case. When a man limits his own property, he cannot deprive the superficiary of his right. Damages will not do. If the master has neglected to reserve his right, he must blame himself for the consequences.

AUCHINLECK. This case is difficult and new. When a man feus out lands with the privilege of pasturing upon a common, the right of property remains with him, and he may set down pits for stone, coal, or other minerals. Most feus were originally no more than grants to those already tenants. Can the proprietor's right be less in leases than in feus? Will you debar him during a temporary right, while he is not debarred during a perpetual right.

On the 21st June 1768, the Lords found the heritor has right to search and put down sinks for coal in the lands set in tack, upon satisfying the tenant for the damage which may be thereby incurred. Adhering to the interlocutor of Lord Pitfour.

Act. D. Rae. *Alt.* R. Blair.

Diss. Alemore, Barjarg, President.

1768. *June* 30. MRS MARY KELSO *against* WILLIAM and GEORGE BOYDS.

PROPERTY.

A Superior Heritor must not, by extending a rivulet over his ground, divert it from returning to its course.

[*Faculty Collection, IV.* p. 307; *Dict.* 12,807.]

AUCHINLECK. A perennial burn cannot be diverted by the superior heritor so as to be prevented from descending to the inferior heritor. *Here,* the superior heritor sets aside the burn for ever.

MONBODDO. The Roman law furnishes us with principles for determining this case. The doctrine of *aqua pluvia* is not to the purpose; for the question here is concerning a *flumen,* not a torrent, but perennial by the Roman law. *Flumen publicum* is not a navigable river, but any streams *usus publici,* whereof a navigable river is composed. To such the Prætor's edict applies, *uti priore æstate, &c.* The right of the inferior tenement is not a servitude, but it is a right owing to the nature of the subject. The superior heritor may use the water even for fructifying his ground, but he must use it so that the water return to its channel. We cannot force parties to use the water *alternis vicibus,* though that may be convenient for both parties.

KENNET. I think the superior heritor may divert the water for a time. *Alternis vicibus* is a good rule, and pointed at by the Ordinary. Kelso cannot appropriate it for a season more than Boyd can.

AUCHINLECK. There is no declarator on Boyd's part, as to his tenement in-

ferior to Kelso's. Besides, Kelso does not seek to divert the burn at all, being satisfied with its overflowings.

ALEMORE. This is not a fountain rising in Boyd's ground, but a rivulet running through different grounds. Every one may use it. None can divert it.

PRESIDENT. I am of Lord Alemore's opinion. I do not, however, say that, if a spring arose in a man's ground, he might not divert it; though, if he did not divert it, the consequence would be, that it might join below with other springs.

On the 30th June 1768, the Lords found, in substance, that the superior heritor could not divert the burn so as to prevent its returning into the channel for the behoof of the inferior heritor; adhering to the interlocutor of Lord Coalston.

Act. D. Rae. *Alt.* R. M'Queen.

1768. *July* 13. JOHN RANDAL *against* ALEXANDER and GEORGE INNES.

TRIENNIAL PRESCRIPTION

Takes place on Debts contracted by a Scotsman in England, if claimed in Scotland.

[*Faculty Collection, IV.* 310; *Dictionary*, 4520.]

MONBODDO. The decisions and authorities are so opposite that I do not know what to make of them. I despair of seeing our law determined by decisions. Here we must resort, as I would always wish to do, to principles and the authorities of the best lawyers. [All this is contradictory. It amounts to this, that a decision upon principles is a decision upon his principles, and that the best lawyers are *they* who support his opinion.] With respect to the constitution of obligations, the law of the country where the contract is entered into, must be the rule. A debt contracted after the English manner, may in this country be extinguished in the same way. This rule will go to prescription, which is presumptive payment. If the parties had continued in England during the six years, and no demand had been made by the creditor, if afterwards the debtor had come to Scotland, there could be no demand. If, on the other hand, prescription were not run by the law of England, when the debtor left the country, the creditor would be entitled to payment in Scotland. A man cannot be freed from his debt by leaving the country, and settling in Scotland. But when a man settles in Scotland, the Scottish prescription must be the rule. After he settles in Scotland, the debt will prescribe by the law of Scotland in three years. This is agreeable to the last and best decision,—that in the case of M'Neil.

GARDENSTON. Of the same opinion. If the rule is not to be according to the law of this country, there can be no limitation at all.

COALSTON. No statute has any authority beyond the territory where it is