

road is the line, or nearly so, coloured blue, laid down on a sheet of the Ordnance survey produced with, and referred to in the summons, leading from a gate in the fence of the turnpike road which leads from Glasgow to Aberfoyle, near the bridge commonly known as Killearn Bridge, at a point marked B on said sheet, and thence along or near to the banks of the river or water of Endrick, through a field belonging to the defender, and forming part of the farm of Drummore, to a point marked A on said sheet, and thence across the said water of Endrick, and into the said lands of Dukehouse: And finds, decerns, and declares that the pursuers and their foresaids have undoubted right, title, and privilege to use and enjoy the said line of road as a means of access to, and exit from, the said lands of Dukehouse on the south, and particularly for the purpose of passing along the same, and driving horses and carts, cattle, sheep, and bestial along it, and that the defender, the said Peter Blackburn, is not entitled to shut up said line of road; and decerns and ordains the defender to desist and cease now, and in all time coming, from troubling, molesting, or obstructing the pursuers and their foresaids in the peaceable use, enjoyment, and possession of said line of road, and interdicts, prohibits, and discharges him accordingly, and decerns: Finds the said Peter Blackburn liable in the expenses in both actions; allows an account thereof to be given in," &c.

Mr Blackburn reclaimed.

BLACKBURN and MAITLAND for reclaimer.

GIFFORD, THOMSON, and GUTHRIE for respondent. The Court unanimously adhered.

LORD DEAS said that though the public did use the road that was not conclusive. In many cases a proprietor might allow his neighbours or the public to use a road through his property to which they had no right. If a road so used was either made or kept up by the proprietor for his own purposes, it would be very difficult for the neighbours or the public to maintain that they had a right to continue the use of it simply because they had been allowed to go that way without challenge for forty years. The very absence of challenge would be a great difficulty in the way of establishing a right to the road. If a proprietor challenged the use of the road, and the use was persisted in, that was an assertion of the right on the one hand and a denial on the other, which, in the end, might be favourable to the right to the road being made out. The only difficulty was whether this was not a case of that kind—whether this was not a road that the proprietor of Killearn kept open for his own purposes. But it rather appeared that that element was not in the case. His Lordship then went briefly over the evidence in the case, and observed that he concurred with the Lord Ordinary.

The other judges concurred.

Agent for Blackburn—Colin Mackenzie, W.S.
Agent for Meiklem—D. J. Macbrair, S.S.C.

Friday, May 29.

SECOND DIVISION.

LINDSAY AND LONG v. ROBERTSON AND OTHERS.

(Ante, vol. iv, p. 91.)

Mussel-Fishings—Barony—General Title—Exclusive Possession—Issue. Form of issue adjusted to

try the question of mussel-fishings with the view of explaining a general title.

In this case, in which Sir Coutts Lindsay and Colonel Long seek interdict against the fishermen of St Andrews from gathering mussels from the scalps on the north bank of the river Eden, the Court, after determining the question of interim possession, appointed the complainers to lodge issues to try the question of fact whether they had the possession necessary to complete their titles. The complainers proposed the following issues:—

"It being admitted that the pursuer, Sir Coutts Lindsay, is heritable proprietor of the lands and others described in the Crown Charter of Sale, dated 20th December 1782, and written to the Seal, and registered 14th January 1783, No. 85 of process, as in the schedule No. I., hereto appended: And it being further admitted that the pursuer, Colonel Samuel Long, is heritable proprietor of the lands and barony of Earlshall, comprehending the lands, fishings, and others described in the Crown Charter, dated 20th, and written to the Seal, and registered 28th December 1815, as in the schedule No. II., hereto appended.

- "1. Whether, for forty years previous to 1867, or for time immemorial, the pursuers and their predecessors, proprietors of the lands and others foresaid, possessed the mussel-scalps, beds, or fisheries lying to the north of the *medium flum*, or central base line of the river or water of Eden, at low water of spring tides, between the points marked A and B respectively on the plan, No. 9 of process, or any part thereof?
- "2. Whether, for seven years previous to 1867, the pursuers possessed the mussel-scalps, beds, or fisheries lying to the north of the *medium flum*, or central base line of the river or water of Eden, at low water of spring tides, between the points marked A and B respectively on the plan, No. 9 of process, or any part thereof?

YOUNG, WATSON, and BALFOUR, for complainers, argued that in their pleas they expressly relied upon Colonel Long's charter, and that the quotation from the infetment was sufficient specification, it not being alleged that the descriptions were different. They were entitled to an issue as to the prescriptive possession without the word 'exclusive,' because that was a misleading expression, and might affect the jury. Besides, it had been held by the Court in the case of *Musket*, 18 D. 656, that possession in regard to a claim of property meant exclusive possession; and the form of issues in questions of property was there intended to be definitively settled. The complainers were entitled to the second issue because this was no case of competition of rights, the respondents having withdrawn their private title alleged in the record, and it having been held by the Court, in the case of the *Duchess of Sutherland*, that the right to mussel-fishing was not *in re publica*.

CLARK and W. A. BROWN, for respondents, objected to the proposed admission, that it was not warranted by the record or the state of the titles as regards production. The complainer, Colonel Long, produced no charter, and only founded on an infetment in 1824. The first issue must put the question of exclusive possession. It is true that in the case of *Musket*, founded on by the complainers, the Court held the word possession to mean exclusive possession in questions of property, but this case is peculiar, in so far that the property admits of a possession, and there has been *de facto* possession

not that of the proprietor. The second issue must be disallowed entirely. Until the complainers have proved forty years' possession they are only in progress of acquiring a title, and without a title of some sort, complete in itself, they cannot acquire a possessory judgment.

