ware, and other sea-weeds within the sea-mark opposite to their lands, and of cutting and burning the same into kelp." No 31.

Act. *G. Halden.* Alt. *Ja. Boswell.* Reporter, *Lord Justice Clerk.* Clerk, *Gibson.*
P. C. *Fac. Col. No* 119. *p.* 180. *Fol. Dic. v.* 4. *p.* 177.

1769. *November* 16.

SIR ALEXANDER DICK of Priestfield, Baronet, *against* The EARL of ABERCORN.

No 32.
By the grant of a lake, not only the water, but the *solum* or *alveus* thereof is understood to be conveyed. The proprietor of a lake, in a question with a conterminous heritor, who has servitudes thereon, is entitled to have the extent of his said boundary ascertained by fixed and certain marches.

THE lake of Duddingston is bounded on the west and south-west by the lands of Priestfield, and on the north-east, east, and south-east, by the lands of Duddingston, the property of the defender.

Thomas, Earl of Haddington, from whom the pursuer derives right, in 1617 obtained a charter under the great seal, containing a *novodamus* of the lands and estate of Priestfield, and disponing the lake of Duddingston, in the following terms: " Nec non totum et integrum lacum jacentem prope et contigue ad dictas terras de Priestfield, cum integris bondis ejusdem in longitudine et latitudine, prout idem jacet tam ex adverso et contigue ad dictas terras de Priestfield, quam ex adverso et contigue ad quascunque alias terras, una cum totis piscariis dicti lacus, et omnibus privilegiis et libertatibus, proficuis, et commoditatibus hujusmodi."

In 1668 Sir Patrick Thomson, the defender's author, reconveyed for himself, his heirs, and successors, in favour of Sir Robert Murray of Priestfield, the pursuer's predecessor, his heirs and successors, all claim or right whatever to the lake of Duddingston, excepting the right of watering his own cattle and those of his tenants. Upon this renunciation, Sir Robert Murray, in 1670, raised letters of inhibition, which, after being duly published, were put on record.

Some differences concerning the boundaries of the lake, and other matters, having arisen between the pursuer and defender, the former, founding upon the title-deeds already mentioned, brought an action of declarator: " That it should be found and declared, that he had the sole property of the lake in question, and of the whole ground, soil, and bounds thereof, in the full extent of the same, in length and breadth, so far as the water now flows, or has flown on all the sides thereof, and to the grazings within the limits thereof; that it should be found and declared, what are the proper boundaries of the said lake; and stakes and posts ought to be placed therein, in order to ascertain the boundaries thereof; and also, that it should be found and declared, that the defender has no right to take any water from the foresaid lake for the use of his coal-mill."

THE LORD ORDINARY, before answer, authorised the Sheriff of Edinburgh to visit the loch, and settle the boundaries thereof, when in its ordinary state, neither swelled by floods, nor decreased by any unusual drought, and to report. His Lordship, upon advising the report, in 1768, found, " That Sir Alexander Dick has the sole and exclusive right, not only in the water, fishing,

No 32. and natural products, but also in the grounds, soil, and *alveus* of the loch in question; and Lord Abercorn and his tenants have no other right or interest in the said loch, excepting the right of watering their horses and cattle therein, as expressed by Sir Patrick Thomson's renunciation; that the boundaries fixed by the Sheriff, and marked upon the ground by certain stakes and posts erected under his inspection, in conformity to the evidence of witnesses examined by him, and as contained in his report to the Lord Ordinary, are the true boundaries of the said loch, and of the pursuer's property therein, as above declared and decerned."

In two reclaiming petitions it was

Pleaded for the defender, 1*mo*, Although the pursuer had, in virtue of the charter 1617, and of Sir Patrick Thomson's renunciation in 1668, an undoubted right to the lake, considered as a body of water, yet he had no right to the soil or *alveus* of the lake. The question, to whom that belonged when the water receded or was carried off, fell to be determined on the same principles which regulated a question concerning the property of the *alveus* of a river. These principles were clearly laid down in § 23. Inst. De Rer. Div.; and, upon applying them to the present case, it followed, that, in the event of the lake subsiding, or being drained or dried up, the *alveus derelictus* belonged to the conterminous heritors.

