

concerned. If they were loosed the subjects arrested might be exposed, perhaps, to hazard of different sorts, whereas the benefit of the diligence just accrues to the bankrupt estate if it be not loosed. Besides, it might raise a question, if a creditor consented to loose his arrestments, whether he did not thereby forfeit the benefit of the provisions regarding his expenses. Such expenses are provided to those only who shall be "deprived of the benefit of their respective diligences," and it seems not to be free from doubt, whether a creditor consenting to loose his diligence, did not place himself out of the reach of these words."

That doctrine is precisely applicable to the matter with which we are dealing here, and section 59 is inapplicable to this case. The object of the proceedings there provided for is (1) that the creditor may not claim for any portion of his debt which he gets payment of preferably out of the estate; (2) That the trustee may take him at his word and give him the value, with 20 per cent.

But what would have been the use of doing so here? The trustee could not ask for an assignation of the security which was his already. So the 59th section is inapplicable to an arrestment within sixty days of sequestration.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the note of appeal and proceedings, Affirm the deliverance complained of; refuse the appeal, and remit to the Sheriff to proceed, and decern; finds the appellants liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Appellant—Dean of Faculty (Clark) Q. C. and W. A. Brown. Agent—John Wright.

Counsel for Respondent—Lancaster and G. S. Dundas. Agents—J. & F. Anderson, W. S.

Saturday, February 27.

FIRST DIVISION.

[Lord Curriehill, Ordinary.]

STEPHEN AND OTHERS v. AITKEN.

Interdict — Property — Usage — Fishing — Right of Beaching Boats.

Circumstances in which the Court interdicted the proprietor of an estate from preventing the fishermen of a village situated thereon beaching their boats on a particular part of his lands.

Private Act of Parliament—Construction—Boddam Harbour Act 1845 (8 and 9 Vic., c. 25).

Observed (per Lord Mure) that Private Acts are to be dealt with on the footing that there is a contract between the individual who obtains the Act and the community for whose benefit, as well as that of the proprietor, the Act must have been supposed to have been passed.

This was an action of suspension and interdict

at the instance of William Stephen and others, fishermen in Boddam, Aberdeenshire, as individuals, and also as a committee elected by the fishermen of Boddam for transacting the fishing affairs of the village, against William Aitken of Boddam.

The prayer of the note was as follows:—"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondent, and all others acting under his authority, from troubling, molesting, or interfering in any way with the complainers and the other fishermen belonging to the village of Boddam in laying up for the winter season, beaching or taking their boats above high water mark at or near the harbour of Boddam, upon the ground coloured blue and green in the plan or sketch herewith produced and referred and marked as No. 7 of process, or otherwise to do in the premises as to your Lordships shall seem proper."

The action was brought in the following circumstances:—The village of Boddam was a fishing village, and the proprietors of the estate of Boddam, on which the village was situated, being desirous to develop and increase the trade, had always done what they could by liberal agreements to induce fishermen to build and settle there. From time immemorial the fishermen had been in use to beach their boats on the ground in dispute. They did not aver that they or any of the fishermen in Boddam had ever obtained from the proprietor, or any of his predecessors, any written grant entitling them to use the ground for beaching their boats, but they maintained that they had the right under their written titles to their houses as explained and defined by immemorial usage. The so-called titles were merely minutes of agreement for leases, entered into from time to time between the fishermen and the successive proprietor of the estate. In 1839 the Earl of Aberdeen acquired by purchase the estate of Boddam, and in 1845, being desirous of improving the harbour, he obtained an Act of Parliament (8 and 9 Vic., c. 25) for that purpose. Clause 7 of the Act was in the following terms:—"And be it enacted, that it shall be lawful for the said Earl and his heirs and successors to demand and receive for every vessel which shall enter within the limits of the said harbour any sum not exceeding the several rates and duties on tonnage specified in the schedule (A) hereunto annexed."

The schedule (A) here referred to was *inter alia* as follows:—

For herring boats:—

For all herring boats engaged at the fishery at Boddam, for the period of their fishing season, to be paid at the commencement of the fishery, and that in lieu of all tonnage duties payable for such herring boats, £0 5 0

For all other boats under 25 tons, coming into said harbour, for any purpose whatever, 0 0 7

And all above 25 tons to be charged the same as coasting vessels,

For all boats laid up at Boddam for the winter season, 0 5 0

The payment of 5s. for beaching boats specified in this schedule was never levied by the Earl of Aberdeen. In 1865 the respondent purchased the estate from the Earl of Aberdeen, and thereafter

levied the payment of 5s. for every boat beached on the ground in dispute.

In 1873, however, the respondent intimated that boats were no longer allowed to be laid up on the ground in question. The complainers accordingly brought the present action.

The respondent averred that there had never been any agreement between the proprietor and the fishermen allowing them to beach their boats on the ground claimed, and that the fishermen had acquired no servitude to that effect. The 5s. allowed to be charged by the Act was for boats laid up within the harbour, and the ground in question was without the harbour bounds as fixed by the statute.

