

Counsel for Pursuer—J. P. B. Robertson—Darling. Agents J. & F. Anderson, W.S.

Counsel for Defender—Mackintosh—J. A. Reid. Agents—Philip, Laing, & Trail, S.S.C.

Friday, February 1.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

PIRIE V. ROSE.

Property—Barony—Foreshore—Seaware—Claim by Members of Public to take Seaware.

A proprietor of lands which formed part of a barony and were *de facto* bounded by the sea, although the seashore was not specified as the boundary in his title, held entitled to interdict from cutting and removing the seaware from the foreshore *ex adverso* of the lands, members of the public who alleged right to do so by immemorial custom.

Alexander Pirie of Leckmelm, Ross-shire, sought to have Hugh Rose, a fisherman and crofter, of Letters, which is situated on the west shore of Loch Broom, nearly opposite Leckmelm, interdicted "from cutting, collecting, or removing, by himself or others acting on his authority or instructions, seaware from the foreshore of Loch Broom between high and low water-mark *ex adverso* of the complainer's property of Leckmelm." The complainer's property of Leckmelm was part of the barony of Loch Broom, and described in his title as, "All and Whole the easter and wester quarters of the lands of Lackmaline (now called Leckmelm), extending to one half davock of land, with houses, biggings, yards, tofts, crofts, outsets, shealings, grazings, fishings, annexis, connexis, parts, pendicles, and universal pertinents thereof whatsoever, all lying within the barony of Loch Broom." It extended two miles along the shore of Loch Broom.

The complainer averred (Stat. 3) that he had under his titles sole and exclusive right to the seaware whether growing or drifted. "The said lands and estate of Leckmelm, which are part of the said barony of Loch Broom, extend for two miles or thereby along the eastern shore of Loch Broom, and under his titles the complainer has the sole and exclusive right to the seaware, whether growing or drifted, between high and low water-mark on the shore of Loch Broom *ex adverso* of his said lands and estate of Leckmelm, and to remove and dispose thereof at pleasure, by himself or others having his authority. The complainer and his authors, and their tenants, have from time immemorial exercised the sole and exclusive right of cutting, gathering, removing, and utilising or disposing of said seaware." He further averred that respondent had trespassed on the shore and collected seaware.

The respondent denied the pursuer's alleged right, and stated that he and his predecessors, in respect of his and their tenancy of part of Letters, and the tenants and possessors of the adjoining glebe lands and others, members of the public generally, had "exercised the right of cutting,

gathering, removing, and disposing of seaware on the shore between high and low water-mark of Loch Broom *ex adverso* of the said lands and estate of Leckmelm, whether growing or drifted thereon, habitually, or according as they required the ware for agricultural purposes, and that for upwards of forty years prior to the complainer acquiring the property of Leckmelm in 1877." He also averred that the foreshore was not the complainer's property but that of the Crown. He admitted having gone upon the foreshore between high and low water-mark for the purpose of taking seaware, but denied having been on the complainer's property.

The complainer pleaded—"The complainer having right to the whole seaware on the foreshore of Loch Broom *ex adverso* of his lands and estate of Leckmelm, and the respondent having removed seaware without his authority, the complainer is entitled to interdict as craved."

The respondent pleaded—" (1) The complainer's statements are irrelevant and insufficient to sustain the prayer of the note. (3) The complainer not having any exclusive right to the whole seaware on the foreshore *ex adverso* of his lands, is not entitled to suspension and interdict as craved. (4) The respondent being entitled to remove seaware from the said foreshore in virtue of prescriptive usage by himself and his predecessors or authors, and other tenants or possessors of the glebe lands of Loch Broom, ought to have the note refused."

The Lord Ordinary (FRASER) found that the respondent had not averred any relevant right to collect seaware *ex adverso* of the lands of Leckmelm belonging to the complainer; therefore suspended the proceedings complained of, and interdicted the respondent from cutting, collecting, or removing, by himself or others acting under his authority or instructions, seaware from the foreshore of Loch Broom between high and low water-mark *ex adverso* of the complainer's property of Leckmelm.

"*Opinion*—The question in this case is as to whether or not the respondent, a fisherman and crofter, residing at Letters, Loch Broom, in the county of Ross, has a right to carry off seaware from the foreshore of Loch Broom *ex adverso* of the complainer's property of Leckmelm. The complainer's property consists of a part of the barony of Loch Broom, and extends for two miles along the eastern shore of Loch Broom. It is not expressly said to be bounded by the sea, but it is *de facto* so bounded, and there can be no doubt that, having such a boundary, even though he has not an express title to the foreshore (except what may be implied in the clause of parts and pertinents followed by alleged possession), he has the right to the seaware thrown upon the shore.

