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

No 33. building-scheme of Mr Fergusson's would interfere with the interest of the Hospital, did, in 1773, institute an action of declarator against Mr Fergusson, and Cleland his author, for having it found and declared, in terms of the proviso above recited, that they could not use the said ground in any other way than by the ordinary labour of plough and spade, without the express consent and liberty of the Governors of said Hospital; and, particularly, that they could not erect buildings without such consent.

Argued in support of the action, Every person making a feu-grant of lands, may insert in his grant such conditions, in his own favour, as he judges proper. This results from the nature of property, that no person is bound to part with it, by his voluntary act, but upon such conditions as he judges proper. And this principle must take place, in its fullest extent, in all feu-grants, which are of the nature of perpetual assedations, or leases made for payment of rent, and are thus properly described by Lord Bankton, vol. 1. p. 556. § 53.; Parl. 1457, c. 71. Such being the nature of feu-grants, it follows of consequence, that they ought to be strictly interpreted against the grantee, and favourably constructed for the granter, so that he may be held to have granted away no more than he has clearly expressed; and so the law is laid down by all our lawyers, Erskine, B. 2. T. 3. § 9.

The clause which gives rise to the present question consists of two parts, each of them absolute and independent of each other. The first is, "That it shall not be liesom to the said John Cleland, and his foresaids, to dig for stones, coals, sand, or any other thing within the said ground." The second is, "Nor to use the same in any other way than by the ordinary labour of plough and spade, without the express consent and liberty of the Governours of the said hospital had and obtained thereto for that effect." Hence it is plain, that it was made an express condition in his grant, that he was to continue the land a rural tenement, and not to use it in any other way than by the ordinary labour of plough and spade, without the consent of the Governors of that hospital, and, therefore, that Cleland was bound to stand to his agreement, and to perform the conditions of his grant.

Pleaded for the defenders, Neither the principles here laid down, nor the authorities appealed to, can, in any degree, be admitted as applicable to the present state of feudal property in Scotland, or to the situation of our land-rights for these 200 years past, whatever foundation they may have had in the original nature, and first intention, of feudal tenures among us. The rights of the superior have been, by degrees, greatly abridged, partly by statute, and partly by usage. The favour of the law clearly is for the beneficial use of those rights, which are naturally consequent on the power of disposal in the vassal. It is a matter of public and manifest expediency, that all restraints upon property should be strictly interpreted, and that no limitation should ever be implied, whether in questions with the superiors or others.

No 33.

As to the comparison between that species of feudal holdings called feus, and tacks, nothing can be less adapted to the present idea of a feudal right. Vid. Erskine, book 2. tit. 6. § 1.; and the cases of Duke of Argyle against Sir Alexander Murray, 8th December 1739, See APPENDIX; 24th November 1736, Earl of Dundonald, See APPENDIX; and 4th January 1757, Sir William Stirling *contra* Johnston, No 70. p. 2342.

The pursuers endeavour to make their clause consist of two different parts; 1*mo*, A prohibition to dig for stones, &c. within the ground; 2*do*, A proviso against using the ground in any other way than by the ordinary labour of plough and spade. But if this second part of the clause was meant to be separate and independent, the defender would beg leave to know why the first was at all inserted; for, if the last was sufficient to comprehend a prohibition against building, much more was it sufficient to include the lesser prohibition against digging for stones or sand. To make the two parts of the clause independent of one another leads into a tautology, which is absurd; whereas, if we suppose the latter part of the clause to be only explicative of the first, the sense becomes obvious, and the construction natural and consistent.

The general words of the clause cannot, either in law or sound sense, go beyond the particulars which are specified in the preceding part; at least they cannot go beyond particulars of the same nature, being only a more full and anxious declaration of what was meant, that there should be no poaching, or destruction of the subject, but that the vassal should only use the ordinary methods of making the best that he could of the property, *salva substantia*. He was laid under no limitation as to what he should raise upon the surface, whether corn, grass, trees, cabbages, houses, or any other thing by which profit could be made. If he should choose to cover it wish dunghills, which, in that situation, between the town and the country, might yield a considerable rent, he certainly might do so, without either employing a plough or spade, though this would be as great a nuisance as could well be figured, both to the Register Office, and to these elegant buildings which stand next to the ground on the west. It is therefore strange, that the only use the defender should be prohibited to make of the surface of this ground, is that of raising houses upon it, which, of all others, is the most beneficial use, not for the proprietor only, but for the superior, and likewise for the public. Upon inspection of the plan, it will appear, that, by the sub-feus given off by Cleland, the ground is so cut and parcelled out, as to render it altogether unfit for the purposes of a farm, or for any other use than that which seems to have been originally intended, of giving it off in little spots for building.

The judgment of the COURT was: "Find that the defender, Walter Ferguson, is entitled to carry on his buildings on his grounds mentioned in the declarator." And, upon a reclaiming petition and answers, adhered.

Act. *Advocatus, Solicitor, M'Cormick.* Alt. *Ilay Campbell, Ja. Ferguson.* Clerk, *Ross.*

Fol. Dic. v. 4. *p.* 177. *Fac. Col. No.* 83. *p.* 209.

No 33.

*** This case was appealed:

The House of Lords, 3d March 1774, ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors therein complained of, be affirmed.

1781. *March* 9.

Sir JAMES GRANT and Others *against* The DUKE of GORDON.

No 34.
Right of floating timber in a river.—Cruive fishing.

THE Duke of Gordon's right to a cruive fishing in the river Spey was brought under challenge by the proprietors of salmon-fishings in that river, as against the public law, and destructive of the salmon-fishing. They were unsuccessful in this challenge; and the Duke's right was ascertained by the judgment of the Court of Session, upon a remit from the House of Peers, in the year 1777.

In the year 1778, the pursuers, as proprietors of lands adjacent to the river Spey, brought a process against the Duke, concluding to have it found, "That they had a right, at all times, to send floats of timber down the river, and to the navigation thereof, in every way of which it was capable, and to have every obstruction to this right removed; and, that the Duke of Gordon should be obliged to remove all dykes, braes, aud other bulwarks impeding the navigation, and should be prohibited from erecting such for the future."

The object of this action was, the demolition of the cruive dykes, in which, it was said, great alterations had been lately made, very detrimental to the navigation. Formerly, a passage was left at one side, which allowed the currochs or small boats used by the Highlanders, to pass. The dykes were composed of loose smooth stones, which gave way to the least force; so that the floats met with little or no obstruction. Now a solid permanent dyke was made, reaching from bank to bank, which rendered the passage very inconvenient and dangerous.

This process came before Lord Gardenstone, Ordinary, who reported the question to the Lords; and the Duke of Gordon having consented that the pursuers should have right to float timber down the river, from the 26th of August to the 15th of March yearly, the Court gave a judgment in terms of this consent, 26th March 1779. Against this deliverance, the pursuers reclaimed, and

Pleaded; The Spey flows perpetually; it is navigated by rafts; and the inhabitants of the adjacent country have, for ages, made use of it for conveying, downwards to the sea, their timber and other commodities. It is, therefore, a public and navigable river; L. 1. p. 14. De Flum. (See APPENDIX.)

With respect to such, the Roman Prætor provided, "ne quid in flumine publico ripave ejus immittas; qua statio iterve navigio deterior fiat, L. 1. § 14. 15. De Fluminibus. Deterior statio itemque iter navigio fieri videtur, sive derive-