

Now, in this case the facts raising one point of law which was discussed and debated, and upon which the decision was pronounced in the Court of Session, are not found in the interlocutor at all. Whatever may be the true construction of the later words, and even if, looking at them alone, they are inconsistent with such a finding, it is obvious, and no one can read the judgment without seeing, that they were not intended to be inconsistent with it, and that in truth the facts relating to this point are not found at all. It is true that the Court below decided the question against the appellant on another and a different ground altogether; but it seems to me that that was no reason for abstaining from finding in the interlocutor those facts upon which not only a point of law depended, but a point of law which was decided in favour of the appellant. I think they should have been stated, because although, for reasons which I will give in a moment, I do not think they would have been sufficient, differing as I do from what was said by Lord Trayner, to entitle the appellant to judgment, yet at the same time it was a matter for discussion here, and a different view might have been taken of it on appeal.

My Lords, it is not necessary to say whether the finding as worded in the latter part of the interlocutor is inconsistent with those facts or not, because I am of opinion that, even supposing all the facts upon which the learned counsel for the appellant rely were stated, there would be no case made out for disturbing the judgment of the Court below. The case suggested on behalf of the appellant is this—by the charter-party the ship was to proceed to Bo'ness, and she was to load at a berth to be selected by the charterer, and the lay-days were to count from the time when she was berthed, and notice was given to the charterer. Undoubtedly that would impose by implication upon the charterer the duty of doing any act that was necessary on his part according to the custom of the port to enable her to get a berth. He could not defend himself from a complaint of the shipowner that his vessel had been delayed by saying that she was not in a berth, when she was not in a berth because the charterer himself had failed in his duty to do some act on his part to enable her to get there. The appellant's case therefore is put in this way. It is said, although she did not get into a berth until the 26th of October, she might have got into a berth on the 21st if the appellant had done an act which he failed to do, namely, had a cargo ready there. That arises in this way. In ordinary turn she could not have been berthed until the 26th, but owing to a vessel which was in the berth not having her cargo there, the harbour-master would have put the "River Etrick" in berth if her cargo had been ready to be immediately put on board. The question is whether on these mere facts there was an obligation on the part of the charterer to have the cargo on the quay so that the vessel might have been berthed on the 21st.

It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing or protecting or preserving cargo, whatever difficulties there might be in short, that was an obligation always resting upon the shipper.

My Lords, no authority has been cited for that at all, and I am of opinion that such a construction of the shipper's obligations would be altogether unreasonable. I do not for a moment deny that he is bound to do whatever is reasonable on his part with a view of getting the ship berthed at the earliest period that is reasonably possible; and it may be that there are circumstances in which owing to the custom of the port, owing to contingencies of this kind being very common, owing to the provision that is made to facilitate cargo remaining there for a few days, and a variety of other circumstances, it would be the duty of the shipper to be prepared by having his cargo there, to do that which would have enabled the vessel to obtain an earlier berthing than would otherwise have been obtained. All that, I say, may be the case, but no such facts are found in the present case, and the appeal can only be decided in favour of the appellant by holding that at all ports, and under all circumstances, however remote and improbable might be the contingency, the duty lay upon the charterer to have cargo there. That is a proposition to which I am unable to give my assent. For these reasons I agree in thinking that the appeal must be dismissed.

LORD MACNAGHTEN and LORD MORRIS concurred.

Ordered that the appeal be dismissed with costs.

Counsel for the Pursuer and Appellant—Joseph Walton, Q.C.—Leck. Agents—Lowless & Co., for J. & J. Galletly, S.S.C.

Counsel for the Defenders and Respondents—Bighan, Q.C.—H. T. Boyd—J. J. Cook. Agents—Wilson & Son, for Boyd, Jameson, & Kelly, W.S.

Thursday, March 26.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Macnaghten, and Lord Davey.)

OGSTON v. STEWART'S TRUSTEES.

(Ante, vol. xxxi. p. 153, and 21 R. p. 282.)

Fishings—Boundaries of Salmon Fishings—Salmon Fishings ex adverso of Adjacent Lands—Possession—Prescription.

A glebe bounded on the north by a river for a distance of 350 yards, marched

at the river side with the estate of A to the west, and the estate of B to the east, these estates having a common march inland. No right of fishing belonged to the glebe. The proprietor of A raised an action against the proprietor of B concluding for declarator that he had the exclusive right of salmon fishing *ex adverso* of the glebe for a distance of 135 yards eastward from his march. The titles of each of the parties included the salmon fishings "belonging to" their respective lands, but there was no express grant of the salmon fishings *ex adverso* of the glebe, nor did it appear out of what lands the glebe had been designated. The Crown was not called as a party to the action.