The complainers pleaded—“(1) The acts complained of being a violation of the rights possessed by the complainers at common law and enjoyed by them for immemorial time, they are entitled to suspension and interdict as craved. (2) The complainers are entitled to be protected in the exercise of their right to beach their boats on the ground in question in respect of the provisions of the Act 8 and 9 Vict. c. 25. (3) The complainers are entitled to be protected in the exercise of said right in terms of the Act 29 George II. c. 23.”

The respondent pleaded—“(1) The complainers have not set forth, and do not possess, any title to insist in the present note. (2) The statements of the complainers are not relevant or sufficient to support the prayer of the note. (3) The spaces of ground in question being the exclusive property of the respondent, and the complainers having no right of any description in regard thereto, the suspension ought to be refused.”

The Lord Ordinary allowed a proof, the result of which was that it appeared that the fishermen had been in use to beach their boats on the ground in question from time immemorial; that there was no other place convenient for that purpose; and in particular, that it was impossible to beach the boats within the harbour.

The Lord Ordinary pronounced this interlocutor—

“*Edinburgh, 10th December 1874*—The Lord Ordinary having heard counsel for the parties, and considered the closed record, proof, and whole process: Refuses the suspension, finds the complainers liable in expenses to the respondent, appoints an account thereof to be lodged, and when lodged remits the same to the auditor to tax and to report.

“*Note*—The respondent, Mr Aiton, is proprietor of the estate of Boddam, which is situated on the sea-coast, in the parish of Peterhead and county of Aberdeen. The village of Boddam is part of the estate, the complainers and the other inhabitants being, with one or two exceptions, the occupants of houses therein as tenants of the respondent. There is a harbour on the estate, situated about a quarter of a mile to the northward of the village. The complainers are all fishermen, and they have now as individuals, ‘and also as a committee elected by the fishermen of Boddam for transacting the fishing affairs of the village of Boddam,’ presented the present note of suspension and interdict, in which they seek to have the respondent interdicted ‘from troubling, molesting, or interfering in any way with the complainers and the other fishermen belonging to the village of Boddam, in laying up for the winter season, beaching, or taking their boats above high water mark at or near the harbour of Boddam, upon the ground coloured blue and green

in the plan or sketch herewith produced and referred to, and marked as No. 7 of process.’ After the note was passed and the record was closed a proof was allowed to both parties, which has now been taken at considerable length.

“The ground coloured blue and green upon the plan lies to the west or north-west of the present harbour of Boddam—the part coloured blue being separated from that coloured green by a road from the bed of the harbour to the high road leading to the village. Both pieces of ground are above high-water mark, and consist of shingle, and are well adapted for beaching boats during the winter season. Indeed, no other ground at all adapted for the purpose exists in the neighbourhood so convenient—or indeed at all convenient—for beaching the boats belonging to the village; and it is proved that in the present exposed condition of the harbour it is necessary for the safety of the boats during the winter to draw them up on the beach above the reach of the tide.

“It appears from the proof that until the extension of the harbour in 1849, after the passing of the Act 8 and 9 Victoria, cap. 25, (to be afterwards noticed) the boats were comparatively few in number, and the ground coloured green appears, for at least thirty years prior to that date, to have been regularly used, and to have been amply sufficient for beaching all the boats in winter. After the extension of the harbour, however, Boddam became a regular herring fishing station, and the number of boats increased, and in addition to the ground coloured blue, the ground coloured green has ever since been more or less used as beaching ground by the fishermen of the village. Of late years it seems to have been fully occupied in this way in the interval between the close of one herring fishing season and the commencement of the next, viz., from the end of September till the following month of July. During the fishing season both pieces of ground are let by the proprietor as curing stations, and occasionally part of the blue ground is, by permission of the proprietor, used for shipbuilding.

“The ground in question is undoubtedly the property of the respondent Mr Aiton, who is asserting and maintaining his right of property, and has intimated to the fishermen that without his permission, and without making such payment as shall be agreed upon, no person is to be allowed to beach a boat upon the said ground.

“The right of property being clearly in the respondent, the complainers must, in order to succeed in their present complaint, establish that they have by grant, prescription, or statute acquired a right to use the ground irrespective of the respondent’s permission.

“(1) The complainers do not aver that they or any of the fishermen of Boddam have obtained from the proprietor or his predecessors any written grant expressly entitling them to use the ground for beaching their boats, but they maintain that under their written titles to their houses, as explained and defined by immemorial usage, they have the right now claimed by them. The so-called titles are however merely minutes of agreement for leases between the fishermen and the successive proprietors of the estate. Only copies of these minutes are produced, but the parties have agreed to hold these as equivalent to the originals. It is necessary to explain in detail the nature of these agreements.

