No 1. having insisted, the LORDS considered the rights as they were *in campo*, and preferred the prior right as aforesaid.

Fol. Dic. v. 2. p. 8. Stair, v. 2. p. 765.

*** Fountainhall reports this case.

1680. *February* 28.—IN the declarator, Sir John Scot of Ancrum against the Archbishop of Glasgow, of his rights of patronage of the church of Ancrum, and of the tacks of their teinds they took from time to time from the parson at his entry, (which, by the act of Parl. 1606, is declared not to be simony,) " the LORDS found the *novodamus* adjected in Archbishop Spottiswood's patent *in anno* 1608, mentioning the patronage of Ancrum, carried the right thereof; without necessity of insructing, that before that gift, it was one of the patrimonial kirks of his diocese, (as it was alleged the Archbsshop ought to prove) because the words of the *novodamus* imported as much as that it had belonged to the Archbishoprick of Glasgow before; since churchmen's evidents cannot be so easily transmitted from one to another as private men's; and therefore they preferred him to Sir John Scot, whose author's right was not till 1625."

Fountainhall, v. 1. p. 91.

*** A similar decision was pronounced 14th July 1737, Heritors of Spey against Duke of Gordon. *See* APPENDIX.

1714. *November* 25.

No 2.
A charter of *novodamus* on the obtainer's resignation containing words not in the former charter, viz. *cum terris* hail sea-greens, was found to give no new right to sea-greens, nothing having been understood given but use and wont.

BRUCE of Poufoulis *against* RASHIEHILL, NEWMILN, and LADY KINNAIRD.

POUFOULIS pursues a declarator of property of certain sea-greens lying opposite to his lands and barony of Poufoulis, libelling upon a charter in the year 1612, containing a *novodamus*, and especially these words therein inserted, viz. *una cum terris vulgo* hail sea-greens, &c.; to which charter the pursuer has right by progress, and thereupon *alleges*, that sea-greens being generally, at least at every high tide, overflowed by the sea, the same fall under the description of *littus maris quatenus maximus hibernus fluctus excurrit*, and consequently can belong to no heritor, as part and pertinent of his lands and barony, but are *inter regalia* belonging to the Crown, and cannot be conveyed without a special right, such as the pursuer produces, and none of the defenders do pretend to.

It was *alleged* for the defenders, *1mo*, That the charter libelled, proceeding upon resignation, is no further to be extended than the right of the resigner, with a *novodamus* of the subject resigned from the Crown, as will appear by

the full clause, viz. *Cum turribus, fortaliciis, pendiculis, pertinentiis, &c. dictarum terrarum, una cum terris vulgo* hail sea-greens, *communibus passagiis, viis dictarum terrarum usitatis et consuetis*, which words *usitatis et consuetis* influences the whole preceding clause; so that nothing was given but use and wont. 2*do*, Hail sea-greens is a very unlimited donative, unless qualified by use and wont. 3*tio*, The position that sea-greens are *inter regalia* as comprehended *in littore maris*, is groundless; for 1*mo*, The definition of *littus maris* by the civil law cannot be adapted to this country, nor many countries else, where the tides rise very high, and overflow great fields of ground, which never were at any time claimed by the Crown; but the heritors of the neighbouring lands do possess the same as part and pertinent without any special grant; and if it were found otherwise, there are many heritors in Scotland, that might come to find the effect of that decision. It is not needful to debate how far *littus maris* was public, whether for navigation, or other public convenience and uses only by the civil law; but with us it is certain, that heritors may enjoy any profit or benefit that can *in littore* consistent with public use, as if stone, or coal, or other minerals, were found within the sea-mark, a neighbouring heritor might reap the benefit thereof; and as to the possession, there is a clear probation as far as the memory of man can reach, which instructs how far these sea-greens have been possessed, and some part inclosed, and how far there has been promiscuous pasturage; in which possession and community according to probation the defenders rest satisfied. No. 2.

It was *replied*, The hail sea-greens are naturally limited to the extent of the pursuer's barony, to the exclusion only of such parts of the defender's lands as are interjected running within that bounds. 2*do*, The words *usitatis et consuetis* are not applicable to the whole clause, but only to the last words, *communibus passagiis, et viis dictarum terrarum*, but cannot naturally be conjoined with the words in the first part of the clause, viz. *una cum terris vulgo* hail sea-greens. 3*tio*, As to the possession, it is proved, that the pursuer's grandfather was killed at Dunbar, leaving his father, an infant of a year old, and his father left the pursuer of thirteen years of age, so that a possession of sixty-seven years must be proved to infer prescription.

As to the prescription, it was *answered*, That the possession being uniformly proved during the memory of man, *præsumitur retro*, especially seeing the pursuer has proved no exclusive possession further than the defender's own.

'The Lords found that sea-greens are not *inter regalia*, and that no new right or feu was constituted by the charter 1612, and that the sea-greens might belong to the neighbouring heritors as part and pertinent without a special right; and assoilzied from the declarator, in so far as the defenders' exclusive possession of property by pasturage, or casting feal and divot, was proved.'

Fol. Dic. v. 2. p. 8. *Dalrymple, No* 118. *p.* 165.

No 2.

