

satisfy the creditor-arrester, and took the payment of the debt upon themselves, as being legally loosed. It had been done by one or two of their number, but the whole submitted to the payment. *Vol. II. Page 362.*

1707. *March 22.* BRODIE of LETHAM *against* SIR JAMES CADEL of MUIRTON.

LETHEM standing infest in a part of the barony and abbacy of Kinloss, with five stell salmon fishings in the river of Findhorn, and ALLEGING, That Muirton had wronged and disturbed his fishing; he raised a declarator of molestation, to hear and see it found and declared, that he has the undoubted right of property of the said five cobles of salmon-fishing, and to the corff-house and yard thereto belonging; and that the said Sir James has much damnified and impaired his fishing, by building a new town near to the said stells, which are deep ponds, pools, and ditches in the river, where the salmon haunting are taken in nets spread beneath them; and that, by many acts of encroachment, such as the floating, sailing, anchoring, and mooring of his boats, ships, and cobles, just upon the place of these stells, the keels and anchors making such furrows in the strand and *alveus* of the river, as wholly chases away the salmon from their former haunts. *2do*, By casting in their ballast and fish-guts into these stells, which not only fills them up, but likewise so corrupts and poisons the water that the salmon desert that place. *3tio*, By planting his muscle-scalps in or near the said stells. *4to*, By the noise and shadows of the carts and horses that are daily loading and unloading goods, they scare away the fishes; it being known that the very shadow of a man, for their self-preservation, makes them run away when they hear or see them on the banks of the river. *5to*, Sir James has built his new town just on the brink where Letham's stells are placed, which, by the constant resort, and the filth of the town being constantly cast in at that place, effectually chases them away. Likeas, he has built it on a commonty betwixt Letham and him; and therefore he ought not only to demolish it, but also to forbear all these deeds of encroachment, disturbance, and invasion, that have brought Letham's salmon-fishing, formerly set to this same Muirton at £1000 *per annum*, that he can scarce now get 500 merks for it. And also to pay him all his bygone loss and damages by poisoning the water, filling up his pools, harbouring his boats there, and so frightening away his salmon.

ANSWERED for Muirton,—That it seemed very mysterious and strange what made the salmon in Findhorn river more nice and timorous than they are in the rivers of Ness, Spey, Don, Tay, &c. where it is known that such public repair of ships, men, horses, &c. scare not the salmon from these waters: so thir are but chimerical imaginary prejudices at most. But, *2do*, *Esto* they were real; yet, if I be using my own property for my advantage, *sine amulatione vicini*, no law in the world can hinder me, though an accidental prejudice arise to my neighbour; that not being my design, but only the improvement of my own ground. *3tio*, The mouth of this river being broad and navigable, the providence of God and nature has appointed it for the use of commerce and trade, by exporting and importing goods for serving the adjacent country: And Letham's private interest of fishing must cede to the public good and benefit of

the kingdom ; the use of great rivers being for navigation and trade, and carrying away the filth and rubbish of the land to the sea. And Sir James is expressly infeft in the barony of Findhorn, with the anchorage, shore-dues, muscle-scalps, and haill emoluments arising therefrom ; which scalps, affording bait to the white fishers all along that coast, is of more concern to the kingdom than all Letham's fishing, and ought not to be discouraged. And, in the pursuit at the instance of the *Mayor of Berwick* against *Riddel of Haining*, in *July 1661*, marked both by Stair and Sir George Mackenzie, in his Pleadings, page 34, for turning in the waters of a loch into Tweed, which killed the salmon, the Lords inclined to think damages casual and accidental are not to be considered, no more than the legislators do *in casibus raro contingentibus* ; but only allowed a commission to try the damage before answer. And, as to his new town, Muirton offered to prove that it was built on his own property, and that Letham had no right of commonty in that place.