Nor was there any absurdity in supposing that ground may be the property of one person when covered with water, and of another when dry. In the one case, it was a pertinent of the water, in the other, it became a pertinent of the adjacent lands; and, accordingly, ground added *alluvione* to the banks of a river, or *insula in flumine nata*, § 1. became the property of the contiguous heritor. The general docrine here laid down was supported by Huber, Lib. 41. Tit. 1. § 10.; and Sande, in his Decisiones Frisicæ, says, that the soil or ground of a lake belongs to the contiguous heritors. According to the law of England, the *alveus*, though covered with water, was not conveyed under the denomination of a lake, unless it was specially mentioned. Blackstone, b. 2. c. 2.; Brownlaw's Reports, part 1. p. 142.

2*do*, Although the *alveus* were the property of the pursuer, the defender must, *jure alluvionis*, have a right to any ground which the lake might desert, opposite to his land. The law was clear, that when a river subsided, the ground left dry *quantum quoque temporis momento adjicitur*, accresced to the conterminous heritors, *pro modo latitudinis cujusque prædii*; and there was not a single argument in support of this doctrine, with regard to rivers, which did not, with equal strength, militate, when applied to lakes.

3*tio*, The edge of the water could be the only line of march. There was an absurdity in establishing a boundary to a lake by an ideal line, unless the water could be confined within the limits so designed. If the defender be restrained from following the lake in a dry season, and be not entitled to possess the ground within the line, when deserted by the water, upon the footing that such

ground was part of the *alveus* of the lake, neither ought the pursuer to be entitled to occupy, by the water of his lake, any part of the defender's property, and to exercise the rights of fowling and fishing upon that part of the water that had swelled beyond the ascertained boundary. It would be ridiculous to say, that, upon the lake's rising beyond that line, the defender would be well founded in an action of damages against the pursuer, for any hurt which may have been done by the water; and yet this was the conclusion to which the pursuer's demand tended. Such an action would be reprobated in every Court, as not founded in nature, and consequently not in law. The pursuer had the property of the lake, but his property went no farther; and as the defender suffered damage by the increase of the water, he was in equity entitled to reap any benefit which might arise from the lake being low. No 32.

The pursuer's demand led to this other absurdity, that, upon the water of the lake's receding, the small strip of land left dry between the estate of Duddingston and the lake would be his property; and, consequently, it would be in his power to exclude the defender from the water, by building a march upon the line of division.

Answered for the pursuer, *1mo*, It was absurd to say that the water of the lake belonged to one person, and the *solum* to another. Both the water and the ground covered were comprehended under the term lake, which was defined *terra aqua co-operta*, and to the existence of which the *terra* was as requisite as the *aqua*. So little idea had the English law of a body of water independent of the ground which it covered, that Blackstone, B. 2. c. 2. § 5. says, that an action for a piece of water would be inept, unless laid as a claim for land covered with water; and our own lawyers maintain, that he who has right to the water has right also to the *alveus* of a lake.

The principles laid down in § 23. Inst. De Rer. Div. did not apply to the present case. These principles had no foundation in the feudal law, according to which the *alveus derelictus* of a river, or an *insula in flumine nata*, belonged to the crown; and although that law were disregarded, these principles would not support the defender's argument. The authority quoted related to a public river, the property of which could not be conferred upon any one, even by the sovereign power; but the present question regarded a lake, which was allowed to be not *publici*, but *privati juris*, and acknowledged to belong to the pursuer. Could a river be disponed in the same way as a lake, the *alveus* would belong to him to whom the disposition of the river was granted; for, as the right of the conterminous heritors was but *præsumptive*, an express right, in favour of any one of them, would exclude the rest. The pursuer had an express right; and therefore, although he were to allow that the doctrine contained in § 23. Inst. De Rer. Div. ought, from analogy, to be extended to lakes, yet he must still contend that the defender had no title either to the water or the *alveus* of the lake in question. Bankton, B. 2. T. 3. § 165.

No 32.

2*do*, The argument drawn from the *jus alluvionis* did not support the defender's claim to any ground which the lake might desert opposite to his land.

Acquisitio per alluvionem took place only on the banks of rivers, and never upon those of lakes; because, agreeable to the civil law, "In agris limitatis jus alluvionis locum non habet;" and the lands upon the banks of a lake were "agri limitati." L. 12. l. 16. D. De Adquis, Rer. Dom. Vinnius, Coment. Ad. Tit. L. 24. § 3. D. De aqua et aquæ pluviæ arcend.

3*tio*, There was no absurdity in the pursuer's proposal of fixing a boundary to the lake different from the water's brink. If the lake had been a body of water so still as never to admit of any variation, the edge of the water might be a proper boundary, but, in the present case, it could not be so. The pursuer's property in the lake was undoubted, and he was therefore entitled to have the boundaries of that lake ascertained, that he might know what precise extent of ground would belong to him if the lake were to be drained.