"The earliest agreement on which the complainants found is a minute entered into in 1830, between Robert Robertson, then the proprietor of the estate, and a large number of the fishermen in the village, by which he agreed to grant to them leases of their respective houses for twenty-one years from Martinmas 1830, with the privilege of fishing for white fish, as then presently possessed by them, and also of the scalps within the flood mark for laying down their mussels and other bait, and also with the privileges, and roads, and accesses, and of the rocks for laying down and winning their fish as then enjoyed by them, for the annual payment of £1, 5s. per annum for the first ten years, and £1, 7s. 6d. for the last eleven years of the lease 'in name of rent or tack duty,' and in the event of the herring fishing being carried on at Boddam during the lease, the fishermen agreed to pay for each boat employed in the said fishery the one-half the same rates of duties as might be payable at the time for the herring boats employed at Peterhead. The proprietor further reserved full power to use the harbour for loading and shipping all sorts of goods and merchandise during the lease,—to regulate and improve the old fishing village, and to lay off stances for building additional houses as he should see proper, and also to build additional harbours at any places on the shore of Boddam he should think fit. At the end of the lease the roofs, doors, and windows of the houses were either to be paid for by the proprietor or removed by the fishermen. In 1832 regulations were issued by the proprietor to be observed by the fishermen who had been parties to the agreement, and these seem to have been acted upon by all concerned.

"At that time the harbour of Boddam appears to have been inconveniently situated, and unsuited to the requirements of the district. The fishermen, however—who had previously been in use during the herring season to go to Peterhead and other fishing stations—became desirous that Boddam itself should become a herring-fishing station, and should accommodate the boats, not only of the local fishermen, but of strangers, during the herring season, and should also be made available for larger vessels loading and unloading goods. To secure these results a new harbour was essential. A new agreement was accordingly, in 1838, entered into between the tenants of the houses and Mrs Gordon (the daughter and successor of Mr Robertson), and her husband, setting forth *inter alia* the agreement of 1830, and that the fishermen of the village had applied to the proprietors to erect a new harbour 'in order to afford a greater protection to the fishing boats, and more particularly to furnish more extended accommodation for prosecuting the herring fishery at Boddam than at present exists, it being the intention of the fishermen to pursue the said fishery at Boddam rather than at distant stations as has heretofore been practised by them, and Mrs Gordon and her husband being desirous to encourage the establishment of a herring-fishery at Boddam, and to erect such a pier or breakwater as, while it would afford the protection and accommodation asked for by the fishermen in the said village, and be sufficient to accommodate other fishermen and curers who may be induced to come to Boddam to fish for herrings during the fishing season, would also accommodate vessels for the purpose of loading and unloading cargoes therein, and for the other general purposes

of a harbour, have agreed to extend the said present lease to the further period of seven years.' They also agreed to lay out a sum of money in the erection of the said pier on a site and according to a plan which had been communicated to and approved of by the fishermen, and both parties homologated the agreement of 1830 and the regulations of 1832, and became bound to extend the lease for seven years from and after Martinmas 1851. Each of the fishermen became bound to pay 10s. a year of additional rent during the currency of the original lease, *i.e.*, to pay £1, 15s. for each of the first ten years of the original lease then unexpired, and £1, 17s. 6d. for each of the remaining eleven years of that lease, and £1, 17s. 6d. during the seven years' extension of the lease. It was also agreed that the fishermen should have right, 'during the currency of the said lease,' to use the said pier, or breakwater, and harbour, and beach enclosed thereby, as well as the old harbour of Boddam, for the herring fishing, as well as for the white fishing, as occasion might require, without any dues being chargeable for their herring boats, and other boats employed at the said fisheries of Boddam. But the proprietors were to have power to levy such rates as they might consider reasonable on all vessels and boats entering the harbour not belonging *bona fide* to the fishermen resident in the said village of Boddam paying the rents herein before-mentioned. The proprietors reserved to themselves the full use of the harbour, power to make and alter rules and regulations of the government of the harbour, and with reference to the berthing of ships, vessels, and boats, and the full and absolute right of property in the harbour and shore, and in the rates and duties to be charged.

"In consequence of this agreement Mrs Gordon and her husband appear to have constructed a new pier which still exists and forms part of the present harbour, and the rents stipulated, which, as the foregoing narrative shows, included all necessary harbour accommodation, both for the herring and for the white fishing, continued to be paid to Mr and Mrs Gordon and to the Earl of Aberdeen, who bought the property in 1839, down to the expiration of the extended lease in 1858, and for some years thereafter—the rent during the last eighteen years being, £1, 17s. 6d. It will be observed that the written title under which the fishermen thus held their houses and used the harbour was a mere title of tenancy, which was to come to an end in 1858, and which, if continued after that date, was continued merely by tacit relocation, and could be terminated by the landlord at the expiration of any year. Even assuming, therefore, that the complainants could establish that for time immemorial they had beached their boats upon the ground in question, they cannot merely by possession upon such a title be held to have acquired a permanent right to continue the occupation of the beach against the will of the proprietor.

