

No 19.

though it might be pretended, that where there is a general grant without limitation, and where the grantee has been in use to draw only on one side, it was thence to be inferred that the intention of the grant had only been to give a right to draw on that side, yet the presumption would only apply to the case where there was what could be called a fishing on the opposite side at the date of the grant, but not to the present case where there was not so much as a capacity of fishing on the opposite side, till after the 1741, that it was cleared of stones and rubbish; and that being the case, it could neither be supposed intended by the Crown, when the grant was made to the Town, to reserve a fishing, which was not at the time in being, or in other words, to reserve a power to create a fishing; nor at the time the general grant was made to Kin-fawns, to convey a fishing which did not then exist, supposing the Crown to have such power, after the grant made in the above terms to the Town, and which, upon the above principles, the Crown was not thought to have; not to mention the Town's immemorial possession of the total right, of itself sufficient to establish a title by prescription.

Nor did it move the Court, that in many instances upon the same river, where the grants were said to be in as general terms as that to the Town of the fishing about the island of Steples, the heritors on the opposite banks had fishings; not only as these were not in the same circumstances with the banks opposite to Steples, but as having been fishings possessed past memory, they may have been acquired by prescription, or in some other manner that now did not appear.

*Kilkerran, (SALMON FISHING.) No 1. p. 499.*

1752. June 10. KINGCAID against Sir JAMES STIRLING of Glorat.

No 20.

In what case proprietor of a superior tenement may divert water from his neighbour's mill on the inferior tenement.

A VARIETY of questions were stirred between these parties on occasion of Sir James Stirling's having built a lint-mill, and rested his dam-dyke upon Kincaid's ground without Kincaid's consent; and Sir James's having diverted a burn or rivulet, at least, pretended a right so to do, from running into the water of Glassart, which Kincaid alleged might render the said water not sufficient for the use of a mill which he had thereon, and which produced mutual processes. *Vide supra* January 12. 1750, No 13. p. 8403. *voce* LOCUS POENITENTIÆ.

The last point between the parties was this day determined, viz. That Sir James had right to divert the said burn.

In this there was a little ground of doubt, as the fact was, that the burn had originally run into the water of Glassart below Kincaid's dam, but that Sir James predecessors had diverted the course of it within his own ground, for the use of a corn-mill by them built, whereby it came to run into the water of Glassart above Kincaid's dam.

*Kilkerran, (PROPERTY.) No 4. p. 454.*