"The respondent, on the other hand, is a crofter and fisherman, living on the opposite shore of Loch Broom, and crosses over from that shore in a boat to the east shore *ex adverso* of the complainer's estate of Leckmelm, and there gathers seaware from that eastern shore, and this he does because he and other tenants of Letters, and the tenants of adjoining glebe lands, members of the public generally, have exercised the right of cutting, gathering, removing, and disposing of seaware on the shore between

high and low water-mark of Loch Broom *ex adverso* of the said lands and estate of Leckmelm,' and that for upwards of forty years. There is no averment here of a right of servitude in favour of a dominant tenement. The claim is made as a member of the public. This is a claim which cannot be sustained according to the decision in *Saltoun v. Park*, November 24, 1857, 20 D. 89. Lord Saltoun was, like the complainer, a proprietor, with the seashore as a boundary *de facto*, though this boundary was not so expressed in his titles. He had also a barony title. The only difference between the present case and that of Lord Saltoun is that Lord Saltoun was proprietor of the whole barony, whereas here the complainer is proprietor only of a part extending along the seashore. But still as part proprietor of the barony he has all the privileges of the baron so far as his property extends along the seashore. A barony title, said Lord Cowan in the case of *Saltoun*, 'confers certain privileges on the Crown vassal, *inter alia* the privilege of collecting seaware cast on the shore *ex adverso* of the lands, when those are *de facto* sea-bounded. No special infestment with an express grant of wreck and ware is requisite to carry that right and privilege. It is inherent of the grant.' The Court therefore found that tenants of lands in different parishes had no right to take seaware from the shore, although they alleged that for forty years and upwards the public generally, including themselves, were in the practice uninterruptedly, and as matter of right, of taking seaweed and shell-sand from the shore, which had ever been accessible to the public, without trespass upon the pursuer's lands, by means of public roads and accesses. Notwithstanding this, the Court found Lord Saltoun entitled to interdict, and following this precedent, the Lord Ordinary finds the complainer entitled to interdict in this action."

The respondent reclaimed, and argued—The complainer was in the same position as the proprietor in the case of *Agnew v. The Lord Advocate*, January 21, 1873, 11 Macph. 309, and had not made out any right of property in the foreshore. The Lord Ordinary was wrong in holding that he had the exclusive right of seaware on it. He might have a right, but that was only a similar right to that of the complainer, viz., one defeasible by the Crown.

The complainer replied—The case was foreclosed by decided cases. Even though his title contained no express grant of the foreshore, his estate was part of a barony, and was *de facto* bounded by the sea. He had then that *prima facie* title to the foreshore which had been held in the cases cited *infra* sufficient to protect him against members of the public who could aver no right on which prescription could possibly run—*Baird v. Fortune*, March 14, 1861, 3 Macq. App. Ca. 127; *Lord Saltoun v. Park*, November 24, 1857, 20 D. 89; *Paterson v. Marquis of Ailsa*, March 11, 1846, 8 D. 752.

At advising—

LORD JUSTICE-CLERK—In this case of *Rose* it appears to me that the question in dispute is entirely foreclosed by decided cases. The claim which is made here, or rather the prayer of the complainer in this application, is to interdict the respondents from removing; "by himself or others acting on his authority or instructions, sea-

ware from the shore of Loch Broom between high and low water-mark *ex adverso* of the complainer's property of Leckmelm." The title of the pursuer as set out in the record is indicated in this way, and nothing is mentioned to the contrary—"The said lands and estate of Leckmelm, which are part of said barony of Loch Broom, extend for two miles or thereby along the eastern shore of Loch Broom, and under his titles the complainer has the sole and exclusive right to the seaware, whether growing or drifted, between high and low water-mark on the shore of Loch Broom *ex adverso* of his said lands and estate of Leckmelm, and to remove and dispose thereof at pleasure, by himself or others having his authority. The complainer and his authors, and their tenants, have from time immemorial exercised the sole and exclusive right of cutting, gathering, removing, and utilising or disposing of said seaware." As against that respondent says—"Explained that the respondent and his predecessors, in respect of his and their tenancy of part of Letters, or authors, and the tenants and possessors of the adjoining glebe lands and others, members of the public generally, have exercised the right of cutting, gathering, removing, and disposing of seaware on the shore between high and low water-mark of Loch Broom *ex adverso* of the said lands and estate of Leckmelm, whether growing or drifted thereon, habitually, or according as they required the ware for agricultural purposes, and that for upwards of forty years prior to the complainer acquiring the property of Leckmelm."

Now the question is, whether that allegation on the part of the respondent is a sufficient title for prescription of any kind. The proprietor claims that he has a part of the barony of Leckmelm, the disposition setting forth that he holds—"All and Whole the easter and wester quarters of the lands of Lackmaline (now called Leckmelm), extending to one half davock of land, with houses, biggings, yards, tofts, crofts, outsets, shealings, grazings, fishings, annexis, connexis, parts, pendicles, and universal pertinents thereof whatsoever, all lying within the barony of Loch Broom." I am of opinion that the landlord having that title, and a *de facto* sea boundary, that is a sufficient title to prescribe the right which he claims. It is not necessary, I think, to go into the question, which may be a moot question, whether a barony title by itself without prescription is sufficient to prescribe the shore as part of the lands. I think it was clearly settled in the case of *Paterson v. The Marquis of Ailsa* that a title to the lands and a *de facto* sea boundary is of itself sufficient to protect the proprietor against a claim of this kind—a claim made as by one of the public, and not depending on any right on which prescription could possibly run, to the effect of acquiring the property of the lands. That is the whole question. The Lord Ordinary has decided, and I think quite rightly decided, that there is in truth here no title upon which prescription could possibly run, and that therefore on the authority of the case of *Lord Saltoun* it was not necessary that the proprietor, though having no express title to the seashore, was not to be deprived of the *prima facie* case of prescription which he has. But I think the case of *Paterson v. The Marquis of Ailsa* raised the whole question which is in controversy here quite distinctly. The Marquis of Ailsa had no doubt a

