

No. 7. 1743, Nov. 24. FAIRLIE *against* EARL OF EGLINTON.

EARL OF EGLINTON built a mill on the water of Irvine that made the water regorge somewhat on a superior mill belonging to Fairlie, and made it go the worse, which occasioned a process ; and Earl of Eglinton brought a proof by artists that the heightening Fairlie's mill-wheel ten inches and widening the trough and fall six inches would remedy the inconveniency, and offered himself to be at the charge of the alteration of Fairlie's mill ; and the question was, Whether Fairlie would be obliged in law to accept of that offer? and it was found by a majority that he might be obliged supposing it might be done with effect, and agreed to make an interim order to try whether the remedy proposed can be effectual. 25th January, Altered by President's casting vote, and 5th June adhered.

No. 8. 1748, July 5. MENZIES *against* DEANS AND TOWN OF ABERDEEN.

THE Lords found that Pitfodels cannot *opere manufacto* alter the course of the river. Here the river has been encroaching gradually on Pitfodels upwards of 10 years, for it is so long since the first bulwark is proved to have been built to hold it off. I was in the Outer-House, and knew not whether the judgment was unanimous. My opinion was that he could not alter it by building *in alveo fluminis* so as prejudge the town, which it would very probably have done, but then I thought, that on finding caution *de damno infecto*, as in the case Lord Braco and Duke of Gordon he might. 22d November Adhered.

No. 9. 1750. Nov. 2. M'KENZIE of Rosehaugh *against* ROBERTSON.

MR M'KENZIE had on the water of Eright a timber work betwixt two rocks, that dams up the whole, and suffers no salmon to pass, commonly called the Keith of Rattray. Robertson of Balnakeilly, and others, heritors above him, pursued a declarator for having it removed, as contrary to law, with concurrence of the Procurator-Fiscal, at least to have it regulated in the same way as cruives. There was some question on the pursuers' title, but as one of the pursuers produced an infestment containing salmon-fishing from the Duke of Athole, who had the like infestment from the Crown, we sustained his title ; but in respect of the pursuer's infestments produced, as old as 1614 and 1682, in the salmon-fishings of the Keith of Rattray, ratified in Parliament 1685, and immemorial possession, we found that it cannot now be taken away, five to four. The President gave no opinion.

No. 10. 1752, July 3. SIR ROBERT GORDON *against* LORD LYON.

THOUGH by the 19th act, 22d Parl. James VI. an heritor of 10 chalders of victual can build but one pidgeon-house, yet Sir Robert Gordon having 46 chalders of rent lying contiguous within two miles, though he has already three pidgeon houses on it, may build a fourth within the said two miles.

No. 11. 1753, June 19. EARL OF HOPETOUN *against* MR WILLIAMSON.

MR HORN obtained leave from the Earl of Hopeton, and wrought a quarry in his grounds, while the Earl was working another, and Mr Horn wanting a rolling-stone, sent

to the several quarries, desiring the workmen, if they found a proper block, to acquaint him, and he would gratify them. A block was found, in the quarry wrought for Hopetoun. Mr Horn was acquainted of it, and sent his overseer there, who, with the assistance of the Earl of Hopetoun's quarriers, raised the block, and Mr Horn gratified the workmen. Afterwards finding that the block could spare so much, he cut off from it a slab, which he dressed and put up in his house, leaving the rest of the block at the quarry. Mr Horn died, and Mr Williamson bought the estate, and Thomas Herriot bought from Anderson servant to Mr Horn the stones he had quarried, but had not used or carried away; and Herriot, (who was the overseer of Hopetoun's quarries) shewed him the block quarried for Mr Horn, saying, if he had use for it he might take it, but the Earl said he had enough of those, and had no use for it. Mr Williamson wanted also a rolling stone, and being told that Herriot claimed right to that block, sent his servant, who bought it from Herriot for 5s., then sent and rounded the ends a little, and carried it from the quarry to Mr Dalrymple of Stair's ground, at which Herriot assisted, and there he employed masons three days to form it into a roller, and fix gudgeons, and sent to carry it to his house of Foxhall (*alias* Todshaugh.) The Earl met it on the road, stopped it, and ordered the servants to leave it there on the high-way, which they did, and he forthwith made a present of it to his brother, Mr Charles Hope, who ordered Herriot to send it to Craigiehall on the Monday after, that being on Friday; and Williamson getting notice of it, went out on Saturday, and carried it to Foxhall. The Earl immediately raised a process of spuilzie before the Sheriff, which Mr Williamson advocated; and we having given an act before answer, the substance of the proof is as above, which we advised this day; and before advising, the Earl passed from any pecuniary consequences of any judgment we might give as to the property of the stone. Some were of opinion that the stone dug out of the quarry for Mr Horn's use, of which he actually cut off a part, and he having had quarrying leave in general from the Earl, without limitation to any place, the property was in him, and either transferred to Williamson, who bought his estate, or to Herriot by Anderson. Others, (particularly Justice-Clerk and Kilkerran) thought the property was the Earl's till the stone was carried away, and that it was unlawful for the quarriers, to whom the Earl paid day's wages, to quarry for Mr Horn, and that that could not transfer the property, and that the stone is yet the Earl's property, and ought to be replaced where the Earl stopped it. Others again thought it needless to determine the property of the block, since Mr Williamson, though he bought it from Herriot, had not paid the price, and owed it to somebody; but thought that he was a *bona fide* purchaser, and that having formed the block into a rolling-stone, whereof the workmanship was of more value than the block, that gave him the property as much as if he had cut it into a statue, and that therefore the rolling-stone was his, but that he is liable to the Earl for the value of the block;—and the Court gave their judgment this day in these terms. There were two questions, first as to the property of the roller as it now is. And of the opinion of the interlocutor were Minto, Drummore, Strichen, Elchies, Murkle. *Con.* were Kilkerran, Kames, Justice-Clerk, Leven. Shewalton did not vote. But Minto in the chair, was for the interlocutor. On the second question some did not vote.