

No 9.

nestras. THE LORDS thought the Dean of Guild had not given a good reason of his sentence, that he could not stop the wall without her consent ; for, unless prejudice be instructed, he may do in his own what he pleases ; yet he is the most competent Judge to neighbourhoods, and there was apparent hazard in this case by weakening the wall ; and therefore sustained his decret, and repelled the reason of reduction, and found he could not strike out a chimney in that wall.

Fol Dic. v. 2. p. 273. Fountainhall, v. 2. p. 25.

1705. June 19.

The MAGISTRATES and TOWN of Dumfries *against* The HERITORS upon the Water of Nith.

No 10.

The building of a controverted mill dam-dike, allowed to proceed, with this quality, that it should be considered at advising of the probation as if no such allowance had been granted.

THE TOWN of Dumfries having formerly a mill upon the Water of Nith, a little above their bridge, served by a dam-dike or watercall cross the water, which by torrents so pooled and sanded that the water took another course, and the mill stood dry and useless ; to obviate this inconveniency, they fell to the building of a mill and watercall below the bridge. Of which work a suspension was procured at the instance of the Heritors upon the Water of Nith, upon this reason, That such a dam-dike would hinder fishes to come up to the bounds whereof they are heritors, at least to come over but with a dry back, and so prejudice them of their properties of fishing more than cruives and yairs and other engines for catching or preventing the swimming of fish, which are discharged in all fresh waters where the sea ebbs and flows ; and where the sea flows not, are allowed only to stand at certain times of the year, under the limitation of observing the Saturday's slop, mid stream, wideness of the hecks, and other legal cautions for securing the liberty of fishing. Therefore the building of the dam-dike ought to be stopt as having a tendency to elude the laws in favours of fishing.

Alleged for the Town ; They being Heritors upon both sides of the water, the *alveus* is their property, and they may build through their own water as they please, though some accidental prejudice may thence arise to the Heritors of the upper fishing ; as the building of a house cannot be stopped upon the bare pretence that it may damnify some neighbours' lights. *2do*, Mill dam-dikes being low, and not a foot and a half above the ebbest water, are no hindrance to fishes going over. *3tio*, Cruives, yairs, nets, and other engines set on purpose to catch fishes have no relation to mill-dams, which are not designed for that end, but only for furnishing of water to mills, that are very much privileged by our law and custom. Besides, this is not a *novum opus* ; for the burgh had a dike for their mill near to the same place, as high as the new one is to be, and as the former dike had a mid-stream open nightly for a free passage to

the fish, so shall this, which therefore can no more prejudge the Heritors than the former did.

Answered for the Heritors; The building of such dam-dikes being destructive to the neighbours' property of fishing that is so advantageous to the nation, should not be tolerated, although there be no positive law against it. Nor doth the pretence of keeping open the mid-stream satisfy in cruives where persons are legally invested with that privilege; but the Saturday's slop must be observed, and they cannot stand in the forbidden time of year; which cautions for the safety of fishing cannot take place here, where the dam-dike is to be fixed and constant. *2do, Esto* the Town were founded *in jure* as to a dam-dike above the bridge, they cannot alter the situation; privileges which encroach upon the rights of third parties being *strictissimi juris*, and not to be extended.

THE LORDS granted commission to the Sheriff-depute of Dumfries to examine witnesses upon the place concerning the old dam-dike, as to its height, and as to the wideness of the slop or gullet for the mid-stream, whether the said mid-stream was constantly kept open, and if the new dam-dike be conform to the old; or upon any other pertinent interrogatories. And allowed the work to proceed in the mean time, with this quality, that the same should be considered and regulated at advising of the probation, as if no such allowance had been granted.

Farbes, p. 5.

* * * Fountainhall reports this case :

LORD CROSSRIG reported the cause betwixt the Town of Dumfries and the Duke of Queensberry, the Earl of Nithsdale, Maxwell of Garnsalloch, and others. The Town of Dumfries, in order to the repairing their mill on the river of Nith, having begun to build a stone dike through the said water, for the conveniency of their mill, the Heritors above the said dike, *novi operis nunciatione* interrupt the work, and give in a bill of suspension, representing, that if the said dike be finished, it will utterly destroy their salmon-fishings, and stop them from going up in all time thereafter; and our laws have taken great pains to preserve these, as appears by the 76th act 1426, and acts 85. and 86. 1457, and many others, discharging cruives and yairs; and that none set creels, wires, nets, &c. to catch, or prevent the swimming of the fish, and injoining the observation of the Saturday's slop; and this dike is yet worse than any of the foresaid engines. *Answered* for the Town, That they being Heritors on both sides of the water, the *alveus* was theirs, and none could impede them, *uti jure suo*, under the pretext that it prejudged their fishings; and that being but accidental, even as if I, by building and raising my house, shall darken my neighbours' lights, that will not obstruct my building, unless he have a servitude *altius non tollendi* upon me; and this is no prejudice to the fishes going

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up the river; for there is a void place left in the middle of the river, six feet broad, which will allow them sufficient passage; besides that the dike comes not to the surface of the water, so that they can leap over it; and they are building nothing but what they had the like before, only it was in another place, and is now sanded. THE LORDS considered, that to stop the work might be very prejudicial to the Town, seeing, in the winter speats (it being a rapid impetuous river), all they had built would be carried away if not perfected suddenly; and, on the other hand, the favour of fishings was very great; therefore they were resolved to grant commission to visit the ground, and examine tradesmen and other witnesses on the prejudice; and the question was, Whether to direct it to some of their own number, or to the Sheriff of the shire, and adjust the interrogatories? Others proposed, that the work might proceed, the Town finding caution to demolish, if in the event it were found inconvenient. A third sort moved to allow a conjunct probation to either party upon their damages. THE LORDS allowed them some few days to think on any expedients to facilitate the trial, but prejudice to either; and if not, they would appoint a visitation.

Fountainhall, v. 2. p. 276.

1713. November 22. CUNINGHAM against KENNEDY.

No 11.

THE LORDS will allow an heritor to build a dam-dike upon a river, for gathering the water to his mill, provided both ends of the dam-dike be made to rest on his own ground, and it be so built, as not to divert the water that comes over it, or goes from his mill, to return to the former channel, and go to another heritor's mill below.

Fol. Dic. v. 2. p. 273. Forbes, MS.

*** This case is No 7. p. 8903. *voce* MILL.

1735. February 12. Duke of GORDON against DUFF of Bracco.

No 12.

A SMALL stripe coming off from the main body of a river, about a mile above where it enters the sea, did gradually encrease till it became a branch of the river, upwards of 60 feet ever; as this branch was daily encroaching upon the neighbouring ground, the proprietor was advised to build a bulwark 30 feet into the channel, to throw that branch of the river into its former channel, or at least to confine him within bounds. This was opposed by the heritor whose lands lay on the opposite side of the river, for whom it was admitted, that a proprietor may *munire ripam*, face up and defend his banks from the en-