

security to the creditors, for the debts are a charge against the whole estate, but it does not alter the course of succession, or the character of the debts, or the incidence of the burdens, or the rights of relief emerging on payment. If there is no special provision in the deed excluding relief, or directing distinctly the application of particular funds to payment of particular debts, the general obligation to pay debts, whether laid on the heir in a grant of heritage, or laid on the executor in a grant of moveables, will not affect the rights of relief. Special words are, I think, necessary to alter the rights of the parties. In this case there are, in Gilbert Douglas' deed, no special words affecting the relative rights of the heir in the heritable estate and of the residuary beneficiaries; and, in the absence of such special words, I think the heritable estate must be viewed as passing to the heir *cum onere*. The result is, that Gilbert Douglas' trustees were not entitled to apply the moveable estate to payment of the heritable debts secured over the landed estate. The cases of *Carnoustie v. Meldrum*, and *Bain v. Reeves* (29th Jan. 1861, 23 D. 416), mentioned by your Lordship, tend to support the views which I have explained; while the cases of *Campbell* and *Coventry* rest on special grounds. For this reason, I am of opinion that the pursuers, trustees of Gilbert Douglas, are not entitled to deduct from the fund *in medio* the £7700 applied to the payment of the debts heritably secured over Douglas Park and Boggs.

But on the other ground—that taken by the Lord Ordinary—I also think the judgment right. This is a question between the trustees and the residuary legatees of Gilbert Douglas. The heir of Douglas Park is not claiming. The trustees declare they are not contending for his interests. The widow's trustees are not claiming for her estate. They cannot, for her will excludes them, and her final and conclusive intention must be held as expressed by that will. This is a plea by Gilbert's trustees to support a refusal to account for this £7700. The debts have been paid. The creditors have no claim. They were paid by Mrs Douglas out of her funds. The discharges so state, and her will so states. The trustees have not proved that the payments were made otherwise than as she has stated. If made by her, she could have taken assignations. She thought she had, and that thought tends to support the view that she had paid the debts. But, though she got no assignations, she got discharges stating that she had paid. She relinquished her claim against the trust-estate. The effect was to throw the £7700 into the trust, and in the absence of special provision, into residue. As against the claim by the residuaries, there is no opposing claim. For whom do the trustees maintain their pleas? Not for the creditors, nor the heir, nor Mrs Douglas' representatives. Then *cadit questio*, for there is no competing claim. These trustees cannot maintain a claim, except for behoof of some party interested in the trust. They cannot deduct from the fund *in medio* a sum which they are not bound, as trustees, to dispose of. It has not been easy to obtain from them an explanation of the disposal which they contemplate. But ultimately I understood them to say they meant to hand it to Mrs Douglas' trustees (the same persons, as I believe) as part of her estate. This mode of disposal is, I think, negated by her will, which is the final and conclusive expression of her intention. I am therefore of opinion that the judgment of the Lord Ordinary is right.

Agents for Reclaimers—Tods, Murray, & Jamieson, W.S.

Agents for Respondents—Mackenzie & Kermaek, W.S.

Friday, January 10.

## SECOND DIVISION.

DUCHESS OF SUTHERLAND *v.* WATSON  
AND OTHERS.

*Property—Mussel-scalps—Fishing—Express Grant—Barony—Prescription—Patrimonium principis—Jus Publicum.* Held (1) that the right to take mussels from the shores and sands of the sea is not a *jus publicum*, nor held by the Crown as trustee for the public, but forms part of the patrimonial estate of the Crown, and, as such, is capable of alienation; (2) that an express grant of mussel-scalps, or of the right to gather mussels, is not indispensable to constitute the right in a subject, but that that may be acquired under a general title containing a grant of fishings, followed by exclusive prescriptive possession. Observed (*per* Lord Neaves) that the Crown is *dominus* of the *solum* of the sea within the boundary-line of the dominions of the British Empire.

This was an action at the instance of Her Grace the Duchess of Sutherland and Countess of Cromartie, and of the Duke, for himself and as her administrator-in-law, against certain fishermen and women residing at Cromarty, and also against Alexander Matheson, Esquire of Ardrross, proprietor of the lands of Ballintraid and Pollo, and Sir Charles William Augustus Ross of Balmagown, Bart., proprietor of the lands of Rhives or Portleich. The summons concluded for declarator "that the pursuer, her Grace Anne Mackenzie Duchess of Sutherland and Countess of Cromartie, has the sole and exclusive property in and right to the whole mussel-beds, scalps, or fisheries on the shores and sands of Nigg, and in the Bay of Cromartie, within the boundaries hereinafter specified, to wit, bounded on the north by the lands and barony of Tarbat, the property of the pursuer the Duchess of Sutherland and Countess of Cromartie; on the west by the said lands and barony of Tarbat, the lands of Rhives or Portleich, the property of the said Sir Charles William Augustus Ross, and the lands of Ballintraid and Pollo, the property formerly of Kenneth Macleay, Esquire of Newmore, afterwards of Thomas Ogilvy, Esquire of Corriemony, and now of the said Alexander Matheson; on the south-west by a line measuring 4360 feet in length or thereby, drawn from the march between the said lands of Ballintraid and Pollo and the lands and barony of Invergordon into the Firth of Cromarty, bearing 25 degrees and 30 minutes north by west; on the south by a line measuring 2 miles and 3400 feet in length or thereby, drawn from the extremity of the said other line last mentioned, bearing 7 degrees and 30 minutes east by north, and meeting the course of the burn called the Pot Burn, as the same is left by the sea at ebb tide; on the east by the said Pot Burn, to the point where it joins the march of the said lands and barony of Tarbat," as the said boundaries are marked by a red line on a plan of the said mussel-scalps, or beds, or fisheries, prepared by Alexander Maclean, land-surveyor, Rosskeen, produced with the summons, "and that the pursuer, the said Duchess of Sutherland and Countess of Cromartie, has the sole

and exclusive right and privilege of dredging, fishing for, gathering, and taking and carrying away mussels from the said whole mussel-beds, scalps, or fisheries comprehended within the boundaries foresaid," and for decree ordaining the defenders, the Cromarty fishermen, and all others, "to desist and cease from dredging and fishing for, and from taking or carrying away, or in any way raising or disturbing, without the leave and authority of the pursuers having been previously asked and obtained, any mussels from the said mussel-beds, scalps, or fisheries situated as aforesaid, in all time coming," and for interdict against them "from henceforth troubling or interrupting the pursuer, the said Duchess of Sutherland and Duchess of Cromartie, in her rights of property in and peaceable possession of the foresaid mussel-beds, scalps, or fisheries, and in her sole and exclusive right of dredging and fishing for and taking and carrying away mussels therefrom."

Neither Mr Matheson of Ardross nor Sir Charles Ross entered appearance to defend the action, but defences were lodged by the fishermen, and a record was made and closed upon the questions raised between the pursuer and them.

The pursuer's claim of exclusive right to the mussel-scalps or beds in question was founded both upon title and upon possession.

