

No 17.

plied, could not be pleaded upon for restricting the number of inhabitants. In this case, the inferior mill was erected by consent of the superior heritors, on an obligation that it should not prejudice their right, which could not be understood as if they intended to restrict themselves as to the quantity of water they might need, but only that they should suffer the pursuer to use what they had no occasion for.

Replied; The obligation was only to repair what damage the dam-dyke might do, by resting on the Bakers' ground, and by its keeping up the water, making a pressure on the outside of their aqueduct.

Observed; That the *alveus* was the property of the conterminous heritors, and the river might be considered as common; but the water flowing therein was not their property, but subject to occupation: That the only thing which could be considered as a servitude, was the dam-dyke resting on the ground of the opposite heritor, which therefore had its measure, and could not be increased; but whatever water was appropriated, by being inclosed within that dam, might be derived for the use of the proprietor's mills.

THE LORDS assolizied the defenders.

Act. *Ferguson, Graham, & Lockhart. Alt. W. Grant, H. Home, & Miller. Clerk, Pringle.*

Fol. Dic. v. 4. p. 172. D. Falconer, v. 2. No 40. p. 37.

1750. January 5.

MARSHALL against CORNEILL.

No 18.

The owner does not lose his property in goods taken in a rebellion.

WHERE goods of enemies are taken in time of war, they become the property of the captor, whether they formerly belonged to the State or to private men; because the war is with the State, and every member of it. But in the case of a rebellion, where the goods of loyal subjects are robbed by the rebels, the loyal subject does not lose his property; and if they are re-taken by the King's troops, or other, they belong to the proprietor *jure postliminii*; and so the land stands with respect to captures in war at sea; if the ship is taken by an enemy, and be re-taken before the enemy has got it *intra præsidium hostium*, the property remains with the true proprietor.

Accordingly the LORDS, in this case, found the property of a horse taken by the rebels, which was found in the possession of an officer of the army, to remain with the owner.

Fol. Dic. v. 4. p. 176. Kilkerran, (REBELLION.) No 1. p. 476.

* * D. Falconer reports this case:

1750. January 4.—DAVID MARSHALL surgeon in Hamilton, shewed in a petition and complaint, that a black horse having been taken from him by the rebels, and afterwards found at Glasgow, in the possession of Captain Bartholomew Corneill, of Brigadier Price's regiment, he had made application to the

Magistrates, claiming the property ; which being intimated to the Captain, the suggestion was proved, and the horse ordered to be restored ; notwithstanding whereof, he had been carried away by the Captain, or his order, and craved restitution.

Answered, That the Captain having, during the dependence, left the place, the horse was by his servant carried away, when the regiment marched ; and with regard to the merits of the question, that this horse had been seized from the rebels, sold at Berwick by order of the Commanding Officer, purchased by Captain Groset, who used him as a baggage horse, and came into the respondent's possession, upon his succeeding Captain Groset in the company, he having been killed at Culloden ; whereupon he had paid the value to his executors.

“ THE LORDS allowed Captain Corneill to prove that the horse was taken from the rebels by a party of the militia from Berwick, and was carried into Berwick, and sold by order of the Commanding Officer, and was purchased ; and allowed the complainer a conjunct probation ; and to prove that the horse was seen in Scotland, in possession of the rebels, after the time he was said to have been sold at Berwick.”

The amount of the proof was, by two soldiers adduced by the defendant, that some rebel prisoners were brought into Berwick, by the militia, from one of whom Captain Groset bought a horse, which he used as a baggage horse, till the battle of Culloden ; when he came of course into the possession of Captain Corneill, who got the company ; and Captain Groset's baggage horse, which Captain Corneill got, was by the proof led at Glasgow, proved to be the same that was claimed ; and by witnesses led by the claimer, his horse, and which was the one now claimed, was seen in the rebels' possession on their return to Scotland.

The complainer *insisted* he had proved the property of his horse, which was not altered by his being seized by rebels, not in a just war.

Answered, It is lawful to kill rebels, to destroy their magazines, kill their horses, &c. thereby to weaken them, though it is possible these things may be the property of others ; and therefore the horse, which might have been destroyed, might be sold ; at least salvage is due for having recovered him from the enemy.

Replied, No salvage is due for recovering a horse by soldiers employed in an expedition, when the recovery cost them nothing but taking him.

THE LORDS found Captain Corneill obliged to restore the horse, or, in the option of the complainer, the value he was of at the date of the order for restoring him by the Magistrates of Glasgow ; and remitted to be heard on the value, and whether any thing was due on account of having paid value to Captain Groset's executors, and what value he so paid.

Act. Hamilton Gordon.

Alt. R. Craigie.

Clerk, Gibson.

No 18.

1751. *November 29.*—IN the cause betwixt these parties, whereof mention is made 5th January 1750, it did not appear that Captain Groset had paid any price for the horse in question, but that Captain Corneill, in account with the executors of Captain Groset, had allowed L. 10 for him; it was debated whether any salvage was due as to him by whose purchase the horse was come at by the pursuer.

Pleaded for the defender; Wherever any thing stolen is in such circumstances, as, according to the highest probability, it could never have been recovered, if the possessor had not purchased it, he ought to have salvage; and if this defender had not, on Captain Groset's death, purchased this horse, there is no probability the pursuer would ever have recovered him.

Pleaded for the pursuer, Without disputing the rule laid down, there was no greater improbability of recovering this, than any other stolen horse; he was taken from the rebels, and was in the country when he was purchased by the defender.

THE LORDS found Captain Corneill entitled to no allowance.

D. Falconer, v. 2. No 114. p. 131. No 237. p. 289.

1750. *January 9.*

The TOWN OF PERTH *against* The LORD and LADY GRAY.

No 19.
An heritor having right to fish in a certain part of a river, it was found the opposite heritor, who was infest in a barony *cum piscationibus*, but had never fished in that place, could not begin to fish so as to interfere with the former's fishing.

THE TOWN of Perth had a charter 1375, from King Robert II. *cum insulis nostris, jacentibus infra aquam de Tay, viz. lie lab de Incheret, Incharey et Sleepless, (Steples) et cum omnibus piscariis nostris, ad illas insulas, pertinentibus circumquaque ex omni parte, et utrobique ac qualitercunque adjacentibus, et adiacere quomodolibet valentibus in futurum; cum piscatura unius retis insulæ regiæ, et cum omnibus aliis piscariis nostris insularum dicti burgi.*

Notwithstanding this right bore *cum insulis de Sleepless, &c.* yet this island did not belong to the Town of Perth; but they occupied the fishings around it, particularly one opposite to Lord and Lady Gray's estate of Kinfauns and Craigton, by departing from one part of the island and returning to another; and thus making a draught with their net, taking in the whole depth of the water; and this they did with two boats, the one whereof succeeded the other. The family of Kinfauns were infest 1672, in the barony of Kinfauns and Pitsindy, *cum piscationibus salmonum, alborumque piscium in aqua de Tay; and in the barony of Craigton, cum piscationibus earundem terrarum, vulgo nuncupat. Pilgartsheugh, Cambuspool, et Crook, et cum omnibus aliis piscationibus, tam salmonum, quam alborum piscium, in aqua de Tay, quæ ab antiquo ad abbaciam de Scoon pertinuerunt, inter lie Wood-dike de Kinnoul, et limites seu bondas terrarum de Little-Seggieden, in omnibus partibus infra dict. terras de Craigton, cum pertinen.*