nets used are of such a nature as necessarily to infer either that they will catch salmon, or obstruct the passage of the fish. It may be that the petitioner is not the grantee of the Crown in the *solum* of the sea, but he is the grantee of the salmon-fishings, and in exercise of that right he is entitled to use the shore. On the other hand, the appellant, as a member of the public, has no right to fix engines on the *fundus* of the shore in exercise of his right to catch white fish. The *solum* of the sea is feudal estate in the Crown, and no amount of possession can be available to acquire a right in it by the public, because the public right to take white fish is not a feudal title.

After considerable discussion, the Court expressed an opinion that it would be desirable to ascertain the facts before answer. The Court was further of opinion that the adjustment of issues, with a view to jury trial, would be a matter of great difficulty, looking to the intricate and important questions involved in the case, in which the parties might not eventually succeed. There were no doubt popular issues in the case, specially adapted for jury trial, but that consideration must yield to the important and difficult character of the legal questions involved. The proof was therefore appointed to take place before one of their Lordships.

Agent for Appellant—W. Officer, S.S.C.

Agents for Respondent—Mackenzie, Innes, & Logan, W.S.

Friday, February 24.

FIRST DIVISION.

PITCAIRN *v.* PITCAIRN.

Testament—Effects—Heritage—31 *and* 32 *Vict., c.* 101, § 20. A left his whole estate, heritable and moveable, to his eldest son B, whom failing to his second son C, whom failing to his third son D, subject to payment of certain legacies and provisions. On his death B made up titles, and died leaving a holograph will, in which, on the narrative of his desire to follow out his father's wishes, he declared that C "should not inherit any of my effects," but that they should all go to D. D maintained that under § 20 of the Titles to Land Consolidation Act 1868, this operated as a conveyance of heritage. *Held*, on a construction of B's intention, that "effects" did not include heritage.

Mr Pitcairn of Kinnaird, in Fifeshire, died in 1857, leaving a disposition and settlement dated 1854, and codicil thereto dated 1855. By this disposition and settlement he conveyed his estate of Kinnaird, and the rest of his estate, heritable and moveable, to David Pitcairn, his eldest son, and the heirs of his body, whom failing to the defender Hope Pitcairn and the heirs of his body, whom failing to the pursuer John Pitcairn and the heirs of his body, whom failing to his own nearest heirs and assignees. The deed farther contained an appointment of David Pitcairn, whom failing the parties succeeding under the foregoing destination, to be the testator's sole executor and universal legatory, but it was thereby declared that David Pitcairn, whom failing the party succeeding to the lands under the foregoing destination, should be obliged, out of the estate and effects heritable and moveable, therein conveyed, to make payment of and provide for the debts, provisions, and others therein mentioned. These were, *inter alia*, to pay to his son Hope Pitcairn, the defender, the sum of £500; to pay to the pursuer John Pitcairn, his son, the sum of £2500; to pay to his daughter Miss Mary Ann Pitcairn, the sum of £4000; and to pay to David Pitcairn, and others therein named as trustees, the sum of £6000, £1500 of which was, on the death of the liferentrix, to be paid equally among David, Hope, John, and Mary Ann Pitcairn, his children, or the survivors and their issue. Various provisions were also made in the event of the succession opening to Hope Pitcairn. And it was declared that the foregoing provisions and additional provision should be real and preferable burdens affecting the lands and barony of Kinnaird, and ground on the west bank of Pittencrieff, and the conveyance thereof therein contained, and appointed them to be engrossed as such in the infeftments to follow thereon, and in all the future transmissions of the lands, till complete payment of the sums and whole interest due thereon. By a codicil, dated 17th July 1855, Mr Pitcairn revoked the provision of £500 in favour of Hope Pitcairn, and directed David Pitcairn, whom failing the party succeeding under the foresaid destination, to make payment to David Pitcairn and the pursuer, and the survivor of them, as trustees for behoof of the children of Hope Pitcairn, of the sum of £1000, and he directed that Hope Pitcairn's share of the sum of £1500 should also be paid to David Pitcairn and John Pitcairn, as trustees for behoof of the children of the said Hope Pitcairn. He farther appointed that the sum to be paid to the pursuer, instead of £2500, should be £2000.