The title upon which the pursuer founded was her infetment as heritable proprietrix of the lands and barony of Tarbat, comprehending, *inter alia*, "All and Sundry the lands of Milntown of Meddat and the miln thereof, with the office of principal sergeant or mair of the Earldom of Ross, with the mair's croft in Balconie, the croft called the merklands of Tullich, with the pertinents, with power to the said Anne Duchess of Sutherland, and her successors in the said lands and estate, to depute and substitute depute or deputies one or more in the said office of principal sergeant or mair, and to collect, intromit with and uplift the yearly fees and duties belonging to the said office, together with the manor-places, houses, biggings, yards, orchards, dovecots, cunninggeries, milns, multure, woods, fishings, annexis, connexis, parts, pendicles, and pertinents of the said lands and others above written, together with the salmon-fishing and power of killing and catching other fishes, as well small as great, in any part, as well upon the sands of Nigg as upon and near the said lands of Milntown, with power also to the said Anne Duchess of Sutherland and her foresaids to have and build zairs and stells on any part of the said sands upon the said lands or sands of Nigg, and of killing salmon on any part of the said lands, and of having and keeping boats, nets, and other materials for that effect; and All and Whole the lands of Kilnimuir, Kelnaceroch *alias* Delnaceroch, and Milnamorich, and All and Whole the lands of Pitcandie *alias* Pitveandie, Glacktamaline, with their parts, pendicles, and pertinents lying of late within the sheriffdom or Ross and now of Cromarty," together with various other lands, baronies, burghs of barony and regality, teinds, fishings, and others therein described; and "All and Whole the full power, warrant, right, and title of planting and preserving oyster scalps, one or more, within the Bay of Cromarty, from the two sutors thereof, as far as Cullie-cudden on both sides of the said Bay of Cromarty, and particularly within the Barony of Tarbat, with the sole privilege to the said Duchess of Sutherland, and her foresaids, and those having warrant and licence from her or them allenarly, of fishing and taking oysters within the said bounds . . . .

all which towns, lands, baronies, milns, miln lands, teinds, patronages, burghs of barony and regality, and others particularly and generally above mentioned, are united, annexed, created, and incorporated in an hail and free barony, to be called the barony of Tarbat," conform to charter under the Great Seal in favour of the deceased George Earl of Cromartie, and John afterwards Earl of Cromarty, and the heirs of taillie therein mentioned, in fee; of date the 15th day of July 1698; and by the said charter "the castle, town, and fortalice of Milntown of Meddat is declared to be the principal messuage of the said barony of Tarbat."

The pursuer was infet in the said lands, barony, and others foresaid, conform to disposition and deed of entail executed by her in favour of herself and the other heirs of taillie therein mentioned, dated 16th October 1861, registered in the Register of Entails the 6th Day of December thereafter, and, along with warrant of registration thereon on her behalf, in the General Register of Sasines at Edinburgh the 20th day of December and year foresaid, and confirmed by Crown writ of confirmation engrossed thereon, dated 6th, and registered in the Register of Confirmations and Resignations 20th August 1862, all recorded in the Books of Council and Session 22d January 1863. The pursuer and her predecessors and ancestors have been duly infet in the said lands, barony, and others foresaid under Crown charters and titles, for a period greatly exceeding forty years.

The local situation of the mussel scalps or fisheries in question is explained in articles 2 and 3 of the revised condescendence, which are as follows:—

"The said lands and barony of Tarbat, including the lands of Milntown and others foresaid, lie and extend along the west and north shores of the Bay of Cromarty, within which the said sands of Nigg are situated, and the said sands of Nigg are *ex adverso* of the said lands and barony of Tarbat, and near to the said lands of Milntown.

"On the shores and sands of Nigg, and in the Bay of Cromarty, adjacent and opposite to the said lands and barony of Tarbat and others, in the counties of Ross and Cromarty, there are valuable and extensive mussel beds, scalps, or fisheries, which mussel beds, scalps, or fisheries lie within the boundaries particularly set forth in the conclusions of the summons. The said mussel-beds or scalps are near to the said lands of Milntown. The said mussel-scalps are generally comprehended within the red line marked on the plan referred to in said conclusions. The lands of Rhives or Portleich, and the lands of Ballintraid and Pollo, mentioned in the said conclusions, formerly belonged to the predecessors and ancestors of the pursuer, and formed part of the said barony of Tarbat."

The scalps are thus in the precise local situation within which the power of killing and catching other fish as well as salmon is expressly conferred upon the pursuer, and it is not suggested that any other kind of fishing than salmon and mussel fishing has ever been or could be practised there. The defenders in their first statement say, "Said scalps are chiefly above low-water mark, and are left dry at ebb-tide;" and this is admitted by the pursuer. The locality, therefore, is plainly one in which white fishing is out of the question, and in order to give a meaning to the words of the grant, it must be taken to relate to mussel fishings.

The following were the pursuer's averments as to possession:—

"For time immemorial, or at all events for a

period much exceeding forty years, the pursuer, the said Duchess of Sutherland and Countess of Cromartie, and her predecessors, proprietors of the said lands and barony of Tarbat and others aforesaid, have, by virtue of their foresaid charters and the titles and infeffments following thereon, brooked and possessed the mussel-beds, scalps, or fisheries situated within the boundaries before specified, exclusively, continually, and together, by every mode of possession of which the subjects were capable, and that without any lawful interruption made to them therein. In particular, during the said period they have repeatedly let these mussel beds, scalps, or fisheries to tenants for a yearly rent, and whenever not let to tenants, they have held the same in their own hands, and received and uplifted from parties purchasing the mussels the price thereof. The rent or profit thus arising has occasionally exceeded £300 sterling per annum.

"For time immemorial, or, at all events, for a period greatly exceeding forty years, the pursuer, the Duchess of Sutherland and Countess of Cromartie, and her predecessors, have been in the constant and uninterrupted practice of protecting and preserving the said mussel-beds, scalps, or fisheries, and preventing all others who had not their permission from fishing for and carrying away the mussels therefrom. They have also bestowed care, and expended considerable sums from time to time in the cultivation and improvement of the mussel beds. They have spread the mussel brood or spawn and have frequently caused the star fishes, which are injurious to the mussels, to be gathered and removed from the said scalps, and have otherwise been at pains and expense to improve the same. The value of the said beds, scalps, or fisheries has been materially increased by this attention and outlay.

"The mussels from the said beds, scalps, or fisheries, are in great request by the fishermen on the shores of the Moray Firth and adjoining districts, who have for time immemorial, or, at all events, for a period much exceeding the years of prescription, been in use to come, and till lately came great distances with their boats in order to obtain a supply, for the purpose of using the same as bait in prosecution of the white fishing. For time immemorial, or, at all events, for a period exceeding forty years, the pursuer, the Duchess of Sutherland and Countess of Cromartie, and her predecessors, have been in the constant practice of selling the mussels of the said mussel-beds, scalps, or fisheries, at regular prices, fixed by them from time to time, to fishermen who came and applied for leave to take the same, and the price so fixed by the said pursuer and her predecessors has been regularly levied by and paid to them and their servants and others acting on their behalf.

"The pursuer, the Duchess of Sutherland and Countess of Cromartie, and her predecessors and authors, have repeatedly had their right to the said mussel-beds, scalps, or fisheries, judicially recognised, and have had effect given thereto by decrees in the Sheriff-court.

"The factors, overseers, and others employed by the pursuer, the Duchess of Sutherland and Countess of Cromartie, and her authors, have been in the constant practice of warning off and driving away from the said scalps, beds, or fisheries all who endeavoured to take mussels therefrom without leave first obtained and payment made therefor."

The pursuer complained that in September 1859, and on a variety of subsequent occasions, certain of the defenders and other persons violently invaded the mussel-scalps, and carried away large quantities of the mussels without permission or payment; as also, that they recklessly wasted and abused the said mussel-beds, scalps, and fisheries by carrying away the young mussels, and by disturbing the beds and otherwise.

Besides denying the pursuer's averments as to possession, and alleging that they and the other Cromarty fishermen have from time immemorial enjoyed the free right and privilege of taking mussels from the said scalps, the defenders maintained that the Crown has not and never had power to make in favour of a subject a grant of an exclusive right to mussel-beds, scalps, or fisheries, or to confer upon a subject the exclusive privilege of taking mussels therefrom; and that, even assuming the Crown to have, or to have had, such power, the grant must be express in order to be effectual, and that a title such as that of the pursuer, even if followed by prescriptive possession of the character which she alleges, is not sufficient to give an exclusive right to the scalps or fisheries, or an exclusive privilege of taking mussels therefrom.

