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have been irregular to have employed them on this occasion, the diligence issued from this Court being directed as usual to messengers at arms; but it was submitted, whether, in this singular case, the Court might not grant a new diligence, directed to these officers, or authorise the Sheriff-depute, or his substitute, to issue his precept for citing the witnesses. It is true, the act 1537, c. 58, provides, that all sentences and decreets of this Court shall be executed by the Sheriff or his depute, or by heralds, pursuivants, or macers. But, from a later act 1540, c. 74, it appears, that not only the Sheriffs, but their maires or officers, were then in use of executing the King's letters. By the practice of later times, such executions have become properly the duty of messengers; but it was thought the Court might dispense with it, in respect of particular circumstances. In the late act of sederunt, the Court had appointed intimation to be made even to parties by an advertisement in the newspapers; and as the persons here to be called are only witnesses, it was hoped their Lordships would grant some relief, which was prayed for, as to their Lordships should seem proper.

"The Lords granted warrant to, and authorised the Sheriff-officers of the sheriffdom of Orkney and Shetland, or any of them, to execute the diligence against witnesses and havers, in place of messengers at arms."

Pet. *Rae.* Clerk, *Ross.*

J. M. *Fac. Col. No* 136. *p.* 318.

1765. *January* 19.

Sir Robert Gordon of Gordonstone, Baronet; *against* James Grant of Knockando; William Anderson and William Forsyth, Tenants to Knockando; and Alexander and James Finlay, Tenants to Sir Robert.

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Not competent for the Court of Session to make regulations, or enact penalties for preventing muirburn.

Sir Robert Gordon brought a process against the said Tenants, setting forth, that, in May and June 1762, when no muirburn was lawful, they had kindled a muir near a valuable wood of his, on the hill of Molundy, without taking any precaution to prevent the spreading of the flames; the consequence of which was, that the fire reached the dike enclosing his plantation; catched hold of the turf on the top of the dike; scorched a number of trees in the outer rows; and would probably have consumed the whole, had it not been extinguished by a number of people assembled by him and others; and therefore concluding against the tenants for payment of damages and expenses; and that they should be prohibited from raising muirburn within such a distance of the pursuer's wood as their Lordships may think necessary for its safety, and decreed to observe such rules and regulations as the Lords should prescribe, and under such penalties as they should determine. Knockando was called in this process; but nothing was libelled or concluded against him.

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The tenants, defenders, all except the Finlays, appeared; and denied the libel. Knockando insisted that the process against him should be dismissed, with costs, as nothing was so much as alleged against him. Sir Robert offered to prove the libel against the tenants, and insisted Knockando was properly made a party, because of the declaratory conclusions. 'THE LORD ORDINARY allowed a proof before answer.'

Knockando having again contended in a representation, that the process should be dismissed as to him, the libel was amended, and he concluded against, as being equally guilty and liable with his tenants.

From the proof it appeared, that Knockando and his tenants had no hand in the muirburn libelled, but that it had been kindled by his own tenants, the Finlays, against whom Sir Robert did not insist; and the question came to be as to the declaratory conclusions.

Pleaded for the defenders; It is both profitable and necessary for them to burn the muir of Molundy. Profitable, because it improves the ground; and necessary, because it affords them firing, of which they would otherwise be destitute. No man can use his property *in æmulationem vicini*, by erecting works, or doing any thing which yields him no advantage, and serves only to hurt his neighbour; but, no man can be restricted from profitable or necessary acts of property, though they may, or even must, hurt that of his neighbour, unless he be liable to a servitude. But, if Sir Robert's demand be well founded, there never will be any occasion for a servitude. Lord Bankton, B. 2. T. 7. par. 15.; L. 21. *D. De aq. et aq. pluv. arc.*; *Zoes. ad Pand. lib.* 39. *tit.* 3. § 4. 5.; Gaille, *lib.* 2. *Obs.* 39. And this very case is put and determined for the defenders, in L. 30. § 3. D. Ad leg. Aquil. 'Si quis in stipulam suam, vel spinam, 'comburendæ ejus causa, ignem immiserit, ut, ulterius evagatus et progressus 'ignis, alienam segetem vel vineam læserit; requiramus, num imperitia ejus, 'aut negligentia, id accidit? Nam, si die ventoso id fecit, culpæ reus est; nam 'et qui occasionem præstat damnum fecisse videtur. In eodem crimine est, et 'qui non observavit ne ignis longius procederet. At, si omnia quæ opportuit 'observavit, vel subita vis venti longius ignem produxit, caret culpa.' The defenders would, no doubt, be liable *ob dolum aut culpam* to Sir Robert, if they should kindle muirburn in a windy day, or by carelessness allow the fire to reach his woods. But, if they kindle muirburn, *optima fide*, to improve their land, or for fewel, when there is no apparent danger from the wind, or any other accident; they cannot be liable to Sir Robert, whatever the consequences may be. The defenders, therefore cannot be restrained in their property or possessions. And it is incompetent for a court of justice to make regulations or inflict penalties, as demanded, especially in such a case as this, which has been already regulated by several statutes.

