

NO. 1. " sent case, is not founded in any substantial interests, from any impending
 " danger to the property of the opposers, and being under some doubt as to
 " the soundness of the principle above mentioned, (a doubt founded on
 " Stair, B. 2. T. 7. § 6. ; Ersk. B. 2. T. 9. § 11. ; and decision, Robert-
 " son against Ranken, 3d March 1784, No. 37. p. 14534., as well as the cu-
 " stom of Edinburgh, whereby the common passages and stairs are main-
 " tained in repair at the sole and separate expence of the proprietor of the
 " upper storey); and also observing, that in this case, there is no need of
 " altering in any respect the outer door of the common passage, sists
 " execution till the first Monday of this vacation, and if a petition to
 " the Court is then boxed, sists execution further till the same be dis-
 " posed of."

A petition was presented on the grounds mentioned in the interlocutor.

The Judges in general adopted the principle of the decision, Anderson
 against Dalrymple, and on that ground, viz. that the passage was common,
 the Lords refused the petition.

Lord Ordinary, *Meadowbank*.

For the Petitioner, *O. H. Wemyss*.

R. D.

Fac. Coll. No. 143. p. 320.

1800. *January 24.* JAMES BRAID, *against* Colonel DOUGLAS.

NO. 2.

When a private river separates the property of two heritors, the one retains his right of preventing the other from diverting part of the stream, though the predecessors of the former had taken off a cut from it, on his side, for a

THE lands of Ryelaw, belonging to James Braid, are separated from the lands of Strathendry, the property of Colonel Douglas, by the river Leven in Fifeshire. The proprietors of Ryelaw had been in possession of a dam-dike across the river, erected for the purpose of catching eels, by a cruive on their side of it.

A short way below this, the proprietors of Strathendry have right to a dam-dike, stretching across the river, from which a lead has been taken off on their side for time immemorial, for the purpose of supplying a waulk-mill: The water is not returned opposite to Ryelaw.

About 1780, Colonel Douglas feued ground for a bleachfield, which is supplied with water from this lead; but no alteration was then made on the dam-dike.

In 1789, Braid proposed to enlarge the Ryelaw dam; and, for the purpose of erecting a lint-mill, to make a cut on his lands, by which a consi-

derable portion of the water in the river would be carried quite past the wauk-mill dam.

Having been interrupted by Colonel Douglas in his operations, he applied to the Sheriff for an interdict, and likewise to have it declared, that he had right to half of the water.

The points at issue came to be, How far Braid had right, *imo*, To the superior dam-dike, and to catch eels there? *2do*, To make the alterations proposed by him.

Colonel Douglas's titles give right to eel-cruives; and he contended, that the possession of them by the proprietors of Ryelaw was a matter of tolerance from him.

Braid is infest in his lands with part and pertinent, and maintained his right to the dam-dike, and uses of it by prescription.

The Sheriff allowed a proof as to the first point, and refused the interdict as to the other.

Braid complained by advocacy. The Lord Ordinary allowed a proof; and afterwards gave both points in his favour.

A petition for the defender was followed with answers; and counsel were heard in presence.

On the *first* point, the defender stated, That eel-cruives are illegal, without an express grant from the Crown; 1424, c. 11.; 1477, c. 73.; 1489, c. 15.; 1581, c. 111.; 1685, c. 20.

The pursuer

Answered: That these statutes relate only to salmon-fishing.

The question depended chiefly on the proof.

On the other point, the pursuer did not dispute the general principle settled in the case, 5th March 1793, Hamilton against Edington, No. 38. p. 12824. But he contended, that the defender, by the use of the lead, enjoyed by him for the wauk-mill and bleachfield, was barred from objecting to the intended operations.

The defender

Answered: That as no alterations had been made on the wauk mill-dam, or lead from it, for time immemorial, the pursuer had no title to investigate the uses made of the water, after it was diverted, and that the defender retained his common law right in the river above his dam-dike.

The Lords "found, that the pursuer has right to the eel-fishing in the
" river Leven, and to exercise the same by an eel-dike or cruive across the
" river; at the place, and in the manner, it has usually been exercised:
" Found that the common interest which the parties have in the river op-
" posite to their respective lands, does not enable the pursuer to divert or
" carry off any part of the water, by a new lead through the property, to

NO. 2.

wauk-mill, and he had himself further used the waters, so diverted, for a bleachfield.

A right to eel-cruives may be acquired by possession, with an infestment in adjacent lands with part and pertinent.

NO. 2. “ supply a lint-mill, or for any other purpose, without the consent of the
 “ opposite proprietor ; and therefore assoilzied the defender, in so far as it
 “ was craved to discharge him from interrupting the carrying on of any
 “ works, that tend to divert the stream from its channel, or for carrying the
 “ half of said stream through the pursuer’s lands.”

A petition for the pursuer, craving that he should at least be allowed to take off a lead, provided he returned the water above the wauk-mill dam, was, on a report from a surveyor, refused, (6th March) without prejudice to the pursuer erecting machinery on the present situation of the eel-cruive.

Lord Ordinary, *Monboddie*.
 Alt. *Solicitor-General Blair*.

For Braid, *J. & W. Clerk*.
 Clerk, *Menzies*.

D. D.

Fac. Coll. No. 169. p. 355.

1800. February 5. CLEMENTINA SHARP, against MATHEW ROBERTSON.

NO. 3.
 In a house of several storeys, belonging to different persons, the proprietor of the upper storey and garrets cannot raise the walls and alter the shape of the roof, so as to convert the garrets into an attic storey, without consent of the inferior proprietors.

OF a house in the city of Glasgow, consisting of three floors and garrets above the shops, Clementina Sharp, proprietress of the upper storey and garrets, (under obligation to repair the roof), proposed, by raising the walls and altering the shape of the roof, to convert the garrets into an attic storey ; and applied to the Dean of Guild for liberty to make the intended alterations. The Dean of Guild, on a report of tradesmen, that the walls would not be injured, and her giving caution *de damno infecto*, gave her liberty to proceed.

Mathew Robertson, one of the inferior proprietors, complained by three bills of advocation, which were at first refused, but were passed, on a petition to the Court.

The averments of parties as to the prejudice or benefit which would result to the inferior proprietors from the proposed operations, by increase of pressure on the walls or otherwise, being directly opposite to each other, the Lord Ordinary had allowed a proof before answer.

In a petition for Robertson, and answers for Mrs Sharp, the relevancy of this proof was argued upon grounds not materially different from those in