

Clachary, Creveny, and Philipland, *piscaria* or *piscatione dictarum terrarum*. Where Culquhork is we are not informed. Philipland is the property of the magistrates, but it is an inland property. The other lands have been acquired at a long distant period by the Earl of Galloway from a person of the name of M'Donald, to whom they were sold by the town. The fishings are not shown to have been reserved from the conveyance, and where lands with their fishings are granted, it would require to be clear that when the lands were given the fishings were retained. The titles of the complainer contain Kirvenny, Clauchrie, Broadfield, Burrowmoss, and Milns of Bladnoch, with the fishings of the water of Bladnoch, and hail pertinents thereof, which renders it in the highest degree improbable that any rights of fishing were retained. If not, the magistrates would seem to have no title whereupon a right to salmon-fishing could be prescribed. It is certain that they have not succeeded in pointing to any such title as yet.

The magistrates have never received one farthing of rent from these salmon-fishings. They never let them. They have produced no evidence of their ever having granted a written authority or license to fish to any one. The lease under which the respondents were proceeding to fish is dated only in January last, and was granted against the remonstrances of the Earl of Galloway. They are for the first time attempting to let them. The nature of the possession alleged is embodied in the fourth statement of facts, and is as follows—"The said provost, magistrates, and council, and their predecessors in office, have had, and have now, the sole and exclusive possession of the salmon and other fishings in the said bay of Wigtown; but were in use to allow the inhabitants of the burgh of Wigtown generally to fish in said bay with draught-nets, stake-nets, and others, which nets those using them were in the habit of shifting from place to place along said Wigtown or Burrowmoss sands and Baldoon sands in proximity to the streams of the Cree and Bladenoch; but such allowance, or toleration to fish, was determinable at any time by the said provost, magistrates, and council, who, as representing the burgesses and community, are, in virtue of said charter, acts, and others, in right of the whole fishings, in the same way as they are of the whole lands contained in said charter and others, both for the common good and behoof of the burgh."

They have the sole possession *now*, but they have *allowed* or *tolerated* the inhabitants to fish in proximity to the rivers Cree and Bladnoch. In the charter of confirmation of 1842, these very parties confirm to the Earl of Galloway, all and whole [Quotes]. How strange if their toleration or allowing inhabitants of their burgh to fish for salmon in the proximity of the river, should defeat the very right which they have thus confirmed! But how loose an avowment of possession.—In fact it is not possession under a title at all. If they have had a special grant of salmon-fishings, one could understand it, but that use, said to be simply tolerated, by persons not deriving any authority for them, nor paying any consideration to them, but who chance to be inhabitants of their burgh, should be set up as a *modus acquirendi dominii*, is novel.

I confess that I see as yet no title produced by the magistrates, and no relevant allegation as to possession. And on that ground, and seeing that the respondents are attempting to innovate upon an

actual state of possession, *prima facie* proved, I think that the interdict should be continued.

Caution has been found, and a note has been undertaken to be kept. No reclaiming note has been lodged by the complainer as to these conditions. The latter remedy is certainly very applicable. It may be that the fishings will not be carried on at the places mentioned; but as I would have granted the interim interdict without that condition, it does not appear to me that there is any importance attached to the question.

The other judges concurred.

Agents for Complainer—Russell & Nicolson, C.S.

Agent for Respondents—R. M'William, S.S.C.

Tuesday, February 25.

ROMANS v. NORTH BRITISH RAILWAY CO.

(Ante, p. 142).

*New Trial—Excess of Damages.* In an action of reparation for personal injury, new trial, on the ground that the damages were excessive, refused.

This was an action of damages for personal injury, brought by Mr Romans, gas-engineer in Edinburgh, against the North British Railway Company. The case was tried at the last sittings, and resulted in a verdict for the pursuer with £1250 damages.

The defenders now moved for a rule upon the pursuer to show cause why the verdict should not be set aside on the ground of excess of damages; and the rule having been granted, counsel were heard last week, and the case was to-day advised.

