

*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 visit 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

it is alleged by the pursuer (condescence 11) that the island of Eday was feued of old by the Bishop of Orkney to Edward Sinclair for a feuduty of "£16 Scots and five lasts of fiesche." It is not alleged by the pursuer, and is not instructed, that the island of Eday was annexed as part of the Earldom of Orkney. So long ago as 1595, the island of Ethay or Eday is set forth as within the Bishopric of Orkney, and as held in feu from the Bishop by Edward Sinclair. This appears from an old rental dated 1595. Now, in the Acts of Annexation I have been unable to find any mention of the island of Eday as within the Earldom, while I observe that in the charter of 1632 by King Charles the First to the Earl of Carrick to be afterwards noticed, the island of Athay is specially mentioned, and the duty of £16 Scots money and five lasts of fiesche is particularly set forth, and the island with that old reddendo was, with all its pertinents and privileges, including this right of wreck, conferred on the Earl of Carrick.

This charter of 1632 contains a wide and comprehensive grant of the island of Athay, with the calf and holms thereof, and with all the pertinents, in favour of the Earl of Carrick. The lands were granted of new in express and comprehensive terms of *novodamus*; the little town of Carrick, with its port and harbour and other pertinents, was erected into a free burgh of barony and port, and the whole lands and islands included in the general description are united, annexed, erected, and incorporated "*in unam integram et liberam Baroniam nunc et in omni tempore Baroniam de Athay nuncupandam.*" I may here remark that I do not think that the barony title has been carried down to recent times. It seems to have been broken up and lost. But a barony was created by this charter, and in construction of the writ that is not without some importance.

In the tenendas clause of this charter there is a particular enumeration of the privileges and pertinents previously conveyed; and in this clause there are included "furca, fossa, sok, sak, thol, thaim, vert, wrak, waith, wair, venysoun, infang-theiff, outfang-theiff, pit et gallows, cum communi pastura," &c.

It has been argued on the part of the pursuer that the word "wrak" in this clause means seaware and not wreck or property cast on shore by the sea. I am of opinion that this construction of the word is not sound. When, in the grant of an island or coast estate, the word "wrak" stands in connection with the word "waith," which I understand as "derelict," I can entertain no doubt that it has the same meaning as the word "wreck." That is its most natural meaning in its position, and according to the context—it has received that meaning in the writings of Craig, and others of our old Scottish lawyers—and if any confirmation were necessary it may be found in Spenser, Dryden, Milton, and Shakspeare, those wells of English undefiled to which Mr Pattison has, with ready literary resource, so appropriately referred us. The privilege or pertinent included in this clause is clearly that of wreck—the right to wrecked property, subject always to the claims of the true owners when discovered.

It is true that this right or privilege of wreck occurs only in the tenendas clause of this charter, and the pursuer strongly founds on this peculiarity.

It is to be observed that this is a charter of *novodamas*, that it creates a barony, and that the conferring of wide and important privileges is in such

a case naturally to be expected. The grant of pertinents is very wide, and the privilege of wreck was in those days not inappropriate to the grant of an island granted with pertinents, and created and incorporated into a barony. In the view I take of this case it is not necessary to hold that the privilege of wreck was effectually conferred by the words, and from the date, of this charter. It is certainly not set forth in the dispositive clause, which is the proper place for such a grant. But, in considering the import and effect of the whole progress of titles now before us, this tenendas clause is not to be altogether overlooked. It is in any view a description of the pertinents and privileges within the tenure. It was decided in the case of *Sinclair*, in 1865, that some effect and weight was due to the mention of one of the *minora regalia* as a pertinent, though that mention was in a tenendas clause of an ancient Crown charter. I say no more at present than that the meaning of the words is plain, and that the clause is not to be overlooked, but to be taken in connection with the subsequent titles. This appears to me to be the opinion of this Division of the Court, and more particularly the opinion of Lord Colonsay in the case of *Sinclair*, as given both in this Court and in the House of Lords.

The defender has produced a progress of titles from this Crown Charter of Resignation and *Novodamus* down to the present date, to which, except in so far as regards the privilege of wreck, I do not understand that any serious objection is taken. The lands undoubtedly stand on these titles.

