1744. *January* 26. FAIRLY *against* The EARL of EGLINTON.

No 15.
One cannot build a dam-dike cross a river, so as to make the water regorge to the prejudice of a neighbour's mill, even though he be willing to pay the expense of altering the mill, in order to remove the hurt arising from the restagnation.

FAIRLY of that Ilk has a mill upon the water of Irvine, which has stood in the form it is now in past memory, and which is served by a canal taken off the river within his own property, which also again returns to the river within his property.

The Earl of Eglinton proposing to erect a mill within his property on the same river, drew his dam-dike across the river, which, though about half a mile below Fairly's mill, had the effect, so level does the river run, to make the water regorge on some occasions more than it formerly did, to the prejudice of Fairly's mill. Whereof Fairly complaining, the Earl voluntarily lowered his dam 18 inches, and farther made offer, at his own expense, to raise Fairly's mill-wheel so many inches, as should, in the judgment of skilled persons, effectually prevent any prejudice from the regorging of the water.

But Fairly, not agreeing to this, brought a process against the Earl, concluding, that he ought to be decerned and ordained to throw down his mill begun to be erected, or, at least, so to lower his dam-dike, that the water might at no time be thereby thrown back on the pursuer's mill-wheel.

Upon advising the proof, the LORDS, on the 25th November 1743, found, "That the defender had right to insist that the pursuer's mill may be so altered in its form upon the defender's charges, as that the pursuer's mill may be, and continue a sufficient going mill, and at the same time the defender have the use of his property, without prejudging the pursuer's mill, or throwing any loss or damage upon him." And to the end it might appear, whether such alteration could be effectually made, and particularly if it could be made so as to occasion no greater expense to Fairly in maintaining the mill, "Appointed persons to be named by either party, on the defender's charges, to visit and report their opinion, &c."

But, on the 26th January 1744, on advising petition and answers, the COURT found, "That the defender could not lawfully, without consent of the pursuer, build a dam-dike across the river, so as to cause the water restagnate upon the way-gang of the pursuer's mill, and thereby prejudge or hurt the going of the mill-wheel in the way it used to go formerly; and that the pursuer is not obliged to alter, or suffer any alteration to be made, on the present form of his mill, in order to avoid the prejudice occasioned by the restagnation; and that the defender had no title to insist on making such alteration on the pursuer's property. Found it proved, that, by the dam-dike libelled, the water was thrown back upon the pursuer's mill, and ordered the same to be taken down, in so far as it occasions a restagnation in the common water-course prejudicial to the pursuer's mill."

The doubt was, How far there was any thing in law to hinder the Earl to erect a mill-dam *in suo proprio*, although the water was thereby made so to regorge as to stop the pursuer's mill, where the regorging did not make the water to exceed the *ripa*? But the answer was, That even the *alveus fluminis privati*

est privatus, on which therefore the inferior heritor cannot by any *opus* make the water regorge to the prejudice of the superior heritor; that it may be true, could the superior heritor qualify no prejudice, which might have been the case here, had Fairly had no mill, a court of justice might have restrained him from using his property *in æmulationem vicini*; but as a court of justice can only interpose where there is *æmulatio* on the part of the person, who insists on his property, and that *æmulatio* cannot be alleged where he qualifies prejudice, he was thought not obliged even *pati in suo* to remove such prejudice.

No 15.

Fol. Dic. v. 4. *p.* 172. *Kilkerran*, (PROPERTY). *No* 2. *p.* 452.

*** Lord Kames reports this case:

1744. *January* 27.—THE Earl of Eglinton's property adjoins to that of Fairlie of that ilk, along one side of the river Irvine, and the mill of Leaths, belonging to the latter, stands upon the said river 540 yards above the march of the two properties. The Earl having erected a mill upon his own property adjoining to the march, and built a dam-dyke cross the river, which made the water sometimes restagnate upon Fairlie's mill, Fairlie brought a process, complaining that his mill was hurt by the back-water occasioned by this *novum opus*, and concluding, that the Earl's dam-dyke should be demolished, or so altered as not to obstruct the river's running in its ordinary course. The restagnation was a fact not controverted; but it was contended for the Earl, That the raising the pursuer's mill-wheel ten inches would make the mill go as well as formerly. He offered to defray the expense of this alteration, and urged, that to oppose this expedient would be to act *in æmulationem vicini*, which the law does not indulge. The Court first pronounced an interlocutor, finding, "That the defender has right to insist that the pursuer's mill may be so altered in its form upon the defender's charges, as that it may be and continue a sufficient going mill, and at the same time, the defender have the use of his property, by building a mill of his own, further down the river, without prejudicing the pursuer's mill, or throwing any damage or loss upon him."

