

1769. June 15.

The MAGISTRATES and TOWN-COUNCIL of Culross *against* The Earl of DUN-
DONALD, and other TRUSTEES for CHARLES COCHRAN of Culross.

No 31.

Property in
wreck and
ware.

By a charter, dated 5th June 1592, the town of Culross was erected into a royal burgh, and certain lands were granted by the Crown, "Cum omnibus et singulis domibus, ædificiis, tenementis, &c. salinis, salinariis, sive salis patellis, aliisque infra limites seu bondas suprascriptis, jacen. videlicet, inter terras de Valyfield ex orientali, terras vocat. Vallis de Castlehill ex occidentali. terras Blairhall vocat. et communem moram dicti burgi ex boreali, et mare ex australi, partibus." A particular enumeration of the different obventions and profits which could be supposed to arise from them, was contained in the charter, in these words: "Una cum annuis proficuis et commoditatibus, firmis, feudifirmariis, annuis redditibus, introituum proficuis et divoriis, aliisque commoditatibus dicti burgi, terrarum, tenementorum, &c. vastorum, salinarum, et suis pertinen. &c. cum omnibus aliis et singulis libertatibus, commoditatibus, proficuis, et asiamentis, ac justis suis pertinentibus quibuscunque, tam non nominatis, quam nominatis, tam subtus terram, quam supra terram," &c.

On this charter the pursuers brought a process of declarator of their full and exclusive right, not only to the lands contained in their charter, but also to the sea-shore opposite thereto, together with the wreck, ware, and other sea-weeds within the sea-mark, and the cutting, burning, and disposing of the same; and *contended*, That the boundary therein specified, being by the sea on the south part, must, from the nature of the thing, include the *litus maris*, and every use and profit which could be made of it, either at high or low water, particularly that of cutting sea-ware, which grows, or is thrown in upon the shore of these lands.

On the other hand, the defenders founded upon a charter dated 6th June 1663, by which "all the lands lying within the sea-mark, from the lands of Castlehill, on the west side of the burgh of Culross, to the Newmiln-bridge on the east side thereof," were granted to the Earl of Kincardine; and, as the charter comprehended the whole shore adjacent to the lands contained in the charter to the town of Culross, and had been vested in them by indisputable progress, they likewise *pleaded* a right to all the wreck, ware, and other sea-weeds upon these shores.

Pleaded for the pursuers: The grant founded on by the defenders being near an hundred years posterior to the pursuer's charter, could not convey what the Crown was before divested of; neither does it contain any words, or express grant, of wreck and ware, on which to found the right contended for.

2do, The grant itself was improper and inept, seeing a grant of the sea-shore, separate from, or independent of, the lands to which it is adjacent, is a thing unknown in our law, and what the Crown could not give; especially

after having already given the lands adjoining to such shore to another, and expressed the boundary thereof to be by the sea.

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3tio, The defenders have not pretended that possession ever followed upon their charter, or that they, or their authors, did at any time exercise, or so much as claim the right or privilege of cutting or gathering the sea-ware upon the shore in question.

By the Roman law, the *litora maris* were held to be *res nullius*, and could not be appropriated to any private person; they were *extra commercium, et juris publici*. The sea-shore is, by all our lawyers, enumerated among things common, which belong in property to none; and it is distinguished from things public, which belong in property to the sovereign power. By the law of Scotland, these are reckoned *inter regalia*; but under that denomination sea-shores never were comprehended, or held proper to be made the subject of a separate grant by the Crown, independent of the lands to which they are adjacent. Upon these principles the Court found, 25th November 1714, Bruce *contra* Rashiehill, No 2. p. 9342, that sea-greens were not *inter regalia*, and that they were not established by a charter from the Crown as a feu or right separate from the lands.

But, although the sea-shores cannot become the private property of any one, so as to exclude the public and necessary use of them, yet, on the other hand, the right of a private person may be so far established in them, that a grant of the sea-shore, along with the lands to which it adjoins, or of the casual profits arising therefrom, such as the cutting or gathering of ware, may be proper and valid in a charter from the Crown; and upon possession following thereon, will be effectual for securing an exclusive privilege of exercising such right, as connected with, and dependent on, the adjacent grounds.