The Lord Ordinary (BARCAPLE) reported the case, adding the following note:—

"In the proposed admission, reference is made to the description of the barony of Earlsall, belonging to the complainer, Colonel Long, in a Crown charter of 1815. The respondents object that the earliest title founded upon in the record is Colonel Long's own infeftment in 1824. The Lord Ordinary does not understand that the descriptions are alleged to be different, the necessity for founding upon a Crown grant being the reason for reverting to the earlier title. There seems to be a difficulty as to this in the present state of the record. But the Lord Ordinary is disposed to think that, if necessary, an amendment in this respect may be allowed, on the principle that it is only specification of the complainers' titles, and consistent with the general averments in regard to them now on the record. The complainers' second plea founds expressly on their Crown charters.

"The respondents maintain that the issues should put the alleged possession as having been exclusive. This appears to have been recently disapproved of in cases of ordinary property, especially where the word 'property' has been introduced into the issue. But the case of mussel-fishing is peculiar in this respect. The question is between the party alleging a private patrimonial and exclusive right, and a portion of the public, who allege that the public have not been precluded from taking mussels, according to what is the ordinary usage where there is no private grant.

"Another question is as to the mode of possession which must be proved, and whether that ought not to be specified in the issue. The Lord Ordinary is not aware that the right claimed in such cases has been treated as anything but a right to take the fish, conferred upon a private proprietor by grant from the Crown. Thus, Mr Bell (Prin., 646), says, 'a right to take oysters, mussels, &c., which are fixed to the spot, is effectual 'where expressly granted.' It cannot vary the nature of the right, that the grant is not express, but by implication.

"Again, Lord Corehouse said, in the *Duke of Portland v. Gray*, 11 S. 14, '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.' As the Lord Ordinary has always understood, it is solely in virtue of a grant of fishings, followed by possession, that it is maintained that the right can be acquired by implication in a case such as is here presented by the complainers.

"If mussels are attached to ground, the *solum* of which is private property, the right to take them may be in the proprietor, as the right to fish for trout in a stream is in the proprietor of the lands through which it runs. But the Lord Ordinary does not understand the complainers to assert a right to the *solum* of the shore to which the mussels are attached. The scalps are said to be situated on the shores, wholly or in great part opposite to their lands. The only right alleged seems to be the right to take mussels in virtue of what is substantially a clause *cum piscationibus*; and it would seem to follow that the only possession by which it can be established is the actual exercise of that right. In this respect, such a case altogether

differs from the ordinary case of disputed boundary, or part and pertinent, and is identical with that of salmon-fishing, which is certainly not a part or pertinent of lands. The object of proving prescriptive possession in such a case is to explain the meaning in which the term fishings are used.

"The respondents dispute the right of the complainers to take the second issue as to seven years' possession. Reference was made to the cases of *Hunter v. Maule*, 5 S. 238, and *Saunders v. Hunter*, 8 S. 605. The Lord Ordinary thinks the objection well founded. A charter with a clause *cum piscationibus* does not in his opinion give a title of any kind, either to salmon or mussel-fishing, until it is set up by prescriptive possession. If until that is done it is no title at all, it cannot be a title of possession to found a possessory judgment.

"The proposal of the complainers is, that on the assumption that they shall fail to prove prescriptive possession, they shall be allowed to prove that they began seven years ago to exercise the right claimed by them—that is, to exercise it *sine titulo*. The question is of importance, both because it seems to apply equally to the law as to the title to salmon-fishings, and because, if a proprietor is entitled to such a possessory judgment against members of the public, or a party holding a competing right, he seems to be equally entitled to it against the Crown, his alleged author, in virtue of a grant, which *presumptione juris* does not contain the right claimed."

At the discussion in the Inner House, the second issue was abandoned by the complainers, and the argument mainly turned on the question whether the first issue should contain the words "exclusive possession." Reference was made to the case of *Dempster*, where the First Division, in 1863, had adjusted an issue in a similar case, and which contained these words. The Court resolved to consult the other Division on the terms of the issue. The Court adjusted the issue as follows:—

"Whether, for forty years previous to 1867, or for time immemorial, the pursuers and their predecessors, proprietors of the lands and others foresaid, had exclusive possession of the fishing of mussels from the scalps or beds lying to the north of the *medium flum*, or central base line of the river or water of Eden at low-water of spring tides, between the points marked A and B respectively on the plan, No. 9 of process, or any part thereof?"

Agents for Complainers—Dundas & Wilson, C.S.
Agent for Respondents—Andrew Beveridge, S.S.C.

Friday, May 29.

THE CITY OF GLASGOW LIFE ASSURANCE COMPANY v. STIVEN AND MYER.

Commissary—Confirmation—Executor qua Creditor—Foreign Judgment. Held that a document, bearing to be an office copy of a judgment pronounced for debt against an English debtor by one of the superior courts of England, and appearing to be stamped on each page with the seal thereof, was, if authentic, *prima facie* evidence of the constitution of the debt, and sufficient to entitle the creditor to obtain from the Commissary confirmation as executor creditor of the debtor; and proof of authentication allowed.