Against this interlocutor the pursuer reclaimed, insisting upon the following topics; 1*mo*, No person's property is subjected to the will of another; in suo hactenus facere licet quatenus nihil in alienum immittat. There is no other idea of a positive servitude, than that another man's property is subjected to my use; and therefore to say, that I can direct my water upon my neighbour's ground, or throw my stones upon it, is, in other words, saying, that I have a servitude upon it; 2*do*, A man cannot be restrained from making use of his own property, or from acting within it, whatever consequential damage may follow to a neighbournig proprietor: I can build a house though it obstruct my neighbour's lights: I can dig a pit, though it drain his well. And the reason is, that for a man to be restrained from acting within his own property, because of a damage thereby arising to his neighbour, is plainly subjecting his property

No 15.

to the interest of his neighbour, which is inconsistent with the principle of independency, and resolves into a negative servitude; *3tio*, Want of interest may limit a man in the exercise of his property, where the exercise is hurtful to others: To do an action in itself lawful, with the view to hurt another, without any benefit to myself, is in law language acting *in æmulationem vicini*. On the other hand, I am not entitled to make free with my neighbour's property, however beneficial to me, and however innocuous as to him. The reason is, that interest is in no case the parent of right: Interest alone can never give me the smallest power over another's property, more than it can give me the property itself.

To apply these principles to the present case, the defender maintains, that he is entitled to alter the form of the pursuer's mill, as being no way hurtful to the pursuer, and beneficial to him the defender, by procuring him liberty to restagnate the water. As this, in effect, is claiming a power or right over the pursuer's mill, we must examine where this power or right is founded. The pursuer is absolute proprietor of his own mill, which excludes any sort of power in another. Now, if interest alone, without any other consideration, be sufficient to bestow a power over another man's actions, or over his property, supposing the restraint not to be detrimental in any pecuniary view, it must follow, that my neighbour's property in all cases must be subjected to my interest, unless he can specify an opposite pecuniary interest; which certainly will not be maintained. I have no right to plant a hedge in my neighbour's field, however beneficial to him as well as to myself. And were I to gain a million by driving a level through his ground to drain a silver or copper mine, the law will not give me liberty without his consent: It would signify nothing though I should offer to drive the level below ground, and preserve the surface entire. It is the great privilege of property, that the proprietor can be put under no restraint: A man's mind is his kingdom, and the law cherishes freedom and independency, making every man arbiter of his own actions and property, without any other limitation than that of abstaining from doing harm to others. If the rule be once established, that a man has power over his neighbour's property, to work upon the same, or to alter it for his own benefit, provided the neighbour suffer not, there is no possibility to stop short: The power over his neighbour's property must take place even where the neighbour suffers by the alteration, provided the loss be made up. By heightening the pursuer's mill-wheel ten inches, according to the defender's proposal, one plain consequence is, that the mill must oftener want water in the summer time than it does at present. But perhaps this would not be ten shillings a-year out of the pursuer's pocket; and the defender, doubtless, to come at his purpose, will offer caution to make up this damage, were it twice as great. At this rate, though the pursuer's mill should be rendered entirely useless, it is still but a damage which the defender can also make up; and so the doctrine lands here, that for my neighbour's benefit, law will oblige me to abandon my property, provided he be willing to give an

adequate price for the same. And was this once an established doctrine, a thousand claims would be made, and a thousand consequences follow, which hitherto have not been thought to have any support from law.

No 15.

"FOUND, that the defender cannot, without consent of the pursuer, build a dam-dyke across the river of Irvine, so as to cause the water restagnate upon the way-gang of the pursuer's mill, and thereby prejudice or hurt the going of the mill as formerly; that the pursuer is not obliged to alter or suffer any alteration to be made on the form of his mill, or change the position of his mill-wheel, in order to avoid the prejudice that may be occasioned by the restagnation of the water; and that the defender has no right to insist on making such alteration on the pursuer's property. Found it proved, that, by the dam-dyke lately erected, the water does regorge and is thrown back upon the pursuer's mill-wheel, to the hurt and prejudice of the going of the mill in the usual manner; and declared the same an encroachment upon the pursuer's property, and decerned and ordained the said dam-dyke to be removed or taken down, as far as it occasions a restagnation of the water in the common water-course, prejudicial to the pursuer's mill."

Rem. Dec. v. 2. No 52. p. 79.

