PROPERTY.

1613. *March* 10. SOMERVILLE *against* SOMERVILLE.

No 1.

IN an action betwixt John Somerville and Alexander Somerville, the LORDS found, that albeit both their rights proceeded *ab eodem auctore*, yet seeing John Somerville's tenant was not obliged in a servitude to the other pertaining to Alexander Somerville, that he might lawfully bigg *ad cœlum usque*. *Item*, It was found, that albeit John Somervilie bigged after the Dean of Guild's discharge, that he should not be obliged to demolish, seeing it was now tried *quo jure edificavit*.

Fol. Dic. v. 2. *p.* 274. *Kerse, MS. fol.* 110.

1619. *January* 19. SIR JAMES CLELLAND *against* CLELLAND.

No 2.

A neighbour may build a bridge over a ford become impassable, and fasten it on the other side in another's lands.

ANE action to suffer Sir James to bigg a bridge over a foord of Peddersburne on both the sides thereof, both of his own of Munkland, and the defender's of Fosken, because there has an old way been these 40 years from Munkland to the kirk, and for the hail lieges be east to Glasgow be that foord; whilk foord is now grown so deep, as it is impassable by foot or horse, at ilk speat with great danger. THE LORDS, *in foro contradictorio*, find the summons relevant, and assign a day to prove. *Nota*, There was, in that same session, a visitation appointed be ane other act before Clerk Hay.

Fol. Dic. v. 2. *p.* 274. *Nicolson, MS. No* 527. *p.* 364.

1624. *June* 25. COMMISSARY BANNATYNE *against* CRANSTON.

No 3.

Action sustained for re-

MR JAMES BANNATYNE, Commissary of Edinburgh, pursues ——— Cranston of Skatisbus to hear him decerned to restore a burn which run betwixt

No 3.
storing a march burn to its former channel, from which it was drawn to serve a mill, though the pursuer could qualify no prejudice from want of it, other than *amœnitas*, or trouting.

their lands, to the old channel and water-gang wherein it run continually, before that the said John Cranston diverted the said burn out of the old course, by cutting of a ditch, and drawing the water in within that ditch, to serve a mill which the defender had built upon his own lands, whereby a part of the channel where the water used to run is dry. The summons and action for restoring of the water and burn to the old course was sustained, albeit that the pursuer could qualify no prejudice in any sort, which he sustained by the diverting thereof, and that the defender was served therewith, and had a going mill thereby; and albeit the defender *alleged*, That as the pursuer had no prejudice by the said diversion, so he had profit thereof; likeas, it was lawful to him to draw in the water before it ran or touched, or came to the pursuer's lands in any part, and to make his use thereof, seeing the pursuer had no prejudice thereby, as said is, and that the water was restored and ran again in the old channel, after that the defender was served therewith; so that albeit it ran not throw the whole channel and course, wherein it ran before the defender's in-taking thereof, yet seeing it fell in within a part of the old channel again, albeit that part nearest to the defender's in-taking was thereby dried, and seeing it was as steadable to the pursuer as it now runs, as it was when it formerly ran throw the whole channel before the defender made use thereof, therefore the pursuer's action could not be sustained. This allegeance was repelled, and the action was sustained, for causing of the defender to restore the water to the whole old course where it ran before his intaking thereof; and it was not found necessary to the pursuer, to libel or qualify any use of the burn and water thereof, wherein he was prejudged by the defender's in-taking of the same, seeing the LORDS found that the water running by his land, which lay marching contiguous to the one side thereof, could not be drawn from any part of the land marching thereto without his own consent; for albeit he had no present use thereof, yet he might possibly find thereafter some use for the same, neither was there any use qualified *in spe*, or appearing, whereof he might be prejudged; for the burn fell in again into the old channel, and ran by the pursuer's lands some space, under and beneath the part where it first fell in, and ran by the pursuer's ground before the defender's cast, and served him in all uses as profitably as before; and the LORDS found it enough of prejudice, that he wanted his pleasure, seeing he had the use thereof *ad amœnitatem et voluptatem*, and also had sometimes fishing therein of trouts, whereof he alleged he was prejudged, and which could not be altered without his own consent.

Act. *Stuart.* Alt. *Nicolson.* Clerk, *Hay.*

Fol. Dic. v. 2. *p.* 273. *Durie, p.* 130.

*** Haddington reports this case:

WATER running through the Laird of Newton's lands on both sides, and from there to Newhall's lands on the one side, and Skatisbus's land on the

other side, and thereafter to Newhall's lands; Skatisbus, by Newton's permission, made a loch in Newhall's lands, diverted the course of the water by a long compass to enter toward his land, to serve a mill built by him, and then made it to fall in the old channel in Newhall's bounds, towards the end of his lands; Newhall's action was sustained to compel Skatisbus to restore the water to the old channel in the whole course thereof, without qualification of any prejudice done to him by the diversion, wherein I thought him more beholden to his friend, nor to who were of contrary opinions. No 3.

The action being called the next day, *L. unica. Ne quis aquam de flumine publico*, and being alleged by the defender, and answer made by the pursuer, being considered, he was ordained to condescend upon his prejudice by the diversion of the water. He declared, that to take from him the commodity of watering his goods, of fishing of trouts, and the burn fishes, and it being before a water march, was now made a dry march; whilk the LORDS found relevant.

Haddington, MS. v. 2. fol. 240.

1635. *July* 22. SCOT of Rossie *against* LINDSAY of Kilquisie.

No 4.
Question relative to the property of a loch, where the one party was infeft in it *per expressum*, and the other had had a prior right to the lands *cum lacu*, &c.

SIR JAMES SCOT of Rossie being heritably infeft in the lands of Rossie, with the Loch of Rossie *per expressum*, pursues declarator against Lindsay of Kilquisie, to hear and see it found and declared, that the pursuer has the only right to the loch, and that the defender has no right at all thereto, neither in property or community, and no privilege therein; and therefore he ought to be secluded therefrom, and from all possession therein; and the defender *alleging*, That he ought to be assoilzied, because both the parties' lands, and the loch libelled, pertained of old to one and the same author, (viz. to the Earl of Crawford) in property, and the defender and his predecessors were infeft in the lands of Kilquisie, *cum lacu et piscationibus*, by the Earl of Crawford 200 years since, long before ever the pursuer or his authors were infeft in the lands and loch libelled; likeas by virtue of the said anterior right, the defender and his predecessors have been in continual possession past memory of man, immemorially in fishing within the loch libelled with nets and wands at their pleasure; neither ought the pursuer's posterior right, being many score years after the defender's right foresaid, of his lands and of his loch *per expressum*, specially denominated, derogate to the defender's prior right of his lands *cum lacu*, &c. there being no other loch within the pursuer's nor defender's lands, but only the loch libelled, and to the which loch the said defender's lands lie bordering and contigue; and the pursuer *replying*, That his special infeftment of the loch of Rossie *per expressum*, albeit posterior to the excipient's right foresaid, ought to give him preference to the defender, who was only infeft *cum lacu* generally; likeas in fortification of his right, the pursuer offered to prove continual possesion of fishing within the said loch, by boats, nets, and all other