The boundary mentioned in the pursuer's charter is not *litus maris*, or sea-shore, but *mare ex australi parte*, or the sea on the south part, by which the *litus maris* is included. The distinction betwixt *mare* and *litus maris* is obvious. *Mare*, or the sea, signifies the fluctuating element of water, *cui littora subjiciuntur, et ab eo quotidianis accessibus occubantur*. And *litus* is defined to be *terra vel arena quæ subjacet mari, quatenus hybernus fluctus maximus excurrit*. A boundary, therefore, by the sea, follows its *fluctus* and *refluctus*, and includes the *litus* or *terra vel arena quæ subjacet mari*, and from which the water from time to time recedes. So that the uses and profits which can be made consistently with the public and common use of such *terra* and *arena* during the recess of the water, belongs to the proprietor of the adjacent lands bounded by the sea; and such particularly is the right of cutting sea-ware. The property, therefore, of the shore, did not remain with the Crown after the charter granted to the pursuers; but was, so far as the Crown could convey it consistently with the public good, plainly included in that grant, as was also every profit which could be derived therefrom. In fine, the words in the town's charter,

No 31. which recites the particulars meant to be comprehended within the bounds described, mentioning expressly *salinis, salinariis, seu salis patellis*, which are undoubtedly within the sea-mark, or *litus maris*, are fully sufficient to remove every doubt.

Pleaded for the defenders: That the priority of the charter to the town of Culross, cannot affect their charter, if it shall appear, that what is granted by the one charter, is totally distinct and separate from what is granted by the other.

The charter to the town of Culross contains only a grant of lands properly so called, without any mention of a shore, or any emoluments thence arising, as is usual in every charter, when the sea-shore is intended to be included; but these lands are expressly bounded *per mare ex australi parte*.

The distinction made by the pursuers between *mare* and *litus maris*, is equally nice and fallacious. *Litus maris* is the boundary of the sea; and when lands are said to be bounded by the sea, they are to be understood as bounded by the *litus maris*, which is defined in the civil law to be “*Quatenus hybernus fluctus maximus excurrit;*” and therefore a right to lands bounded by the sea, can reach no farther than to the utmost verge of the shore on which the winter-tide flows.

The charter to the Earl of Kincardine expressly conveys the lands within the sea-mark; and though it does not contain an express grant of wreck, and sea-ware, yet as the bonds therein mentioned comprehend the whole of the shore adjacent to the lands contained in the charter to the town of Culross, it must be understood to comprehend a right to the sea-weed, and every other profit arising from a right to such a subject as a sea-shore, or land within the sea-mark.

2do, Although a subject may in some respects be understood as *inter res communes*, yet that it is nevertheless capable of property, is a doctrine laid down by Lord Stair, B. 2. T. 1. § 5.; and as the lands within the sea-mark, or *litus maris*, may be understood by the feudal maxims to be *inter regalia*, for *quæ nullius sunt, sunt domini regis*, the King may, consistently with public use and policy, alienate them, to the effect that the grantee shall reap any benefit that may accrue from their being understood to be his property, subservient nevertheless to the common uses of mankind. As, therefore, in the grant to the town of Culross, no mention is made of the sea-shore, or any advantages proper thereto; as the lands of the town of Culross are bounded by the sea, of which the boundary is *quatenus hybernus fluctus maximus excurrit*; as the benefit accruing by sea-ware, or other casual advantages, arising from the possession of the shore, is not granted to the pursuers; and as the defenders, by the charter 1663, under which they claim, have an express grant of the lands within the sea-mark, they must of consequence be understood to have a right to the wreck and sea-ware, as the fruit and produce of these lands.

“THE LORDS found, that the pursuers have right to the whole wreck and

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. G. 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.

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 disposing 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,

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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.