"(2) The complainants, however, maintain that they have a servitude right to beach their boats there, on the principle which regulated the decision in the Eyemouth case (*Home v. Young*, 9 D. 286), *viz.*, that as inhabitants of the village of Boddam they and their predecessors have, by immemorial possession, acquired right for the whole community to beach their boats upon the ground in question. This contention appears to me to be untenable. The principle of the Eyemouth case is not applicable to the present case at all. The vil-

lage of Boddam is not a burgh of barony or a corporation of any kind. It consists merely of houses belonging to the proprietor of the estate on which they are built, and let by him to tenants. The occupancy, therefore, of these houses by the fishermen, without which they could never have had the alleged possession of the beach, having been merely temporary and under an express contract of lease with the proprietor, is very different from the title and possession founded on in the cases of *Eye-mouth* and *Dysart*, and similar cases. In all of these it was held that where a burgh territory has been erected into a royal burgh or a burgh of barony the burgh thus incorporated is capable of acquiring for the community, by and through the possession of individual burgesses and inhabitants, a right to use the territory for certain public purposes, although the feudal title thereto might still remain in the crown or in the baron, and that the right of use so acquired may be enforced, not only by the community against encroachment by the baron or third parties, but by individual inhabitants against the magistrates of the burgh, in the event of their attempting to alienate the property, or to convert it to uses inconsistent with the enjoyment of the community. There is in the present case no corporation or community capable of acquiring such a right, either directly or indirectly, through the possession of the inhabitants. I am therefore of opinion that the first plea in law for the complainers, viz., that the Acts complained of 'are a violation of the rights possessed by the complainers at common law, and enjoyed by them for immemorial time,' is not well founded. And if this view be sound, it is unnecessary to decide whether the servitude claimed by the complainers is a servitude recognised by the law of Scotland, or whether the complainers are entitled to claim such a servitude on behalf of the general body of fishermen of the village of Boddam.

"(3) The complainers, however, maintain that they have right to beach their boats on the ground in question in respect of the provisions of the Act 8 and 9 Vict., cap. 25. They allege that by that statute 'the right of fishermen to beach their boats on the space specified in the preceding article was expressly recognised and provided for,' and also 'that the spaces above referred to are within the limits of the harbour of Boddam, as defined by the Act.' The complainers are in error in saying that this alleged right of the fishermen is by the Act expressly recognised and provided for. No such right is referred to in the Act. The complainers' counsel, however, explained at the hearing that the following entry in the schedule of tonnage dues appended to the Act, viz.:—'III. For all boats laid up at Boddam for the winter, 5s.' must be read with reference to the agreement of lease current at the date of the Act (1845) and to the usage then in force, by which the boats were then in use and had from time immemorial been in use to be beached upon the ground coloured blue. And they contend that the proprietor (Lord Aberdeen), by obtaining the Act for the enlargement and improvement of the harbour, with power to levy the tonnage dues therein specified and particularly quoted, became bound to find ground for laying up boats in winter, that this obligation is now incumbent on the respondent as proprietor of the estate, and that the Act of Parliament thus distinctly recognises the right of the fishermen to beach their boats at or near the harbour on the

ground immemorially used for that purpose, whether within the limits of the harbour or not. They also say that the respondent has for some years been exacting 5s. for each boat beached, expressly as beaching dues under the Act, and that he has thus interpreted the Act in their favour, and that he is bound to supply the necessary accommodation. I do not think that this is the sound construction of the statute. Although the harbour in its present state may be unfit for the protection of boats laid up therein during the winter season, it appears from the map, plan, and sections of the proposed improvements lodged in the Sheriff Clerk's office at Aberdeen, with reference to the bill which ultimately was passed by the Legislature, that a much larger and more complete work was contemplated, involving the excavation of a large quantity of rock, the extension of the then existing pier, first in an easterly direction, and then at right angles thereto in a southerly direction, and the construction of a breakwater still further south to protect the proposed entrance to the new harbour. A large open space would thus have been provided within the harbour, and under the protection of the pier and breakwater, and it was apparently with reference to the harbour thus improved and extended that the dues for laying up boats at Boddam in winter were to be charged under the schedule. There seems to be no warrant whatever, either under the enacting clauses of the Act of Parliament or under the schedule, for holding that any right on the part of the complainers to lay up their boats in winter on the respondent's lands above high-water mark is recognised by the Legislature; and the fact that the contemplated harbour has never been fully constructed will not confer upon them any such right. Nor can the erroneous description of his charge for beaching the boats, as being dues under the Act, introduced by the respondent into some of his more recent receipts granted to the fishermen, alter the true construction of the Act.

"It appears that in 1865 Lord Aberdeen, shortly before the sale of the property, instead of charging the fishermen (whose leases had all expired in 1858) a slump rent of £1, 17s. 6d. for their houses, and for the use of the harbour and beaching, subdivided the charge as follows, viz.:—

Each house yearly,	£1	2	6
Each herring boat fishing,	0	5	0
Each do. beached,	0	5	0
Each white-fishing boat,	0	5	0
	<hr/>		
	£1	17	6
Each boat for light dues, <i>i.e.</i> , for lighting the harbour,	£0	2	6

"Some of these are no doubt harbour dues, but neither the house rent, nor the lights, nor the charge for beaching, come under that category.

"(4) The complainers maintain, however, in the last place, that the ground in question is, in point of fact, within the limits of the harbour as defined by the Act, section 1; that boats beached there are truly 'laid up' in the sense of the Act, and that the respondent is therefore bound to accommodate them on said ground for payment of the statutory charge of 5s. The limits of the harbour, as described by the Act, are—'Extending southward as far as the island or peninsula on which the Buchaness Lighthouse is erected; eastward as far as the north-east point of the said island or peninsula,

and from thence in a north-easterly direction until it join a line from the beach four hundred yards distant from the pier delineated in the plan hereinafter referred to, and marked therein, "present pier," and including the present boat harbour, and also all Mugie Rocks opposite the proposed entrance delineated on the said plan.

