

of it, as the village and sands are *inter gaudia* of the inhabitants of Edinburgh. Many other situations, equally commodious for the work, might have been obtained, where it would not have been offensive; and, at any rate, comfort is not to be sacrificed to manufactures, making every allowance for their importance.

The Lords found it proved, that “the blood-work in question is a nuisance, and ought to be removed from that place, or discontinued; and therefore suspended the operation complained of.”

A petition, craving that the interlocutor should be so qualified as to give the chargers an opportunity of adopting some cure for the nuisance, which might supersede the removal of the works, was (8th July) refused, as unnecessary.

Lord Ordinary, *Justice-Clerk.*
Alt. *C. Ross.*

Act.
Clerk, *Gordon.*

D. D.

Fac. Coll. No. 187. p. 424.

1800. *July 1.*

Colonel AYTOUN, *against* Colonel DOUGLAS and ROBERT BIRREL.

THE Leven, in Fifeshire, separates the lands of Achmuir from those of Strathendry.

In 1787, Colonel Douglas, proprietor of the latter, let the lands on his side to Robert Birrel, for a bleachfield. Birrel new-modelled and added a little to the height of a dam-dike across the river, which the proprietors of Strathendry had, for time immemorial, used for the purpose of catching eels, their titles giving them right to eel-cruives.

The eels had formerly been caught at an opening in the dike, without taking any part of the water out of the channel; but Birrel now made two cuts from the river, considerably above the dam-dike, for the purpose of his bleachfield and machinery, and the water was returned below the dam-dike, opposite to the lands of Auchmuir.

Notwithstanding these cuts, the effect of the alterations on the dam-dike was to raise the water above it; and the tenant of Auchmuir estimated the damage done to his lands by these means, as not exceeding a shilling

NO. 4.

NO. 5.

When a stream of water is the boundary between two opposite proprietors, the right of either to object to alterations on the channel of it, is cut off, when in consequence of homologation matters are no longer entire.

NO. 5.

a-year. These operations were perfectly known to John Carnegie, proprietor of Auchmuir, who gave Birrel permission to take turf from his side, for making the alterations on the dam-dike.

In 1793, Carnegie sold Auchmuir to Colonel Aytoun, who, at first, gave Birrel the same permission which his predecessor had done.

In 1795, Colonel Aytoun raised a declarator, concluding, that the river should be returned to the same situation as at the commencement of Birrel's lease.

Birrel had by this time expended several thousand pounds upon his bleachfield.

A proof was allowed.

The Court ordered memorials, and a hearing in presence on the prepared state.

The principles of the decision 5th March 1793, Hamilton against Edington and Company, No. 38. p. 12824., were not disputed; but the case was rested upon the evidence and effect of the alleged acts of homologation on the part of Carnegie and the pursuer.

The Court were of opinion, that as it was established by the evidence, that they had not merely acquiesced in Birrel's operations, (which some Judges thought would not have been sufficient to bar the objection), but had positively, *rebus ipsis et factis*, testified their approbation of them, the present challenge came too late.

The Lords (24th January 1800), "in respect of the acts of homologation on the part of Mr John Carnegie, the proprietor of Auchmuir, and of the pursuer himself, sustained the defences."

And upon advising a petition, with answers, "adhered."

Lord Ordinary, *Justice-Clerk Rue.*

Alt. *Solicitor-General Blair, Craigie.*

Act. *Ar. Campbell, W. Erskine.*

Clerk, *Pringle.*

D. D.

Fac. Coll. No. 189. p. 435.

1801. May 19. Colonel AYTOUN, against JOHN MELVILLE.

NO. 6.

The right of
a conterminous
heritor
to object to.

THE river Leven, in Fifeshire, separates the lands of Goatmilk, belonging to Colonel Aytoun, on the south, from the lands of Prinlaws, on the north, which belonged to John Berry.