

1776. November 22. JOHN and THOMAS KELLY *against* WILLIAM RAMSAY of Preston.

REGALIA—CHARTER.

A clause *cum piscationibus* in the *tenendas* of a royal charter, though followed with possession, does not convey the exclusive privilege of an oyster-fishing *in mari*, even although the lands had been a barony.

[*Supp. V.* 445.]

COVINGTON. A grant of a barony will not comprehend a part of the sea or of a navigable river. *Cum piscationibus* can only apply to fishings which may chance to be within the barony. The grant, here, is only in the *tenendas*, which being the operation of the party himself, not of the Barons of Exchequer, is not much regarded. I will not interpret possession to the clause in the *tenendas*, but to the prior right which the party had of fishing in common with the rest of the king's subjects. Here, then, is neither title nor possession.

MONBODDO. There is a distinction between white-fishing in the sea, and a fishing of oysters. *White-fishing* is *juris publici*, and cannot be acquired by grant; but a fishing of oysters may. The only question is, Whether such right is here acquired by prescription? And I think it is not.

KATMES. The Crown has no right to give away an oyster scalp: and supposing it had, there is no exclusive possession here.

HAILES. If the right of the Crown is to be tried, it is necessary that the officers of state should be made parties. This question was the subject of a hearing, and of informations, many years ago, between the Crown and the York-Building Company, though I believe the question was not decided. It is certain that the Court, in Lord Prestongrange's case, supposed the Crown to have the right. But this is not necessary for the decision of the present case. *Here* there is no effectual grant of a barony, and no intention in the Crown to bestow the exclusive fishing claimed. Neither is there that exclusive possession which is necessary, at any rate, for one that pleads on prescription.

PRESIDENT. I had always a doubt of the Crown's right to bestow what was *in alto mari*; but it is impossible that a clause in the *tenendas, cum piscationibus*, can give an exclusive right to an oyster-bed seven miles off. The case of salmon-fishings is very different, for they are within the barony.

GARDENSTON. My opinion is founded totally on the want of possession. If the Crown had power to grant, we can go by no other rule but that which prevails in the case of salmon-fishings.

On the 22d November 1776, "The Lords found that the pursuer has no exclusive right within the limits libelled; and therefore, that he cannot debar the pursuers."

Act. D. Dalrymple. *Alt.* H. Erskine.
Reporter, Gardenston.