The Earl of Carrick, the grantee in the Charter of *Novodamus*, conveyed the island of Ethay or Eday to Henry Stewart, who seems to have been infeft on that disposition. There is then a Crown charter of apprizing in favour of Alexander Bothwell of Glencorse in 1649, who had obtained decret of apprizing against Sir James Stewart as lawfully charged to enter heir to the Earl of Carrick. In this charter the island of Ethay, with the whole privileges and pertinents, is included, and in the tenendas clause of that charter the particular description of the pertinents is repeated, and among these is wrack, wair, waith, &c. In 1651, Colonel John Stewart, son of Sir James Stewart, acquired the "lands and barony of Ethay" with all the pertinents, and was infeft therein in the same year. In 1653 he conveyed to his brother Captain Robert Stewart, eldest son of Sir James Stewart, who was infeft in the lands and barony of Ethay, with the whole pertinents. And in 1664, Bothwell of Glencorse, who had held the decree of apprizing, conveyed to this Captain Robert Stewart the whole lands and barony of Ethay, with all the pertinents as then possessed by him; and it is to be observed that he had possessed under the charter of apprizing where the privilege of wrack and waith is specially mentioned in the tenendas. Captain Robert Stewart was infeft on this disposition, and he thus had a title to the whole island as a united barony, and with all pertinents, conform to the previous titles to which I have referred. Soon after this, I think, the barony title begins to have been broken up. But the privilege of wreck and waith was not parted with or lost.

It appears that in 1660 a small portion of the island of Eday, being the northern part, and extending to about one-fifth of the island, was conveyed by Robert Stewart to Arthur Buchanan. This portion afterwards came into the possession of James Fea, in whose favour there is a Crown

Charter of Resignation dated in 1770. It is not necessary to trace the course of the titles to this northern part of the island. But it is to be noticed that the charter of 1770 specially refers to the charter of King Charles, already mentioned, in 1632 in favour of the Earl of Carrick, and also refers to the burgh of barony of Carrick thereby created. This James Fea conveyed the northern portion of Eday to Robert Laing, and it was ultimately vested in Samuel Laing by disposition and sasine in 1816. In these titles to the northern part of the island there is no mention of wreck. That privilege seems not to have been parted with, but to have been retained and exercised by the proprietor of the southern or principal part of Eday.

In briefly following the course of the titles to the larger and southern portion of the island, I may mention that in 1673 Robert Stewart, son of Captain Robert Stewart already mentioned, conveyed to Arthur Baikie of Tankerness the lands of Greentoft and the holms of Ethay, and various other lands in the island of Eday with all their pertinents, and particularly with the office of Bailliarie and privilege of Admiralty, wrack, waith, whales, small and great fishings, and other privileges," &c. On this disposition infettment followed, and also on a subsequent disposition of certain omitted lands, Arthur Baikie was infett. He disposed to George Baikie, and George Baikie expedite a Crown Charter of Confirmation dated 7th May 1683.

This Crown Charter is a most important writ confirming the six previous titles to the lands of Greenholms of Ethay and others, with the office of Bailliarie and privileges of Admiralty, "lie wrack, wraith, coetis, magnis et parvis, piscationibus et aliis privilegiis, &c." The next title to which it is necessary for me to refer, as there is no dispute as to the titles to the land, is the precept from Chancery of 27th November 1778, and sasine thereon in 1779, in favour of Robert Baikie of Tankerness, comprehending expressly the lands of Greentoft and Greenholms of Eday, "*cum officio Balivatus et privilegiis Thalassiarchie lie wreck, wreath, coetis piscationibus magnis et parvis,*" and all other pertinents. In this deed the privilege of wreck is expressly recognised as conferred with the office of Bailliarie and as a privilege of Admiralty, the word *Thalassiarchia*—a word of Greek origin—being synonymous with Admiralty.

The two writs to which I have last referred—viz., the Crown Charter in favour of George Baikie of 1683, and the precept from Chancery in favour of Robert Baikie in 1778, appear to me to be of great importance in this case, the privilege of wreck being in both instances in the dispositive or governing clause. But then there follows a Crown Charter of Resignation in favour of Robert Baikie dated 6th August 1784, wherein the Greenholms of Athay, with other lands, are set forth with all pertinents, and particularly the privilege of Admiralty of wreck and waith as before.

