KAIMES. The freeholders did right in not admitting the complainer without evidence.

COALSTON. There is a difficulty here. The practice in the cess-books was, to name the heritor instead of the lands: Is it necessary to require a connected progress to shew what the lands were ?

AUCHINLECK. The proprietor for the lands at the time, pays cess, and this fixes what lands are meant; but here Lord Strathmore's valuation is *in cumulo*, so that it does not appear to whom the Laird of Nevay's lands belonged. Suppose that no progress were produced, could we take it for granted that the lands of the Laird of Nevay, in 1683, were the Kirktoun, &c.? If we could not, how could the freeholders?

KENNET. A man does not know what objection may be made; he therefore is not bound to come prepared with his whole proof.

PITFOUR. There is an enix declaration in the judgment of the House of Peers on Sir John Gordon's case, which points out the rule for us to walk by.

ELLIOCK. New arguments may be brought before this Court, but not new titles. It matters not what lands the Laird of Nevay had: How does the complainer connect with him?

On the 19th December 1767, "The Lords found that the freeholders did right in refusing to enrol Captain Stewart; and therefore dismissed the complaint, and found him liable in the penalty and expenses."

On the 24th December, they adhered.

Act. Ilay Campbell. *Alt.* A. Elphingston.

1768. *January* 14. MAGISTRATES of LINLITHGOW, and OTHERS, *against* CHARLES ELPHINSTON of Cumbernauld.

PROPERTY.

Can a River be appropriated, or any of its feeders?

[Kaimes's *Select Decisions*, 331; *Dictionary*, 12,805.]

KAIMES. What is a river? Not only the main stream, but its branches: all partake of the same nature. Neither a river nor any of its branches are to be diverted. Every one has an equal right to them in their course. I distinguish between water *publici juris et privati juris. Perennis aqua* is *publici juris*; but *here* I see no proof of *perennis aqua*. There is a lake or morass. If the water in it were to be sacred, so as not to be diverted while within the property of the heritor of the whole circumjacent ground, this would be extending the rights of a river much too far: there is no evidence that this loch is part of the river. The Roman law, and common sense, have connected the idea of a

river and of a perpetual run from a lake; but there is no evidence here of any perpetual run, perennial stream, or *aqua viva.*

MONBODDO. An experiment in natural philosophy is not common in law. Here, however, it has been made, and properly made. From this experiment it has been proved, that there is no perennial run from Fanniside loch: upon *that* I lay my opinion. The possession of the water is not sufficient. *That* is the case of every superior mill, but gives no right to divert the water arising in my ground. I am the master of the water in my own ground, and I may use it as I please, unless it has been appropriated by inferior heritors. Fanniside loch is a *stagnum,* in the sense of the Roman law. A *servitus aquæductus* out of a *stagnum* is anomalous for a servitude,—must have a *perpetua causa,* which a *stagnum* has not. Nevertheless, we may suppose a case where a servitude out of a *stagnum* might be created: Suppose that a canal were drawn out of a *stagnum* under the direction of the inferior heritors, this would be a servitude, however anomalous. I should be for assoilyieing, although the mills were to be stopped, for I determine according to principles, be the consequences what they will; but there is no danger of this, for the water from Fanniside loch only issues at those times when the inferior mills have no occasion for it. The distinction in the Roman law between *flumen publicum* and *aqua privata* determines this case. *Publicum flumen* is not, as we commonly suppose, a navigable river, but *flumen quod perenniter fluit.* The Prætor's edict applies to every boat; but *here* there is not *publicum flumen,* but *aqua privata,* as appears on evidence: the water is made up not only of springs, but of snow, rain, collections of waters from ditches, and from an *opus manufactum.* This, then, is a *stagnum,* not *aqua perenniter fluens,*—it is like a fountain rising in one's own ground.

JUSTICE-CLERK. It is proved that, in the original state of this loch, when overflowed by natural causes, its course was to Avon. I do not think that this course can be diverted, for there is a perpetual cause *τη δυναμει,* as Cujacius expresses it. The *opus manufactum* is in cutting through a natural bank, and making a dam in the west loch. The inferior heritors submitted to this, as beneficial to themselves in drought or frosty weather: but then this does not give to Mr Elphinston any exclusive right to the loch, or enable him to carry off the water.

GARDENSTON. There are two sorts of lochs in Scotland: one a stagnating loch, not the source of running water; the other a loch, the source of running waters. That one which is stagnating is the property of the person in whose lands it lies, though arising from springs as well as from rain or artificial runners. That which is not stagnating, but affording running water, is not the property of the person in whose lands it lies. The loch in controversy is a stagnating loch, and therefore, in its natural state, it might be used as the heritor pleased. There has been an *opus manufactum,* whereby a benefit has arisen to the inferior heritors; and *this* they now hold by prescription, in the same way as a mill would have, had it been built before the water of the loch joined the rivulet.

KENNET. I do not think that Mr Elphinston is bound to keep up the dam,

nor is he prevented from draining the loch; but he cannot divert the water. I am not clear whether there is here a *perpetua causa*, but I think that there is.