The estate of Kinnaird cost Mr Pitcairn about £12,000; and the burdens on it under it in his disposition and codicil were variously calculated at £13,000, and £15,000. His personal estate amounted to £11,187, odds. David Pitcairn made up a title to the property and possessed it till his death in 1869. He left a holograph will, admittedly made long before his death, in the following terms:—"I, David Pitcairn, merchant, Dundee, eldest son of the late John Pitcairn, Esq. of Kinnaird, being desirous of following out the wishes of said John Pitcairn, my father, as expressed in his last will or testament, hereby declare that Hope Pitcairn, my brother, shall not inherit any of my effects, but that they shall all descend to my brother John Pitcairn, subject to the following burdens," viz., certain legacies, and an annuity to his widow.

The pursuer contended that by this word "effects" David meant both his heritable and moveable estate; and he brought this action to have it declared that his brother was bound to enter as heir to David in whatever character was proper, and convey to him the whole heritable and moveable estate subject to the burdens imposed on it. The pursuer rested his contention on section 20 of the Lands Clauses Consolidation Act 1868, which enacts that words used in a testamentary or *mortis causa* deed with reference to heritable estate, and that would have sufficed to carry moveable estate, shall suffice to carry such heritage, and shall be valid, though the word dispone has not been used.

Lord Mure assoilzied the defender.

The pursuer reclaimed.

Solicitor-General and Asher for him.

Dean of Faculty and Marshall in answer.

At advising—

LORD PRESIDENT—The father of the pursuer and defender was John Pitcairn. He was owner of a small estate in Fifeshire called Kinnaird, and also of various small parcels of lands. He executed a settlement in 1854, by which he made a general conveyance of his heritable and moveable estate, including Kinnaird, to his eldest son David and the heirs of his body, whom failing to his second son Hope and the heirs of his body, whom failing to his third son John and the heirs of his body, whom failing to his own heirs and assignees whomsoever. He died in 1857, and his eldest son David made up a title as heir, and possessed till his death in 1869. He left a holograph will, upon the effect of which this case depends. If this will does not affect the heritable estate, the destination of it, not being evacuated, must take effect; and therefore the heritable estate would go to the second son Hope, who is David's heir of line and of conquest, and heir of provision under this destination. The present action is raised against him in these three characters by John Pitcairn, and concludes that he should be ordained to enter as heir in one or other of these three characters to the heritable estate, and execute a conveyance thereof to him; and he asks for decree of declarator that David's holograph will is an effectual conveyance of the lands to him, and on this footing for adjudication in implement in effect of this holograph will.

It is evident that if this holograph will of David's does not settle his heritable estate, it must go to his father's heir of provision. The main reliance of the pursuer for his contention is the 20th clause of the Titles to Land Consolidation Act of 1868. He says that this clause gives to David's will the effect of making it operate as a conveyance of the heritage of the granter. No doubt, if the Act said every will is to be held as settling the heritable and moveable estate of a testator, it would have that effect. But that was not the object of the clause. The object of the clause was to dispense with the necessity of certain technical words, and to allow heritable estate to be settled by words of bequest as well as by *de præsenti* words. And this object the enactment exactly carries out. It provides—"From and after the commencement of this Act it shall be competent to any owner of lands to settle the succession to the same in the event of his death, not only by conveyances *de præsenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of this Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the grantor has not used, with reference to such lands, the word 'dispone,' or other word or words importing a conveyance *de præsenti*." So far all that is enacted is that the absence of words importing a conveyance *de præsenti* shall not operate to make an intended conveyance of lands ineffectual. The statute proceeds by the rest of the clause to enact—"and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such land any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of the 19th section hereof by the granter of such deed or writing in favour of the granter thereof, or of the legatee of such lands, and shall be held to create, and shall create, in favour of such grantee or legatee an obligation upon the successors of the granter of such deed or writing to make up titles in their own persons to such lands, and to convey the same to such grantee or legatee."