As to any damage which the defender might suffer from the water of the lake increasing beyond the line fixed as the boundary, no argument could from thence be drawn against the pursuer's plea, that being a natural servitude, which land lying contiguous to a lake must ever be subject to; nor ought the pursuer for that reason to be deprived of any of his property.

Were it impossible to ascertain the boundary of a lake, the civil law would never have ascertained the boundary of the sea, which it fixed to be *litus*, and defined that to be *quatenus hibernus fluxus maximus excurrit*. The same boundary ought to be established in the present case; the civil law often mentioned the *termini lacuum*, L. 12. D. De Acquir. Rer. Dom. Vinnius, *ut supra*, L. 69. D. De contr. Empt.; and in a decision so late as the 1757, Earl of Crawford against Ralston *, it was determined that a boundary different from the edge of the water might and ought to be fixed to lakes.

The Court, upon the 17th February 1769, found, "That the pursuer has the sole and exclusive right of property to the loch of Duddingston, not only to the fishings and fowlings, and plants of every kind therein, but also to the soil or *alveus* thereof; but that the defender has a right of servitude to water his and his tenants cattle in said loch, and also to the use of water from it for his mill and coal-engine, conform to use and wont; and also to pasture his cattle down to the edge of the water, in its natural state, or even upon any part of the *solum* of the loch, which, by a natural drought, may be left dry at any time; but that these servitudes, of watering and pasturing, shall take place only opposite the defender's property; and, farther, when at any time the water of the loch shall swell beyond its natural state, so as to overflow any part of the defender's property, that the pursuer has the right of following it for the purposes of fishing and fowling; and that, *in hoc statu*, it is unnecessary to fix any stakes between the pursuer and defender's property, or to ascertain the limits of the loch farther than is done as above; and that neither party is entitled to expenses."

* Not reported., see APPENDIX.

Against this interlocutor, a reclaiming petition having been given in for the pursuer, the Court ordered memorials; upon advising which, on 13th July 1769, the following judgment was given: " Find that the boundaries fixed by the Sheriff-depute of Edinburgh, and marked upon the ground by certain stakes and posts erected under his inspection, and referred to in the Lord Ordinary's interlocutor, dated 21st June 1768, are the true boundaries of the loch of Duddingston, and of the pursuer's right of property therein, and to the *solum* or *alveus* thereof; and decern and declare accordingly; but, *quod ultra*, they adhere to their former interlocutor."

No 32.

To this judgment the Lords, upon advising another reclaiming petition for the defender, with answers, adhered, " reserving to both parties their mutual servitudes, as ascertained by the interlocutor of 17th February 1769."

Lord Ordinary, *Gardenstone.* For Sir Alex. Dick, *Sol. H. Dundas, Lockhart.*
Clerk, *Ross.* For the Earl of Abercorn, *Macqueen, Ilay Campbell, Crosbie.*

R. H.

Fac. Col. No 1. p. 1.

1773. *July* 30.

The Governors of the Hospital founded within the City of Edinburgh by George Herriot *against* Walter Fergusson, Writer in Edinburgh.

No 33.
Limitations in feu-grants are not to be extended beyond the express words.

In the original feu-charter, granted by the Governor of Herriot's Hospital in 1734 to John Cleland gardener, of five acres of the Hospital's estate, lying at the east end of the lands over which the royalty of the city of Edinburgh has been since extended, and near to the bridge of communication over the North Loch, there was a clause in the following words: " That it shall not be leisom to the said John Cleland, and his foresaids, to dig for stones, coal, sand, or any other thing within the said ground, nor to use the samen in any other way than by the ordinary labour of plough and spade, without the express consent and liberty of the Governors of the said Hospital had and obtained thereto for that effect."

Prior to Cleland's obtaining this charter from the Hospital, he, with two sureties for him, had granted bond to the governors, wherein he became bound to expend L. 1000 Scots upon enclosing the said ground, and building sufficient houses, and others thereupon, to the extent above mentioned, and that between and the term of Martinmas 1736.

Cleland built several houses upon the different parts of the ground. He likewise sub-feued three parcels of the ground to different persons, who built houses thereon. At a late period, Walter Fergusson acquired, by purchase, so much of the land as remained with Cleland; and having made known his design of erecting buildings, in the form of a square, upon his area, adjoining to the Register-Office, the Governor's of Herriot's Hospital, on the footing that this