Their Lordships refused to set aside the verdict, holding that the amount awarded was not so outrageous or extravagant as to imply improper motives, or passions, or prejudice on the part of the jury. It was only in such cases that the Court would interfere with an award of damages, at least where the elements of the damage consisted, as here, of *solatium* for past and prospective personal suffering, as well as compensation for past and prospective pecuniary loss.

Counsel for the Pursuer—Dean of Faculty and Alexander Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for the Defenders—Young and Gifford. Agents—Dalmahoy, Wood, & Cowan, W.S.

Wednesday, February 26.

FIRST DIVISION.

KERR v. KERR AND OTHERS.

*Entail—Prohibition against Altering Succession—Irritant and Resolutive Clauses.* A prohibition in a deed of entail against altering the order of succession not being fenced by irritant and resolutive clauses, held that the deed of entail was invalid.

This was an action of declarator at the instance of William Scott Kerr, of Chatto, against Robert Scott Kerr, and others, asking declarator that the deed of entail of the lands of Over Chatto and others in the county of Roxburgh, dated May 1759, was invalid and ineffectual, and that the pursuer was entitled to hold the lands in fee simple.

The deed contained certain prohibitory, irritant, and resolutive clauses in the following terms:—

"And also it is expressly provided and declared that it shall not be leisome or lawful to the said persons and heirs succeeding to and possessing my said estate, to sell, annalzie, wadset, or dispone my said lands and estate, or any part thereof, irredeemably or under reversion, nor yet to contract debts or grant obligations for performance of any matter, nor committ treason, nor do any other fact or deed civil or criminall whereby the said estate or any part of it may be adjudged, appraised, forfeited, carried away, burdened, or affected, and in case they contraveen and do in the contrary thereof, it is expressly provided and declared, that not only all the said facts and deeds prohibited as aforesaid shall be void and null in so far as the same may affect my said estate, but also the contraveners shall forfeit and loss their right to my estate, and the same shall fall and belong to the next person hereby appointed to succeed: And it is likewise provided and declared, that in case any of the persons or heirs appointed to succeed to my estate shall be owing debt, or lyable to the performance of any deed, by writings granted or obtained before their succeeding to my estate, then they shall not suffer adjudications or appraisings of my estate to pass against them for the same; and if they contravene and do in the contrary, not only the bonds for the said debts and performance of deeds shall be void and null in so far as the same may affect or burden my said estate, but also the contraveeners shall loss their right to the said estate, and the same shall fall to the person or heir hereby appointed next to succeed: And also, it is hereby provided and declared, that it shall not be leisome or lawful to the persons or heirs succeeding to my said estate to alter the order of succession hereby settled, nor sett tacks for a longer time than the setter's lifetime or for nineteen years, nor for a less tack-duty than at the time of his succession, at least for a tack-duty less than the value to be ascertained before a judge, nor yett to cutt the young planting upon my estate sooner then twenty years after my death.' There was no irritant or resolutive clause in the deed, following on or applicable to the before quoted prohibition against altering the succession.

It was further averred "by marriage contract, dated 16th December 1806, entered into betwixt the pursuer's late father, Robert Kerr, Esq., of Chatto, and the pursuer's mother, Elizabeth Fyffe, otherwise Elizabeth Bell Fyffe, the said Robert Kerr became bound to resign the said lands and others which he held as heir under the said procuratory of resignation and deed of entail, and he granted procuratory of resignation for resigning the same for new infetment to himself and the heirs-male of his body and the other heirs called under the said procuratory of resignation and deed of entail, and that under the whole conditions and provisions, and clauses prohibitory, irritant, and resolutive contained in the last mentioned deed."

The pursuer pleaded, "The prohibition against altering the order of succession, contained in the said deed of entail, not being fenced by any irritant or resolutive clauses, the said prohibition is not valid or effectual, in terms of the Act 1685, cap. 22, and therefore, in terms of the Act 11 and 12 Vict., cap. 36, section 43, the said procuratory of resignation and deed of entail, and also the said marriage-contract are invalid and ineffectual, as regards all the prohibitions therein contained."