Now, it is important to observe in regard to this—(1) that the statute contemplates and requires the use of words effectual to convey moveables, and (2) that the words are to be intended to convey lands. The clause does not dispense with a reference to lands. A person is not to be held to give what he does not mention. The clause does not dispense with words *of what* and *to whom*. It only dispenses with the use of technical words. Its whole effect is to give words of bequest equal effect with words of disposition.

Apply this doctrine to this case, and see if it operates to make a conveyance of the estate of Kinnaird. The will declares "that Hope Pitcairn, my brother, shall not inherit any of my effects, but that they shall all descend to my brother John Pitcairn." There are no words of bequest save these. Now, when a testator says all his effects are to descend to certain individuals, does he mean this to apply to heritage? I apprehend not. The word effects properly applies to corporeal moveables. But it is also used in reference to all moveables. It may also apply to incorporeal personal estate. But what we have to do here is to seek to find out the intention of the testator. David Pitcairn was an educated and an intelligent man; and I have not a doubt that no intelligent Scotchman would have used these words to include heritage. A variety of English cases have been quoted to us. But even if they shewed us that it was settled in English law that effects include heritage, it would not impress me. I only ask myself—Would an ordinary educated Scotchman, especially a lawyer, use it with this intention? And I cannot doubt for a moment that he would not.

Now, it will be observed that David's will is framed with the intention of giving effect to his father's settlement. And the pursuer contends that his father did not intend Hope to get any of his heritable estate. But this argument is perfectly untenable, for the estate of Kinnaird is expressly destined to him. Then, in the next place, the pursuer contends that this might have the effect of giving Hope the estate not subject to the burdens their father had created in his settlement. There is more in this argument. But it must be remembered what the position of Mr Pitcairn was as to money matters. He purchased Kinnaird at a cost of about £12,000; he left personal estate to the value of about £11,187; and he created burdens that, in one computation, amount to £13,000, and on another, to £15,000. His executor was to take the heritable estate as well as the moveable; and out of the whole estate to pay those burdens and provisions, they being for further security made real burdens on Kinnaird. This is a summary of Mr Pitcairn's will; and it will be observable that even

on the lowest reading of the amount of the burdens they exceeded the personal estate, and therefore they were laid on the heritage also. But they also exceeded the heritable estate. It was evidently, therefore, not Mr Pitcairn's intention to impose the burdens on it alone, and this is borne out by his obvious desire to make Kinnaird a family estate; for it was first to go to David, then to Hope, and then to the pursuer.

The true reading, therefore, of these provisions is, that they were to come first against the personal estate; that the heritable estate was only to be subsidiarily liable; and that the son taking the heritage was to make up the deficiency. That being Mr Pitcairn's will, there is no inconsistency in it with David's will. No doubt it lays the burden of unpaid provisions on the favoured brother John. The burden laid on John is really 10,000. And there is also a burden laid on him of an annuity of £500 to David's widow. And it is said to be hard on him to burden him for Hope, who is not favoured by his father, and gets none of his executry. But it is to be noticed, in the first place, that John gets a large sum; and, in the next place, that, as David thought his personal estate amounted to £30,000, he expected the pursuer would get the residue of this, and left the heritable estate to go as his father destined it. I arrive at this interpretation of David's will, therefore, not on any technical reading, but on a construction of his intention, and that intention was, in my opinion, not to convey by it his heritable estate.

Lord Deas—This is an important question. The first question we have to decide is, whether effects can be held to include heritable estate? and in determining this question we have nothing to do with what it means in England. From the earliest period in our law it never included heritage; and there have been nice questions as to what part of the moveable estate it applied to. Then the next question is, whether, where the testator has used words not including heritage, the statute will include it under them? Now the enactment does not dispense with the mention of the heritable estate; but, assuming that it is mentioned, it dispenses with the technical words formerly necessary. The clause may perhaps—I do not say it does—make a testing clause or date unnecessary. Its real effect is to dispense with technical words. And if we were to hold that the word "effects" includes heritage, with the view of giving effect to David's will, this interpretation, if in one case it gave effect to a testator's will, might defeat it in another.