Answered for Sir Robert; The law which protects one person in the exercise of his property, likewise maintains his neighbour in the preservation of his; and, without enforcing a mutual *comitas*, there would be an end to the peace and

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good order of society. Where a man's operations are confined to his own property, and the effect of them is not *immittere* any thing destructive upon that of his neighbour, or where an act is necessary for the preservation or defence of a man's property, great latitude would be allowed, though hurtful to neighbouring property. But, where the act is intended solely *in majus emolumentum*, or *lucri faciendi causa*, the law will not gratify an avaricious spirit, which desires to make profit to itself at so great an expense as the destruction of the property or interest of a neighbour. And, upon this principle, it is laid down in the title *D. De aq. et aq. pluv.* that no person can, *opere manufacto*, drain up the water on his own property, so as to occasion an unnatural and destructive emission of it.

If damage, therefore, were to be done to the pursuer's property by the muirburning of the defenders, it is clear that he would be entitled to reparation. The only question, then, is, Whether the pursuer be entitled to any security for preventing a danger which is daily imminent? or, if he must calmly wait the destruction of his property, and then betake himself to an action for damages, which would very probably be frustrated by the poverty of those who have occasioned the loss? The pursuer ought to have some remedy, upon the plan and principles of the Roman edict *de damno infecto*, or of our own caution in law-burrows.

If the Court shall be of opinion, that no such remedy shall be granted him in the present case, the pursuer submits, if the old statutes, discharging muirburn from March to Michaelmas, should not be enforced by additional penalties, the old ones being insufficient? If this were done, the pursuer would have some security, as muirburn is most dangerous from March to Michaelmas. Such encrease of penalties is not without a precedent; for, in the late dispute between Scot of Brotherton and Carnegie of Craigie, No 84. p. 7352, this Court enforced the observance of the old statutes, regulating the exercise of the right of fishing, by a penalty of L. 50 Sterling for every transgression.

Replied for the defenders; The edict *de aq. et aq. pluv.* does not at all apply to this case, as it relates singly to an *opus manufactum*. The caution *de damno infecto* was not introduced to prevent a wrong done intentionally, or by negligence; for such wrongs were understood to be sufficiently guarded against by the law which punished these wrongs when committed; but it was introduced to prevent a mischief apprehended *vitio rei, loci, vel operis*; and the reason of the distinction is obvious, The law can regulate the actions of men, but cannot prop a leaning wall or falling tree; and, if this remedy were to be extended from things to persons, there would be no knowing where to stop. In the case of law-burrows, the damage feared must be from intention and deliberate purpose.

As to the case of Brotherton against Carnegie, the Court was much divided, and different judgments were pronounced; and the cause was afterwards appealed, and the judgment reversed of consent. Besides, that case differed in

several respects from this. For, *first*, with respect to the cruives, every single act of contravention was a damage to the superior heritors; whereas the heather on the hill of Molundy may be kindled, and has been kindled, thousands of times, without any danger to the pursuer. *2dly*, In that case, the damage to the superior heritors, though certain, was incapable of estimation, as it was impossible to say what part of the fish, intercepted by the legal cruives, would have been taken by any of the superior heritors. And, *lastly*, in that case, there was a continued practice of delinquency, for several years, proved against the defenders.

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" THE LORDS assoilzied, and found expenses due."

Act. Advocatus, Solicitor, *Lockhart, Henry Dundas.* Alt. *Burnet, Maclaurin.*
J. M. *Fol. Dic. v. 3. p.* 342. *Fac. Col. No* 2. *p.* 3.

1765. *February* 8.

COLIN CAMPBELL, Commander of a Revenue Sloop, *against* JOHN MONTGOMERY, &c.

No 89.
An unlawful seizure made at sea by an officer of the revenue, is nor the subject of a privative jurisdiction to the Admiral, but may be tried before the Court of Session.

IN the month of August 1761, Martin Campbell, mate to Colin Campbell, seized two vessels belonging to Newry in Ireland, loaded with Irish meal; the one lying at anchor in the harbour of Tobormory; and the other in the sound of Mull, near to the coast of Morvern. Having brought these vessels to Fort-William, he presented a petition to the Sheriff of the county, praying that the meal and vessels might be condemned, in terms of the statutes 3d Cha. II. *anno* 1672, Cap. 3, and of Queen Ann, chap. 9. 1703.

A proof being granted to both parties by the Sheriff, relating to the nature of the seizure, he was pleased to assoilzie the defenders, and to ordain the ship and cargo to be restored.

Before the proof was concluded, or a sentence of absolvitor obtained from the Sheriff, the season became too far advanced for the proprietors of the cargo to prosecute their intended voyage for North Faro in Norway, whither they were bound. The damage sustained by this delay made them bring a process before the Court of Session, containing certain indemnatory conclusions for the reparation of the loss they had suffered by this illegal seizure.

The cause being called, parties were ordered to produce the whole procedure before the Sheriff. Which interlocutor having been obtempered, and Captain Campbell failing to compear, decreet in absence was pronounced against him.

Being charged upon this decreet, Campbell *pleaded* a declinator to the jurisdiction of the Court, founded upon the act of Parliament 1681, chap. 16. by which it is provided, that the High Admiral should have the sole jurisdiction in all maritime and sea-faring causes, of whatever kind: That in this case, as in