"It is plain, both from the language of this section and from the notice plan therein referred to, that the boundaries extending southward and eastward are not straight lines, but follow the high water mark along the shore, commencing at the then existing pier, and extending round the bay to the north-east point of the peninsula referred to. The north-easterly boundary, being in clear water, is obviously a straight line, as is also the line which joins it from the beach. The complainers maintain that the starting-point of the line from the beach is to be, not at the pier, but at a point on the beach four hundred yards to the west or north-west of the extremity of the pier as that existed in 1844, and that in this way the ground coloured green and blue which lies between this assumed point and the extremity of the pier is brought within the limits of the harbour, and that they have thus right to insist upon their boats being beached in winter upon the said ground. This construction of the statute appears to me to be unnatural and erroneous. I think that the line from the beach is to start from about the extremity of the then existing pier, and is to be continued so as to include the rocks delineated in the plan opposite the proposed entrance to the new harbour until it meet the line running in a north-easterly direction from the peninsula. In short, the precise direction of the two lines is to be ascertained by describing a circle, with the extremity of the old pier as a centre, and a radius of four hundred yards, and drawing a tangent from the north-east point of the peninsula to that circle. That tangent will be found to run in a somewhat north-easterly direction from the north-east point of the peninsula. In this way it will be seen that no part of the ground in dispute can be held to fall within the limits of the harbour as described in the Act of Parliament.

"On the whole, it appears to me that the complainers have failed to establish any of the grounds on which their suspension is laid, and that the same must therefore be refused, with expenses."

The complainers reclaimed.

At advising—

LORD DEAS—From time immemorial the fishermen of Boddam have been in the habit of laying up their boats during the winter on the ground in dispute. It is also admitted that there is no other ground there which is available for the purpose. But it is also clear that that use was fixed by arrangement from time to time with the proprietors, and it appears that up to the time that the Earl of Aberdeen parted with the property the proprietor dealt liberally with the fishermen.

The Earl of Aberdeen was advised to make a harbour at Boddam on certain conditions, and obtained an Act of Parliament in 1845. After the passing of the Act the custom of beaching the boats gratuitously was still continued down to about 1865. After the present proprietor purchased the property in that year a payment of 5s. a year was levied for each boat. Subject to that payment, the custom of beaching the boats has

continued down to the present time, and the question to be tried in this suspension and interdict is whether the fishermen can claim the privilege of beaching the boats as a matter of right.

On 8th October 1874 the Lord Ordinary pronounced the following interlocutor:—The Lord Ordinary having heard the agents for the parties, and having again considered the note of suspension, passes the note, and, in respect the respondent, who is now present with his agent, undertakes to give ground for safely beaching the boats at the sight of the harbour-master during the dependence of the present process, finds it unnecessary *hoc statu* to dispose of the question of interdict."

Now, it is clear that in 1845, when the harbour Act was passed, the fishermen were allowed the use of the ground in question for beaching their boats, and when the proprietor applied for the Act he must have been aware that the fishermen had a material interest in the provisions of the proposed bill. If the Act proposed had been distasteful to them they would have appeared and opposed it, so it was the interest of the proprietor not to make the Act unsatisfactory to the fishermen. So the Act was obtained, and we find in section 7 the following provision:—"And be it enacted, that it shall be lawful for the said Earl and his heirs and successors to demand and receive for every vessel which shall enter within the limits of the said harbour any sum not exceeding the several rates and duties on tonnage specified in the schedule A hereunto annexed."

That section in its terms refers to rates and duties or tonnage, but coming to schedule A, which is referred to, we find, in the first place, payments for vessels other than herring boats, and then we have the following duties:—

For herring boats:—

For all herring boats engaged at the fishery at Boddam, for the period of their fishing season, to be paid at the commencement of the fishery, and that in lieu of all tonnage duties payable for such herring boats,	£0	5	0
For all other boats under 25 tons, coming into said harbour, for any purpose whatever,	0	0	7
And all above 25 tons to be charged the same as coasting vessels.			
For all boats laid up at Boddam for the winter season,	0	5	0

