No 8. *Observed*, That in petitory actions it was indeed necessary to allege a wrong done, or a right withheld, but not in declarators.

THE LORDS repelled the objection to the pursuer's declarator, and found he had a right in terms of the act 1592, and that it was not lawful for the Crown to work the said mines, or set them in feu or tack to any other person.

D. Falconer, vol. 2. No 120. p. 137.

1760. *June* 20.

JAMES EARL of MORTON *against* DAVID COVINGTREE of Newark.

No 9.
The sea-weed, of which kelp is made, belongs to the heritor whose lands lie next to the shore, in virtue of his grant thereof, with wreck and ware.

THE Earl of Morton stands infeft, upon a charter from the Crown, in the earldom of Orkney, and lordship of Zetland, with the lands, privileges, and pertinents, &c. thereto belonging, as well by sea as by land, with wreck and ware.

In Orkney, the lands are frequently distinguished by the denomination of penny-lands; and eighteen of these penny-lands are understood to compose what is called an urisland.

The Earl of Morton, in virtue of the above charter, is proprietor of fifteen penny-lands in the urislands of Watland and Skealon, in the parish of Deerness.

Mr Covingtree of Newark is proprietor of the lands of Newark and Air, extending to nine penny-lands, lying nominally within the said two urislands, under a charter from the crown of these and other lands, " cum omnibus mossis, moris, maresiis, wreck, wair, waith, &c. ac omnibus pertinentibus quibuscunque, tam non nominatis quam nominatis, tam subtus terra quam supra terram, procul et prope, ad prædictas terras pertinen."

The greater part of these lands, belonging to Newark, lie in a continued stretch along the sea-shore, and the Earl's lands, within or behind them; only a small part thereof extending to the shore, at the end of Newark's grounds; and, in some places, at a distance from the sea, part of their grounds are intermixed.

The tenants of both had been immemorially in use of carrying off the sea-ware cast in on the shore, for the manure of their lands.

This they used to divide in some proportion to their respective penny-lands; and the Earl's tenants of his inland grounds were suffered, by Newark's tenants, to come through his grounds, and carry off their shares of that wreck.

Of late, the manufacture of kelp was introduced into that country. The weed proper for making it, is not the loose ware thrown in by the sea, but what is there called tang, which grows upon, and adheres to the rocks, and is cut off from them at low water. Newark's tenants begun to carry on that manufacture successfully, upon the shore of his own lands; and thereupon the Earl's tenants attempted to do the same on those shores, but were interrupted.

The Earl thereupon brought an action before the Sheriff against Newark, for supporting his tenants in the possession of making kelp on those shores; and the Sheriff decerned in the Earl's favour. No 9.

Newark obtained a suspension, and repeated a declarator of his own exclusive right to the property of those shores to which his lands are adjacent, and to the cutting of tang, and making kelp thereupon.

Pleaded for the Earl, It is agreed, that wreck and ware, and every thing which is the natural growth of the sea, is *inter regalia.* Here the parties have equally grants from the Crown of wreck and ware; but as these are general, they are only proper titles of prescription of an exclusive right, by possession, on any particular part of the coasts. The lands of the parties lie runrig or rundale, and their possession of the sea-ware has been joint, conform to their respective shares or penny-lands of the two urislands, which seem to have been originally entire tenements, though now divided into penny-lands. Their right and interest in the shores and ware, &c. must therefore be common or joint, according to their possession, in the same manner as if one original grant had been made by the Crown to the several proprietors of those urislands of the wreck and ware on the coast thereof, conform to their several proportions of the urisland. Newark's having the property of most of the land next the shore, makes no difference, as discontiguity does not exclude the Earl's interest, under the grant and possession of what is *inter regalia.* So it has been found in the case of salmon fishings; and in the same manner in the case of mosses and muirs, which are not *inter regalia*, a joint property may be constituted on them by possession solely as part and pertinent of other lands to which they are not contiguous.

Answered, for Newark, 1*mo*, That his titles from the Crown are more ancient than the Earl's, as he refers to a charter upon record to one of his predecessors, as far back as the 1632, whereas the Earl has only produced a charter in 1743. If, therefore, Newark's titles are broad enough to give an exclusive right, they must be sustained as preferable. 2*do*, With us the sea-shores, though still common for the uses of navigation, are understood to be *inter regalia*, and the property thereof may be given by the Crown to a subject. A gift of lands, with wreck and ware, however, neither has been, nor can, to any purpose, be granted, excepting where these lands are in some part bounded by the sea and its shores; and then such a grant does imply an exclusive right to the shores adjacent to the lands, with the whole produce thereof, subject only to the uses of navigation, without the necessity of prescription to support it, Craig, L. 1. D. 16. § 42.; Skene, title, WRECK and WARE. The Earl's charter contains some lands bounded by the sea, and so far he may have right to the shores; but as Newark, on the other hand, has a grant from the Crown, not only of his lands lying next to the sea, but of the wreck and ware on the shores thereof, he has thereby an exclusive title to the said shores adjacent to his lands. Though part of the parties' lands are interjected together, yet the bulk of them are nei-

No 9. ther runrig nor rundale, and Newark has a great track of ground next the shores in question. There is no evidence, nor even tradition, of each urisland having been once a distinct tenement. That name, and the lesser proportions of penny-lands, are merely descriptive appellations, such as, in other parts, forty-shilling lands, &c. *3tio*, The case of salmon fishings is different; for though *inter regalia*, and frequently granted with lands, yet such a fishing is considered as a distinct tenement; so that a right thereto may, and does often subsist, without any concomitant grant of lands; whereas there is no instance of wreck and ware being granted separate from lands that are contiguous to the shore. Mosses and muirs not being *inter regalia*, can afford no rule for this case, though, if the circumstances are supposed parallel, the decision will be agreeable to Newark's plea. For example, if a moss lies within one heritor's lands, and another at a distance has been in use only to get peats or turf from it, the property would be held to belong to the contiguous heritor, and the other to have only a servitude. And, *4to*, The possession of the Earl's tenants, of getting sea-ware for the use of their lands, may have established a proper predial servitude for continuing them in that possession, but can give them no right to extend that servitude, or encroach on Newark's property in the shores, and tang growing thereon, which they have never possessed, and which is proved to be a weed quite distinct from the ware commonly used for manure; though, in some other places of Orkney, where they have no ware thrown in by the sea, they may have applied tang in that way, before the manufacture of kelp was known.

"The Lords found, That the Earl of Morton, as heritor of a part of the urislands of Watland and Skealon, has no right to cut ware or tang for making of kelp upon the rocks or shores of Newark and Air; and decerned and declared accordingly; and assoilzied Newark from the process at the Earl of Morton's instance, reserving to the Earl, and his tenants, the servitude of carrying off from the shore of the two urislands of Watland and Skealon, or Air, what wreck and ware shall be cast thereupon, in proportion to his penny-lands in the two urislands, conform to use and wont."

Act. *J. Monro, F. Garden.* Alt. *D. Rae, Lockhart.* Clerk, *Gibson.*

D. R. *Fol. Dic. v.* 4. *p.* 220. *Fac. Col. No* 221. *p.* 406.

See Appendix.