The Lords having allowed a conjunct probation of all the points of fact alleged by either party ; and the same coming this day to be advised,---it was ALLEGED for Letham, That all laws condemned the pretence of private utility, where it was evidently done *in æmulationem vicini*. And it was so found in the case of a fair and market craved near to the day of an older one ; as Dury observes, *24th June 1642*, betwixt *Glenbervie* and *Falconer* ; and Stair, *24th December 1679*, *Farquharson* against *the Earl of Aboyne* ; and lately betwixt *Murray of Polmais* and *the Town of Stirling*. It is true, *quilibet potest facere in suo et re sua licite uti* ; but it is always with the exception, *ne quid immittat in alienum*. Thus, *non licet sterquilinum vel furnum habere prope alterius parietem, ex quo paries ille madescat vel torrescat,---l. 17, § ult. D. si Serv. Vind. l. 19, D. de Serv. Præd. Urb. Imo paries inclinans supra aream meam, vel arbor viæ meæ impendens, removeri potest,---l. 4, § 5, eod.* So that law takes notice of the smallest and nicest disturbances of property. And you may as well chace away my sheep off my pasture as the salmon from haunting my cruives ; and the *æmulatio vicini* is plain ; for you have a superior fishing above mine, whither the salmon, by thir disturbances, retire ; and therefore, to secure my right, I may crave all impediments to be removed. And Leo, *Novel. 56*, allows me to stop any *ante ædes meas piscari* ; because, if one has long fished *in aliquo moris diverticulo*, he may exclude others, and pursue them *actione injuriarum,---l. 7, D. Divers. et Tempor. Præscript. l. 14, Dig. de Injur.* And Grotius thinks this to have been the rise of that custom of nations, that strangers may not fish near my shore, but at 60 miles' distance at least : for, by the Roman law, the sea was *omnium commune* ; but now the fishing there is *inter regalia*.

ANSWERED for Muirton,---That commerce and navigation is of greater interest to mankind than a private fishing, and is founded *super jure gentium*. And how ridiculous were it for Letham to tell a French, Dutch, or English skipper,---Sir, you must not bring your vessel to anchor on my side of the river, because it mars the swimming of my salmon. Nothing is to be done out of malice or envy to our neighbour ; but, in balancing inconveniences, the lesser must yield and give way to the greater ; and therefore Muirton cannot be restrained in the use and exercise of his own right, though eventual damage and prejudice should redound to Letham thereby.

The Lords found thir points clear :---*1mo*, That Letham stood infeft in the said coble-fishing as a part of his property ; and declared the same in his favours. *2do*, That no deeds, except necessary ones, could prejudice or impair his fishing.

3^{tio}, That the coming up and down of boats and ships amongst the river could not be stopped nor hindered on pretence of wronging his fishing. 4^{to}, That the anchoring upon these stells was *in æmulationem*; seeing it appeared they had other stations and parts to harbour at safely besides this; unless they were driven in upon his stells by storm or stress of weather. 5^{to}, They ought not to cast out their ship-ballast nor fish-guts at his stells, seeing they might as conveniently throw them elsewhere. 6^{to}, That Muirton could answer only for the prejudice done by his own people, and not for strangers who resorted there for trade. 7^{mo}, The Lords inclined to think it was *in æmulationem* of Lethem for Muirton to plant his muscle-scalps in or near his stell-fishing; but it being contended, that his right to the scalps was more ancient than Lethem's right to the fishing, the Lords forbore to determine this till they came to advise the rest of the probation.

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1707. *March 22.* JAMES SMITH *against* JOHN LENNOX.

JAMES Smith, glover, against John Lennox, deacon of the incorporation of the skinners and glovers in Edinburgh. Smith being a freeman in that trade, but using the help of one Simpson and other unfreemen, he is convened by the trade for contravening the rules and acts of their calling; and Bailie Cleghorn offering him a bond to subscribe for observing their rules; and he, declining to do it, was, for his disobedience, put in prison, and 18 pairs of kid-leather gloves taken from him. Whereon he gives in a suspension, and charge to set at liberty, with a declarator, that, being a freeman, he had as much liberty to work as any of them; and that their rancour at him was, because he sold cheaper than they. His reasons of suspension were, that the warrant for his imprisonment was illegal, contrary to the Act of Parliament 1701, not bearing the cause. 2^{do}, That no bonds can be imposed on the lieges but what are enjoined by public authority.

ANSWERED,—Their rules and constitutions had brought the manufactory of gloves to great perfection; one of which was, to name visitors and censors to debar unfreemen, and to try the sufficiency of the work; and that this Smith both employed unfreemen and likewise vended most insufficient work, and therefore was imprisoned.

The Lords thought it too summary; and therefore ordained him to be set at liberty, without caution or consignment.

Then Smith gave in a bill, ALLEGING, That, by their bangistry and oppression, the trade had damnified him in £200 Scots by his imprisonment and loss of trade; and therefore craved that both the deacon and bailie might be condemned in his expenses for their illegal and irregular procedure.

The Lords referred it to the Lord Forglan reporter, to modify his damage, after hearing parties, if he saw cause.

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1707. *March 27.* The UNIVERSITY of GLASGOW *against* HAMILTON of DALZIEL.

THE university of Glasgow having purchased the lands of Shields and Burn-