No 36. stagnated in the outskirts of the town; but now a large quantity of water, raised by a fire engine, being thrown from the distillery, that filth was of course washed down to the sea, and in its way might perhaps prove somewhat offensive, but was of no noxious quality. The defender certainly cannot be said to have occasioned a nuisance, by throwing into a common sewer water of a much purer quality than it before contained. The opening of new wells in the city would have produced the same effect. THE LORDS were of opinion, That however pure might be the water issuing from this distillery, it was enough that it was provod, that a stream, formerly fit for the necessary purposes of life, had thereby been rendered unfit for those purposes; and therefore they decerned in terms of the libel.—The cause was appealed, and the House of Lords remitted to the Court of Session to investigate, whether the the water had been pure or contaminated prior to erection of the distillery. This was never done. See APPENDIX.

Fol. Dic. v. 4. *p.* 173.

No 37. 1791. *November* 24. OGILVY *against* KINCAID.

THE LORDS found, That an heritor may take away by a pipe as much water from a river as can be of use to his family and cattle, but not so much as to supply a distillery. See APPENDIX.

Fol. Dic. v. 4. *p.* 175.

1793. *March* 5.

JOHN HAMILTON *against* THOMAS EDINGTON and COMPANY.

No 38.

When a private river separates the lands of two heritors, neither can take a cut from it for the purpose of establishing any species of manufacture, without the consent of the other.

A FEW miles above the city of Glasgow, the river Clyde runs between the lands of Westburn, the property of Mr Hamilton, and those of Carmyle, which belong to Mr Dunlop. A short way above Mr Hamilton's boundary, a dam-dyke runs across the river, from which two opposite mills are supplied with water, the one belonging to Mr Dunlop, the other to the Duke of Hamilton; but the water taken off to supply these, returns into the river before it reaches Mr Hamilton's lands. For some years, Messrs Edington and Company had carried on an extensive iron-work on the lands of Carmyle. Their operations were performed by means of a steam-engine. Thinking, however, that a stream of water from the Clyde would answer their purpose better, they purchased Mr Dunlop's mill, and intended to lengthen and enlarge the old water-course, so as to carry, as they themselves admitted, an eighth or a tenth, or, as Mr Hamilton alleged, one fourth of the whole river, entirely past his property. Upon their beginning to execute this plan, Mr Hamilton brought a suspension, in which he

No 38.

Pleaded; If from the nature of running, water it cannot in a strict sense, be the object of property, every heritor through whose lands it runs, has, at least, the exclusive use and enjoyment of it, which is the most essential mark of that right. But whatever may be said of the water or *aqua profluens*, the stream or *flumen* continues the same from one age to another, and is therefore the object of permanent rights; Vinn. p. 127.

Every heritor through whose lands it passes, has an equal right to every use to which it can be applied, whence the superior heritor, though he may alter its channel in as far as it lies within his own grounds, must transmit the stream entire to the heritor below. The present is, in fact, a question between a superior and inferior heritor, as the water is meant to be taken off above Mr Hamilton's property, and the inferior heritor is equally entitled to object, whether he be owner of both banks or one.

In like manner, a common property arises where a stream forms a march between two tenements, and each is entitled to all the ordinary uses of the subject; but neither can make any material alteration on it, without the concurrence of the other; for, in re communi melior est conditio prohibentis, l. 1. § 1. 2.; l. 24. § 3. De acq. et acq. pluv. arcend. et passim, l. 1. § 12. De fluminibus, &c. Bracton, fol. 234. l. 4. c. 45. De assissa novæ dississinæ, § 9. De aquadiversa; 1 Wilson, 174. Brown against Best; 25th June 1624, Bannatyne against Cranston, No 3. p. 12769.; Hope's Maj. Practics, Bairdie, *voce* SERVITUDE; 13th November 1713, Cunningham, No 11. p. 12778. 1st July 1768, Kelso against Boyd, No 29. p. 12807.; 5th June 1744, Fairley against Earl of Eglinton, No 15. p. 12780.; 1791, Jamieson against Lord Abercorn, (not reported); Stair, b. 2. tit. 7. § 12. 29.; Bankt. b. 2. tit. 7. § 29. Nor is either party under the necessity of assigning a reason to justify his refusal. For although a person will not be allowed to use his property *in æmulationem vicini*, no other will be permitted to use it without his consent. In the present case, however, the suspender would be a considerable loser, both in point of amenity and pecuniary advantage. In summer, a great part of the channel would be left dry, and the stream be so much reduced as to become either very inconvenient, or altogether unfit for a variety of useful purposes to which it might otherwise be applied.

Answered; Running water is, from its nature, common to all, and cannot be the object either of sole or joint property; Inst. De rer. div. pr. § 1. Voet, l. 1. tit. 8.; De rer. div. et qual. § 3.; Stair, b. 2. tit. 1. § 5.; Blackstone, b. 2. c. 1. The heritor indeed, through whose lands it runs, may prevent any person from having access to it, and consequently has the exclusive use and enjoyment of it; but this arises, not from his having any property in the water, but from his connection with the land.