larger amount of territory along the shore than appears to be the case here, but he had not a barony title, and he had no express right to the seashore in his titles. The challenge was on the part of certain tenants and fishermen in the neighbourhood, and they claimed in the action, in the first place, a right to cut the seaware between high and low water-mark, and secondly, a right to a road there. In that case the Court, with the exception of Lord Cockburn, unanimously held, in accordance with the interlocutor of the Lord Ordinary, that it was quite sufficient as against this public action that the Marquis of Ailsa showed that his lands lay adjacent to the sea and had it as their actual boundary, although he had no direct or express grant of the shore. Lord Wood decided the case on that footing without any proof. Lord Medwyn, Lord Moncreiff, and the Lord Justice-Clerk (Hope) all agreed that it was not a case in which the proprietor could be put to a proof of possession, because the title alleged against his right was not one upon which prescription could run. In the course of the discussion the other day, Lord Moncreiff's opinion to that effect was quoted. The Lord Justice-Clerk gives his opinion in these words:—"I do not require Lord Ailsa to prove possession, because I think the seaweed is a proper pertinent of his lands, and that the public are not entitled to cut and carry away the same to manure lands at a distance away, or to burn kelp *ex adverso* of the proprietor's lands. I do not inquire as to any possession by Lord Ailsa for we are not in that question, and his leases without actual proof would not be evidence of possession if we thought that any actual possession could be required to be proved on the part of Lord Ailsa."

I think that case and the case of *Lord Saltoun* are quite conclusive, and that the interlocutor of the Lord Ordinary should be affirmed.

LORD CRAIGHILL—I am entirely of the same opinion. The question at issue between the parties has been more than once decided by the Court, and that being so, I think that the reclaimers have no case.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD YOUNG was absent.

The Court adhered.

Counsel for Complainer—J. P. B. Robertson Graham Murray. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondent (Reclaimer)—Campbell Smith—Kennedy. Agent,—Wm. Officer, S.S.C.

Friday, February 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

LIDLAW AND SPOUSE v. NEWLANDS.

(See *Newlands v. Miller (Laidlaw's Trustee)*, ante, 14th July 1882, vol. xix. p. 819, and 9 R. 1104; and *Laidlaw v. Miller (Laidlaw's Trustee)*, 16th December 1882, vol. xx. p. 261).

Husband and Wife—Marriage-Contract—Action of Denuing.

By antenuptial contract of marriage the husband conveyed certain estate to trustees for behoof of his widow in liferent and of any person she might name in fee, and bound himself, in the event of there being children of the marriage, to upbring and maintain them in a proper manner, and to make suitable provision for them after his death. The wife accepted these provisions in full of all her legal claims, and conveyed to the marriage-contract trustees the whole estate then belonging or which might pertain to her in any way during the subsistence of the marriage. The husband renounced all his other legal rights over the wife's estate. The trustees were to pay over the produce of the wife's estate to the husband during the subsistence of the marriage, and upon its dissolution to pay the capital to the wife or her heirs, and it was further declared "that the trusts hereby created . . . shall subsist until all the ends, uses, and purposes above written are come to an end."

The husband's estates were sequestrated during the subsistence of the marriage, and subsequently the last surviving trustee under the marriage-contract died. Thereafter the spouses nominated a new trustee, who obtained payment of a share of a succession which came to the wife under a settlement making it payable to her exclusive of the *jus mariti* and right of administration of her husband. The husband's liferent interest during the subsistence of the marriage in this estate was valued, and the amount paid by the marriage-contract trustee to the trustee in his sequestration. The marriage-contract trustee also obtained payment of the wife's legitimum from her father's trustees.

The spouses then brought an action to have it declared that the marriage-contract trustee was bound to denude in favour of the wife, exclusive of the *jus mariti* and right of administration of her husband, of the trust-estate conveyed by her in the marriage-contract. There were four children of the marriage alive at the date of the action. Held (*dis. Lord Deas*) that the point had been involved in the decision of *Newlands v. Miller*, July 14, 1882, 9 R. 1104, 19 S.L.R. 819, and that there being no interest of children or other third parties created by the contract in the funds conveyed by the wife, she was entitled to have those funds conveyed to her by the marriage-contract trustees.

By antenuptial marriage-contract, entered into between Thomas Laidlaw, sometime builder,