with sand or mud, he must clean it to prevent the water from overflowing and hurting the neighbouring grounds; and therefore the decision November 1731, Carlyle of Limekilns *contra* Douglas of Kelhead, (*See* APPENDIX.) is wrong in principles, finding, "That where prejudice done to the neighbouring grounds by restagnation, did arise, not from the insufficiency of the dam-dykes, but from the running in of mud and gravel by land-floods, the proprietor of the mill is not obliged to clean the dam, the restagnation of the water not being occasioned by any *opus manufactum* of him, nor by his neglect; but that the proprietor of the servient tenement may clean the dam if he please." No 24.

But the present case differs fundamentally from that mentioned. The pursuer has not to complain of any restagnation; it is not alleged that a single drop of water flows back from the aqueduct into his ground. He only complains that the aqueduct has become more shallow by mud settling in it, and that a less quantity of water is carried off than originally. Were this hurtful to the defender, he would clear the aqueduct of mud for his own sake; but there is no foundation in law or equity for obliging him to do this work for the sake of another. No man is entitled to use his property so as to hurt another; and therefore he must not throw stones into his neighbour's field, nor open a passage for his water into it. But he is not bound to make a ditch in his own ground for carrying off his neighbour's water; nor, supposing a ditch already made, is he bound to widen or deepen it for the conveniency of his neighbour.

"The defence was accordingly sustained, and the defender assoilzied."

But the Judges were generally of opinion, though they had no occasion in this process to determine the point, that the pursuer would be well founded against the neighbouring heritors in a conclusion, that he should be suffered at his own expense to clean the aqueduct for the conveniency of draining his ground, provided they could not specify any damage thereby; for that this would be *innocui utilitatis* which no proprietor ought in equity to obstruct.

Fol. Dic. v. 4. *p.* 172. *Sel. Dec. No* 200. *p.* 266.

1764. *July* 6. Sir LUDOVICK GRANT *against* Ross of Kilravock.

No 25.

IN a private river a mussel-scalp belongs to the proprietor of the ground adjacent; in a public river it belongs, like white-fish, to the public, and consequently the use of it is open to every one of the lieges. But as such general use tends to root out every mussel-scalp, expediency, supported by practice, has introduced a prerogative in the Crown, of gifting mussel-scalps to individuals, which has the effect to preserve them by the exclusive use given to the grantees.

Upon this ground, a grant from the Crown to Rose of Kilravock of the mussel-scalps in the river of Findhorn, which is a public river, supported by long

No 25. possession, was preferred before a similar grant to the Laird of Grant of a later date.

Fol. Dic. v. 4. *p.* 177. *Sel. Dec. No* 218. *p.* 282.

1765. *November* 13. HENRY WALKER *against* SPENCE and CARFRAE.

No 26.
If one purchasing cattle, *bona fide*, and selling or slaughtering them before action, is liable to the real owner?

HENRY WALKER, stabler in Edinburgh, had sent a parcel of sheep to John Spence, to be grazed at a certain sum for grass mail. John Spence sold these sheep as his own, partly to William Spence butcher in Musselburgh, who paid ready money, and slaughtered and sold them in the public market; and partly to Carfrae, who likewise had paid the price, and disposed of them before any action was commenced.

Henry Walker brought an action against Spence and Carfrae, and *pleaded*, That no man's property can be taken from him, and transferred to another, without his consent, except by legal diligence, to which he is supposed to consent, by contracting the obligation on which it proceeds; and, therefore, it may justly be doubted, though the defenders could plead *bona fides* in the purchase, if that would protect them from restoring the sheep or their value to the lawful proprietor. It is certain, if they were still in their possession, it would be no good defence against restitution, that they bought them *bona fide*, for rem meam vindicare possum ubicumque inveniam. Indeed, if they had sold them to another person, *bona fide*, no action would lie against them, but against the possessor; but, where the purchaser has slaughtered and consumed the sheep, the pursuer apprehends, the action does properly lie against him. If a person purchases corns, and pays the price, *bona fide*, he is nevertheless liable to the landlord, in virtue of his right of hypothec; and, if this holds in a right of hypothec, it must much more hold in a right of property; for it is impossible that a right of hypothec should have stronger effects than a right of property.

Answered for the defenders; Supposing the property of the sheep did actually belong to the pursuer, yet they fall to be assoilzied upon the principle laid down by the pursuer, That, if the goods are both bought and sold to another *bona fide*, action lies only against the possessor. Now, that the defenders were *in bona fide* to purchase these sheep from John Spence, is clear from this, that they were in his custody and used as his property; for he had disposed of the lambs and wool as his own, without any challenge from Walker: These were such deliberate acts of property, as left the defenders no reason to doubt that they were really his own, and that he was entitled to dispose of them; and, consequently, they were *in bona fide* to purchase them; nor can it be said, that either of the defenders *dolo desiit possidere*. See Lord Stair, lib. 1. tit. 7. § 10. and 11.; Lord Bankton, lib. 1. tit. 8. § 11.; and Scot *contra* Low, 15th June 1704, No 16. p. 9123.