The Lord Ordinary (BARCAPLE), in an interlocutor pronounced on 20th February 1866, found that the pursuer's title was not sufficient to give her the exclusive right to the mussel fisheries in question, or to establish such a right in her by prescriptive possession. His Lordship observed in a note:—

"The Lord Ordinary does not think that any principle clearly involving the decision of this question has been hitherto authoritatively settled, and he feels it, in the existing state of the authorities, to be a question of considerable difficulty. There are, however points having an important bearing upon it, which, though they have been the subject of controversy, may now be taken as fixed.

"The exclusive right to mussel-scalps and to take mussels may be conferred by the Crown upon a subject-proprietor of lands. This was decided in the cases of *Grant v. Rose*, in 1764, M. 12,801, and *Erskine v. Magistrates of Montrose*, 7th December 1819, Hume 538; and the doctrine has since been recognised. Thus Lord Corehouse, in the case of the *Duke of Portland v. Gray*, 15th November 1831, 11 Sh. 14, said—'It is settled law that a right to fish oysters and mussels in the sea from the scalp or bed to which they are attached may be appropriated.' Mr Bell (Prin., § 648), says that the 'right is effectual when expressly granted.' To this extent the doctrine must be held to be now established in our law, and it is recognised by the Act 10 and 11 Vict., c. 92. But whether it is essential that the grant shall be express, conferring the right to fish mussels *eo nomine*, and whether even an express grant is sufficient without prescriptive possession, are points which have been controverted, and can hardly be said to have been authoritatively settled.

"The Lord Ordinary is also disposed to hold that it must now be received as settled law that 'the charter of a barony is a good title by prescription to carry salmon-fishing.' The law is so laid down by Mr Bell (Prin., § 754), in accordance with what appears to be the prevalent opinion. On the other hand, though the opinion of (Stair, ii. 3, § 60-69), upon the point is at least ambiguous, and is followed in adverse sense by Mackenzie, (Inst. ii. 6 3), the Lord Ordinary thinks it must be held that a charter of barony which does not mention salmon-

fishing will not carry that right without the aid of prescriptive possession. It remains to be inquired whether the same principles can be applied to the different right to mussel-beds which is now in question.

"In the case of *Grant v. Rose* there was an express grant of mussel-scalps. It may be taken as the leading authority for the proposition that mussel-scalps may be appropriated by express grant; but it can go no further.

"In the case of the *Duke of Argyll v. Robertson*, the grant was in fishing as well in salt as in fresh waters, with no mention of mussels. The Lord Ordinary in that case stated that 'he was not aware of any authority for holding that such a title would be sufficient to confer an exclusive right to fish for mussels on the shores of the sea, even if it had been followed by exclusive possession for the prescriptive period.' As possession was not proved, it was unnecessary to determine that point; but the present Lord Ordinary, after going over all the authorities, concurs in the view so expressed by Lord Mackenzie.

"As the pursuer's title contains an express grant of fishings, it does not appear to the Lord Ordinary that her case is materially strengthened by the circumstance that it is also a barony title. If fishings had not been mentioned it might have been maintained that a grant of fishings was to be implied in a barony title. In a question as to salmon-fishings, a barony title is held to imply a grant of fishings, which, by aid of prescriptive possession, may be construed to include salmon-fishings. If a barony title can by prescriptive possession support a claim to mussel-scalps which are not mentioned in the grant, the Lord Ordinary does not see any reason which is to him satisfactory why a mere grant of fishings, without erection into a barony, should not have the same effect.

"The Lord Ordinary has come to the conclusion that neither a mere grant of fishings, nor a barony title, nor, as in the present case, both combined, constitute a sufficient title to prescribe an exclusive right to mussel-scalps. He thinks that, in regard to this question, there is a broad distinction in principle between salmon and mussel-fishings. Salmon-fishing, while not granted out, is the patrimonial property of the Crown, in which the public has no right either of property or use. The grant by the Crown to a subject merely transfers the property from one exclusive proprietor to another. The right to mussel-scalps on the shore of the sea or a navigable river is in the Crown, not as patrimonial property, but for public uses, like the shore itself. It may indeed be alienated to a subject, though the principle on which such alienation is sustained is not plain, and its validity must probably be referred to immemorial usage. But the effect of a grant of mussel-scalps is clearly quite different from that of salmon-fishings. It deprives the public of a right which they previously possessed. And such being the nature and consequences of the grant, the Lord Ordinary thinks that, not only is it not to be presumed, but that, consistently with sound principle, it cannot be inferred by construction or established in any way except by a conveyance in express terms. The Crown may have the power to alienate the right from the public, but the exercise of that power, when founded on by the grantee against the public, must, it is thought, have been carried out so as to be complete in itself, without the aid of possession by the grantee to construe it."

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The pursuer reclaimed.

YOUNG, DONNAD, and BALFOUR, for her, argued,—That all rights of fishing are, in common with salmon-fishing, feudal estate by the law of Scotland, and that as such they were all originally vested in the king as paramount superior of the whole feudal estate of the realm. That consequently, other fishings, as well as salmon-fishings, could, by the common law of Scotland, be validly made, as they were in use to be made, the subject of feudal grant by the Crown, and of exclusive right by the Crown grantee. That the lieges had not, by the common law of Scotland, any right of taking even white or floating fish in the narrow seas or public rivers of the realm. That any right which the lieges in progress of time acquired, or now have, to take white or floating fish, is founded solely upon royal license and statutory authority. That there never was any royal license or statutory authority given to the lieges in general to take any kinds of fish other than white or floating fish, and that consequently all other kinds of fish remain at the present day in the same position, as regards the matter of right, as they occupied under the old feudal law of Scotland.

CLARK, WATSON, and MACLEAN, for the defenders, answered,—The right to take mussels from the shores and sands of the sea is *juris publici*,—the right of the Crown being that of a trustee only, and, as such, is incapable of alienation. Even if it were capable of alienation, it could only be conveyed to a subject by an express grant, followed by exclusive prescriptive possession.

At advising—

LORD COWAN—This summons of declarator asserts the right of the noble pursuer to the sole and exclusive property in and right to the whole mussel-beds, scalps, or fisheries on the shore and sands of Nigg, and in the bay of Cromarty. The bounds within which this right is asserted are specified in the summons, and delineated on a plan to which it refers. At the outset, it is necessary to observe that the mussel fishery thus asserted cannot be stated to be in any sense *in alto mari*, being certainly within the *fuuces terræ* which form the entrance to the frith of Cromarty, and on the shore or *solum* of the bay of Nigg, which lies on the north side of the frith, the frith itself running inland in a south-westerly direction. Again, these mussel-beds in the bay of Nigg are admitted in the record to be chiefly above low-water mark, and left dry at ebb tide. This being the locality of the fishery to which the action relates, the title on which the pursuers found is set forth in the record, and is more fully explained in the written argument.

It will be seen that by Crown charter, dated July 1698, various properties belonging to the pursuer are united and incorporated into a free barony. Among other possessions, there are included in the barony the lands of Milntown, of Meddat, and others, together with the subjects therein specified, including among others "fishings," and specially "with the salmon fishing, and power of killing and catching other fishes, as well small as great, in any part, as well upon the sands of Nigg as upon and near the said lands of Milntown;" power is also conferred to erect zairs and stills "on any part of the said sands upon the said lands or sands of Nigg." And there is also conferred by the said charter special power, right, and title to plant and preserve oyster-scalps within the bay of Cromarty, from the two suters thereof, as far as Culliecadden on both sides

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of the bay and within the barony of Tarbat. No special grant of mussel-fishing or of the mussel-scalps *eo nomine* is conferred. The words of the Crown grant, along with the salmon fishing, confer on the grantee the power of killing and catching (*interficiendi seu trahendi*) other fishes. And the contention is, that, having had the immemorial and exclusive possession of the fishing of mussels and of the mussel-scalps long beyond the years of prescription, the Crown grant of fishings in the bay, other than salmon fishing, has been construed and explained and made as legal and effective, as if the charter from the Crown had specifically conferred right to the mussel-beds, scalps, and fisheries in question.

