

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-

jects to draining. The pursuer *answered*, That his petition was most relevant, and noways contrary to the right and effect of property, which giveth the proprietor power to dispose of his own, so that he keep him within his own bounds, and do not send forth any noisome thing upon his neighbours, but he may not do so to his neighbours' detriment, especially if he make use of that which is his own, not according to the nature and common use thereof, but against the same, and so though he may build upon his own ground, albeit to the detriment of his neighbour's light or prospect, or may dig a well in his own ground, albeit thereby he cut off the veins of his neighbour's well, yet can he not otherwise prejudice his neighbours; as if he had a loch on a hill, he might not cut it if it drowned his neighbour's ground below, nor may he build a mill upon his own ground, so as to take the water from his neighbour's mill, nor may he turn the water out of the old channel, or make it run otherways upon his neighbours than was accustomed. In like manner, in superior and inferior tenants in town, the superior may not be made use of to the detriment of the inferior, nor the inferior to the detriment of the superior, by putting fire on the floor, which would smoke the same. The like is provided by many interdicts in the civil law, &c.; and therefore the defender might not, contrary to the nature of a loch, which hath perpetually been a loch, do any deed beginning within his own bounds, but ending in a public river, to the detriment of the fishing, which is worth more than L. 12000 Sterling by year. The defender *answered*, That suppose he might not make use of his own, to emit any thing upon his neighbour's property contrary to nature, to his neighbour's detriment, as in the instances alleged, they did not meet with this case, because here he offered him to prove, that his loch had a perpetual current to the water of Ettrick, which made a mill go, and when his draining was done (which would be shortly) the current to the river would be as little and pure as ever, so that albeit there was detriment, it was temporary, nor was he working contrary nature, but helping it, by redding the passage, to let the loch run quickly away. *2do*, Albeit he might make no new work on his own ground, to the detriment of his neighbour's property, yet might he well send away any stagnant water, corruption or filth, by a public river, whereof one prime use is to purge the earth of all corruption, and to carry it to the sea; and therefore the corruption, not only of men and beasts, but of the earth, as of minerals, coal-pits, lime, and all others might be freely turned thereunto, unless there were a positive law or custom to the contrary, albeit there may be detriment of fishing, which is but a casualty, and must carry the accident of such inconvenience along with it. And as for the Roman interdicts, they neither meet the case, nor are they laws for us, where the civil law is not a law, but an example we follow freely when we find it just and fit.

“ THE LORDS were inclined to refuse the said bill, on that consideration mainly, that it was the proper use of rivers to carry away the corruption and filth of the earth, which should not be hindered by any right of fishing, which

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is but a casualty given and taken with the common use of the river ; but in regard the matter was remitted by the Parliament, who might, if they found great inconveniency, make a law for remeid thereof, (before answer) the LORDS granted commission to try the condition of the loch, and how it run before this draining, and how it would run after the same, and how long the draining would continue, and what alteration was in the fishing of Tweed thereby, and what appearance that the same was caused by the draining of this loch.

Fol. Dic. v. 2. p. 273. Stair, v. 1. p. 49.

1673. July 26.

HAMILTON *against* the MASTER of the Ship called the ——— of STATIN.

No 6.

Property of a
ship presumed
ed by posses-
sion without
a written
vendition.

CAPTAIN HAMILTON having taken a ship called the ——— of Statin, she was assoilzied by the Admiral. The Captain gave in a bill of suspension. THE LORDS ordained the cause to be discussed upon the bill for the stranger's dispatch. The reasons insisted on for the Captain were, that this ship was bought in Holland, as the skipper acknowledgeth, and that she was taken as she came from Holland before she broke ground in any other dominion, which, by the custom of nations, is a sufficient ground of prize; and was so found by the Admiralties of France and the Spanish Netherlands, even albeit the ship have aboard a writ to show the seal; because simulate trade cannot be shunned, if such seals within the waters of the enemy can protect their ships, but here there is nothing to instruct the seal. It was *answered*, That there was neither reason nor custom for such a pretence to hinder neuters to buy ships from enemies more than any other goods, seeing thereby they do not partake of the war, or assist the enemy, nor is there any law requiring writ for the alienation of ships, which always may, and ordinarily do pass by verbal bargains and possessions, and whereof the possession presumes a property, but this ship is not only in the possession of a Swede, but he hath by his oath declared, that he truly bought her, and paid for her without simulation.

THE LORDS found this reason alleged for the privateer not relevant, and adhered to the admiral's decret.

Stair, v. 2. p. 221.

1681. December 15.

DEANS *against* ABERCROMBY.

No 7.

No reparation found due to the proprietor of an inferior tenement, for damage occasioned by the falling of stones and rubbish in heightening the walls of a superior tenement, the damage arising from the nature and situation of the inferior tenement.

Fol. Dic. v. 2. p. 273. Falconer.

* * * This case is No 58. p. 10122. *voce* PERICULUM.