There seems to have been about this time a procedure, probably for the purpose of making votes by which a mid-superiority was created; but I need not dwell on that, because the lands with their pertinents and privileges remained with Mr Baikie on the base title, and it is sufficient for the present case, and sufficient for our inquiry into the foundation of a prescriptive right, that that base right was built on a good title from a subject superior confirmed by the Crown, and containing the privilege of wreck now in question.

In 1824, James Baikie conveyed to Samuel Laing,

who had a few years previously become the proprietor of the northern portion of the island. The whole island being thus the property of Mr Laing, and the whole privileges being still within the titles, it was purchased at a public sale by the defender Mr Hebden in 1853, with the privilege of Admiralty, "wrecks, weath, whales, &c.," and all other pertinents. Mr Hebden's title has been completed under the provisions of the Titles to Land Act.

On this state of the titles I am of opinion that the old Crown Charter of Novodamus in 1632, with its wide clause of pertinents and privileges, and with special mention of wrack, waith, and ware in the tenendas clause, is not to be lost sight of in considering what are the pertinents attached to the islands of Eday in the subsequent titles, more particularly as it is referred to in more than one of the subsequent charters. But whether viewed in connection with this old charter or not, I am of opinion that the defender has produced in the progress of titles through his authors Stewart, Baikie, and Laing, a sufficient title to form the foundation of a prescriptive right; and that, if on the proof the defender has instructed immemorial possession of the right and privilege of wreck, he is entitled to succeed in this action. There is no original charter of novodamus since 1632; but in the base title and in the charters by progress this privilege appears.

The case of salmon fishing, also one of the *minora regalia*, is in some respects analogous, and there is authority for holding that a grant from a subject-superior bearing a clause *cum piscationibus* is a sufficient title to enable a party to establish a right of salmon-fishing by prescriptive possession for forty years.

This was the opinion of Lord Moncrieff in the case of *Ramsay v. Duke of Roxburgh*, Feb. 9, 1848; it was also the opinion of Lord Colonsay both in this Court and in the House of Lords in the case of *Sinclair*, and I think it was confirmed by the judgment in the House of Lords. Indeed the decision in the case of *Sinclair* chiefly turned on this point.

Now, I think it can scarcely be made matter of reasonable doubt that Mr Baikie held the island of Eday on a good base title with this privilege of wreck—that he transferred it to Mr Laing—and that the defender Mr Hebden has now acquired it, with the same privilege. That the lands are Mr Hebden's under that title is not disputed. The question is, Whether the right or privilege of wreck has been fortified by prescriptive possession. On this state of the titles I proceed to consider the evidence of possession, in which it is true that the burden of proof is on the defender.

I concur very much in the view of the defender's proof of possession which the Lord Ordinary has taken. It is to be considered in two aspects. It bears on the construction of the defender's titles as affording explanation and illustration thereof; and it gives to these titles the corroboration of prescriptive possession. In both views the possession here proved is important. I shall not enter on any detailed analysis of the proof, which, however, I have carefully considered. I think the possession by the proprietor of Eday and his tacksman has this marked feature. It was uniformly exercised on the footing of a right—not an occasional or precarious possession hastily snatched or carelessly permitted—but a possession avowedly by the proprietor, or by his tacksman, as under the proprietor, in respect of a right arising on his titles. The

correspondence of the possession with the title of the defender is worthy of remark. The limitation of the right is as instructive to our inquiry as the exercise of it. It never was a right as given, or as exercised, or as claimed, of taking possession for his own behoof of wrecked vessels or wrecked goods when the owner was known. Therefore, evidence on the part of the pursuer, applicable to the goods of ascertained owners is not opposed to the proof led, or the right claimed by the defender. Then it never was a right, as given, or exercised, or claimed, to the office or the jurisdiction of Admiralty. Therefore proof by the pursuer, of the grant or the exercise of the powers and jurisdiction of Admiralty is not contradictory to the proof or the claim of the defender.

Little can be made of the letters patent, and Royal Commissions of Admiralty, on which the pursuer founds to support a jurisdiction of Admiralty which the defender does not claim, but which do not impair the privilege of wreck, which he does claim; and I really do not think that the pursuer's proof of possession, rightly understood, is truly conflicting with the proof for the defender, or that it presents any serious difficulty to the defender's case.

