himself any trouble about the distress that would be occasioned to Mr Fraser and his family, by the smoke of the lime-kiln, when the wind is in any of the western points. The matter was brought before the Court by suspension, and the following interlocutor was pronounced: 'Finds, That as Fraser the suspender has no servitude upon Dewar's grounds, and that the place where Dewar proposes to place his draw-kiln, appears in sundry respects to be the most commodious for him, and noways *in æmulationem* of Fraser, though it will be attended with inconveniencies to him, Dewar has right to carry on his work; therefore, repel the reasons of suspension,' &c. No 27.

The rule was admitted, *Quod non licet immittere in alienum*, but the plurality thought that the present case does not come under the rule, for that the smoke of the lime-kiln was emitted into the air, and carried as the wind blew, sometimes into the suspender's property, and sometimes in a different direction. Most of the Judges gave their opinion, that if Dewar could have placed his lime-kiln so as to be less noxious to his neighbour, without great loss or inconvenience to himself, he was bound to yield so far upon the principle of neighbourhood.

Sel. Dec. No 251. *p.* 323.

1768. *January* 14.

MAGISTRATES of Linlithgow, &c. *against* ELPHINSTONE of Cumbernauld.

No 28.

Can a river be appropriated, or any of its feeders.

THE wester and easter lakes of Fanyside, covering 70 acres of land, are distant about a mile or two from the source of the river Aven, and what water issues from these lakes descends naturally to the river. The mill of Fanyside is served by water from these lakes, but far from sufficient to keep the mill in constant operation. The water after serving the mill descends to the river, and it is the only water that reaches the river, unless when the lakes in great speats overflow their banks.

The lakes, the mill, and the whole surrounding lands, belong to Mr Elphinstone of Cumbernauld; and an artificial canal being projected to direct the water of the lakes into the river Carron for serving the Carron Company, the proprietors of many mills upon the river Aven took the alarm, and commenced a declarator against Mr Elphinstone, concluding, that by positive prescription they had acquired a servitude upon the lakes, which Mr Elphinstone could not deprive them of by diverting the course of the water.

At advising this cause, much darkness was occasioned by a notion which some of the Judges unwarily adopted, as if a river could be appropriated like a field or a horse. A river, which is in perpetual motion, is not naturally susceptible of appropriation; and were it susceptible, it would be greatly against the public interest that it should be suffered to be brought under private property. In general, by the laws of all polished nations, appropriation is autho-

No 28. rised with respect to every subject that is best enjoyed separately; but barred with respect to every subject that is best enjoyed in common. Water is scattered over the face of the earth in rivers, lakes, &c. for the use of animals and vegetables. Water drawn from a river into vessels or into ponds becomes private property; but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest, by putting it in the power of one man to lay waste a whole country. The same reasoning concludes equally against the subjecting a river to a servitude: They are both of them inconsistent with the public good; and the latter is rather less consistent with law than the former. There may be supposed a dominant tenement, a mill for example, that by long use has acquired right to an aqueduct from a neighbouring river; but can that river in any sense be considered as a servient tenement? Certainly not. Nor need we have recourse to the absurd notion of a servitude in cases of this nature, which can be explained clearly and simply as follows. A man who builds a mill is entitled to make an aqueduct, provided, after using the water for his mill, he restore it to the river from whence it was taken. This right he has from the law of nature without aid of prescription. But to carry the water another way without restoring it, will require 40 years possession to defend him by negative prescription against a challenge by inferior heritors.

Laying then aside arguments from property or servitude, the principles that govern this case are as follow. A river may be considered as the common property of the whole nation, but the law declares against separate property of the whole or part. "Et quidem naturali jure communia sunt hæc; aer, aqua profluens, et mare." § 1. *Instit. De rerum divisione.* A river is one subject composed of a trunk and branches. No individual can appropriate a river or any branch of it; but every individual of the nation, those especially who have land adjoining, are entitled to use the water for their private purposes. Hence it follows, that no man is entitled to divert the course of a river or of any of its branches; which would be depriving others of their right, viz. the use of the water.

But this restraint has its limits. There is not a moss nor a marsh but emits some moisture to a river: Nay, rivers are greatly fed by water running underground; and if such circumstances were comprehended under the general rule, we would be barred altogether from taking any liberty with water beyond the simple use; which would be as hurtful on the one hand as private property would be on the other. At that rate we would be prohibited to drain a marsh or a moss, or to intercept a spring by digging a pit within our own ground; for who knows whether these operations may not deprive a river of some of its secret feeders.

But what is the middle course that we are at liberty to take? An excellent practical rule is laid down in the Roman law, which is, that we cannot divert from a river any rill or runner that has a perennial course, but that we may

use freedom with all other water within our bounds. And the distinction is sensible; for nothing properly can be considered as a part or branch of a river, but what, like itself, has a constant flow. No 28.

The Judges came generally into the opinion, that if the lakes were supplied with water, whether by springs or otherwise, in such a quantity as not only to make up what was lost by evaporation, but to occasion, over and above, a constant discharge into the river, the lakes upon that supposition must be held branches of the river which no man had power to divert from its natural course. But it appearing from the proof, that there was not a constant run of water from the lakes into the river, nor any run except in a wet season, it was found, "That the defender, proprietor of these lakes, lay under no restriction from using them as he pleased, and he was accordingly assoilzied."

Sel. Dec. No 259. *p.* 331.

1768. *July* 1. Mrs Mary Kelso *against* William and George Boyds. No 29.

If a superior heritor can divert a rivulet from the inferior tenement?

The question was, whether the defenders were intitled, for the purpose of watering their meadows, to divert a rivulet, which passing through their property, run into that of the pursuer, from whom they held their lands in feu.

There was no servitude constituted in favour of the pursuer by grant, nor was the use of employing the water for fertilizing her meadows alleged to have subsisted 40 years.

Argued for the defenders: Though it is not in the power of a superior heritor, by any *opus manufactum*, to force the water out of its natural course, upon the lands of his neighbour, and to his prejudice, yet he is entitled to apply the water on his own grounds to every necessary and proper use; he may even prevent it from descending upon his neighbour's grounds entirely, if this be not done *in æmulationem*.

The distinction is pointed out in various texts, as L. 2. § 9. L. 1. 21. D. De acq. et acq. pluv. arc. L. 10. C. De serv. et acq.: And the reason of it is given in L. 21. § 23. D. eod. Nature has imposed a servitude upon inferior grounds, of receiving the water of the superior, which is understood to be made up by the soil and manure which the water brings along with it; and, at any rate, must be submitted to by the proprietor, from the necessity of the thing, without any conventional servitude. But there is no such natural servitude upon the superior heritor, and law could not impose it without injustice, since he derives no advantage from the inferior. Accordingly, Lord Bankton lays it down, II. 7. 29. that, "the owner of the higher ground may wholly intercept the water within his own grounds, and hinder it from running into the lower, unless the heritor has a servitude upon him."