In like manner, when a river forms the boundary between the lands of two heritors, neither has a right of property in the water, but both are entitled to apply it to every lawful purpose; 7th January 1749, Lyon and Gray against

No 38.

the Bakers of Glasgow, No 17. p. 12789. At the same time, in the exercise of this, as of every other right, neither must act *in æmulationem*, or to the direct prejudice of his neighbour; l. 24. et ult. D. De damno infecto, l. 1. § 11. 21. De aqua et aq. pluv. acrend.; Voet, lib. 39. tit. 3. § 4.; Erskine, b. 2. tit. 1. § 2.; 9th July 1757, Trotter against Hume, No 22. p. 12798.; 19th January 1765, Gordon against Grant, No 88. p. 7356. Here a lawful use of the water is sought. There is no intention to injure, and the suspender, if he pleases, may turn the stream to the like use on his side of the river. The intended cut will not materially diminish its beauty, and, in all events, no loss in that respect could be set in opposition to the useful purposes to which the water is meant to be applied. In these circumstances, it makes no difference whether the water is returned or not, or whether it is taken away opposite to or above the lands of the suspender.

The primary uses of water are easily supplied; and it would be unreasonable that a large river, such as the Clyde, should be rendered useless from the ill humour of an opposite heritor.

In the case of a rivulet only sufficient to supply the primary uses of water, the consent of the opposite heritor would indeed be necessary; but, according to the suspender's doctrine, the same would hold even with regard to the largest river in the world, which surely cannot be maintained. Every case, therefore, must be determined according to its circumstances. The Clyde, after the claim of the charger is satisfied, will retain a sufficient quantity of water for every purpose, secondary as well as primary.

Replied; Joint property can be divided only where an equal division is possible, and where the parts retain the same situation, and can be applied to the same purposes with the undivided subject; L. 19. § 1. D. Comm. divid. Voet. § 5. ejus tit. neither of which requisites occur in the case of running water. If it were true, that the heritors on the banks of a river have no more right in it than any other person who can get access to it, any one heritor through whose lands it passes, or any other person with his permission, might entirely alter its course, and the inferior heritors could not oblige him to return it.

The Lord Ordinary reported the cause on informations.

The Judges differed in opinion.

The reasoning of those who thought the letters ought to be suspended, seemed in general to establish, that in the case of a private river, of whatever extent, running between the lands of opposite proprietors, the mere possibility of damage, (and as some expressed themselves) even in point of amenity, gave either a title to object to any material alteration upon its course. Whatever may be said (it was observed) of the water of which it is composed, the stream itself is the object of property, or at least of a right equally entitled to protection. The water may be used for all ordinary purposes, but the stream cannot be diverted. It is acknowledged the chargers cannot divert the whole river, and where is the line to be drawn? Manufactures will not be injured by this

doctrine, because there is little danger that consent will be refused where an adequate consideration is offered; at all events, the right of private property is sacred. No 38.

Others thought, that as there was no property in running water, each conterminous heritor might take every lawful use of it, without the consent of the other. How far the erection of machinery is a lawful use, (it was observed,) will depend upon the circumstances of the case; it must be considered as such wherever the opposite heritor is not thereby prevented from doing the same on his side of the river.

"The Lords suspended the letters *simpliciter*, and continued the interdict."

And, upon advising a reclaiming petition and answers, "they adhered."

Lord Reporter, *Dreghorn.* For the Suspenders, *Dean of Faculty, M. Ross, John Millar*, jun. For the Chargers, *Lord Advocate, Solicitor-General, Wight, Rolland, Arch. Campbell*, jun. Clerk, *Sinclair.*

D. D. *Fol. Dic. v. 4. p. 175. Fac. Col. No 43. p. 89.*

1793. *December 21.*

Sir James Colquhoun *against* The Duke of Montrose and Others, and The Magistrates of Dumbarton.

No 39.
No length of possession can authorise any obstruction to the navigation of a public river.

Sir James Colquhoun has a right of salmon-fishing in Lochlomond and the river Leven, which his predecessors had, for some time prior to the 1760, (how long, was disputed, and was the subject of proof,) been accustomed to exercise by means of masking-nets, the meshes of which were from six to eight inches wide. These nets were put loose into the water, a little above the mouth of the river, and reached as near the shore on each side as there was depth of water for a coble. They were sunk on the one side with slates, and kept up on the other by cork; and to prevent their being carried down the stream, they were supported by, but not fastened to stakes stuck into the channel at certain distances from each other, leaving an empty space of about twenty feet in the middle, in order to allow boats to pass.

In 1760, this fishing was let to an English Company, who made several alterations in the mode of conducting it. The stakes were now brought much closer to each other, and nets of a much stronger texture, and narrower in the mesh than those formerly used, were fastened to them both at top and bottom. Besides, at one place there was an opening left in the nets, by which the salmon were allowed to get into a *stell, i. e.* a complete inclosure of stakes and close nets, from which the salmon could escape only at the place of their entry.

Certain heritors claiming a right of salmon-fishing in Lochlomond, or the river of Enrick, which runs into it, brought an action of declarator, complain-