That noble Lords and learned Sheriffs have exercised jurisdiction of Admiralty in Orkney, or even in Eday, does not appear to me to be inconsistent with the defender's exercise of the privilege of wreck. The Royal grant of powers and privileges to the Admiral, in virtue of which jurisdiction is exercised, is not inconsistent with a right in the pursuer to wreck, and may fairly be held as made under reservation of any privilege and pertinents previously granted by the Crown.

In regard to the instances in which it is said that the Crown has exercised rights inconsistent with the defender's claim, or having the effect of interrupting the defender's possession, I have, after attentive consideration of them, come to the conclusion that they cannot be sustained to that effect.

One of these instances is the sale of a vessel in 1818. Now, it appears first, that in that case the owners were ascertained, in which case the privilege was of no avail to the proprietor of Eday; and secondly, that Mr Murray, the tacksman under Mr Baikie, then proprietor of Eday, is mentioned as "concerned" in the matter, and as present at the adjustment of the accounts. He was not merely concerned to the extent of his claim as an ordinary salvor, but I think he was concerned as tacksman representing the landlord, and claiming salvage where the owner was known, as he would have claimed the wreck if the owner had not been known. This is not an instance of any exercise of right hostile to the defender, or inconsistent with the defender's claim. Nor is the other instance founded on by the pursuer, of the sale of a log in 1824, of more importance, either as an act of possession by the Crown, or as an act of interruption of the defender's possession. The value of that log was very small; and the whole proceeding was under protest by Mr Baikie, that, according to his titles and his immemorial possession, he claimed the right to wreck. Besides, it is stated that there was a mark on the log which might have led to the discovery of the owner, and this may have tended to induce Mr Baikie to leave that matter for arrangement without, however, surrendering or compromising his right. It appears to me that the claim of Mr Baikie was made as a matter of right, and was more emphatic

than its denial by the Crown; and that the proceedings for sale of the log and adjustment of salvage were matter of arrangement implying no surrender by him, but made *salvo jure cujuslibet*.

On the other hand, the evidence for the defender in regard to possession is unusually strong. There is documentary evidence, of old date, and of great importance. There is a minute of tack by Robert Baikie of Tankerness to Robert Reid, merchant in Eday, dated in 1721. There is a draft tack between Robert Baikie of Tankerness and James Murray, dated in 1774. There is a missive offer of lease by Robert Baikie to James Murray, dated 8th August 1792, and there is a letter from James Murray to Robert Baikie dated 5th January 1793, in all of which Mr Baikie, as proprietor of Eday, asserted the right and privilege, and let, or proposed to let, to these tacksman the right and privilege belonging to him of wrecked goods under the value of £10 Scots, he retaining the right to goods above that value.

In addition to these pieces of documentary evidence instructing unequivocal acts of possession as matter of right, we have the important parole evidence of Mr Baikie himself, a gentleman far advanced in life, but most intelligent and distinct, and whose evidence is in the highest degree reliable, and we have him supported by four or five old witnesses whose recollections carry them back for sixty years, and who bring the possession and exercise of the privilege down from remote dates to a recent period.

It is not suggested that the proof for the defender, if not contradicted by the pursuer's proof, is otherwise than credible and satisfactory, and I can see no reason to doubt it. All evidence of possession must be according to the nature of the right and the circumstances of the case; opportunity of exercising the privilege is occasional, and not on every occasion is it worth assertion; but I must say that I could scarcely have expected better evidence of the assertion of right and the exercise of right than what the defender has adduced. Indeed, there is nothing opposed to the evidence for the defender except the instances to which I have already adverted; and there is an acknowledgment by one of the pursuer's witnesses, Oliver Drever (p. 55), that his recollection of the possession in Eday in his youth corresponds very much with what the defender's witnesses have explained. Drever says that when he was a youngster "it was the practice for the principal tacksman to hold like the power of the landlord, and to claim the wreck that came ashore, and to forbid the subtenants from taking it, and make them give it up." This corresponds entirely with the testimony of Mr Baikie and the old witnesses for the defender, and tends to instruct the possession of the proprietor, through the tacksman, of the privilege of wreck conferred by the old charters. It is important to bear in mind that no right is claimed by Mr Hebden which encroaches on the rights of the lawful owners of wrecked goods—rights which were ignored by our ancient law, but which the more just and humane legislation of recent times has carefully protected.