These payments, and particularly that of 5s. for boats laid up for the winter, are in lieu of tonnage-duties. So there is no difference under section 7 of the Act, but under it a payment of 5s. is exigible for every boat laid up for the winter. The question is, whether, on a fair construction of the statute, it was not one of the conditions on which the proprietor was allowed to get the Act without opposition, that the fishermen should be allowed to lay up their boats upon the ground in question for a payment of 5s. I am disposed to read it so, and I do not think it could fairly be read otherwise. That this is the fair construction of the Act is very much confirmed by what followed upon it, for up to 1865 the boats were allowed to be laid up just as before, but the duty of 5s. was, during that period, dispensed with. That dispensation is not wonderful considering the liberal way in which the proprietor was in the habit of dealing with the fishermen. But in 1865 the proprietor himself construes the Act in this way, that the fishermen are entitled

to lay up their boats for a payment of 5s., and so he allowed them to use the ground for that purpose and exacted the 5s., and I do not see how there could be a clearer indication of what was his construction of the statute. The only thing not expressed is the particular ground on which the boats are to be laid up, but they are to be laid up at Boddam, that is somewhere on the estate of Boddam, and the reasonable inference is that they are to be laid up on the ground used for that purpose from time immemorial and up to the present time. If the particular ground had been specified in the Act, or if we were to hold that the provision in the Act did apply to the particular piece of ground, then the proprietor could not put it to other purposes. But I construe the words as meaning that the fishermen are to be allowed to lay up their boats on ground convenient for that purpose, and so the proprietor may change the ground altogether and give them another piece of ground, and there is nothing to hinder him to make the harbour in such a way as to give them accommodation to lay up their boats within it. But the question between the parties is not whether or not they are entitled to have ground to lay up their boats, but as to the particular portion of ground which the fishermen claim a right to.

The evidence of Mr Aiton in reference to the ground in question is as follows:—"I would not allow boats to be built there, as my intention is to excavate the ground and to increase the harbour inland, for two reasons,—because the rock dies away there, and because the further inland the harbour is made the quieter it is. The ground is convenient for shipbuilding purposes, and any shipbuilding which has taken place in my time has been on that ground. (Shown No. 18).—The works delineated on that plan have not been all executed. . . . Following upon the notice which I issued, four or five of the fishermen came to me. I had not made up my mind about the charge for beaching before they came. I gave them a note to Mr Barclay, the harbour master, that they had arranged for their stances and that he was to charge 7s. 6d., and point out the stances for them. I came to fix 7s. 6d. simply to take it out of the category of the 5s. that had been charged as harbour-dues. . . . I was at a meeting before the Lord Ordinary in the Bill Chamber on 8th October. At that date the whole of the boats had been beached with the exception of those away for mussels, and I am not sure whether these had returned or not. The question between the fishermen and myself came to be whether they would pay 2s. 6d. more or not, and that question was raised solely in consequence of their 'appeal.' It struck me that if I allowed the 'appeal' to pass I should very likely be stultifying myself. *Cross-examined.*—I recognise no right on the part of the fishermen to beach their boats at Boddam. I am exceedingly anxious that they should do it, but I maintain my right to charge such rate as I think proper for the privilege. I do not think that I told them until after the interdiction was served that I did not recognise their right of beaching. I am not aware whether my agent received a letter on the subject from Messrs Boyd. A protest was served upon me personally. I handed it over to my agent. I do not think I directed him to reply to Messrs Boyd. I am not aware that he wrote to Messrs Boyd. (Shown letter of 16th September 1874).—I do not think that letter was written with my authority, but

the views therein expressed are in accordance with my views on the subject. There is a statutory charge in the Act of Parliament of 5s. for laying up boats for the winter. I understand that to refer to boats laid up in the harbour. I am aware that boats could not with safety be laid up in the harbour, but had the works been carried out which are contemplated by the Act it would have been safe. At present the boats could only be beached where they are now beached, or on other ground belonging to myself or other people, of which there is plenty. . . . I became proprietor in November 1865. So far as I am aware, the harbour works were in the same condition then in which they are now. (Q) Has there been any proposal made to extend it?—(A) In 1870 I excavated space sufficient for twelve boats additional. (Q) Has there been any proposal to execute the additional works as contemplated by the parliamentary plan?—(A) No, not yet."

Now, in face of this deposition the proprietor can hardly dispute that he must in some way or other provide ground for beaching the boats. No other place than that in dispute has yet been given, although the respondent says he means to do so. In that state of matters it is not necessary to go further. The proprietor must allow the fishermen to lay up their boats on the piece of ground in question until he provides other accommodation. If that is a sound view it is of no moment whether or not the ground in dispute is within the limits of the harbour—at least it is of no moment to the fishermen, although an important question for the proprietor. I do not think, however, that it is necessary to decide that question just now, but I may say that I cannot see that the construction of the Act as regards the extent of the harbour given on behalf of the proprietor, will stand investigation.

The proprietor's construction does not bring within the statute many objects mentioned in the Act, while the construction submitted by the other side does do so. So I am not prepared to decide that the ground in dispute is not within the harbour, but I think we have here enough to authorise us to grant the prayer of the petition.

LORD ARDMILLAN—The complainers are fishermen in the village of Boddam. The respondent is proprietor of the estate of Boddam, including the village and the harbour to which the fishermen resort. The former proprietor of Boddam, Mr Robertson, and afterwards Mrs Robertson or Gordon, wished to encourage the fishing and to make a fishing station at Boddam, and in 1839 the Earl of Aberdeen purchased the estate and continued to encourage the fishermen, and entered into liberal and favourable agreements with them. In 1865 the respondent Mr Aiton purchased the estate from Lord Aberdeen. It is, in my opinion, instructed by the proof that for very many years—I think for much more than forty years—the fishermen were in the habit of beaching their boats on the piece of ground near the harbour of Boddam which is now in dispute.