The First Division of the Court of Session (*rev.* the judgment of the Lord Ordinary) granted decree of absolvitor upon the ground that the proprietor of A had not established such possession as would have been sufficient in a question with the Crown either to sustain a prescriptive right or to show that the fishings were within his title.

The House of Lords on appeal *reversed* this judgment, and pronounced declarator in terms of the conclusions of the summons, on the ground (1) that the question between the parties was one of boundary merely, and was not affected by the rights, if any, possessed by the Crown; and (2) that the evidence as to the reputed boundaries and as to possession was sufficient to support the appellant's claim, and was not inconsistent with the titles under which the lands were held, or with the statutory regulations as to the designation of glebes.

The case is reported *ante*, vol. xxxi. p. 153, and 21 R. p. 282.

At delivering judgment—

LORD WATSON—My Lords, the appellant is proprietor of the lands of Ardoe, whilst the respondent is proprietor of the lands of Banchory and others, both estates being in the parish of Banchory-Devenick and county of Kincardine, and bounded on the north by the river Dee. The parochial glebe of Banchory-Devenick, which also has the river for its northern boundary, is situated between these properties, marching at the river side with Ardoe on the west, and with Banchory on the east. In this action the appellant concludes for declarator that he has the exclusive right of fishing for salmon *ex adverso* of the westmost portion of the glebe lands, having a frontage to the river 135 yards in length, between the march with Ardoe and a drain which leads from the manse offices to the river. The claim thus asserted relates to a barren stretch of water, which, according to the evidence, is incapable of being profitably fished with the net and is of very little value for angling purposes.

It is not matter of dispute in this case that the salmon fishings of the glebe lands,

to the east of these 135 yards, belong to and have been possessed from time immemorial by the respondent and his predecessors in title, along with the fishings to the east of the glebe. Each of the parties avers that the fishings in dispute are within the ambit of his title from the Crown; and also that he has had continuous and exclusive possession during and beyond the period of prescription, which, in the case of rights such as that of salmon fishing, has been reduced to twenty years (from forty) by section 34 of the Conveyancing and Land Transfer Act of 1874 (37 and 38 Vict., c. 94). On record the respondent maintains alternatively that he has a joint right to the fishings with the appellant. Accordingly the only issue raised by the pleadings is, whether the fishings in dispute belong to the appellant, or to the respondent, or to both of them. Upon that footing a proof was allowed and was led before the Lord Ordinary (Moncreiff), who gave judgment for the appellant.

When the case was heard before the First Division the respondent was allowed to add a plea to the effect that the appellant "has no title or right to the salmon fishings in question," which was sustained by the Court upon the ground that the appellant had not established such an amount of possession as would be sufficient in a question with the Crown either to sustain a prescriptive right or to show that the fishings were within his title. The learned Judges accordingly recalled the interlocutor of the Lord Ordinary, assoltized the respondent, and found the appellant liable in expenses. In that view it appears to me that the course which their Lordships ought to have followed was, not to grant absolvitor, but to direct intimation to be made to the Crown authorities, so as to give them an opportunity of appearing in the process or of bringing a separate action, the present action being stayed in order to await the result of these proceedings. It might have been more satisfactory if that course had been adopted; but after hearing the argument on this appeal, I can find no reason why your Lordships should not dispose of it upon its merits and put an end to this litigation. The question presented for decision upon the record and evidence is substantially one of boundary between two neighbouring proprietors, and in my opinion there are no elements in the proof which naturally or necessarily suggest that the Crown has a *prima facie* claim to the fishings in question. If the Crown should have a well-founded claim, it cannot be prejudiced by a decision between the parties to this appeal.

Before referring to this evidence I shall notice shortly the titles under which the parties respectively contend that they have an express grant of the fishings in question from the Crown.

The estate of Ardoe, as now vested in the appellant, was originally the property of the church. It belonged to the Abbot and Convent of Arbroath, by whom it was disposed in feu to laymen, about the end

of the fifteenth century, in two separate parcels, described as the "sunny" and "shady" halves. In both cases the disposition was with the salmon fishings in the Dee adjacent to the half conveyed; and that right has all along been recognised by the Crown, and continued in the subsequent progress of the appellant's titles.

