of the other. If he has acquired a right so to do, this servitude is to be measured by the extent of his possession, and he cannot increase it, and divert more water than he has been used to receive.

*Pleaded* for the defenders; Their right to their mills is older than the erection of the pursuers' mill, and the servitude they have acquired is not limited by the need there was of it at first, but must be extended to the increasing demand of the tenement, in like manner as a servitude of moss to a barony would be claimed by the inhabitants, though their numbers were considerably increased; and a servitude granted subsequently to another, to be taken after the first was sup-

No 17.

plied, could not be pleaded upon for restricting the number of inhabitants. In this case, the inferior mill was erected by consent of the superior heritors, on an obligation that it should not prejudice their right, which could not be understood as if they intended to restrict themselves as to the quantity of water they might need, but only that they should suffer the pursuer to use what they had no occasion for.

*Replied*; The obligation was only to repair what damage the dam-dyke might do, by resting on the Bakers' ground, and by its keeping up the water, making a pressure on the outside of their aqueduct.

*Observed*; That the *alveus* was the property of the conterminous heritors, and the river might be considered as common; but the water flowing therein was not their property, but subject to occupation: That the only thing which could be considered as a servitude, was the dam-dyke resting on the ground of the opposite heritor, which therefore had its measure, and could not be increased; but whatever water was appropriated, by being inclosed within that dam, might be derived for the use of the proprietor's mills.

THE LORDS assolized the defenders.

Act. *Ferguson, Graham, & Lockhart. Alt. W. Grant, H. Home, & Miller. Clerk, Pringle.*

*Fol. Dic. v. 4. p. 172. D. Falconer, v. 2. No 40. p. 37.*

1750. January 5.

MARSHALL against CORNEILL.

No 18.

The owner does not lose his property in goods taken in a rebellion.

WHERE goods of enemies are taken in time of war, they become the property of the captor, whether they formerly belonged to the State or to private men; because the war is with the State, and every member of it. But in the case of a rebellion, where the goods of loyal subjects are robbed by the rebels, the loyal subject does not lose his property; and if they are re-taken by the King's troops, or other, they belong to the proprietor *jure postliminii*; and so the land stands with respect to captures in war at sea; if the ship is taken by an enemy, and be re-taken before the enemy has got it *intra præsidium hostium*, the property remains with the true proprietor.

Accordingly the LORDS, in this case, found the property of a horse taken by the rebels, which was found in the possession of an officer of the army, to remain with the owner.

*Fol. Dic. v. 4. p. 176. Kilkerran, (REBELLION.) No 1. p. 476.*

\* \* D. Falconer reports this case:

1750. January 4.—DAVID MARSHALL surgeon in Hamilton, shewed in a petition and complaint, that a black horse having been taken from him by the rebels, and afterwards found at Glasgow, in the possession of Captain Bartholomew Corneill, of Brigadier Price's regiment, he had made application to the