At the date of the respondent's purchase in 1865 that long customary possession and exercise of the privilege of beaching their boats existed, and it was known to the respondent. The terms or dues exigible for beaching boats were 5s. each boat. That had been arranged and acted on long before the respondent's purchase, and he, knowing

the fact, and well aware of the terms, continued to claim and receive from the fishermen 5s. a-boat, and to give or permit those authorised by him to give receipts to the fishermen for "dues for beaching boats, 5s." After this had been continued for some years the present dispute unfortunately arose. The respondent now denies to the fishermen the privilege hitherto recognised. His contention is, that the fishermen have no right whatever to beach their boats at Boddam.

Now, it is beyond doubt that beaching of boats is necessary to the fishermen, who cannot carry on their business without it; that the piece of ground in question is convenient and suitable and well adapted for beaching boats; that it is the only suitable place accessible or available at Boddam; and that the boats of the fishermen, if not beached, but left in the stormy season floating in the harbour, would probably be knocked to pieces. In this state of matters, with long-continued possession, with long and unbroken custom and practice of beaching the boats, with a purchase by the respondent in the knowledge of the claim and of the exercise of the privilege, and with the recognition of it by the respondent after his purchase, by claiming and receiving the previously agreed on dues for beaching—a notice was issued by the respondent forbidding the beaching of any boats on the lands of Boddam. Payment of the customary dues of 5s. a-boat has been offered, but refused. This is not a question of the amount of fees. The right to exclude the boats, unless a new bargain is made, is maintained by the respondent. He is undoubtedly the proprietor of the ground in question, and his claim to such a right must be met. The complainant must instruct a right to use his property for the purpose—to them necessary, and to the proprietor customary—of beaching their boats.

I do not think that the *Eyemouth* case supports the complainers' argument. Boddam is not a burgh of barony, and no rights for the benefit of the inhabitants have been acquired by magistrates or corporation.

But when the estate was sold the privilege of beaching boats at 5s. a-boat was distinctly set forth, recognised, accepted, and acted on by the proprietor and by the fishermen. Even apart from the question raised in regard to the limits of the harbour, I think the right of the respondent to stop by peremptory notice the practice of beaching boats by the fishermen on the lands of Boddam near to the harbour may be seriously doubted.

As the result—I think the natural result—of the previous possession and of the desire of the proprietor and the fishermen to improve the fishings, the Act of Parliament of 1845 (8 and 9 Vict. c. 25) declares the conditions on which the rights are conferred on the grantee, and it also fixes the limits of the harbour to such an extent as to shew that the piece of ground in question cannot be held as excluded as not within the bounds of the description. I construe the description given in the Act in the same manner as Lord Deas has done; and I am not able to concur in the view taken by the Lord Ordinary, that "the precise direction of the two lines is to be ascertained by describing a circle with the extremity of the old pier as a centre, and a radius of 400 yards, and drawing a tangent from the north-east point of the peninsula to that circle." I think a "tangent" must be drawn at right angles. If so, a line

drawn as a tangent to this circle would not suit Mr Aitken's case, for it would not meet or satisfy the requirements of the statutory description, since it would not include the Mugie Rocks. Nor do I think that any other explanation has been given by the respondent's counsel which excludes the piece of ground in question and yet satisfies the requirement of including these rocks, "all which," opposite the proposed entrance to the harbour, are included in the statutory boundaries. But though I am disposed to take this view of the description of the harbour given in the statute which authorises the construction of the harbour and the exaction of rates and dues, I do not look on that question of construction as necessary for decision of this case.

The safer and more satisfactory ground of decision is, in my opinion, that the granting leave to the proprietor to levy dues was on the condition that he should grant the privilege of "laying up boats at Boddam for the winter season" at 5s. a-boat. He could not demand the dues without recognising the privilege, and he did demand and receive the dues. It has been suggested that "laying up" for the winter does not mean "beaching." But there is no force in that suggestion. The word was well understood. The respondent himself, or his collector, gave receipts for these sums of 5s. a-year for "beaching dues." He also admits in his deposition that he understood the charge was for beaching, and that laying up in the harbour is not safe for the boats, and that the place now in dispute is the natural and only safe place. Yet he refuses it, except on his own terms, of which he is alone to be the judge.

I think the complainers are entitled to succeed.

LORD MURE—I agree with your Lordships that it is not necessary for the disposal of the question here raised to decide whether the ground in dispute is within the limits of the harbour, and as at present advised I shall only say that I am not satisfied that the line contended for by the respondent can be adopted consistently with the provisions of the Act of 1845. I also concur as to the grounds upon which this question of interdict should be decided, because, having regard to the position of the parties at the date of the Act of 1845, and to the possession which the fishermen at Boddam then and have since had of this ground for beaching their boats, I think that the respondent is not entitled to prevent these fishermen from continuing so to use the ground on payment of 5s. of beaching dues as heretofore, unless he is prepared to provide them with some other convenient place.