On the whole matter I am of opinion that the proof is sufficient, and I concur in the judgment of the Lord Ordinary.

LORD CURRIEHILL—This action concludes to have it declared that the Crown has right to all wreck either cast upon the shores or floating upon the

coasts of the island of Eday,—subject to the provisions of “The Merchant Shipping Act 1854,” and to the claim of the rightful owners of such wreck. The defender, Mr Hebden, who is the owner of that island, claims that right as now belonging to him, subject to the same qualification.

In order to determine this competition, it is necessary to have in view the peculiar state of the articles which are the subjects of them. In the first place, these are not articles which have never had owners, and as to which the rule is applicable *res nullius cedit occupanti*. Nor, secondly, are they articles of which the ownership has been voluntarily relinquished by the persons to whom the same had formerly belonged. But, thirdly, they are articles which, although they have formerly belonged to owners, have been found straying, without being in the possession of any person, and the owners of which are unknown, and have not appeared to claim them. And, fourthly, they are what are known by the denomination of wreck or waith,—that is to say, they have suffered shipwreck at sea, and have been found either stranded on shore, or floating at sea in the vicinity of some shore. Certain precautions have been adopted by the Statute mentioned in the summons, and otherways, for saving the rights of the owners of such articles in the event of their appearing to claim their property or the proceeds thereof. But the question is, to whom does the right to them belong, in the event of their owners never claiming them.

And this much is certain, that articles in such a predicament belong to the Crown, or to those to whom the Crown has conferred its right. To use the words of Lord Stair (3, 8, 27), “Shipwreck and waith goods, or treasures in the ground, whose owner appeareth not, are confiscated as caducuary, whereby the owners are presumed to relinquish or lose the same. And so a *jure suo cadunt*; and the things become *nullius*; and yet belong not to the first possessor, as things relinquished do by the common law, but do belong to the King, by his royal prerogative, or to others having right from him.” Hence there is no doubt that the Crown has a good title to sue the present action, and that the articles in question must be held to belong to it, unless the defender has established that its right has been transferred to him. The question is, has he done so? I entirely concur in the statement by Lord Ardmillan, that the Acts of Annexation do not include the island of Eday. I also concur in the view he has taken of the history of the title of that island. But it appears from that analysis of the title, that the defender has not produced any grant by the Crown conveying its right to him, or to any party whatever. He has, indeed, produced a Crown title to the lands of the island of Eday; but these titles contain no conveyance of the Crown’s right to the wreck, &c., in dispute.

It is true that in the *tenendas* clause of the Crown’s title to the lands the words “wraik, waith, ware,” are inserted among a long list of other things; and also that, in the dispositive clauses of some renewals of the feudal investiture of the lands, the words “privileges of Admiralty, wrecks, weath, whales, fishings great and small, and other privileges belonging to the said whole lands” are inserted. But the mere insertion of such words into such writings does not import a conveyance by the grantor to the grantee of these things, when they are not in the dispositive clause of either the original charter, or of a Charter of Novodamus. The

*tenendas* clause of even an original charter has no such dispositive effect. This has been settled for more than two centuries, see *Keith v. Graham*, 25th January 1668, Mor. p. 2256; and also Menzies’ Lectures, p. 532. Nor has the mere introduction of such words into renewals of the investiture such an effect. In such renewals there is always implied a condition *salvo jure* in favour of the granters. This is another of the established rules of Scotch conveyancing. It is stated by all the institutional writers from Craig downwards; and it is *in viridi observantia* as appears from the recent case of *Bain v. Duke of Hamilton*, 4th Nov. 1867, and the series of prior cases referred to in the report of that case. Thus the Crown’s legal right to the articles in dispute has not been transferred to the defender by any deed of conveyance.

On the other hand, such charters by progress, when followed by infestment (as those in question appear to have been), are available as titles for transferring such rights by the operation of the positive prescription established by the Statute 1617, c. 12; and consequently, if, for a period of forty years before the institution of this action in 1860, the defender and his authors had enjoyed such possession as that Statute requires, of wreck, waith, and ware, he would have had a good defence against this action. The question therefore appears to me to come to this,—has the defender proved that he and his predecessors did enjoy such possession?

