use freedom with all other water within our bounds. And the distinction is sensible; for nothing properly can be considered as a part or branch of a river, but what, like itself, has a constant flow. No 28.

The Judges came generally into the opinion, that if the lakes were supplied with water, whether by springs or otherwise, in such a quantity as not only to make up what was lost by evaporation, but to occasion, over and above, a constant discharge into the river, the lakes upon that supposition must be held branches of the river which no man had power to divert from its natural course. But it appearing from the proof, that there was not a constant run of water from the lakes into the river, nor any run except in a wet season, it was found, "That the defender, proprietor of these lakes, lay under no restriction from using them as he pleased, and he was accordingly assoilzied."

*Sel. Dec. No* 259. *p.* 331.

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1768. *July* 1. Mrs Mary Kelso *against* William and George Boyds. No 29.

If a superior heritor can divert a rivulet from the inferior tenement?

The question was, whether the defenders were intitled, for the purpose of watering their meadows, to divert a rivulet, which passing through their property, run into that of the pursuer, from whom they held their lands in feu.

There was no servitude constituted in favour of the pursuer by grant, nor was the use of employing the water for fertilizing her meadows alleged to have subsisted 40 years.

*Argued* for the defenders: Though it is not in the power of a superior heritor, by any *opus manufactum*, to force the water out of its natural course, upon the lands of his neighbour, and to his prejudice, yet he is entitled to apply the water on his own grounds to every necessary and proper use; he may even prevent it from descending upon his neighbour's grounds entirely, if this be not done *in æmulationem*.

The distinction is pointed out in various texts, as L. 2. § 9. L. 1. 21. D. De acq. et acq. pluv. arc. L. 10. C. De serv. et acq.: And the reason of it is given in L. 21. § 23. D. eod. Nature has imposed a servitude upon inferior grounds, of receiving the water of the superior, which is understood to be made up by the soil and manure which the water brings along with it; and, at any rate, must be submitted to by the proprietor, from the necessity of the thing, without any conventional servitude. But there is no such natural servitude upon the superior heritor, and law could not impose it without injustice, since he derives no advantage from the inferior. Accordingly, Lord Bankton lays it down, II. 7. 29. that, "the owner of the higher ground may wholly intercept the water within his own grounds, and hinder it from running into the lower, unless the heritor has a servitude upon him."

No 29.

*Answered*: The pursuer has not perhaps instructed a practice for 40 years, of artificially diverting the water for the use of her meadows, but, from time immemorial, the rivulet has overflowed them naturally, and thereby contributed to their fertility.

That a navigable river cannot be diverted is laid down L. 10. § ult. D. De acq. et aqu. pluv. The same doctrine is established with respect to smaller runs of water, L. 4. 7. C. De servit. et aqu. And this is not contradicted by the laws referred to by the defenders, which will be found to relate not to perennial runs of water, or rivulets, but to collections of rain-water, falling upon the superior grounds, or to springs rising in them, which, according to the doctrine of those laws, may be applied to the necessary uses of the proprietor.

Lord Stair gives his opinion, that, " without a servitude, water may not be altered or diverted from its course," II. 7. 12. And so it was decided, 25th June 1624, Bannatyne *contra* Cranston, No 3. p. 12769.; and more lately in the question between the Town of Aberdeen and Menzies, 22d November 1748, No 16. p. 12787.

" THE LORDS found, that the defenders have no right to divert the water of the rivulet within their grounds, so as to prevent its returning into its natural course, upon entering into the lands of the pursuer."

Act. *Rae.* Alt. *Macqueen.*

*G. F.* *Fol. Dic. v.* 4. *p.* 175. *Fac. Col. No* 68. *p.* 307.

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1768. *July* 29.

WILLIAM RALSTON, Surgeon in Glasgow, *against* GAVINE PETTIGREW.

No 30.

One cannot use one's property so as to do real damage to that of another.

THE defender, proprietor of a field in the town of Glasgow, consisting of some acres adjacent to a garden belonginig to the pursuer, having found clay fit for making bricks, erected a brick-kiln about thirty feet distant from the march

The pursuer brought an action, setting forth, that this brick-kiln did damage to his garden, and concluding, that the defender should be decreed to remove it to such a distance as that it might be attended with no prejudice to the pursuer's property.

A proof having been allowed before answer, it appeared, that part of the march-hedge opposite to the kiln was dead, and that the trees, bushes, and grass in the pursuer's garden, for some way from the march, had suffered by the heat of the kiln.

*Pleaded* for the defender: Every person is entitled to use his property in the way that may be most profitable to him, though a consequential damage should thence arise to his neighbour. From this general principle have sprung the variety of servitudes that make such a figure in the law, and which are nothing