Lord Ardmillan—I concur in thinking the judgment of the Lord Ordinary right. If the holograph settlement of David Pitcairn in 1857 is construed apart from the provisions of the 20th section of the Titles to Land Consolidation Act of 1868, it cannot be matter of doubt that it is ineffectual as a conveyance of the landed estate of Kinnaird. I am satisfied that the words "my effects" have primary and natural application to moveables, and that, neither in legal nor in popular acceptation, can the words "any of my effects" or "all my effects" in this settlement be read as including the land.

I do not say that the position and relation of the same words in regard to, or in connection with, heritage mentioned in the context might not possibly give them an exceptional meaning and a more comprehensive scope; and this seems to be the ground of judgment in some of the English cases quoted. But there is nothing of the kind here. In this settlement the words cannot receive any other than their usual and natural meaning.

Then I come to consider the effect of this statute. I am of opinion that it is not applicable to the question here raised. The clause of the statute relates to deeds or writings "purporting to convey or bequeath lands." That is not the purport of this writing. Then the clause enacts that where words such as "dispone," or other words "importing a conveyance," have not been used, but words have been used "with reference to such lands" which would effectually convey moveables, then the writing shall not be invalid, but shall be deemed "equivalent to a general disposition of lands." Now, this clause in the statute relates entirely to words of conveyance where the subject to which the words apply is land, but where the words are appropriate to moveables. No such case is here. The clause of the Act does not relate to words of description, but only to words of conveyance. It does not enlarge the scope of the deed: it only increases its power within its scope. If the testator was dealing with land, the clause will make words of bequest valid as a conveyance of land. If the writing does not relate to land, the clause is not applicable. It does not extend the description, and cannot enable the Court to construe the word "effects" in this context as including a landed estate.

This seems really the whole question—a question of legal construction of the writing. It is enough for decision, and is conclusive.

The provision of David's deed as to the burdens is plain, if the deed does not convey the land, but does convey the personal estate, amounting, we are told, to about £30,000, and it is impossible to refuse effect to it.

I do not feel quite satisfied that, in the decision which your Lordship proposes, and in which I concur, we are giving effect to what was really desired and intended by David Pitcairn; but I have no alternative judicially, except to give effect to that expression of David's will which is to be found within his deed, construed according to Scottish law, and without the application of the rule introduced by the Act of 1868.

Lord Kinloch—I am of opinion that the Lord Ordinary has come to a right conclusion in this case.

It is impossible, as I think, to give to the word "effects" as occurring in David Pitcairn's will, the meaning of "lands and heritages," or to hold that under this word a landed estate can be comprehended. The whole authorities of our law are opposed to such a construction of the term. I can conceive a case in which the word might be so combined with an explanatory context, as possibly to give it such an enlarged meaning. But there is none such here. The words "inherit" and "descend" may be made applicable equally to heritage and moveables.

The pursuer mainly relied on the words contained in the narrative of the document, to the effect that Mr David Pitcairn was "desirous of following out the wishes of John Pitcairn, my father, as expressed in his last will and testament." It was contended that the result arrived at by the Lord Ordinary, of Hope Pitcairn succeeding to the estate

of Kinnaird, unburdened by the provisions in the father's settlement, was contrary to the father's intention, which the pursuer stated was, that Hope Pitcairn should either not succeed to the estate of Kinnaird at all, or should succeed to it burdened with provisions up to if not beyond its value.

If the word "effects" cannot, on the face of the document, be legally construed to mean "lands," I would have great difficulty in resorting to an extrinsic inquiry into the father's intentions, in order thereby to give the word other than its legal interpretation. I do not think that even a clear view of the father's intentions would warrant me in converting the words actually used to another than their true legal meaning. I could not so control the clause of disposition by the clause of narrative or recital.