He has proved several acts of possession. And if he had been in the position of having had right to the wreck, &c., by a previous conveyance thereof by the Crown to him, and if the question had been whether he had lost such vested right by prescription, these acts of possession would have been sufficient to protect him from the loss of such vested right. But the question here being whether by the operation of prescription the Crown has lost its legal right to these articles, and whether its right has been transferred to the defender, there is a much heavier onus on the defender. The prescriptive possession which it is incumbent on him to prove must have been both *exclusive* of the possession of the former owner, and *uninterrupted*. But I do not see any proof that the Crown’s exercise of its legal right has been entirely excluded by the defender and his authors during all the period of forty years anterior to the institution of this action in the year 1860.

In the first place, that the Crown did not intend to relinquish its legal rights to its emoluments of this kind from any of the islands of Orkney and Shetland appears from the terms of the patents granted by it, to its Vice-Admirals for that district. There has been produced a series of these grants, nine in number, commencing in 1737, and ending with that in favour of Sheriff Ayton, who died only three or four years ago. Passing over such of these writings as were granted before the commencement of the prescriptive period in 1820, let us see what were the terms of those granted during that period. The first of these was granted to Mr James A. Macnochie on 28 Feb. 1823. It sets forth that it was granted “during our pleasure only,” and while the grantee should hold the office of Sheriff and Steward-depute; that he was empowered to appoint local resident deputies, for whom he was to be responsible, and that he was yearly to account in Exchequer for all the fees, profits, casualties, and emoluments uplifted by him or his deputed, and pay the same to the Crown’s

Receiver-General of land-rents and casualties. Mr Maconochie named five deputies for different districts of the county (one of whom was Mr Robert Strong for Sanday and Eday), with this declaration that "their powers shall only extend to the salvage and custody of wrecked and stranded goods as law directs; and to the rendering assistance to vessels wrecked and in distress, being required thereto by the persons in command, or in the event of no living person being on board, to the care and custody of any shipwreck, until they communicate with and receive instructions from the Vice-Admiral-depute;" they also accounting annually for the matters under their charge. Such *appropriations and sales* were directed to be made according to established rules, and subject to the claims of the owners of the wrecked goods, if they should appear to claim them or their proceeds after being sold; but, failing their appearing and making such claims, these functionaries were to account for the same to the Crown officers.

These arrangements were not mere matters of form. It appears that they have ever since been acted upon. The proof discloses an instructive instance of this soon after these appointments were made. On 23d March 1824, Mr Strang, the deputy appointed for Eday as above mentioned, having written to William Sinclair, the vice-Admiralty clerk, that an oak log had come ashore on that island, Mr Sinclair instructed a person named John Allan to secure the log above high water mark until further orders. The predecessor of the defender, Mr Baikie of Tankerness, who was then the owner of the part of Eday on which the log was stranded, wrote to Mr Sinclair on the following day (25th March 1824), claiming the log, and founding his claim on the terms of his title. That title, as already stated, did not contain any *conveyance* to him of the Crown's legal rights, but was merely a *renewal* of the former investiture, in which the words formerly referred to were inserted. Mr Sinclair would not admit that claim until the terms of the charters should be examined. And the result of the investigation was, that on 8th March in the following year, 1825, the log of wood was sold by auction at Kirkwall, in presence of the *Vice-Admiral-depute*, for £3, 15s., and the balance of the price, after paying the expense of salvage and other costs, was accounted for to the Crown by the Admiralty-clerk. Mr Baikie, when examined as a witness for the defender in the present action, on 21st September 1865, had naturally enough forgotten his correspondence forty years before regarding this article. But there is no contrary evidence as to this fact as established by the evidence for the Crown. Now, even were there nothing more in this case, the fact thus established would itself be conclusive against the legal right of the Crown having been derelinqished and transferred to the owner of Eday by the positive prescription; for here is a clear act of continued exercise of the right on the part of the Crown, and of interruption and exclusion from possession of the defender's predecessor, within the *prescriptive period* of forty years before this action was instituted. As stated by Erskine (3, 7, 45), "Interruption has the effect to cut off the course of prescription so that the person prescribing cannot avail himself of any part of the former time, but must begin a new course commencing from the date of the interruption." And as that act took place in 1824, the prescriptive period, even if it had commenced, would not also have been completed in 1860.

