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of the said corn-mill called the Rass-mill, or of any other corn-mill to be built in place of the said Rass-mill." Further, Mr Gibson obliged himself, " That he should not set or assign, or otherways dispose of the water from the dam-head of the Rassmill-lead to the sea, or any other water within its privilege, to any persons for the service of any saw or iron-mill." *Lastly*, Both parties obliged themselves, " jointly to repair and keep up the dam-head of the said Rass-mill-lead, and to be at the equal half of the charges in repairing and keeping up the same during the continuance of the saw or iron-mills."

Mr. Gibson put a salmon-cruive into the dam-head ; the effect of which was, that when the sluices of the cruive were open, there was a waste of water ; and the sides of the cruive being built higher than the dam-head, prevented the ice from getting over, which would otherways have been carried off in time of speats. Mr Robertson brought an action to have this *novum opus* removed.

" THE LORDS ordered the cruive to be removed."

Act. Dalrymple.

Alt. Lockhart &amp; Rae.

J. M.

Fol. Dic. v. 4. p. 174. Fac. Col. No 60. p. 144.

1762. July 30.

GRAY of Balledgarno *against* MAXWELL of Bogmill.

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A man must not use his property so as to hurt another, but is not bound to make a ditch in his own land for carrying off his neighbour's water.

AN aqueduct in the Carse of Gowry, admitted to have been *opus manufactum*, carries water from a marsh in the lands of Balledgarno down to Bogmill, belonging to Alexander Maxwell. This aqueduct, having been partly filled up by mud settling in it, carried off less water from the marsh than formerly. Mr Gray, in order to have his marsh thoroughly drained, brought a process against Maxwell proprietor of Bogmill, and also against the heritors through whose grounds the aqueduct ran, concluding against the former, that he should clean the whole aqueduct from the mud that was settled in it ; and against the latter, that supposing the proprietor of the mill not to be bound, each of them should clean so much of the aqueduct as is within his ground.

He began with Mr Maxwell, who said in defence, That in the present state of the aqueduct he had sufficiency of water for his mill, and that he was not bound to clean it for the benefit of the pursuer.

In advising a long proof, the principles that govern this case were stated as follows. When a man obtains liberty to carry an aqueduct for the use of his mill through a neighbour's ground, it is implied in this servitude, as in every subject of property, that it must not be used *in damnum vicini* ; and therefore it is incumbent on the person to whom the aqueduct belongs to keep the dykes entire, that the water may not run out and overflow the neighbouring grounds ; l. 8. § 5. Si servitus vindicetur, July 1637, Parson of Dundee *contra* Inglis, *vide* SERVITUDE. For the same reason, if the aqueduct happen to be filled up

with sand or mud, he must clean it to prevent the water from overflowing and hurting the neighbouring grounds; and therefore the decision November 1731, Carlyle of Limekilns *contra* Douglas of Kelhead, (See APPENDIX.) is wrong in principles, finding, "That where prejudice done to the neighbouring grounds by restagnation, did arise, not from the insufficiency of the dam-dykes, but from the running in of mud and gravel by land-floods, the proprietor of the mill is not obliged to clean the dam, the restagnation of the water not being occasioned by any *opus manufactum* of him, nor by his neglect; but that the proprietor of the servient tenement may clean the dam if he please."

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But the present case differs fundamentally from that mentioned. The pursuer has not to complain of any restagnation; it is not alleged that a single drop of water flows back from the aqueduct into his ground. He only complains that the aqueduct has become more shallow by mud settling in it, and that a less quantity of water is carried off than originally. Were this hurtful to the defender, he would clear the aqueduct of mud for his own sake; but there is no foundation in law or equity for obliging him to do this work for the sake of another. No man is entitled to use his property so as to hurt another; and therefore he must not throw stones into his neighbour's field, nor open a passage for his water into it. But he is not bound to make a ditch in his own ground for carrying off his neighbour's water; nor, supposing a ditch already made, is he bound to widen or deepen it for the conveniency of his neighbour.

"The defence was accordingly sustained, and the defender assoilzied."

But the Judges were generally of opinion, though they had no occasion in this process to determine the point, that the pursuer would be well founded against the neighbouring heritors in a conclusion, that he should be suffered at his own expense to clean the aqueduct for the conveniency of draining his ground, provided they could not specify any damage thereby; for that this would be *innocui utilitatis* which no proprietor ought in equity to obstruct.

*Fol. Dic. v. 4. p. 172. Sel. Dec. No 200. p. 266.*

1764. July 6. Sir LUDOVICK GRANT *against* Ross of Kilravock.

In a private river a mussel-scalp belongs to the proprietor of the ground adjacent; in a public river it belongs, like white-fish, to the public, and consequently the use of it is open to every one of the lieges. But as such general use tends to root out every mussel-scalp, expediency, supported by practice, has introduced a prerogative in the Crown, of gifting mussel-scalps to individuals, which has the effect to preserve them by the exclusive use given to the grantees.

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Upon this ground, a grant from the Crown to Rose of Kilravock of the mussel-scalps in the river of Findhorn, which is a public river, supported by long