But whilst so holding, I think it right to add that, so far as I can form an opinion, the pursuer is in error in attributing to the father of the parties the intentions which he ascribes. The father undoubtedly intended Hope Pitcairn, his second son, to succeed to the estate of Kinnaird, failing the oldest son David: for he expressly calls him second in the destination. Nor do I think he contemplated this otherwise than as an unburdened succession, or at least a succession slightly burdened, if at all. Though the family provisions in his settlement are made a real burden on the landed estate for the security of the parties interested, I think the father intended these to be discharged by David Pitcairn, the person first called, out of the moveable succession which he gave him alongst with the estate. To hold anything else would simply render nugatory the destination to Kinnaird; seeing that the provisions were so large, as mainly, if not altogether, to exhaust the value of the landed estate. David did not pay the provisions during his survivance, except to a small extent. He left behind him a personal estate, which consisted of his father's executry *plus* his own accumulations, which are estimated at nearly £20,000 more. All this executry he left to his brother John, the pursuer, charging it with the provisions in the father's settlement; that is to say, charging these provisions on his father's moveable estate as well as his own. At the same time, according to the interpretation which I think must be put on his will, he allowed the estate of Pitcairn to descend according to the destination in the father's settlement to his brother Hope, the person second called. In all this David Pitcairn seems to me to have acted, not in contradiction to, but in conformity with his father's wishes. But whilst I think it right to exhaust the case as argued to us by intimating this impression, the ground of my judgment is that which I stated in the opening, that the word "effects" used in this document cannot, under any view, be construed to comprehend the landed estate of Kinnaird.

Agents for Pursuer—M'Ewen & Carment, W.S.
Agents for Defender—Hill, Reid & Drummond, W.S.

Thursday, February 24.

MASON *v.* SMALL AND OTHERS.

Husband and Wife—Conjugal Rights Act—Provision—Expenses. A wife, having succeeded during the marriage to £2000, in a declarator against her husband and a creditor of his, claimed therefrom a reasonable provision in terms of section 16 of the Conjugal Rights Act. The Court indicated approval of a compromise by which the wife was allowed £1000 in fee; and gave her her whole expenses as against the creditor.

Robert Thom, farmer, Gartverrie, Lanarkshire, died intestate and unmarried on 4th May 1868, leaving certain moveable property; and on 29th May, his nephew Alexander Mason was decerned his executor-dative. Mr Thom had three sisters; and Mrs Bethia or Betty Muir, as only child of one of these, was entitled to one-third share of her uncle's executry. She was twice married; first to Gavin Black, by whom she had seven children, and next to Alexander Small, by whom she had one child, named Ann. On 16th May 1868 Mr and Mrs Small and William Black, one of Mrs Small's children by her first marriage, executed a mutual agreement whereby Mr Small, *inter alia*, renounced his *jus mariti* and whole other rights competent to him in the share due to Mrs Small of her uncle's executry. This deed was intimated to the pursuer on 11th June 1868. On 13th January 1869 Mr Small executed a revocation of the renunciation made by him in the agreement, and assigned his whole share and interest in Mr Thom's executry to James Scott, grain merchant in Glasgow, to whom he was indebted to the extent of more than £1000. On the same day arrestment was used of the funds in the pursuer's hands by Mr Scott; and on the following day the revocation and assignation were intimated to the pursuer. On 16th January Mrs Small intimated to the pursuer a claim for a reasonable provision out of her share of the executry under section 16 of the Conjugal Rights Act. That section provides "that when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of a dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session, according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*." She asserted her husband had deserted her, and refused to accept the proceeds of a sum of £600 out of her share of the executry as sufficient in the circumstances. A multiplepoinding was raised in name of Mr Mason, the executor; and the case turned upon two questions—first, whether the renunciation by Mr Small was revocable as a donation *inter virum et uxorem?* and, second, whether, if the wife was entitled to a reasonable provision under the Conjugal Rights Act, the proceeds of £600 offered to be secured on her on Mrs Small's death was such provision.

Eventually the case was settled by a minute of agreement amongst the parties, of which the Court indicated its approval. It was stipulated that, in the first place, Mrs Small should receive £1000 in fee; in the second place, Mr Small £125; and that Mr Scott should receive the balance.