The respondent's estate of Banchory is made up of two parcels, which have been held by the same proprietor since the year 1618, but anciently belonged to two different ecclesiastical bodies. The lands and barony of Banchory, with their salmon fishings in the river of Dee, were in the thirteenth century feued out by the Abbot and Convent of Arbroath to the Justiciar of Scotland, and have since been held by laymen. The Kirkton of Banchory belonged to the See of Old Machar until 1571, when it was feued by the Bishop with the consent of the Dean and Chapter. It was acquired by Alexander Gardyne of Banchory in the year 1618. Down to that date the Kirkton titles contained no grant of salmon fishing. In November 1743 a successor of Alexander Gardyne, by the same deed, disposed the lands and barony of Banchory and also the Kirkton to Alexander Thomson, "with the whole salmoned fishing in the water of Dee belonging to the said whole lands"; and in May 1744 the disponee, under the procuratory contained in that disposition, exped a Crown charter of resignation in which these lands are granted "cum integra salmonum piscatione super aquam de Dee ad dictas terras spectante."

The proof led by the parties, which I do not think it necessary to examine in detail, is chiefly directed to two matters, the first of these being the extent of possession of the disputed fishings which has been exercised by the parties respectively within and beyond the years of prescription; and the second, the point which has been reputed to be, and has been and recognised as, the boundary of their fishings.

The evidence of possession, as might well have been anticipated in a case of this kind, cannot with propriety be described as full and satisfactory. But having regard to the barren nature of the subject which forms the stake in this action, the possession of the appellant and his predecessors, and others in their right, exercised by rod and line, which was the only suitable method, appears to me to have been as extensive as might have been expected of a single proprietor who had a clear title from the Crown. There is no doubt a certain degree of complication arising from the fact that there is evidence of persons from the Banchory estate having angled in the disputed water. When, however, the evidence as to the boundary observed during the time when these incursions were made is taken into account, as in my opinion it ought to be, I cannot regard them as acts intentionally adverse to, and therefore as neutralising the effects of the possession proved by the appellant.

The evidence, in so far as it bears upon

the second point, the question of fishing boundary, appears to me, as it did to the Lord Ordinary, to be in favour of the appellant. In arriving at that conclusion I do not rely upon the respondent's admission, in a letter of the 16th July 1869, to the effect that the fishing boundary now claimed by the appellant "had never been disputed by anyone." The respondent has retracted that admission, and has explained in his testimony that the letter was written under a misapprehension, upon information received by him from one Mackie, now in America, who was at that time and had for many years previously been ground officer on the estate of Banchory. It is, however, impossible to discard the fact that the information was given to him by his own servant, who presumably had the best means of knowing the truth; and Mackie's information is, in my opinion, corroborated by the proof. In November 1850 the whole of the Banchory salmon fishings, including those *ex adverso* of the glebe, were offered on lease, and were taken by Robert Clark for three seasons, commencing on the 1st February 1851. The conditions of let prepared by the proprietor and accepted by the tenant state that "the western boundary is at the manse offices." Clark from time to time renewed his tenancy, upon the same terms, until he obtained a lease, for nineteen years from Martinmas 1858, of a farm upon the estate of Banchory, "along with the salmon fishing on the Dee presently occupied by him." Clark was examined as a witness, and stated that during his occupation under these leases, covering a period of thirty-seven years, "he never tried to fish farther west than the manse offices of Banchory-Devenick." In the face of that evidence, which is practically uncontradicted, I am unable to regard an occasional cast in the disputed water, by persons coming from the estate of Banchory, as an assertion of their right to the fishing by the proprietors of that estate.

Assuming the appellant to have made out his case, in so far as concerns possession by rod fishing and the recognised boundary between his fishings and those of the respondent, these facts will not avail him, unless he is able to show that his possession or right of fishing can be reasonably ascribed to his title as proprietor of Ardoe. The respondent alleges on record that the glebe was designed "out of the church lands of the Kirkton of Banchory," and consequently that after its designation "the right to the salmon fishings *ex adverso* of the glebe remained in the proprietors of Banchory;" and if these statements were substantiated the appellant would not be in a position to ask decree in terms of his summons. There is no direct evidence however in support of the allegation that the glebe was designed out of the lands of the Kirkton; it rests upon mere inference; and in my opinion there are various considerations which strongly point to a different conclusion.

It appears from the minute book of the

Presbytery of Aberdeen that the glebe was designated by them in March 1602. The difficulties which beset this part of the case have arisen from the fact that the presbytery clerk, though he left a blank space for the purpose, has omitted to enter the formal act of designation which, if it had been extant, would have shown the particular lands which were taken from their owners, or given up by them, in order to constitute the glebe of the parish. There seems no reason to doubt that the glebe as then designated, with the exception of some immaterial alterations of boundary which were made about the year 1837, has ever since been possessed by Mr Robert Mercer, the incumbent of 1602, and his successors in the benefice. It appears that the parsonage of Banchory-Devenick was anciently held by a prebend of Old Machar, who had his residence in Aberdeen, the cure being served by a vicar who in all likelihood, had a residence at Banchory-Devenick. It is, however, obvious that in 1602 the minister's demand for a glebe and the lands assigned to him, included for that purpose a much larger area than had previously been occupied by the vicar.