Such Private Acts are to be dealt with on the footing that there is a contract between the individual who obtains the Act and the community for whose benefit, as well as that of the proprietor, the Act must be supposed to have been passed. The natural presumption is, that unless there was some such mutual arrangement, the local community would have opposed the passing of the Act. Now, that being the principle upon which the case must, as I apprehend, be dealt with, I find in the schedule to the Act a provision that "all boats laid up at Boddam for the winter season" are to pay 5s.; and this payment must, I think, be held to have reference to the laying-up of boats upon the ground in question, upon which

they were then in use to be beached, and not to boats laid up in harbour, as contended for by the respondent, because it appears from the evidence that after the Act was passed the boats were not laid up for the winter in the harbour, but upon the ground in dispute, while the property belonged to Lord Aberdeen, and down to the date of the present complaint. Mr Aiton in his evidence, which seems quite candid, says, "I saw the particulars of the purchase when I got the estate. I noticed that a charge of 5s. was made for beaching boats." When the respondent therefore acquired the estate he was in the knowledge of the payment in question, and immediately after his purchase in 1865 receipts are granted by his factors to the complainers for 5s. "as beaching dues." The receipts are in the same terms down to 1873, and in 1870, when the respondent's son was collector, it appears from a notice which he issued in that year that beaching meant being "laid up on the lands of Boddam," thereby negating the present contention of the respondent, that the statutory dues referred to boats laid up in harbour. There was thus, as I conceive, a complete adoption by the respondent of the custom which had existed from time immemorial of the fishermen beaching their boats on this ground, and I agree with your Lordships that the fishermen, who have all along been using this ground for beaching their boats on payment of the statutory dues are entitled to interdict in the terms proposed.

The LORD PRESIDENT was not present.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the complainers against Lord Curriehill's interlocutor, dated 10th December 1874, Recal the said interlocutor; find that the complainers are entitled to the use of the ground in dispute for laying up or beaching their boats in the winter season on payment to the respondent of 5s. for each boat so laid up or beached, and this so long as the respondent shall not have provided other safe and suitable accommodation for that purpose, either within the limits of the works proposed to be executed or completed by him under the Act of Parliament, 8th and 9th Vict., cap. 25, or elsewhere at Boddam, and to this extent and effect sustain the first and second pleas in law for the complainers; interdict, prohibit, and discharge, in terms of the prayer of the note of suspension and interdict as amended, and decern; find the complainers entitled to expenses; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for the Complainers—Dean of Faculty (Clark) and Brown. Agent—Alexander Morison, S.S.C.

Counsel for the Respondent—Asher and Jamieson. Agent—John Auld, W.S.

Tuesday, March 2.

SECOND DIVISION.

[Lord Shand, Ordinary.

REID AND OTHERS (M'LEOD'S TRUSTEES)
v. M'LEOD.

Testament—Disposition of Heritage—Statute 31 and 32 Vict. c. 101, sec. 20.

A person in possession of property, heritable and moveable, left a testamentary disposition by which he empowered his trustees, of whom the defender was one, "to realise all my heritable and moveable property when they see fit . . . to intromit with my means and effects in every way competent to executors, guardians, tutors, or curators." Held that this conferred on the trustees right to the heritable estate, and that the deed was equivalent to a general disposition of the estate in their favour.

This was an action of adjudication in implement, raised by the trustees of the late Gordon M'Leod of Glencassley, Sutherlandshire, and Lochbay in Skye, against his son and heir-at-law George William Leslie M'Leod, the summons in which concluded that he should procure himself served heir to his father, and then convey the whole estate to the testamentary trustees in terms of his father's testamentary disposition and the Titles Act of 1868. The defender resisted the action on the ground that the testament contained no valid or effectual conveyance in favour of the trustees either at common law or under the said Act.

The case came before Lord Shand, as Ordinary, who, on the 24th December 1874, issued the following interlocutor:—"Having considered the cause, Finds that, in virtue of the statute 31 and 32 Vict. c. 101, sec. 20, the trust-disposition and settlement dated 27th October 1863, and recorded in the books of Council and Session 22d January 1873, by the late Gordon M'Leod, Esquire of Glencassley, Sutherlandshire, and of Lochbay in the isle of Skye, conferred on the trustees nominated by said deed right to the heritable estate which belonged to the said Gordon M'Leod at the time of his death, and that the said deed is equivalent to a general disposition of such estate in favour of the said trustees: Therefore repels the defences, and ordains the defender, as only son and heir of the said deceased Gordon M'Leod, to procure himself, at the pursuers' expense, served and decerned as heir to the said Gordon M'Leod under the proper character or characters required by the investitures or writs and titles of and connected with the lands and other heritable estate and effects mentioned in the summons, which pertained to the said Gordon M'Leod at the time of his death, or by other legal method to obtain the full heritable and irredeemable right thereto established in his person; and that by decree of service and infettment, or other legal method, according to the state of the rights thereof; and immediately on completing thereof, to dispone and convey the said lands and other heritable estate and effects to the pursuers, and the survivors and survivor of them, as trustees foresaid, and their assignees and disponees; and for that purpose to make, grant, subscribe, and deliver valid and efficient dispositions, assignments, and conveyances thereof in their favour, containing all usual and necessary