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not unlikely that Dunlop saw the error into which Scott Moncrieff was falling, for the latter makes no difficulty in accepting the draft which had been so much, and so materially altered by Dunlop, and sees no difference between the two papers, calling them trifling alterations.

Kenyon.

“ Under the circumstances of the 'present case, I thought it proper not to rest upon my own opinion alone. I would willingly have rested on the opinion of those whom I respected, had that opinion been uniform on either side. I requested the assistance of a noble *Lord* now near me, and after reading the case, his Lordship formed an opinion different from what I have now given ; he, however, now concurs with me in opinion to affirm the judgment of the Court of Session.

Supposed to
be Butler and
Laurence.

“ *Two judges* also, of much acuteness, and great experience in such questions, were applied to ; they differed in opinion, and after having had a conference together on the subject, they parted still holding different opinions.

“ Under all the circumstances of this case, I think the judgment of the Court of Session is not founded on error, and ought to be affirmed. The decision of your Lordships, if in this way, will also have a good effect. It will give a lesson to the Royal Bank to be more circumspect, and to pay a greater attention to accuracy in their future transactions.”

Accordingly it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Sir John Scott, Ro. Dundas, W. Grant.*

For Respondents, *Robert Dallas, Wm. Tait.*

THOMAS SMART, Mason in Dundee, *Appellant ;*
The MAGISTRATES and TOWN COUNCIL of }
Dundee, - - - - - } *Respondents.*

House of Lords, 22d Nov. 1797.

PROPERTY—ACCESSION—SEA SHORE—BURGH.—A proprietor of a tenement within burgh, whose property is bounded by the sea flood, cannot acquire the vacant space of ground left by the sea, be-

tween his property and the sea flood, such soil belonging to the magistrates of the burgh, for the benefit of the community.

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The appellant, possessing a tenement and piece of ground in the town of Dundee, described in his title-deeds as “ All “ and whole that *enclosed* yard, lying within the burgh of “ Dundee, bounded by a tenement of land and yard be- “ longing to the heirs of William Mitchell, ship-builder in “ Dundee, and another small tenement, belonging to the “ heirs of James Kay, on the east, the *sea flood upon the “ south*, a yard belonging to David Laird of Straithmartin “ on the west, and by the street on the north parts, with all “ right, title, and interest, claim of right, property, and “ possession, &c.”

The town of Dundee lies at the mouth of the river Tay. The sea flood at one time had washed the southern boundary of the appellant's tenement, but now, from various causes, there was a considerable space of ground between his south wall and the sea flood; the magistrates of the burgh having from time to time taken possession of this vacant ground, the appellant raised action of declarator to have his right to the same fixed and determined; contending that in all the title deeds of his property, the same was described as *bounded by the sea flood* on the south. That it was so bounded when he purchased the property—that this being his boundary, he was entitled to all within these bounds, and, of consequence, to the vacant space of ground in question, whether the same has been gained or occasioned by the gradual retiring of the tide, or whether the soil has been recovered from the sea by an *opus manufactum*, and that the sea flood being his boundary, he was entitled to follow the course of the river wherever it went. In their defences, the magistrates stated their title as a corporation, to enjoy certain rights and privileges, and to acquire for the benefit of the community, all the rights thereto belonging. They admitted the doctrine, that when the property of a proprietor is bounded by the sea or the river, he has a right to the soil that may be acquired from either; but that this did not apply to a property described as an *enclosed* garden within burgh, where the magistrates, as an incorporation, are entitled to all the soil not expressly granted away. Besides, the appellant's title was defective. He had only a base infestment, and no charter to show from the superior, which could not compete with the respondents' title of the burgh and possession.

The Lord Ordinary (Monbodo) held, “ that the magistrates,

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in so far as concerns the river and frith of Tay, had only right to the same for the purposes of navigation, and that, as the pursuer's property was described as bounded on the south by the sea flood, he had a right to whatever land the sea leaves adjoining and opposite to his property, or that he might acquire by any *opus manufactum*, not prejudicial to the navigation." But, on reclaiming petition, the Court altered, sustained the defences, assoilzied the defenders, and decerned : And, on a second reclaiming petition, they adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The appellant purchased a piece of ground in question, situated in the burgh of Dundee, bounded by the sea flood, the value of which considerably enhanced its price. He then proceeded to embank a part of the sea-shore, when he was interrupted by the magistrates of Dundee, who proceeded to embank the remainder of the beach, besides seizing that portion of it which had been taken possession of by the appellant. The question thus came to be, whether the appellant, whose property is bounded by the sea flood, is entitled to all the accession of ground and soil which the sea flood leaves unoccupied opposite to his property? He humbly submits, both by the principles of the Roman law and the law of Scotland, that such ground belongs to him, whether acquired by the operation of nature, or of the works of human industry. By the Roman law, banks of rivers, though navigable, belonged to the adjacent proprietors. That the shores even of the ocean, are capable of occupancy, although this always subject of course to the rights of navigation and commerce, which must not thereby be hurt, nor the rights of the community. Whether, therefore, the Tay at Dundee be considered merely as a navigable river, or as a part of the ocean, the right of the appellant is, on either ground, clear; because in the law of Scotland, no difference exists between the one right and the other. In both, the sovereign is the trustee for the public, and as such has a right to prevent all appropriations, such as would impede navigation, render it dangerous, or hurt the interests of commerce: That all grants in favour of incorporations or burghs is of the same nature. In particular, a grant of a port and harbour, gives to a certain extent the same privileges as possessed by the sovereign within a defined space, and always for the purposes of navigation and commerce; but this leaves unimpaired the right of proprietors bounded by the sea flood, of gaining

whatever ground the sea may leave adjacent to their own property. In the present case, the magistrates wish to deprive the appellant of this right, by asserting that the burgh has a right to all the unoccupied soil so gained, as a pertinent of the greater right of the burgh, apart altogether from the purposes of navigation or commerce. The appellant humbly submits that there is no law for this.

Pleaded for the Respondents.—The reference to the civil law, and to the cases in the law of Scotland, are all inapplicable to the present case. The doctrine, that a proprietor, whose property is bounded by the sea flood, is entitled to gain all the vacant ground left between him and the sea, is indisputable, where no other can show a preferable title to that ground; but such law does not hold with reference to a tenement within burgh, where the incorporation is entitled to all the soil not expressly granted away. A property so bounded within burgh is a limited grant, just as if it had been stated to be bounded by another tenement; because the whole territory of the burgh belongs to the magistrates as a corporation, and, in particular, the bed of the river and sea; and it is in evidence, that they have been in immemorial possession, and have from time to time feued, or made grants of the soil so acquired, without challenge. This general right, therefore, of the respondents to the whole territory of the burgh can only be counteracted by clear titles produced by the burgesses or feuars, containing an express conveyance of such. The appellant has produced no such title; and no title even to his enclosed garden sufficient to protect that possession, were the respondents disposed to quarrel it. He alleged, that he held under the Douglas's family as superior; but, being obliged to abandon this proposition as untenable, he cannot produce any charter from the burgh, and all that he can show, is a minute of council promising a charter to his predecessor. The appellant, therefore, at most, cannot claim an inch of ground beyond the garden or enclosure. What is given to him is not *ager arcifinius*, it is *ager limitatus*. An enclosed garden, and the ground enclosed by the walls of a garden, are one and the same thing.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors be affirmed.
For Appellant, *T. Erskine, W. Adam, Henry Erskine, H. D. Inglis.*

For Respondents, *Sir John Scott, Wm. Tait.*

NOTE.—Unreported in Court of Session.