The defender pleaded, "1. On the sound construction of the deed of entail, the general words following the prohibition against contracting debt

are effectual to prohibit the alteration of the succession, and the subsequent special prohibition against altering the order of succession ought to be construed as explanatory of the foresaid general words. 2. On the sound construction of the deed of entail, the irritant and resolutive clauses ought to be construed as applicable to the whole of the prohibitions and declarations under which the lands are resigned, including the prohibition against altering the order of succession which is subsequent in position to the said irritant and resolutive clauses."

The Lord Ordinary (KINLOCH) pronounced an interlocutor repelling the defences, and finding and declaring in terms of the conclusion of the summons, adding this note:—

"The Lord Ordinary can entertain no doubt that in this case the prohibition against altering the order of succession is unfenced by irritant and resolutive clauses. The prohibition maintains an isolated place in the deed. The previous prohibition occurring some sentences before, against selling or contracting debt, 'or to do any other fact or deed, civil or criminal, whereby the estate, or any part of it, may be adjudged, appraised, forfeited, carried away, burdened, or affected,' cannot, as the Lord Ordinary thinks, be held to include another prohibition, against altering the order of succession. And the irritancy, which immediately follows this last quoted clause, must, in the Lord Ordinary's estimation, be attached to the immediately previous prohibitions, and to these only.

"The question remains, what is the effect of a prohibition to alter the order of succession, sufficient in its own terms, but unfenced by clauses irritant and resolutive? Anterior to the Entail Amendment Act, 11 & 12 Vict., c. 36 (14th August 1848), the Lord Ordinary is clearly of opinion that such a prohibition was, by itself, and without the necessity of any fencing, clauses sufficient *inter heredes* to nullify any gratuitous deed in favour of a new series of heirs. So it was expressly ruled by the opinions of the whole Judges of the Court, with a single dissentient voice, in the case of *Carrick v. Buchanan*; and the principle was expressly sanctioned by the after judgment of the House of Lords in that case. (*Carrick v. Buchanan*, H. of L., 5th September 1844.—Bell's Appeal Cases, 3, 342.) By the 43d section of the Entail Amendment Act, it is provided, 'that where any tailzie shall not be valid and effectual in terms of the recited Act of the Scottish Parliament, passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects, either of the original deed of entail or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions.' It is here enacted, that where an entail is ineffectual as regards the prohibition to alter the order of succession, it shall be ineffectual as regards all the other prohibitions. It did not follow that a prohibition to alter the order of succession was ineffectual merely because it was not fenced by irritant and resolutive clauses: it might be ineffectual (as it has been often found to be) from defectiveness of expression, either as regarded the thing prohibited, or the person against whom the prohibition was directed. But by a series of decisions pronounced since the date of the Entail Amendment Act, culminating in that pronounced in the case of

*Rollo v. Rollo*, (23d November 1864, M. 3, 79), the Court have so interpreted the Act as to hold it to require that the prohibition against altering the order of succession should be fenced by irritant and resolute clauses not less than the other prohibitions, in order to become effectual. On these decisions the Lord Ordinary cannot go back, whatever opinion he might have entertained had the point been open.

"The marriage-contract referred to in the summons was not pleaded to the Lord Ordinary as containing any obligation in favour of the heirs of the marriage, entitling them in that character to insist on the entail being maintained."

The defenders reclaimed.

CLARK and J. M'LAREN for them.

YOUNG and MONRO for respondents.

The reclaimers were allowed to add to the defence this plea:—

"The deed of entail contains a valid prohibition against altering the order of succession, and the same does not require to be fenced with irritant and resolute clauses in order to be effectual against onerous and gratuitous deeds."

The Court adhered.

Agent for Pursuer—John Hope, W.S.

Agent for Defenders—Andrew Fyfe, S.S.C.

Wednesday, February 26.

LORD ADVOCATE v. HEBDEN.

*Property—Regalia—Wreck—Barony—Prescription.*

State of titles and possession on which held that a proprietor had acquired a prescriptive right to wreck cast on the shores of his property.