*** This case is also reported by C. Home:

1744. *June* 5.—THE pursuer being proprietor of the mill of Leath, built past all memory of man on his own property, brought a process against the Earl, to have it found, that he ought to be decerned to throw down a mill and mill-dam begun to be erected by him on the river Irvine, about a quarter of a mile below the pursuer's mill; or at least to lower the mill-dam to run quite cross the channel of the river, whereby the water regorged back on the pursuer's mill-wheel, which prejudiced it.

The Earl, in order to remove any cause of complaint, offered to raise the pursuer's mill-wheel at his own expense, which it was said would give him a better going mill than ever it had been. Fairly rejected the offer; whereupon this question occured, Whether he was bound to alter his mill for the conveniency of his neighbour, though without damage to himself? or, which comes to the same, Whether Fairly was bound to suffer it to be altered by the Earl, even supposing the alteration to be no way detrimental to him.

In support of the action, it was *pleaded* for the pursuer, That, by the laws of all civilized nations, liberty and property have always been held sacred; that, abstracting from contracts, no man was bound to subject either himself or his property to the will of another; and to make any man or his property subservient to the benefit of another, was a plain contradiction to that principle. If the defender was entitled to alter the form of the pursuer's mill, this was giving him a power over it: It was proper, therefore, to examine where this power or right was founded. The pursuer was absolute proprietor of his own

No 15. mill; this, as it includes the power of disposing the same, so it excludes any sort of power in another: Both these things are included in the idea of absolute property. Now, if interest alone is sufficient to give a man power over his neighbour's property, supposing the restraint is nowise detrimental it any pecuniary view, it must follow, that one's property must be subject to his neighbour's interest, unless he can qualify some damage. This is surely not tenible; for no man has a power to plant a hedge, or drive a level in another's property, though it were beneficial to both, without his consent: The law cherishes freedom and independency, making every man arbiter of his own actions and property, without any other limitation than that of abstaining from doing harm to others. If it be once established, that a man has power over his neighbour's property, to make any alteration thereon, provided it be not for the worse, it follows, that the same power should subsist even where the alteration is to the worse, provided he be ready to make up the proprietor's loss; there is no stopping short. So much on the general point, taking it for granted, that the alteration can have no bad effect: But with respect to the point in hand, it deserves to be considered, that water-engines of all kinds are nice machines, so that even people of the best skill cannot foresee all the effects, good or bad, that may happen upon altering the shape or form of the engine. One thing is certain, the pursuer's mill went extremely well before the defender's mill-dam was reared up; it cannot be so certain what effect the alteration may produce. Is not this very thing a damage, to have uncertainty imposed on the pursuer instead of a certainty, and a damage at the same time which cannot be liquidated?

For the Earl it was *pleaded*, That it was highly invidious for the pursuer to insist on his point of right, and that he was not obliged to allow any alteration to be made on his mill, (though at the defender's expenses) since he could not qualify any damage; which was using his property emulously to his neighbour's prejudice, a thing the law did not allow of: That both parties were equally entitled to erect mills on their respective properties; and as prescription does not enter into the present question, the point of right could not depend upon the accident, whether the pursuer's or defender's mill was first erected. The case, therefore, behoved to be considered, as if neither party had as yet built a mill upon this river, and that the Earl proposed to erect one on his own property, the pursuer should object thereto, on account that the water regorged beyond the boundaries of the defender's property; and, in that view of the case, the question would be, If the law considered this to be such an encroachment upon the pursuer's right, that the defender should therefore be obstructed from building his mill. Upon this point it was observed, that the channel of a river, from head to foot, is a common property, so far at least as to be subservient to the receiving the water which naturally composes that river; and therefore, so long as the water is not increased by any *opus manufactum*, so as to overflow the banks or otherwise prejudge the adjacent grounds, no heritor, under the notion of his property in the same channel, can complain that the same is invaded, though it

