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 Rae.* Act. *Ar. Campbell, W. Erskine.*
Alt. *Solicitor-General Blair, Craigie.* 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.

The lands of Goatmilk stretch along the river about 200 yards. From the abruptness of the bank, as well as from there being somewhat less than three feet of fall between the extremities of the property, they are not well fitted for machinery, and none has hitherto been erected on them. NO. 6. the extension of a mill-lead, taken from a march stream, is lost if not exerted *tempestivè*.

The lands of Prinlaws extended farther up the river than those of Goatmilk, and near their utmost extremity there has been, for time immemorial, a dam-dike across the river, and mill-lead taken from it, for supplying a barley-mill on the lands of Prinlaws.

By this lead, about a third of the water is taken off in dry seasons; but a much less proportion when the river is full. The water from this lead was returned to the river, opposite to about the middle of the lands of Goatmilk.

In 1778 or 1779, Mr Berry extended the mill-lead so as to carry the water quite past the lands of Goatmilk, in order to supply a lint and barley mill, erected at the lower extremity of them.

In the course of this operation, Mr Berry had occasion to carry the lead across the public road, over which he built a small bridge.

It was not established whether Colonel Aytoun was then in Scotland; but it was certain, that he was very little in it from before this period to the end of 1783, after which he resided in the neighbourhood.

His tenants and neighbours carried their flax to the mill; and barley, for the use of his own family, was ground at it. In 1788, 1789, and 1790, Berry advertised the lands for sale; the advantages of the situation for machinery, and there being a lint-mill already on the premises, were particularly noticed.

In 1791, Prinlaws was purchased by John Melville, who, in the view of erecting extensive machinery upon the site of the old barley-mill, (where he afterwards expended several thousand pounds,) prevailed on the tenant to give up his lease; and, to induce him to do so, purchased the current lease, and gave him possession of the lint and barley mill erected on the extended mill-lead.

Hitherto the extension of the mill-lead had not been complained of by Colonel Aytoun.

But in 1795, in the same action in which he complained of the operations of Colonel Douglas and Mr Birrell, (See No. 5. *supra*,) he likewise called Mr Melville as a defender, and contended, that the extended part of the lead should be filled up.

No. 6. The preliminary procedure was the same as in the branch of the action already reported.

The principles of the decision, 5th March 1793, Hamilton against Edington, No. 38. p. 12824, were admitted on both sides, and the defence of Mr Melville was attended with more difficulty than that of Colonel Douglas and Mr Birrell, from having no positive acts of homologation on the part of the pursuer to found on. He rested entirely upon the delay in instituting the challenge.

On the one hand, it was contended, that it was irrelevant to inquire what use the pursuer could make of the water on his side; that he had at least, originally, the admitted power of preventing the operations on the other side, for his consent to which, as in the case of any other property vested in him, he was entitled to an adequate consideration; and that a person, particularly in the circumstances of this case, cannot be gratuitously deprived of his property, merely from his delay in challenging an illegal act, while it is not sanctioned by prescription; see Preface to Lord Kames's Dictionary of Decisions, p. 10.; see Dictionary, *voce* Homologation; 8th January 1663, Nicoll, No. 12. p. 5627.; Bankt. vol. 1. p. 341.; Ersk. B. 3. T. 3. § 49.; May 1796, Buchanan against Johnston, (not reported); 15th May 1799, Wilson against Douglas, (not reported).

On the other hand, it was held, that the pursuer's continued acquiescence in the operations to which he had so little interest to object, the defender's purchase of the property, and the large sum expended on the faith of the validity of the right, barred the pursuer from insisting in the present action, and amounted to consent adhibited *rebus ipsis et factis;* 28th June 1666, Laird of Philorth against Lord Fraser, No. 4. p. 5620; Haldane Corbet against Mackenzie, (not reported.)

The Court, upon these opposite grounds, were much divided in opinion. "The Lords, (29th January 1800,) in respect the pursuer was in the know-"ledge of the operations now complained of, made by John Melville, while "the same were carrying on, and did not object thereto, sustained Mr Mel-"ville's defences."

But, on advising a petition for the pursuer, with answers for Mr Melville, "the Lords (1st July 1800) found, That no sufficient acts of homolo-"gation or other circumstances are condescended on by him, for establish-"ing his right to protract the tail-race or mill-lead of his former barley "mill, now converted into a machinery mill, to the effect of working his "lint-mill, or any other mill or works in that quarter: Therefore found, that

NO. 6.

" he is bound to return the said mill-lead or tail-race at the place where it " formerly did return into the river Leven, before the erection of the said " lint-mill."

Mr Melville reclaimed.

And the Lords returned to the interlocutor first pronounced.

Lord Ordinary, *Justice-Clerk, Rae.* Act. *Ar. Campbell, Wm. Erskine.*
Alt. *Solicitor-General Blair, Craigie, Monypenny.* Clerk, *Pringle.*

D. D. *Fac. Coll. No. 229. p. 519.*

1808. *May* 12. MISSES GLASSFORD *against* JOSEPH ASTLEY.

NO. 7.

The proprietors of a small garden in a town found entitled to erect a screen of wood on their own ground, close upon the windows of an adjoining proprietor's house, which looked into their garden, for the purpose of excluding these windows from this view; there being no servitude, *luminibus non officiendi*, and the windows being two of them newly made, the third newly enlarged.

THE Misses Glassford were proprietors of a garden attached to a house in Borrowstounness. Joseph Astley was proprietor of a building immediately adjoining, which had some windows looking into this garden. This property had no servitude, *luminibus non officiendi*, over the garden. Astley, in order to make a better use of his property, enlarged one of the windows looking into this garden, which had formerly been an open granary window with wooden spars, and converted it into an ordinary dwelling-house window with glass casement. Though the garden was overlooked from various other quarters, yet the Misses Glassford, not liking it to be so closely looked into as it became liable to be from Astley's windows, erected a wooden screen, on their own property, but within a foot and a half of these three windows, and so high as to cover all of them. After submitting to this for two years, Astley pulled it down by his own authority; on which Misses Glassford applied to the Sheriff to compel him to re-erect it at his own expence, and to prohibit him from touching it in future.

Astley at the same time petitioned the Sheriff to prohibit the Misses Glassford from re-erecting it.

In these processes the Sheriff pronounced this interlocutor, (December 27. 1805,)—" The Sheriff conjoins this complaint with the complaint at the in- " stance of Joseph Astley relative to the same subject; and having consi- " dered the debate in both processes, finds, that Mr Astley has not produced " nor alleged the existence of any writing which grants him a servitude of " free light or prospect over the property of the Misses Glassford, or which