

1748. November 22.

The MAGISTRATES and TOWN-COUNCIL of ABERDEEN against MENZIES.

No 16.

THOUGH it is not allowable for conterminous heritors *aliquid erigere in alveo fluminis* which runs between their several lands, yet it is allowable to either *munire ripam*, so as to prevent the river's encroaching upon him. Accordingly, where the river of Dee had broke in upon the bank belonging to Menzies of Pitfoddles, he by a strong battery prevented its taking a new channel through his ground; and this battery, first begun about 70 years ago, was from time to time kept up and repaired, till about the year 1731, that being neglected, the river broke in so as to make two channels, one of which ran through Pitfoddles's ground, and, after forming an island, returned again below to the old course, in which another branch of the river always did continue to run.

What competent to an heritor, in order to defend his property against encroachments by a river.

As by this Pitfoddles had lost a small salmon-fishing, which, in the new channel, by reason of the situation of the ground, was impracticable, and of no more use in the branch which remained in the old channel by the diminution of the water, he now began again to repair the battery his predecessors had made, and for many years kept up, in order to restore the river to its ancient channel.

Being interrupted by a suspension at the instance of the proprietors of the opposite bank on the north side of the old channel, at discussing thereof, after proof led, the LORDS found, "that in this case, Pitfoddles had no right to alter the south *alveus* in prejudice of the suspenders."

The prejudice lay mostly in this, that the old *alveus* being now more filled up than it was before, a part of the river had diverted from its course, which, when sent back again, would occasion a greater overflow: But the point the judgment was chiefly put upon was, that though he might have restored the river to its channel *de recenti*, he could not do it *post tantum tempus*. What length of time is for that sufficient, must in the nature of the thing be *arbitrii*.

Fol. Dic. v. 4. p. 172. Kilkerran, (PROPERTY.) No 3. p. 454.

* * * D. Falconer reports this case:

MR MENZIES of Pitfoddles was entitled to a salmon-fishing in the river Dee, where it runs and serves as a boundary betwixt the lands of Blair, part of his estate, and the estate of Murthill, belonging in mortification to the town of Aberdeen; and this right he used, by drawing his nets on the haughs of Blair, round which there runs a small stream, or strin, as the witnesses called it, of the river, making them an island; but at first this might have been leapt over, or past almost with dry foot.

In the end of King Charles II.'s reign, Pitfoddles built a bulwark to hinder the water from running in the strin, and to keep it in the river, and about 56

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years ago repaired it ; but notwithstanding, the water continued to run there, and the quantity increased, while the fishing in the main branch turned worse, till 20 years ago it was discontinued : And at the commencement of this process, the main body of the water run in this south branch, where Pitfoddles could not fish, by reason of the steepness of the banks ; and the rest of the water had taken a course further to the north, upon the ground of the town of Aberdeen, the old channel being become a part of the inch of Blair.

William Menzies, now of Pitfoddles, attempted to build a bulwark, whereby to force the river into the north channel, in which he was opposed by the town of Aberdeen.

Pleaded for Pitfoddles ; The north branch is the proper bed of the river, in which he had right to keep it ; for the quantity of water which run in the strin was too small to be considered as part of a public river ; and though it has now considerably increased, yet as he was from time to time endeavouring to oppose this encroachment, and save his property, he cannot be said to have lost his right.

Pleaded for the Town and James Deans their master of mortifications ; Pitfoddles undoubtedly has right to fence his bank, but not to divert the course of the river : He had not right to divert even the strin ; and if he had succeeded in it, it might have been the subject of a process, which became unnecessary, by the river's preserving its possession : Much less can he divert so large a part of the river as now runs, and has for several years run in that course, by turning it down the other stream, where it will greatly encroach on the Town's property, especially considering the northern branch does not run where it did, but has considerably already damaged the Town, the same heaps of chingle which, coming down the river and settling at the head of the inch of Blair, have thrown more water down the south branch, having pushed the other further north ; so that the whole river runs in a channel which it has newly acquired to itself, and Pitfoddles cannot turn more water down this north channel, taken off the Town's property, than the river has gained right to by occupying it.

Pleaded for Pitfoddles ; He would willingly, if it were possible, make the river run precisely in the course it did ; but since it is not, he contends, that where the north channel now is, is the bed of the river, it being changed imperceptibly, and the ground on the south side of it, which is added by alluvion to the inch of Blair, entirely useless ; but the south stream is a new channel cut out of his undoubted property, which he has been in course of opposing, and therefore ought to be held as having preserved his right to it.

“THE LORDS, 5th July 1748, found, that in this case Pitfoddles had no right to alter the south *alveus* of the river, in prejudice of the defender.”

On a petition, citing a decision betwixt the Duke of Gordon and Lord Braco, (See APPENDIX) by which Braco was allowed to return into the river of Spey a branch thereof called the Murray Strin, which had run there for seven years,

upon finding caution *de damno infecto* for ten years; to which it was answered, That seven years was a much shorter term than the time the river in question had run in its present course; and also, that there was little ground for the opposition made by the Duke of Gordon, as there was a large tract of beachy ground, through which the river run betwixt it and his property; whereas, in the present case, the river had already damaged valuable ground of the Town's, and much greater damage was imminent, if the whole water was turned into one channel;

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THE LORDS adhered.

Act. *W. Grant & Lockhart.* Alt. *Ferguson, Burnett, & J. Grant.* Clerk, *Hall.*

D. Falconer, v. 2. No 11. p. 12.

1749. *January 7.* LYON and GRAY against The BAKERS of GLASGOW.

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THE Bakers of Glasgow had a charter from the Archbishop, 26th May 1655, granting them the mills of Partick, on the water of Kelyin, one end of the dam for serving which rested on the opposite heritor's land.

Walter Gibson, provost of Glasgow, built a mill on the opposite bank at Donaldshill, inferior to the Bakers' mills, but above the place where their aqueduct returned the water used by them into the river; and on that occasion, granted an obligation, 2d September 1692, that his dam, which rested on their ground, should not cause any prejudice to their mills, mill-dam, &c. or that he should repair the same.

A person having a mill-dam on a river, may use more water than he has formerly used, though to the prejudice of the heritor of an inferior mill.

The Bakers, for serving the increasing consumption of the city, had occasion to build more mills, and divide their aqueduct into several leads, and alter their sluice, by which means it was alleged they drew more water, so that there came not so much over the top of the dam as could serve the Donaldshill mill as it had done formerly; but there was no heightening of the dam-dyke.

William M'Cun, proprietor of the Donaldshill mill, raised an action against the bakers, which was carried on by his successors John Lyon and James Gray.

Pleaded for the pursuers; A river betwixt conterminous heritors is their property, as the *alveus* is, and one of them cannot divert it into his grounds to the prejudice of the other. If he has acquired a right so to do, this servitude is to be measured by the extent of his possession, and he cannot increase it, and divert more water than he has been used to receive.

Pleaded for the defenders; Their right to their mills is older than the erection of the pursuers' mill, and the servitude they have acquired is not limited by the need there was of it at first, but must be extended to the increasing demand of the tenement, in like manner as a servitude of moss to a barony would be claimed by the inhabitants, though their numbers were considerably increased; and a servitude granted subsequently to another, to be taken after the first was sup-