This was an action brought by the Lord Advocate, as acting under 20 and 21 Vict., c. 44, on behalf of her Majesty, and on behalf of the Commissioners of her Majesty's Treasury, the Board of Trade, and the Commissioners of the Customs, against Robert James Hebden, Esq., proprietor of the Island of Eday, in Orkney, the object of the action being to have it found that the Crown had the sole and exclusive right to all wreck cast on the shores, or floating upon the coasts of Eday, subject to the provisions of the "Merchant Shipping Act, 1854," and the claims of the rightful owners. The defender contended that he and his predecessors held their lands under titles conferring a right to wreck, and that they had possessed under these titles from time immemorial.

The Lord Ordinary (MURE), after a proof, pronounced this interlocutor:—

"The Lord Ordinary having heard parties' procurators on the closed record, proof adduced, and whole process, and made avizandum—Finds that the pursuers have failed to instruct that they have the sole and exclusive right to all wreck cast upon the shores or floating upon the coasts of the Island of Eday, subject to the provisions relative to wreck contained in the Merchant Shipping Act 1854, or that the defender has no right or title to such wreck: Therefore assoliszes the defender from the declaratory conclusions of the summons; but, without prejudice to the above findings, prohibits and discharges the defenders from interfering with the receivers of wreck appointed by the Board of Trade in the execution of their duties under the Merchant Shipping Act 1854, in reference to wreck cast ashore on the island of Orkney: Finds the defenders entitled to expenses," &c.

The pursuer reclaimed.

LORD ADVOCATE (GORDON), SOLICITOR-GENERAL MILLAR, and MUIRHEAD, for Reclaimer.

PATTISON and WATSON for Respondent.

At advising—

LORD ARDMILLAN—This is an action at the instance of the Lord Advocate, on behalf of the Crown, against the defender Mr Hebden, proprietor of the island of Eday in Orkney. The pursuer concludes for declarator that the Crown has the sole and exclusive right to all wreck cast upon the shores or floating upon the coasts of the island of Eday; and that the defender Mr Hebden has no right or title to wreck cast on the shores or floating on the coasts of that island. There is a reservation, which both parties acknowledge, of the claims of the rightful owners of wrecked goods, and of the provisions of the Merchant Shipping Act of 1854; and there are relative and ancillary conclusions of the nature of interdict.

The defender pleads that he holds the island of Eday as proprietor under titles in favour of himself and his predecessors, conferring rights to all wreck and waith cast on the shore or floating near the coasts of the island, and that he and they have possessed under these titles, and enjoyed that right from time immemorial.

The Lord Ordinary, taking into view the titles of the defender, and the possession instructed by the proof, has assoliszed the defender from the conclusions of the action, adding the very proper and necessary qualification that any right to wreck must be subject to the provisions of the Merchant Shipping Act.

We have had an ample and able argument on the question of title, and on the nature and extent of the possession; and I have arrived at the same conclusion as the Lord Ordinary. I think that the title is sufficient to support prescriptive possession; and that possession has been instructed sufficient in character and extent to explain and confirm the title, and to establish the right of the defender.

By our law the right to wrecked property is in the Crown. It is *inter regalia minora*. It is not of that class of *regalia* which are inseparable from the Royal dignity, but of that class of *regalia* which may be communicated by grant of the Crown to a subject.

Before proceeding to consider the title of the defender, it is necessary to dispose of a plea stated by the pursuer, to the effect that by the Acts of Parliament annexing the Earldom of Orkney and Lordship of Zetland to the Crown, any royal grant of wreck cast on the island of Eday subsequent to the earliest of these Acts (Act 1540, cap. 19; 1612, cap. 15; 1669, cap. 19; 1707, cap. 9; and 1742, cap. ), must be of no effect, as being contrary to the enactments and conditions of annexation.

I do not think that this plea would be conclusive, even if the island of Eday were included within the Annexation Acts, because there is no question here in regard to the higher rights and jurisdiction of the Office of Admiralty, but only in regard to the right or privilege of wreck and waith said to be conferred by the Crown. I am by no means satisfied that in any view of the Acts of Annexation they have the effect of rendering void a Crown grant of the privilege of wreck, the exercise of the right granted being always under reservation of the provisions of Statute Law and of the just rights of owners. But, apart from this, I am of opinion that the Acts of Annexation founded on by the pursuer do not include the island of Eday. I observe that