The statutes from which, in the year 1602, the authority of presbyteries to design glebes for the reformed clergy was derived, were 1563, c. 72, 1572, c. 48, 1592, c. 118, and 1592, c. 165. By these Acts the powers of the presbytery had been gradually increased; but they did not as yet extend beyond church lands, that is, lands which either were or had at one time been the property of the Church. The Act of 1593 (Thomson's Acts, vol. iv., p. 17) provided that in cases where there was no glebe, or where the old glebe was less than four acres, the designation was to be made "of the parson, vicar, abbot, or prior's lands, and failing thereof out of the bishop's lands, prior's lands, or any other kirk land lying within the bounds of the said parish."

Banchory, Kirkton of Banchory, and Ardoe were all of them church lands within the meaning of these Acts, but there was this material difference between them. Banchory and Ardoe were abbot's lands, having originally belonged to the Abbot and Convent of Arbroath; whereas the lands of Kirkton were bishop's lands, and therefore not liable to be designed as glebe until Banchory and Ardoe had been exhausted. I have failed to discover, and the respondent did not suggest any reason, why the presbytery in assigning a glebe to the minister of Banchory-Devenick should have entirely disregarded the order of designation prescribed by the Act of 1593. The Kirkton of Banchory was not acquired by the proprietor of Banchory until 1618, and it cannot be presumed that its then owner consented to part of it being designated in 1602 in order to protect Banchory and Ardoe from designation.

There are other considerations which to my mind enhance the improbability of any part of the Kirkton of Banchory having been included in the designation of 1602. There is nothing to show that any of the lands of Kirkton were riparian. The terms

of the Crown Charter of 1744 do not appear to me necessarily to indicate that they were so. It was not a charter containing any fresh grant, but was merely a renewal of the rights already held by the predecessors of the grantee in and connected with the lands of Banchory and Kirkton, the latter having admittedly no right of salmon fishing attached to them. It was revised and passed by the Scottish Court of Exchequer as then constituted under the Act 6 Anne, cap. 26, who had no power to add to the rights previously granted out by the Crown. According to Mr Erskine (Inst. i., 3, 32) "When the signature contains no more than was contained in the vassal's former charter, the barons may pass it; but when it imports a conveyance of any new subject not formerly granted by the Crown, it must be first superscribed by the King himself; for if it pass of course in exchequer, it is not effectual to the grantee in so far as relates to such new right." If, therefore, part of Kirkton was riparian, the grant of its salmon fishings was *ultra vires* of the Court, and could not bind the Crown. If not, the charter did nothing more than continue the former investitures. I do not think it ought to be assumed in these circumstances that the Court of Exchequer either neglected its duty or exceeded its powers.

In these circumstances I am of opinion that it is matter of reasonable inference from the title-deeds of the litigants, and from the facts disclosed in the proof, that the glebe of Banchory-Devenick as designated did not include any part of Kirkton, and that it did include portions both of Banchory and Ardoe. It being beyond the power of the presbytery to assign salmon fishings to the minister, the disputed fishings would in that case remain with Ardoe and the other fishings of the glebe with Banchory.

I would therefore advise your Lordships to reverse the judgment appealed from, to restore the Lord Ordinary's interlocutor of the 8th February 1893, and to declare that the respondent must pay to the appellant the expenses incurred by him in the Court of Session after the date of that interlocutor, and also his costs of this appeal.

I have been requested by Lord Shand, who is unable to be present to-day, to state that he has examined and concurs in the opinions which I have expressed.

The LORD CHANCELLOR—I concur in the judgment of my learned friend.

LORD MACNAGHTEN—I have had the opportunity of reading my learned friend's opinion, and I entirely concur in it.

LORD DAVEY—I also have had the opportunity of reading the judgment delivered, and I concur in it.

Counsel for the Pursuer and Appellant—The Sol.-Gen. Graham Murray, Q.C.—Haldane, Q.C.—Abel. Agents—Grahams, Currey, & Spens, for Auld & Macdonald, W.S.

Counsel for the Defender and Respondent—Asher, Q.C.—Dundas. Agents—A. & W. Beveridge, for T. J. Gordon & Falconer, W.S.

VALUATION APPEAL COURT.

Friday, March 20.

(Before Lord Moncreiff and Lord Kyllachy.)