The averments of possession in the record are such as will, if proved, establish the exclusive right alleged by the pursuer, provided the general terms of the Crown grant, with such prescriptive possession following on it, be relevant to establish the right asserted in the summons. The claim of the pursuer is to be allowed to prove these averments of possession; but this has been refused to her by the interlocutor under review, in respect that a mere general grant of fishings cannot by proof of possession, however long and however exclusive, be interpreted to include and carry to the grantee the right of mussel-fishing. Such right, it is said, must be given out by the Crown in specific terms, assuming it to be within the power and competency of the Crown to give such specific grant at all, which the Lord Ordinary, for the reasons stated in his note, does not dispute.

There are thus two questions of general importance on which the parties are at issue. The one is whether it is within the competency of the Crown to grant, even in special terms, a right to fish mussel-banks or scalps as a right to be held in property by any of the lieges; and the other is, assuming it to be within the power of the Crown to confer the right by special title, whether a grant in general terms, as in this case, when followed by prescriptive possession of mussel fishings, is sufficient to carry the right.

I am anxious, at the outset, thus to state the only matter to be decided. For there is no question raised by this record relative to white fishing or the fishing of floating fish in the sea, or along the coast or shore of the sea. On such a question, when it arises, I reserve my opinion. I do not wish the observations I have to make on the two general questions alone in issue here, to apply in any respect to rights of white fishing.

Towards arriving at a sound conclusion as to the sufficiency of the title founded on by the pursuer—when fortified by possession—it is necessary to attend carefully to the grounds on which the competency of a special grant of mussel-fishings, or of oyster fishings (for they stand substantially in the same position), must necessarily rest if it can be competently granted. Were such rights of fishing not such as to fall within the class of patrimonial rights of the Crown, they could not be made the subject of a feudal grant to any of the lieges in individual property. That class of rights which is vested in the Crown as *res publicæ* are inalienable, except in certain special cases, such as rights of harbour or ferry, to which, when conveyed *jure prerogative* to a subject, are annexed conditions to secure their free use and enjoyment by all the lieges. Such is not the case with the right of fishing mussel-banks or scalps in bays of the sea or on the sea shore. It is conferred as a patrimonial

right. No more than a right of salmon-fishing is it accompanied by limitations or conditions affecting its use and enjoyment by the grantee. In the numerous specific grants of oyster-fishing and of mussel-fishing to which the pursuers have referred, there is no instance of the grant being given in any other terms than the right of salmon-fishing is conferred. It is granted as a patrimonial right to be used and enjoyed by the grantee in his own way and at his own pleasure, and not otherwise. This points directly to its being classed among the patrimonial rights of the Crown. And, accordingly, such is the view taken of it by our institutional writers and in recent decisions.

The distinction between the rights vested in the Crown, which are designated by Craig *regalia majora*, and those rights which he designates *regalia minora*, in the passages to which reference is made in the pleadings, has been recognised from the earliest period of the feudal law. The *regalia* of the former class, he enumerates and states "*per feudi concessionem nullum esse transmissibile.*" Those of the latter class, again, are described by him as rights which may be disposed to others, and be the subject of feudal grant to any of the lieges. Once established that fishings for salmon or for other kinds of fish in bays or creeks and along the shore of the sea, fall within the class of *regalia minora*,—the power and competency of the Crown to include them in a feudal grant cannot be disputed. And having in view the situation of the mussel-banks or scalps here in question, it is material to observe the character of the right to the sea-shore itself, and the *solum* of the sea adjoining the coast which is vested in the Crown. Subject to the rights of navigation and of commerce, Stair states expressly that where the sea is enclosed in bays, creeks, or otherwise is capable of any bounds or meiths,—the sea itself may become proper, and the subject of a special grant as regards the shore thereof. This is well explained in a passage from Lord Wood's opinion in *Paterson v. Marquis of Ailsa*, quoted in the pursuer's pleading. Taking this to be the correct view of the law, a special grant of other fishings besides salmon-fishing may certainly be given to the owner of the adjoining lands and estate, more especially where the whole are created by the royal charter into a free barony, and the grant relates to fishings within a defined locality *ex adverso*, and adjoining the baronial lands and estate.

It is not my intention, however, to enter at large on this branch of the question, being satisfied with the reasoning in the Lord Ordinary's note, and with the pursuer's argument, I may only remark that the views entertained by modern lawyers of the established law will be seen from (1) the quotation given from Lord Corchouse's note to his interlocutor in the case of the *Duke of Portland* (15th November 1832), where he states it to be settled law "that a right to fish oysters and mussels in the sea from the scalp or bed to which they are attached may be appropriated;" (2) the passage from Mr Bell's Principles (section 646) in which he says, "a right to take oysters, mussels, &c., which are fixed to the spot, is effectual where expressly granted;" (3) the observation made by the Lord Justice-Clerk, in the recent question of interim interdict in the case of *Sir Coult Lindsay and Others*, to the effect that "it is plainly impossible in the state of the law and decisions, to affirm that the Crown cannot confer a right to mussel-scalps." And (4) the legislative provisions for the protection of mussel fisheries in

Scotland, contained in the 10 and 11 Vict., c. 92, which refer to these fisheries as having been and being the subject of royal grant and of private right.

Holding this branch of the argument, then, to have been rightly disposed of by the interlocutor under review,—the question at issue in this declarator resolves into the inquiry whether the Crown has the power to grant the right asserted by the pursuers by a general grant of fishings in connection with a barony on the shore of which the scalps lie—exclusive prescriptive possession of that kind of fishing having followed upon the grant; or, to state the question in another way, whether a general grant of that kind contained in a Crown title of barony, can be so explained by exclusive prescriptive possession as decisively to ascertain its meaning to be such as the pursuer contends for?

Were it held as matter of law that general terms in a grant from the Crown were incapable of carrying special rights comprehended within the scope of the general terms, because of the grant not mentioning the specific rights asserted to be included within it, even when such rights have been prescriptively possessed by the grantee,—the principle would strike deep into the validity and sufficiency of the titles upon which our landowners in many instances possess their lands and other heritable rights. It is quite usual to confer on the grantee under a general denomination a variety of kindred rights, and which come to be specifically marked out as intended to be within the grant, by the possession that has followed on it for that period of time, which the law has fixed as enough to secure the title from challenge. For example, under the clause of parts and pertinents in grants flowing from parties who have the power, and are under no incapacity to convey the subject to which the grantee asserts right,—his prescriptive possession will secure his title to it if the subject can be fairly brought under the general description. In this respect such grant differs essentially from grants containing no such general terms, or flowing from parties under an absolute incapacity to convey the right asserted by the grantee. There is a title in the one case, while there is no title in the other, on which the grantee can found his prescriptive possession. And it is precisely to such a case that prescriptive possession applies in interpreting the grant. Thus, Mr Erskine (3. 7. 4.) says, "A right or subject may be carried by prescription, though it be not expressed in the prescriber's charter, if he shall have possessed it for forty years as part and pertinent of another subject specially mentioned;" and he adds, "But if the subject cannot by its nature be accounted a pertinent of the lands on which he who claims the subject is infeft, prescription cannot be admitted" as where the grantee is infeft on a bounding charter. The case of the *Magistrates of Perth v. Earl of Wemyss*, 28th Nov. 1829, was decided on that principle. A baronial title was held to carry right to an island, through prescriptive possession as part and pertinent, even in competition with parties founding on a special grant to the island as a separate subject. A general right of common pasturage as attached to the special subject of the feudal grant, in like manner, will carry by force of prescription a servitude of pasturage over the lands of another. And it is only an illustration of the same principle that when a right of "fishings" generally is conferred by the dispositive clause of a charter, it will be a good title to whatever kind of fishing the grantee has enjoyed for

the prescriptive period, which the Crown could have given in specific terms. Thus a Crown title to lands and others *cum piscationibus* does not in itself and unexplained carry the right of salmon-fishing to the vassal, because, as Mr Erskine explains, being a *jus regale*, it is not carried by a charter without an express clause. "Yet," he adds (2. 6. 15), "by our uniform practice, the common clause *cum piscationibus* is a sufficient title for constituting a right to salmon fishing by prescription; so that where the vassal hath been in the uninterrupted possession of it for forty years, such possession, joined to the general clause, establishes a right to that *regale*." This being so, does not the same principle apply to the kind of fishing here in question?

