

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.

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.

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 assolizied, 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 contiguous; 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 possession of fishing within the said loch, by boats, nets, and all other

No 3.

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.

No 4.

manner of fishings; and by bigging of eel-arks, and slaying and using the eels and fishes taken at his pleasure, and also by debarring this defender and his predecessors from any manner of fishing within the same, and impeding them therein; the defender *duplicating*, that he being *prior in tempore* must be *potior in jure*; and for the alleged interrupting of the excipient, by debarring of him to fish, that ought not to be respected, seeing that debarring being done *via facti et non via juris*, ought not to corroborate, or establish a right to the pursuer, which was not in itself good without that act, neither ought that deed to prejudge the excipient; for that impediment, alleged made to the defender, and his predecessors never being authorised in law, but being violent and unlawful, ought not to add force to the pursuer's right, especially seeing notwithstanding of any debarring, the defender and his authors retained and kept still their said possession of fishing, and they could not hinder the party to do wrong, but notwithstanding of that wrong done, they ever kept their said possession, and therefore ought not now to be excluded from that manner of possession which they have immemorially had, by virtue of their said right; for the pursuer might retain the possession which he had, and the defender his also, as he had it, and as ilk one of them has prescribed by their rights, according to the quality and manner of their possession, as said is. THE LORDS repelled this exception, and duply, and admitted the pursuer's reply, and in respect of the said interruption, found the right to pertain to the pursuer, and excluded the defender totally from all right to the loch, and all sort of privilege therein, notwithstanding of his anteriority of right, and offer to prove retention of possession immemorially as said is.

Act. Nicolson.

Alt. Stuart.

Clerk, Scot.

*Durie, p. 774.*

No 5.  
Salmon fishing in a river, found not to prevent letting out a loch into that river, though hurtful to the fish.

1661. July 1. The MAYOR OF BERWICK *against* L. of HAYNING.

THE Mayor of Berwick, and others, having right to the salmon fishing in Tweed, within Berwick bounds, gave in a supplication to the Parliament against the Laird of Hayning, bearing, that he was now draining a loch which fell into the water of Etrick, and thence into the water of Tweed, which had given a red tincture to all the river to the sea, most noisome to the salmon, which were found never to swim where the said tincture was, but in other clearer places of the water; all the salmon fishing was prejudged to a great sum, to the detriment of the country and the King's customs; therefore desiring that he might be ordained to desist and cease. The Parliament remitted the bill to the Lords. It was *alleged* for the defender, That the bill was not relevant, because of any alleged prejudice of the pursuers, to take away from the defender his undoubted right of property, giving him power to dispose of his own at his own pleasure, and so to drain his loch, or to cut his own ground; especially seeing his Majesty, by his proclamation, having invited all his sub-