But numerous subsequent acts of interruption on the part of the Crown functionaries have also been proved.

In 1828 two pieces of wood were cast ashore on Eday, besides several other pieces on an adjacent island. On 1st May in that year, warrant was granted by the Vice-Admiral for selling them. Mr Samuel Laing, who had then become the owner of Eday, wrote to the Vice-Admiral-depute on 12th May 1828, not claiming them, but suggesting that it should "be ascertained whether this part of the *regalia* within your jurisdiction has been granted by the Crown to a donatory, or is still entire in the Crown." And on the 16th of the same month he again wrote stating, that he wrote "merely to have it noted that such a claim was intimated to you for the consideration of the Vice-admiral or Crown officers, when in a state to be laid before them." In consequence, the Vice-Admiral-depute directed his substitute not to sell the logs until the King's counsel should be consulted, but with notice that the claim was not recognised. And it has not been proved, and there is no reason to believe, that Mr Laing ever obtained delivery of that article from the Crown, or that the Crown ever afterwards relinquished its possession thereof. And the written proof establishes that, so long as Mr Laing remained the owner of Eday, articles wrecked on or adjacent to the island continued to be sold by the Crown, without any interference on his part, or without any suggestion even of a claim by him, and without any question being raised as to the Crown's right to such wreck. Thus, in 1840, a wreck on the Island of Eday, consisting of a log of elm wood, was sold by the Vice-Admiral-depute, and the free proceeds were accounted for to the Crown.

In the written evidence we find a third proceeding of the same kind in 1846 in reference to several logs of timber then stranded on Eday. These were sold under warrant of the Vice-Admiral-substitute, and again the free proceeds were accounted for to the Crown as being included in the droits of Admiralty of the year 1846.

In 1847 a log of American elm was found as a wreck on Eday, and was taken possession of by the Admiral-substitute. But as there was no opportunity of selling it by a licensed auctioneer until the following year, 1848, and it was then found to be so much worm-eaten as not to be worth the expense of a sale, the Crown abandoned it to the *salvors*, leaving them to pay all expenses.

Besides the proceedings which thus appear from the written evidence, five witnesses, examined on the part of the Crown, establish that the officers of the Crown, and of the Customs, were in the *practice generally* of appropriating goods and vessels which were found either stranded on the shores of Eday, or floating in the adjacent sea; and in no case whatever does it appear that the owners of the *solum* of that Island ever obtained possession of the articles so appropriated.

The defender's written evidence consists of certain leases granted by the Baikies of Tankerness while they were owners of Eday, in which they granted authority to their tenants to appropriate wrecks. It is probable, from the correspondence before referred to, that these gentlemen had inserted such clauses in their leases under a belief that they were authorized to do so by the clauses which had found their way, as already mentioned, into the renewals of their investitures. The letters already mentioned in 1824 by Mr James Baikie while he was the owner, and by Mr Samuel Laing in 1828,

after he had become the owner, show that they then entertained such a notion. But it does not appear that possession of the wreck was ever actually enjoyed by the tenants under these leases. On the contrary, it has been seen that, although both Mr James Baikie and Mr Laing did intimate a claim to the wreck in virtue of their charters, yet after these writings were examined, and their true nature was ascertained, such claims were not insisted in, and the Crown continued to exercise its legal rights.

The defender examined seven witnesses. One of them was his predecessor, Mrs James Baikie; and, as has been seen, his attempt to get possession of such wreck failed, and was defeated by the Crown within the years of prescription. And although these witnesses state that the tacksmen of lands in Eday did occasionally appropriate wreck, yet that possession was very far from being of the *exclusive and uninterrupted character* which is requisite to render it prescriptive; and was indeed very much of the same character as that of the peasants and general inhabitants, who are proved to have often lawlessly appropriated the articles which they found lying on the shore, as if these had been *res nullius*. And even these witnesses expressly state that a great proportion of the wrecked articles in that locality was carried off by the Custom House Officers, without there being the slightest indication of such articles having ever been returned to the owners or lessees of the Island of Eday. And one of them, George Davidson, who had been appointed Admiral-depute about the year 1845, swears that "when I first got my appointment I acted upon it, and continued to act till Mr Hepden's purchase" (which was in 1853). "During the time I acted, I claimed all the drift-timber for the Crown, and got it, and sold it, and accounted for the proceeds."