The title founded on by the pursuer contains, in general terms, salmon and other fishings,—“with the salmon-fishing and power of killing and catching (*interficiendi et trahendi*) other fishes” in the locality specified. The proposal is to establish that under the general words “other fishings,” the fishing of the mussel-banks or scalps must be held comprehended because of prescriptive possession. The right of that fishing might have been conferred in specific terms, just as a right of salmon fishing might. But general terms being used in the grant, neither the one nor the other will be held to be carried by the grant itself. Being *jus regale*, a special title, intended to take instant effect from its date, is necessary. But then, as the right may be the subject of special grant in the one case as in the other, prescriptive possession under the general terms of the charter should be as effective in the case of the one right of fishing as it is in the other. No reasonable ground of distinction can be stated for excluding that mode of vindicating mussel-fishing which is effective in vindicating salmon-fishing under the general terms which here occur.

As regards oyster-fishing, there are decisions which proceed upon the principle now stated. The decision in *Kelly v. Ramsay* (22 November 1726, 2 Hailes, 722) proceeded in the first place on defect of title—the clause *cum piscationibus* having occurred not in the dispositive, but only in the tenendas clause; and, in the second place, upon the failure to prove exclusive possession. The only doubt expressed in some of the opinions preserved by Hailes relates to the Crown's right to bestow an oyster-fishing *in alto mari*. It is not stated to be doubtful—assuming the Crown's power to confer a right of fishing by special grant, as in a bay of the sea, or on the sea-shore,—that the grantee may establish, by prescriptive possession under a charter having *cum piscationibus* in the dispositive clause, right to fish oysters in virtue of his general title to fishings. As regards that matter, on the contrary, Lord Gardenstone states, what is not contradicted by any of the other judges, that “if the Crown had power to grant, the Court can go by no other rule but that which prevails in the case of salmon-fishings.” And in the more recent case of *Agnew v. The Magistrates of Stranraer* (27th Nov. 1822) Lord Alloway, whose interlocutor was affirmed by the Inner House without observation, states in his note what he held and understood to be the law and practice in this respect. The title founded on by the pursuer was a royal charter in 1701, which granted the lands and barony of Lochryan with full powers of fishing oyster scalps in Lochryan along the whole shore and lake. The defenders founded upon the charter of erection of the burgh and right of free port and certain privileges, and amongst others *cum piscationibus* in the tenendas clause. The Lord

Ordinary repelled the defences in respect that the burgh charter contained no right of fishing in the dispositive clause; and stated that, notwithstanding the exclusive grant of oyster-fishings in the pursuer's charter, this would not have prevented "any other proprietor with a right of fishing (*i.e.* in the dispositive clause) from acquiring a prescriptive right to fish oysters," but that the pursuer's right could not be lost "except in so far as others had upon a proper title acquired a right by prescription." This is in accordance with the principle held applicable to rights claimed under the general term of part and pertinent or of the general clause *cum piscationibus* as regards salmon-fishing. Then, does not the principle apply with equal force to mussel-fishings?

The recent decision in the *Duke of Argyll's* case, on 17th Dec. 1859, which related to mussel-fishings, requires to be noticed. The grant founded on was of "salmon-fishings and other fishings in salt as in fresh water." It was not a Crown grant; it was not attached to a barony; and even the Crown title of the pursuer's superior was not shown to have any grant of mussel-fishings. A proof of exclusive possession had been allowed, in which, however, the pursuer failed, and the result was absolvitor of the defenders. The Court, in reviewing the proceedings in an advocacy, did not proceed on the insufficiency of the general terms of the title to carry the right, had exclusive possession been clearly proved. On the contrary, the actual question was stated to be, whether under his title the pursuer has had that kind of possession which is necessary to exclude the right of the public under the Statute 1617? And the rubric appears to state accurately enough the import of the judgment to be, that a general grant of fishings will not comprehend mussel-scalps "unless followed by prescriptive possession for the prescriptive period." Here the grant flows directly from the Crown. It is attached to a baronial estate. It relates to scalps attached to the shore *ex adverso* of the lands upon the sands of which the right of fishing and dredging for other fish than salmon is expressly conferred. The case of the *Duke of Argyll* seems, therefore, *a fortiori* to support the relevancy of the proof offered by the pursuer in support of his right and title. Accordingly, in the earlier case of *Erskine v. Magistrates of Montrose*, where the title founded on was a general one, "*cum piscariis super dict. terras*," and so forth, all united unto the barony of Dun,—the Court adhered to an interlocutor of Lord Alloway, who found "that the exclusive right to the fishings in question is instructed by the pursuer's title-deeds, and by her possession, as ascertained from leases and other documents produced." Some discussion took place as to the effect of a grant of lands to the pursuer as carrying with it the right of the mussel-fishing; but, irrespective of that specialty, the decision has been justly founded on as a precedent of the greatest weight in this discussion. And in a still more recent case, the same principle was acted on by the Lord Ordinary. But as his Lordship considered that proof was necessary before he could give judgment, the cause was reported by him on issues,—the terms of which are understood to have been the subject of dissent in the Inner-House, but the case was not proceeded with farther. The fishings related to the taking of mussels from the beds or scalps in the firth of Dornoch *ex adverso* of or adjacent to the lands and barony of Skibo. (*Dempster v. Bowie & Others* reported by the Lord Ordinary to the Court, 23d

July 1863.) The title conferred on the pursuer the lands and barony "*cum piscationibus tam salmonum quam aliorum piscium tam in aquis solus quam dulcibus*," &c. Prescriptive possession being averred, but without evidence, by leases of the scalps having been prescriptively let on lease,—the Lord Ordinary ordered issues, and said he had no reason to doubt "that the title of the pursuer is framed in terms adequate to warrant possession of such mussel-fishings as may fall within the boundaries of the grant," and to authorise interdict against parties intruding on the fishing without title.

The Lord Ordinary, in this case, says that he considers there is a broad distinction in principle between salmon and mussel fishing, in respect that salmon-fishing, until granted out by the Crown, is *in patrimonio principis*, "in which the public has no right either of property or of use," while, as regards mussel-fishings, a grant by the Crown to an individual "deprives the public of a right which they previously possessed." I am not at all satisfied that this distinction is sound except in its more general aspect. It is true that when no special right of salmon-fishing on the shore of the sea, or in bays and firths, or at the mouths of rivers, has been granted, the Crown would be entitled to interfere. The case of *Gemmel* is conclusive as regards the Crown's patrimonial right in this respect. But the same reasoning may be applied to the fishing of oyster and mussel-banks or scalps along the sea shore or coast. They, too, are patrimonial rights, and may be specially granted to individual proprietors. They are, when not parted with by grant, within the patrimony of the Crown, without whose permission and consent expressly or tacitly given, the public could not interfere with such fishings any more than salmon-fishings.