*** Bruce reports this case :

By charter under the Great Seal in the year 1612, in favours of Poufoulis' predecessor, after enumeration of the lands formerly belonging to the family, proceeding upon the father's resignation, the King grants a *novodamus*, in which there is this clause, 'Una cum terris vulgo (the hail sea-Greens) com-'munibus viis et passagiis totarum et integrarum predictarum terrarum respec-'tive, usitatis et consuetis.' And all, with the former lands, are erected into a new barony, called, the barony of Poufoulis. These sea greens are for the most part every tide, and in spring and high tides, entirely overflown.

By virtue of the above clause, Powfoulis claims property in all the sea greens that front upon his own lands, from one point to the other; but Rashiehill, and the other neighbouring heritors *contending*, That those of the sea greens, which lie betwixt their respective lands and the sea, are a part and pertinent thereof, and founding also upon immemorial possession;

It was *alleged* for the pursuer, That these sea-greens were a part of *littus maris*, which is defined to be, *quatenus Hibernus fluctus maximus excurrit*; and therefore by the common law, counted *inter res communes*; but by the feudal custom, *inter regalia*; for *quæ nullius sunt, sunt Domini Regis*, So that they cannot be claimed by any, as part and pertinent of their lands; and accordingly here the king makes them over, not as the rest of the lands, upon resignation, but by a new grant; 2*do*, A special charter is preferable to indefinite ones, which have only the claim of part and pertinent. And hence the LORDS preferred the proprietor of Tillicultry, in a debate of controverted lands with Murray of Abercairny, where Abercairny's proof of possession, as part and pertinent, was very pregnant.

Answered for the defenders, That if the civil law be taken as the rule here, then *littora maris* by that law are *inter res nullius*, and therefore the dominion of them is not communicable to any private party; and though it were granted that our Kings had the dominion of the seas, yet it is very absurd to say they could alienate the same, since public use and policy require that this dominion continue inseparable from the Crown; 2*do*, The above feudal maxim only takes place in such things as are caduciary or derelinquished, or come any way to want an owner, and yet truly are the subject-matter of property, *et in commercio*; but it cannot be applied to *res nullius*, and which by their nature cannot be appropriated; 3*tio*, Our feudal customs have entirely receded from that principle of the common law, it being plain that they whose lands front upon the sea, do fence and inclose far within where *fluctus hibernus* reaches, and use the same as their property; yea, they have power to gain upon; 4*to*, By our custom, *littus maris* is only the sand where the sea ordinarily flows; for the definition in the Roman law took its rise from this, that, upon the coasts of Italy, the rising and falling of the tides did not by very far vary so much as with us;

otherwise reason would never have allowed them to reckon so much more ground, *juris communis*, than can be thought necessary for public use. No 2.

Answered, also *separatim* for the defenders, That by the words of the charter these sea greens are not disponed as a separate tenement, since if the words (sea greens) be so taken, it is scarce good sense; especially since they are limited by the following words, *usitatis et consuetis*; whereby these sea greens are only thrown in among other pertinents of the lands disponed, and are expressly called the sea greens, (*prædictarum terrarum*,) limited by the words, *usitatis et consuetis*; therefore the probation of possession must regulate the matter.

Replied for the pursuer, That this interpretation cannot be admitted, 1*mo*, Because, if it had not been the giving a new right, it had been brought in to the former part of the charter, upon the resignation of the proprietary; whereas the sea greens are not mentioned in all the former part; 2*do*, They are first brought in, in the clause of *novodamus*, and that as a distinct right; for the other lands are repeated, and closed with the usual stile, *cum partibus, pendiculis annexis et pertinent*; and then follows a new grant, as of a distinct tenement, *una cum terris, vulgo*, the sea greens; 3*tio*, The words, *usitatis et consuetis*, are only applicable to *communibus viis et passagiis*, immediately preceding; for it is incongruous to apply use and wont to property, it being only applicable to servitudes; nor did ever any stile dispone lands used and wont. And the very designation of the hail sea greens rejects a restriction; for otherwise it had been, the sea greens, as in use to be possessed; 2*do*, Nothing can be more *usitatum et consuetum*, than that he should have the sea greens adjacent to his own barony; especially, 3*tio*, Since most of the defender's lands lie discontiguous from the sea greens they possess.

Duplied for the defenders, 1*mo*, That general words, such as *usitatis et consuetis*, in the end of a sentence, affect all that went before; otherwise, 2*do*, These words had likewise been adjected before the words, hail sea greens; it being ordinary in charters to adject these words to the end of the clause; 3*tio*, The words *communibus viis et passagiis*, relate to the whole lands, as well as to the sea greens; otherwise the common passages to the other lands are not disponed, which are never omitted; how then can it be thought, that the hail sea greens, (a separate tenement, as the pursuer pleads) would have been thrown in the midst of the pertinents of the other lands, and separate the one half of them from the other? 4*to*, *Usitatum consuetum*, is *facti*; nor is it to be inquired what might have been proper and expedient for Powfoulis to have, but what use and wont has given him; 5*to*, Discontiguity excludes not part and pertinent.

The Lords found the sea greens are not *inter regalia*, and that they were not established as a separate feu, or right, from the lands formerly belonging to the obtainer of the charter 1612; but that sea greens may belong to the neighbouring heritors, as part and pertinent of their lands.

Act. *Sir Walter Pringle.* Alt. *Ro. Dundas.* Clerk, *Mackenzie.*

Bruce, v. 1. *No* 10. *p.* 15.