On the whole, I am of opinion that the defender has failed to prove that he and his predecessors have enjoyed such an exclusive and uninterrupted possession of the wreck, waith, and ware, on and adjacent to the Island of Eday for a period of forty years prior to the institution of this action, as is requisite to establish that, by the operation of the prescription established by the Statute of 1617, the Crown has lost the right which, by law, belongs to it. I therefore think that decree ought to be pronounced in terms of the conclusions of the libel, subject to the qualification therein set forth.

The LORD PRESIDENT and LORD DEAS concurred with LORD ARMILLAN.

Agents for Pursuer—W. H. and W. J. Sands, W.S.

Agent for Defender—Thomas Ranken, S.S.C.

Friday, February 28.

EARL OF DALHOUSIE v. CROKAT.

*Heir and Executor—Entailed Estate—Rents—Apportionment Act—Lease.* Held that the Apportionment Act does not apply in the case of leases constituted merely by entries in the rental books of the estate followed by possession. Observed that such leases were not "instruments executed" in the sense of the Act. Question, whether they were verbal or written leases?

The late Lord Panmure died on 13th April 1852.

By his last will and testament he appointed the defender, General Crokot, to be his sole executor. Upon Lord Panmure's death, certain rents out of entailed estates in his possession fell to be apportioned between the pursuer, the present Earl of Dalhousie, his heir, and General Crokot, his executor. The greater portion of these rents were apportioned, but a question arose as to the apportionment of the rents of certain farms on the entailed estates. The Apportionment Act, 4 and 5 Will. IV., c. 22, is made applicable to rents "made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this Act."

The defender alleged (cond. 2) "The late Thomas Collier was, at the date of Lord Panmure's death, and had been for about thirty-five years previously, factor on the Panmure estates. When a farm was to be let, he was in use to make all the arrangements with regard to the letting of it. After Mr Collier had adjusted with the tenant the terms of the proposed lease, it was verbally reported by him to Lord Panmure, and if approved of by Lord Panmure, the essential conditions of it were inserted by Mr Collier in the rental book of the estate kept by him. In no cases were entries of leases inserted in the rental books until after the terms of the leases had been adjusted with the tenants and approved of by Lord Panmure. The entries in the rental books were made with the knowledge of the tenant as well as of the landlord, and were relied upon both by landlord and tenants as constituting a written lease. It was the custom of the estate to record the particulars of the leases for this purpose. In some cases formal and probative leases were also executed. In these rental books the subject let, the name of the tenant, the duration of the lease, and the amount of the rent, are specifically set forth in writing, and under and on the faith of the leases so recorded in the rental book the tenants possessed the subjects, and paid the rents, all as specified in the said rental book."

The Lord Ordinary (ORMIDALE) held that the Apportionment Act did not apply to rents payable under leases constituted in this way.

The defender reclaimed.

SOLICITOR-GENERAL (MILLAR) and ADAM for reclaimer.

CLARK and RUTHERFURD for respondent.

At advising—

LORD PRESIDENT—The Lord Ordinary has found in this case that the Apportionment Act is not applicable as between the heir and the executor in regard to those leases current at the death of the late Lord Panmure, which rested for their establishment on entries in the rental books of the estate. It is necessary to ascertain more exactly than is expressed in this interlocutor the position of these leases. The condescence for General Crokot states the thing precisely enough, and apparently with sufficient accuracy. [*Reads cond. 2.*] If it were necessary to determine whether the leases described in this article are verbal or written leases, I should consider the question to be one of some difficulty, but I think it is not necessary, for I think the words of the statute are so plain that it is impossible they can apply to leases of this kind, whether verbal or written. I do not think that every written lease comes under the Statute. A lease, to come under the statute, must be constituted by an instrument that shall be executed after the passing of this Act, and the rents to be apportioned must be made payable at fixed periods under