It is, indeed, difficult to see how in any material respect as regards the public, a specific right of fishing of this kind can be at all less injurious than a general grant of fishing followed by such a length of exclusive possession as that here alleged. It has been supposed by some writers that even a special grant of oyster or mussel-fishing requires to be supported by forty years' exclusive possession. The Lord Ordinary does not sanction this view, and it is plainly erroneous in principle, and not supported by authority. But were there anything in this view, possession for so long a period, as is here alleged, under a Crown title extending so far back as a century and a half, should afford sufficient evidence of acquiescence by the public in the validity of the Crown grant. I do not think that the Crown could dispute the right of the pursuer, founded on exclusive immemorial possession under her general title of fishing on the shore and sands *ex adverso* of her baronial lands. But if so, the distinction pointed at by the Lord Ordinary will not entitle the public to maintain what the Crown could not, in a question with its grantee. It would be quite different were a right of this kind incapable of being transferred by the Crown to the prejudice of the public, even by special grant.

Farther, a peculiarity is alleged to exist in regard to mussels that does not hold in reference to oysters, from which it is inferred that a legal distinction may be drawn between the rights of fishing of the one and the other. That peculiarity is, that mussels are extensively used by fishermen as bait in catching white fish, which oysters are not. But it cannot with justice be stated that on this ground any difference exists in the legal principles

applicable to rights of fishery of the two. They are usually classed together, and the same principles held to apply to both, whether the fishing of oyster-banks or the fishing of mussel-scalps. Farther, in general reasoning, this peculiarity of mussels being used as bait, tends rather to support the assertion by the pursuer that benefit results to the public from the constitution of individual rights in these fisheries. There is thereby created an interest in the grantees to protect and foster a species of property, the preservation of which is of so much moment, and which is so open to be injured or destroyed by indiscriminate and exhaustive dredging. The grantees of such rights are induced, from regard to their own interest, at once to cultivate with care the mussel beds, and to furnish a supply of bait to the fishers at reasonable rates.

On the whole, I am of opinion that the title of the pursuer is sufficient to support her demand to be allowed a proof of the averments of exclusive possession for the prescriptive period set forth in the record, and that the Lord Ordinary's interlocutor should be altered.

**LORD BENHOLME**—I have had an opportunity of conferring with my brother, Lord Cowan, and the benefit of reading his opinion, and the opinion, as now delivered, exactly expresses my sentiments.

**LORD NEAVES**—I concur in the results of the opinion that has now been delivered. We have had the benefit of a very able discussion in this case. We have had a very able and elaborate argument upon the questions raised in the case, and we have also had a very able and elaborate argument upon several questions that are not raised. The view that I take of the case is a simple one, and I shall state it as shortly as I can. I agree with Lord Cowan in the view that this is not a case that relates to floating fish. No doubt, if we found that there could not be any competent exclusive grant of mussel-scalps, that might be a precedent *a fortiori* that there could be no exclusive grant of floating fish; but our finding that there is a competent grant of mussel-scalps, will be no authority, in my opinion—no precedent, and scarcely even a step in the direction of that question, with regard to floating fish. I do not say what my opinion is upon that question. It is quite unnecessary for me to do so. But to come to the question that we have here at issue. These are the principles that I adopt in deciding this case. In the first place, I think that the *solum* or *fundus* of the deep sea—that is to say, the part not only between high-water and low-water mark, but the sea between such a line as may be reasonably drawn in connection with the shores—belongs in property to the Crown, and as a patrimonial right. That it does so belong to the Crown at least within narrow limits near the shore, such as are here in question, is quite clear; and that would be clearly seen if any question were raised as to any minerals which might extend under the sea, and which might be worked from the shore into a point under the deep sea. I say that that right is a patrimonial right. It is not a right held by the Crown in trust for the public—it is a patrimonial right. There are rights held by the public that are burdens upon it so far—namely, that over and above that *solum* in the deep sea there are rights of navigation by the public; and there may or may not be rights of fishing by the public—rights to catch fish in the water that float over the *fundus* or *solum*. These may be public rights;

but the right of property in the *solum* of the sea I consider to be a clear patrimonial right of the Crown. Now, that right may be granted to a subject, always subject to those rights of navigation of which I have spoken, and that right may be the subject of explicit infestment, so as to make it a feudal subject. Now, in regard to mussel-scalps or mussels, which are the things here in question, I consider these to be *partes soli* from their nature. I consider mussel-scalps to be part of the inheritance of the estate. The nature of the fish is very important in this case. The habits of the mussel are very well explained in the paper for the pursuer, and it is a very important part of the case—so important, that it is upon that that my opinion very much turns. This animal has powers of locomotion, and very strong organs of locomotion, which it puts in effect particularly early in life; but when it settled down and fixed its domicile, it seemed to do so *animo remanendi*, and there it remains generally for the full period of its life, or till dislodged by some violent means; or till some other extraordinary circumstance occurs. Now, being there, it is attached to the soil with a peculiar tenacity that is very remarkable in the natural history of the animal; and I cannot doubt that it is a trespass and an encroachment upon the soil if any one takes from it an animal that is so attached. It may possibly be that there may be some difference between an animal and a plant in that respect. At the same time, it is not very easy to see the reason for any difference in this instance. I do not think there is any difference; and I think some of the facts that are quite well-known in connection with this animal are exceedingly important. The case of the bridge at Bideford, in Devonshire, referred to in the case for the pursuer, is a most important illustration; for there the piers of the bridge were consolidated to a great extent by means of the fixity of tenure which these mussels have, which makes them become a part of the *solum*. And that is not a solitary case. I have not very extensive information with regard to the subject; but there are instances in modern engineering in which the use of mussels has taken place in that very way. I believe that in some harbour works in France, many tons of mussels were put in to fix the stones that were to form a break-water. That was done for a double purpose. The one was to fill up the crevices and prevent the water getting in and disturbing the bulwark, and the other was, that by the peculiar appendages of the animal, which seem to contain a most powerful adhesive liquid, the stones may be bound together as by a cement of unusual firmness and power. That makes the mussels a part of the work erected upon that ground, and it appears to me they must be held to be in connection with the soil. There is not the smallest doubt that a plant belongs to the person to whom the soil belongs; and if there was any doubt in this case, from the circumstance of the mussel being a living animal and not a plant, this is clear, that the analogy is so great that it has fully justified upon that ground the law which is established, and which the Lord Ordinary recognises, as to treating mussel-scalps—and it may be oyster-scalps also, though we need not inter into that—as capable of grant by the Crown to an individual exclusively. That being the case, I cannot doubt that the Crown can grant out the right of using these scalps, and taking the mussels out of the scalps or shells. The Crown may do that in two ways. It may give the *solum* or *fundus* of the sea as a feudal estate, and if it does so, it gives the