should so happen that, by reason of a mill-dam built by the *dominus* of the inferior grounds, the quantity of water should be so increased outwith the line of marches, providing it thereby neither overflowed the banks, nor prejudged the adjacent grounds; consequently, the law cannot consider this case as any encroachment on Fairly's property, so as to debar the Earl from his natural right of erecting a mill upon his own ground. And upon the same supposition that the pursuer had not built a mill, but should have occasion to erect one afterwards upon his own grounds, which would be hurt by the restagnation of the water, it would be a good answer to say, Raise, or allow your mill-wheel to be raised a few inches, which will remove the inconveniency. Now, if the law would have stood thus, when Fairly was first erecting his mill, it is hard to conceive that there should be a *jus quæsitum* in this respect, by the pursuer's building a mill, before it was foreseen that the defender would have occasion to erect one upon his ground. In a word, all that can be demanded in justice is, that Fairly be indemnified of any expense that has been occasioned by the Earl's neglect of interposing to regulate the form of Fairly's mill when first erected: And it is a jest to say, that water-engines are nice machines, which even people of skill cannot with certainty know what prejudice may arise upon altering the form of them, seeing such water-mills as those in question are of all others the grossest, and, generally speaking, may be made to go with a less power of water than is usually required: If, indeed, there was a scarcity of water in the river, there might be some ground for opposing the alteration proposed; but that will not be alleged, there being more water in the river Irvine (except in time of frost) than is sufficient to serve all the mills that can ever be built on it. See l. 1. § 12. and l. 2. § 5. De aqua et aquæ pluviæ arcendæ, Voet, lib. 29. tit. 3. § 2.

Replied; That it was a principle in law, that in suo hactenus facere licet, quatenus nihil in alienum immittat, which really imported no more than that one cannot use his neighbour's property; and for a man to take the liberty to direct his water upon his neighbour's ground, or to throw his stones upon it, is plainly using or making free with his neighbour's property. On the other hand, a man cannot be restrained from making use of his own property, or from acting within it, whatever consequential damage may follow to a neighbouring proprietor. This is called by Ulpian the *lucrum cessans*, without attending to the distinction betwixt *damnum datum*, *et lucrum cessans*, *e. g.* to say, that I can lay my stones, or throw my water upon another man's property, is, in other words, saying, I have a positive servitude upon him; for we have no other idea of a positive servitude, than that of another's property being subjected to my use. And, on the other hand, to say, that I cannot build a house, because it may obscure my neighbour's lights, or dig a pit, because I may drain his water, is, in other words, saying, that he has a negative servitude upon me. In short, it is certainly true, that every man may do a lawful act *in suo*, without regard to the consequential damage he may thereby do his neighbour; but the case

No 15. here is, that the defender has done an unlawful act *in suo*, whereby he has thrown the water back upon the pursuer. As to the observation, that no man can use his property emulously to the prejudice of his neighbour, it does not apply to the present case, as the pursuer is doing nothing in his property that can hurt or prejudice his neighbour; and, if it did, it would apply against the defender, for it is he who is plainly acting in that manner. Neither is the argument of any avail, that the channel of a river is common property, so that none can complain of an *opus manufactum* therein, though the consequence is to make the water regorge; for the question is not here of a navigable river, but of one that is not navigable, which is a part of every man's private property through whose grounds it runs. When the defender, then, by an *opus manufactum* in his own part of the channel, makes the water regorge upon the pursuer, it is truly using his neighbour's property for his own conveniency, which no man is entitled to do. To conclude: Before the defender's dam-dyke was built, there was a good ford in the river, a little below the pursuer's mill, which led to several market towns; but since that time it is not passable in winter, and even in summer it is deep; 2*do*, By means of the defender's dam-dyke, the water is always three feet deeper at the foundation of the pursuer's dam-dyke, than formerly, which makes it impracticable for him to repair any breaches therein, unless when the defender is pleased to let out his sluices; 3*tio*, If the pursuer were to agree to the elevation of his wheel, he would thereby lose a considerable force of water which he possessed formerly, and must be considered as his property, which he is not bound to part with for the conveniency of his neighbour, even for a price. See l. 8. § 5. Si servit vindicet. l. 26. De damno infecto, l. 1. § 12. and l. 2. § 5. in fine, De aqua et aquæ pluviæ arcen. Heringius de Molendinis, as cited by Dirleton.

The Lords found, that the defender has right to insist, that the pursuer's mill may be so altered in its form, upon the defender's charges, as that his (the pursuer's) mill may be and continue a sufficient going mill, and, at the same time, the defender have the use of his property, by building or maintaining a mill of his own farther down the river, without prejudging the pursuer's mill, or throwing any damage or loss upon him.

But, upon a reclaiming petition and answers, the Lords found, that the defender could not lawfully, without consent of the pursuer, build a dam-dyke across the river of Irvine, so as to cause the water restagnate upon the way-gang of the pursuer's mill, and thereby prejudge or hurt the going of the mill-wheel in the way it used to go formerly; and that the pursuer is not obliged to alter or suffer any alteration to be made on the form of his mill, or change the position of his mill-wheel, in order to avoid the prejudice that may be occasioned by the restagnation of the water; and that the defender has no right to insist on making such alterations on the pursuer's property.

C. Home, No 265. p. 426.