SMART v. MITCHELL & SONS.

Valuation Cases—Erections Made by Lessee—Minerals—Clay—Lands Valuation (Scotland) Amendment Act 1895 (58 and 59 Vict. cap. 41), sec. 4, sub-sec. 2.

Clay is a mineral within the meaning of section 4, sub-section 2, of the Lands Valuation (Scotland) Amendment Act 1895, and therefore erections or structural improvements made by a lessee under a lease of the clay for the purpose of working it are not to be entered in the valuation roll.

Messrs Peter Mitchell & Sons, brick and tile manufacturers, Westbank Brick Works, Portobello, appealed to the Magistrates of Portobello against the following entry in the valuation roll for the burgh—

Description.	Situation.	Proprietor.	Occupier.	Yearly Rent or Value.
Engine and erections	Westbank	Peter Mitchell & Sons	Same	£80

Messrs Mitchell & Sons were the lessees under a lease for a period of ten years from Whitsunday 1891, granted by W. C. Miller of Craigtintny, by which there was let, *inter alia*, "the right of digging and taking clay from that triangular field lying to the west of the road leading from Edinburgh to Portobello."

The subjects, the entry of which in the valuation roll was objected to, were erected partly by the previous tenant, Mrs Marion Brodie Sherriff, and partly by Messrs Peter Mitchell & Sons, the latter having acquired from Mrs Marion Brodie Sherriff those erected by her. Being erections voluntarily made by a tenant, their yearly value could not be entered in the valuation roll prior to the passing of The Lands Valuation (Scotland) Amendment Act 1895 (58 and 59 Vict. c. 41), and the question raised was whether the Assessor was now entitled to enter such value under the authority of the provisions of clause 4 of said Act.

By section 4 of the Lands Valuation (Scotland) Amendment Act 1895 (58 and 59 Vict. cap. 41) it is provided—"Section 6 of the Valuation Act 1854 shall be read and construed as if the following proviso were inserted after the words 'as compared with the amount of such valuation,' that is to say—'Provided also, that where any lessee of any such lands and heritages, holding under a lease or agreement the stipulated duration of which is twenty-one years or under from the date of the entry under the same, and in the case of minerals thirty-one years or under from the date of such entry,

has made or acquired erections or structural improvements on the subjects let, and where the actual yearly value of such erections or structural improvements cannot, under the provision of section 6 of this Act, be entered in the valuation roll, such erections or structural improvements shall be deemed to be lands and heritages within the meaning of this Act, and such lessee shall be deemed to be proprietor thereof for the purposes of this Act; and the assessor shall ascertain the yearly value of such erections or structural improvements, as a separate subject, by taking the amount of rent, if any, in addition to the rent stipulated to be paid under such lease or agreement, at which, one year with another, the subjects let, and such erections or structural improvements might together in their actual state be reasonably expected to let from year to year in consequence of such erections or structural improvements having been made, and shall make a separate entry thereof in the valuation roll, setting forth all the particulars relating thereto as hereinbefore provided with respect to other lands and heritages. But this proviso shall not apply (2) To any erections or structural improvements made or acquired and used exclusively for the purpose of working or cleaning minerals let under such lease or agreement as aforesaid, in respect of which minerals rent or lordship is stipulated to be paid."

The Magistrates, by a majority, held that the erections fell within the exception pleaded, and therefore sustained the appeal, and ordered the entry complained of to be deleted.

The Assessor appealed.

Argued for the appellant—Clay was not a mineral within the meaning of sub-section 2.—*Magistrates of Glasgow v. Farie*, Jan. 21, 1887, 14 R. 346, rev. Aug. 10, 1888, 15 R. (H.L.) 94.

Argued for the respondent—The meaning of the word "minerals" in any particular statute or deed depends upon the general construction of the context.—*Hert v. Gill*, July 12, 1872, L.R. 7 Ch. 699; *Midland Railway Co. v. Haunchwood Brick and Tile Co.*, March 20, 1882, 20 Ch.D. 552. Here a wide construction was in the spirit of the section, and clay should be included, because the erections in question were similar in character to those which might be used in working any other mineral. The case of *Magistrates of Glasgow v. Farie (supra)* only decided that clay was not included under the word "minerals" in section 18 of the Waterworks Clauses Act 1847.

At advising—

LORD MONCREIFF—I am of opinion that the determination of the Valuation Committee is right. The word "minerals" is an elastic term, and admits of construction. It will be held to have a wider or more restricted signification according to the circumstances of the case and the terms of the statute or deed upon which its interpretation depends.

Taken in its widest sense, "mineral" includes every substance which can be got