scalps along with it. I think the right to these scalps would be given, even without their being mentioned, if the *solum* was given, because they are accessories of the soil, and it would be as much a trespass upon the soil to remove them, as to remove sea-ware or any other plant. But the right may be given in another way. The Crown may retain the *solum*, and it may give, not the feudal estate, but the privilege to the grantee to take that enjoyment of the ground still retained by the Crown, which it would have given away as an accessory of the property if it had given out the whole property. I do not see the slightest objection in principle to that. It will be a different kind of estate in point of form. It may be a perpetual privilege, but it will be as good a grant or right as the other, though in a different category of law. It will be a perpetual license and privilege granted out by the Crown. Now, then, the question is, whether either of these things is here done, or can be held to be done?—and there it is alone that the difficulty of the case lies; and it is not without difficulty that I have got over the view stated by the Lord Ordinary with, I think, great ability. It is quite plain to me that the *solum* of this ground is not given by this grant. I do not think that the *solum* upon which these scalps are situated is feudally given by the Crown in this case. The *solum* or *fundus* of the sea at the place in which these scalps are, therefore, is retained by the Crown in my estimation. Neither is there an express privilege granted of mussels; and, certainly, the objection upon that head is very much strengthened by the special manner in which the oyster-scalps are granted. The only thing that can be stated is the grant *cum piscationibus*. Now that is a nice question. *Cum piscationibus* means little more, in general, than just the pertinents of the estate. It does not carry salmon-fishings; and as to the other fishings, if the public have a right to fish, it can only carry such enjoyment as a man has of trout in connection with his own property, or the right of fishing off his own land. The question was, whether a grant *cum piscationibus* can be converted, by prescriptive possession exclusively of mussel-scalps, into the same thing as an express grant of the exclusive use of the mussel-scalps? That is a very nice question, and I have found difficulty about it. I am not sure that the point has been directly decided; but, upon the whole, I think that the dicta of decisions, and the current of practice, as seen not in cases perhaps ultimately decided, but in what has been recognised by the Court, and the practice of conveyancing—which of itself is also something—has come to this, that a grant *cum piscationibus*, though not a well-expressed or proper grant for a thing of this kind, is still so capable of explanation that—as Lord Stair says in one passage quoted in these papers—it may, “by means of long possession,” be converted into an exclusive right to mussel-scalps; but the possession must be not possession of the privilege by the person alone, but possession of it as an exclusive privilege, by which it shall appear that not only this grantee had taken mussels there, but had excluded others in a distinct and unequivocal manner from exercising that right. I conceive, then, that under either a grant of the *solum* on which the scalps are situated, or under a grant of express mussel-fishing, no prescription will be needed. The grant would take effect immediately. But if there only be a grant *cum piscationibus*, that, when explained by exclusive prescriptive possession, appears to me, upon the autho-

rities, to be sufficient to give an exclusive right to mussel-scalps. I do not go into the nicety that *cum piscationibus* does not apply to mussels, in respect that they are not fish but molluscs. That is not the view I go upon. The phrase *cum piscationibus* is not an appropriate expression; but I think it cognisable and explainable on the general principle of law that where there is a grant, and there is no real or positive principle against it, you may, by prescriptive possession, convert it into an exclusive grant. In salmon-fishing that has been done to an extent somewhat at variance with the principle, because a grant *cum piscationibus* from a subject has been found ground of prescription. Now that has been a strong thing; yet the law has allowed it. It has allowed a party, upon production of prescriptive right to exclusive fishing, to grant that exclusive right, though there had been no grant of exclusive right. That being the case, I am compelled to concur in opinion that this interlocutor is upon that point too strict, and is not consistent with the general principles of law.

**LORD JUSTICE-CLERK**—Concurring in the result to which all your Lordships have arrived, and adopting generally the views which have been taken of the authorities applicable to the case—particularly in the elaborate opinion given by Lord Cowan, and which I had an opportunity of perusing; I am enabled to give my opinion more shortly than I should otherwise have thought it necessary to do.

There are substantially two questions before us—one as to the power of the Crown to confer on individuals a right to fish for mussels; the other, as to whether, assuming the power to exist, the grant can be effectual without a special and express conferring of the right to mussel-scalps.

On the first question the Lord Ordinary has expressed an opinion favourable to the pursuer, and I think has done so rightly; on the second, he has decided against the pursuer, and I think erroneously. The authorities are clearly favourable to the view that mussel-scalps may be granted by the Crown to individuals. I shall not resume the examination further than to say that the case of *Grant v. Rose*, in 1742, is a decision to that effect expressly, and that there is no opposite decision since, and no challenge of it as a sound decision by any institutional writer. It states, as the learned reporter's view of the ratio of the judgment, that such grants are supported; because otherwise this description of subject could not continue to exist, but would be destroyed. I trace the right of the Crown rather to its proprietary right in the sea-shore. But it is certainly matter of important observation when public right is pleaded against such grants, not only that such grants have been sustained, but that such grants are necessary for the very existence of the thing which forms the subject of the grant. If there were no power of conferring on individuals a patrimonial right in mussel-scalps, there would be no one having any interest to maintain them, or to impose those restrictions necessary to prevent their destruction. The Crown might have a right as trustee for the public to control to some extent the waste which will follow from indiscriminate use, but, having no proper patrimonial interest, could scarcely be looked for to provide such a staff as would be indispensable for securing the continuance of these scalps. In most cases expenditure is from time to time required. No source from which such expenditure could come has been suggested if the Crown cannot alienate the subject or

grant it in lease. The notorious state of the fact that such mussel-scalps exist in the hands of individuals in very many instances under Crown grants, and form the source of a large annual revenue; and that an Act of Parliament has been actually passed by the Legislature for the very purpose of securing grantees and lessees of mussel-fishings from having their rights encroached upon, should, I think, be conclusive.

The case of the defenders, which is very ably stated, seems to rest upon the authority of the well known passage in Balfour's Practicks, and the recognition of the law laid down in it in the observation of Lord Justice-Clerk Hope in *Hall and Whillis*, together with an argument, apparently receiving the support of Mr Tait in a case reported by him, and stated in the 5th volume of Broun's Supplement, as to mussels being bait for white fishings. Taking the case referred to in Balfour, as explained in Skene (*voce* "Wair"), I hold it not to apply except where the owner of the land adjoining the sea has no grant from the Crown; and I further hold that the mussels referred to and dealt with are not regular fishings of mussels or mussel-scalps, but mussels casually found with limpets, and such like small shell-fish on the rocks. As to the argument that, as white fishings in the sea are free to the lieges and incapable of appropriation, so mussels should be as forming a usual bait used in such fishings; while I am disposed to concede the premises, I dispute the conclusion deduced from them.

I incline to hold that white fishings are incapable of alienation by the Crown, even in bays and creeks such as the locality in question. Your Lordships have reserved your opinions on that subject, and I desire also to reserve mine; but having considered the point in reference to the very elaborate argument presented to us, I may state that, as at present advised, the grants of fishing of white fish in the sea seem to me to be capable of construction in reference to the exclusive use which the shore may afford for the prosecution of such fishings. My impression is, that floating fish may be captured from boats by any of the lieges though the *locus* may be a bay, and a grant of fishings in the sea conferred by Crown charter on the neighbouring proprietor. In this respect floating fish, which are unconnected with any locality and appear in different portions of the sea, without any one knowing from whence they have come or being able to predict whether they are to go, stand completely contrasted with mussels, which, as Lord Neaves has said, adhere with wonderful tenacity to the rocks or shores with which they are connected, and are practically fixtures, and parts of the soil. But though the fishing of floating fish is free to the lieges, and mussels are applied as bait, it does not follow that bait is or ought to be free to be taken by any sea fisherman. The same principle would give him right to enter private grounds in order to take worms, a result manifestly absurd.

I think it clear that the Crown may grant a right to mussel fishings, and, assuming that it is in the power of the Crown to grant a right to mussel fishing in favour of an individual, it seems to me to follow that the right is of the nature of proper patrimony of the Crown.

The Crown, upon that assumption, may sell a right in a particular locality for valuable consideration, or grant a lease whereby the lessee shall, during its currency, reap the benefits accruing from possession. All this of course is subject to the right being exercised so as not to impede navigation.

The Crown may or not attach conditions to the grant whereby the grantee may be bound to satisfy on fair conditions the demands of fishermen for bait, but it is not bound to insert any such condition, and such grants are in the general case unconditional. If so, if the alienation or lease is perfectly within the prerogative, the right must fall within the same category as salmon-fishings. It is not one of the class of *regalia* where the Crown is trustee, but where the Crown is proprietor. It is within the class of *regalia minora*, or rights patrimonial.