When the cause was a second time advised, he said :—When a natural run of water is from one man's ground to another, and that run is used, it cannot be stopt, even although an *aqua perennis*; but, where there is a *torrent*, it may be diverted. The difficulty is as to the fact. I rather think that, *here*, there is no continual natural run to give a *jus quæsitum* to the heritors. There are marks in the ground, but they may have been owing to speats. The experiment shows there is no natural run. A servitude *in dubio* is not to be presumed.

PITFOUR. The claim is a servitude: defence, no servitude without a *perpetua causa*. This is branched out into two considerations. 1*st*, No perennial run. 2*do*, Always in the defender's power, and therefore possession precarious. At first this view of the cause appeared strong, but I do not think the defence conclusive. If the superior heritor has a primary use, the inferior heritors have a secondary. As to *aqua perennis*, it is laid down in the civil law. I will not say it is a subtlety; but still it ought not to be extended. All greats are made of smalls. If you allow *small* waters, not perennial, to be taken away, what will become of *great?* If an express servitude can be established by consent, as is admitted by Lord Monboddo, why not by possession? Here there is both *aqua viva* and rain water. How shall we divide them? Perhaps I am under a prejudice from the great favour due to mills.

ALEMORE. Great is the favour of mills. Every lawyer, from the time that he read *regiam majestatem*, gets a hankering after mills. But is this to stop every improvement upon waters, which may be connected with mills or other engines? All stagnating water, then, which overflows from time to time, must be kept sacred. This is not a perennial water; it is a water like most of the fish-ponds in England. If there had been no *opus manufactum*, the water would have run out, and the mills would have had the use of it when they had no occasion for it. Cujacius's authority is not in point: he speaks of a lake with a perpetual outlet.

AUCHINLECK. When a person claims water, he must show that he has either a servitude or a right to it. If he has a perennial burn running through his ground, he has a right to it. If there is a stagnating water not on his own ground, he can have no right to it, otherwise than by grant or servitude. If the proprietor of land has a right to dispose of the water before it falls into a lake, why not afterwards also, if there is no servitude on it? He may drain it. Here there is no perennial run: A man, by using his own water with dams, can never give a servitude to the persons who use the water. The fact is this: here is a large loch, it is now a collection of waters, owing to the situation of the ground. It is increased *opere manufacto*. The heritor may do what he pleases with the water which falls into a hollow place within his own ground. If there were a drain from it, there would be no water but what falls from the heavens. Whenever the water leaves the loch, it is every man's burn; but still there is no perennial run from the loch.

COALSTON. Here is a great body of water arising from natural causes. Its natural course is into the Avon. It is necessary for the mills. It is not in the power of the superior heritor to divert it from its natural course. Here there is a perpetual cause, though, during a great drought, no water can run. If

you require a perpetual flow of water in order to make a *perpetua causa*, half the mills in Scotland would be ruined; for there are few brooks in Scotland which flow perpetually from one end of the year to the other.

President. The subtleties in the civil law, as to servitudes, are not received into our law. *Here* there is a repository of water: the natural course is to the Avon. A *perpetua causa* is what arises from a natural cause. Mills are built upon the faith of this water continuing to flow. Shall I allow the heritor to turn it away? Water rising in my ground is mine, for my private uses, but I cannot divert it.

On the 14th November 1767, the Lords assoilyied the defender. On the 14th January 1768, they adhered.

Act. C. H. Brown, H. Dundas. *Alt.* W. Wallace, R. M'Queen.

Diss. Gardenston, Coalston, Elliock, President. Justice-Clerk, Pitfour, and Kennet, had dissented from the first judgment; but they changed their opinion.

1767. *July* 29; *and* 1768, *January* 15. Mrs Harriet Stewart *against* The Earl of Fife.

REPARATION.

Nature of an Assythment.

[*Sel. Dec. No.* 258; *Dictionary*, 13,904.]

Pitfour. The punishment of murder is death. Such is the voice of nature. Such the law of God, not judicial but moral. Not delivered to the Jewish nation, but to Noah, the father of mankind, at the renovation of the earth, after the flood. If that punishment is inflicted, no more is due. When that punishment is not inflicted, reparation is required. By punishment, I do not mean what is the elusory. There are two differences between this case and that of *Campbell.* 1*st, There* the crime was proved; *here* it is not. 2*d, There* the defender was secured from punishment; *here* that matter is *in pendente.* I do not think that, in the present state of the case, a proof of the fact can be allowed. The rule is *non debes prejudicium facere publico judicio per privatum judicium.* I grant that the treason may sometimes be proved where the consequences are less than capital; as if a vassal, pardoned for treason, should have his estate demanded by the superior, on the clan act. The reason is, because such proof cannot hurt the defender nor infer punishment. The pursuer will have an assythment, but not now. If Abernethy compounds, it will be paid: if he is condemned, there will be the reparation by blood: if he dies abroad, the assythment will be due, because it will then be impossible for him to undergo the ultimate punishment. This seems reasonable; though the question has never been tried, as it seldom occurs. The only objection is, that *actio ex delicto non*