If so, then it is an error to deal with a Crown grant of mussels as an invasion of a previous right of these fishings in the public; it is no more so than a grant of salmon-fishings in a portion of the sea-coast which had been previously unprotected and open to anyone who choose to fish there. The Crown in this case has made a grant of fishings on the sands of Nigg, and on the sea-shore near Milntown, and for more than forty years it is said that, in virtue of the grant, there has been possession,—possession not merely in the form of a use of the fishings, but in the shape of rent paid to the grantees,—an exclusion of the public except on conditions, and these conditions acted on. If this be true then—if, in virtue of a Crown grant of fishings, there has been an exclusive and beneficial enjoyment of the fishings of oysters—Is there any reason why the grant so explained should be unavailing to carry the right of fishing?—possibly it may be proved to be the only right of fishing which can be practised in the particular locality.

I entirely agree with Lord Cowan in his views of the cases of *Agnew* and *Dempster*. If a general title to fishings other than salmon-fishings, with possession for forty years of oyster-fishings, was thought in the case of *Agnew* such a title as would have effectually competed with a special conveyance, I think it clear that a similar title would be sufficient in the case of mussels. I am unable to see any room for distinction. In the case of *Dempster*, the mussel-scalps were alleged to be held under a general grant, and issues were prepared and allowed to try the question of fact as to possession, on the assumption that the fact, if proved, would complete the grantee's right. In *Erskine's* case, a grant of the land of Sandis *cum piscariis*, and forty years' possession of mussel-fishing, was held good. I think it was in reference to the grant of *piscaria* that the right must have been sustained. There is an expression in the report of the opinion of the then Lord President, stating that the lands themselves on which the fishings were had been given out by the Crown, and this is founded on as the ground of judgment. If it formed the ground of judgment, then mussel-fishing would pass with a right to the soil and as an accessory to it; public right could not be pleaded as against such a grant, and the Crown would be in the position of an heritable proprietor having a capacity to give a grant which could not be open to the objection of being an invasion of public right, and consequently would be subject to the same rules and principles attaching to the grants of ordinary heritable subjects. Independently of authority, I am unable to see why, if a grant of *piscationes* can be held, by virtue of prescriptive possession, to carry salmon-fishings, the same expression should not, with a similar possession, be held to prove a right to another but less valuable right of fishings. The terms of the grant are not restrictive, so as to ex-

clude all fishings not prosecuted by any other than a particular mode of fishing pointed out in the grant. Mussel-fishings are certainly one of several kinds of fishings. If fishings generally be the subject of the grant, and mussel-fishings fall under the general term; and if it is offered to be made clear, by unequivocal acts of possession involving the exclusion of all other persons for forty years, that there has been possession of this special description of fishings in virtue of the general grant, how can the offer be rejected as irrelevant? A general grant may surely be individualised in reference to a particular right truly falling under the general expression by a prescriptive enjoyment of the particular for forty years. I can find no authority and no principle which can prevent the Crown granting, under the general term, any particular description of fishings competent to form the subject of a grant of fishings. It would seem to be conclusive of the meaning of such a grant in a question with the Crown, or with any other party, that during the years of prescription, there has been a possession under the grant. There is no reason why a different rule should prevail than is found to prevail in such grants generally. I subscribe to the view of Crown grants generally given by Lord Cowan, and, so concurring, I come to a clear opinion adverse on that point to that of the Lord Ordinary, and favourable to the pursuer.

The Lord Ordinary's interlocutor was accordingly altered.

Agent for pursuer—Colin Mackenzie, W.S.

Agent for defenders—L. M. Macara, W.S.

Friday, January 10.

## SECOND DIVISION.

### STAINTON'S TRUSTEES v. TOPHAM AND OTHERS.

*Trust—Payment of Debts—Legacies—Direction to Entail—Surrogatum.* A party by his trust-deed directed his trustees to pay his debts and a number of legacies, and, after payment of these, to make over the balance of his personal estate and the lands and heritages belonging to him, or "such part thereof as they might not find necessary to dispose of for answering the purposes of said trust," to and in favour of a certain series of heirs, under a deed of strict entail. In terms of these directions, the trustees proceeded to realise the estate, and to pay the debts and legacies as provided, and in the course of doing so it became necessary to sell part of the lands, as the personal estate was insufficient to carry out the purposes of the trust. By the subsequent recovery of a certain sum from the shares of a company, the personal estate proved to be more than sufficient for carrying out the purposes of the trust, and it became evident that the sale of lands was unnecessary. *Held*, upon equitable principles (Lord Neaves diss.), that a portion of the sum recovered fell to be dealt with as a *surrogatum* for the lands sold.

This was an action of multiplepointing brought by the trustees of the late Joseph Stainton, of Biggarshiels, and the question was as to the rights of parties in a sum of £13,000 recovered some years ago from Carron Company, in respect of certain shares of that company belonging to the trust-estate

which the trustees had been induced, by misrepresentation and concealments, to sell at a price much below their real value.

Mr Stainton by his trust-deed directed his trustees to pay his debts and a number of legacies, and after payment of these to make over the balance of his personal estate, and the lands and heritages belonging to him, or "such part thereof as they might not find necessary to dispose of for answering the purposes of said trust," to and in favour of a certain series of heirs under a settlement of strict entail. In terms of these directions, the trustees proceeded to realise the estate, and to pay the debts and legacies as provided; and, in the course of doing so, it became necessary to sell part of the lands, as the personal estate, including the Carron stock, proved insufficient for the purpose. The question now was whether the heirs of entail were entitled to have the lands so sold replaced out of the £13,000 now recovered from Carron Company. It was, on the one hand, contended that a portion of that sum fell on equitable principles to be dealt with as a *surrogatum* for the lands sold, in respect, that the sum in question being added to the personal estate, it now appeared that that estate was more than sufficient to pay all the debts and legacies. It was on the other hand contended that there was no direction to entail any lands but those conveyed in the deed; and that the meaning of the truster was that the trustees should exercise their powers of administration in the realisation and disposal of the estate, and that those lands only should be entailed which remained after these powers of administration had been fairly exercised according to what seemed best at the time.

The Lord Ordinary (BARCAPLE) sustained the claim of the trustees, who sought to have the sum in question dealt with as a *surrogatum* for the lands sold. His Lordship added the following note to his interlocutor:—

"The trustees have now recovered £13,000, constituting part of the truster's moveable estate. They formerly sold part of the heritage for £7433, 2s. 6d., under the belief that it was required to pay debts and provisions—the moveable estate, which was primarily liable for these purposes, being, as they then supposed, exhausted. By the trust settlement, after the fulfilment of the other trust purposes, the whole lands and heritages disposed to the trustees, or such part thereof as they may not find necessary to dispose of for answering the purposes of the trust, were to be entailed upon the heirs-male of the body of the entailer, whom failing, the heirs-female of his body, and a series of substitute heirs of entail. The residue of the personal estate was to be paid and made over to the same parties. The truster left an only son, who survived the period when the trustees were bound to make over to him the residue of the trust-estate, heritable and moveable, in terms of the trust, but died before they had actually done so. He left an only daughter, the claimant, Miss Josephine Stainton, in whose favour the trustees have, under authority of the Court, executed a deed of entail of the lands remaining unsold. It is in these circumstances that the trustees have now in their hands a sum of £13,000, realised from the moveable estate, while they have, in ignorance of the true value of that part of the estate, sold heritage to the extent of £7433, 2s. 6d. to meet purposes of the trust for which the moveable estate was primarily liable. If it had not been for the error into which the trustees were unavoidably led, it would have been apparent from the first that there