

her husband's estate; and so, to prevent all such questions, she made up a list as complete as she could in order to carry into effect the intention of her husband, and prevent all disputes. It is not easy to prevent disputes, but she did all she could do, and it would be defeating her intention if we allowed a question to be opened up which she took all the means in her power to foreclose.

LORD ARDMILLAN concurred.

Agents for Reclaimers—Macallan & Chancellor, W.S., and Tait & Crichton, W.S.

Agent for Respondents—Lockhart Thomson, S.S.C.

Wednesday, July 1.

MILNE'S TRUSTEES v. COMMISSIONERS OF  
H. M. WOODS AND FORESTS.

*Salmon-Fishing—Barony—Prescription—White-Fishings—Express Grant.* Held (1) that a grant of barony was a good title by prescription to carry salmon-fishings (2) notwithstanding an express grant, in the charter, of white-fishings.

The Magistrates of Aberdeen, trustees *ex officio* under the trust-deed of the late Dr John Milne, of Bombay, proprietor of the lands and barony of Muchalls, in the county of Kincardine, brought this action against the Commissioners of Her Majesty's Woods and Forests, for declarator "that the pursuers have the sole and exclusive right to the salmon-fishings in the sea and sea-coast *ex adverso* of the lands and barony of Muchalls, in the county of Kincardine, excepting the parts and portions of the said lands and barony under-mentioned, viz. . . . and that the said pursuers have good right and title to fish for salmon, grilse, salmon trout, and other fish of the salmon kind in the sea and sea-coast *ex adverso* of the said lands and barony, excepting as aforesaid, and that by stake-nets, bag-nets, net and coble, and every other legal mode: Further, it ought and should be found and declared, by decree foresaid, that the defenders have no right to the said salmon-fishings, and that they are not entitled to fish for salmon, grilse, salmon trout, or other fish of the salmon kind in the sea and sea-coast *ex adverso* of the said lands and barony, excepting as aforesaid, and from erecting or using stake-nets, bag-nets, net and coble, or any other engine or apparatus for catching salmon, grilse, salmon trout, or other fish of the salmon kind within the said lands; and ought and should be decerned and ordained, by decree foresaid, to desist and cease from disturbing and molesting the pursuers in the peaceable possession and enjoyment of the said salmon-fishings."

The pursuers founded upon a crown-charter of resignation, dated in 1806, wherein the lands conveyed are described as "Totas et integras terras et baroniam de Muchalls cum messuagio et maneriei loco ejusdem toftas croftas et pertinentiis earundem comprehendend. villas et terras de Pityot Contlahills Mothgatehead Blackbutts Stranathro Stratethin Denabucks Corthings et Greenhead una cum

decimis rectoriis et vicariis earundem et piscationibus alborum piscium et cymbis piscariis lie fisherboats cum molendino de Muchalls." &c. The pursuers alleged prescriptive possession on their barony title, and pleaded that, "in respect of the grant of barony to their authors, with the possession and exercise by their said authors and them of the right of salmon-fishings for upwards of forty years prior to 16th April 1862, they had at the said date, and have the sole and exclusive right to the salmon-fishings in the sea and sea-coast *ex adverso* of the lands and barony of Muchalls, excepting as above-mentioned."

The defenders pleaded—"There being no grant either of salmon-fishings or of fishings generally in the titles of the pursuers prior to 28th December 1844, the title on which the pursuers found is not a good basis for acquiring a right to salmon-fishing by possession. Even if a simple barony title, with possession for forty years, could in any case be held to confer a good title to salmon-fishings, that title founded on by the pursuers, containing as it does an express grant of 'fishings of white-fish,' without any grant either of 'salmon-fishings' or of 'fishings' generally, is not a good basis for acquiring a right to salmon-fishings by possession, on the principle *expressio unius exclusio alterius*."

The Lord Ordinary (BARCAPLE) pronounced this interlocutor:—

"Finds that the barony title founded on by the pursuers is a sufficient title to the salmon-fishings in question if followed by prescriptive possession of such fishings: Repels the second and third pleas in law stated for the defenders: Finds that the pursuers are entitled to prove said prescriptive possession; and appoints the cause to be enrolled for further procedure, reserving all questions of expenses.

"*Note*—The pursuers found upon their barony title, as giving them right to the salmon-fishings. They produce a crown charter of resignation in 1806, in which the lands are described as the barony of Muchalls, and they aver prescriptive possession of salmon-fishings by them and their authors following upon that title. The Lord Ordinary thinks that it must be taken as settled law that, in the general case, the charter of a barony is a good title by prescription to carry salmon-fishing. To this extent all the institutional writers concur, whatever difference of opinion may have existed as to the stronger doctrine laid down by Lord Stair and Sir George Mackenzie. (St. 2, 3, 60, 61 and 69; M'K. 2, 6, 3; Ersk. 2, 6, 18; Bell Pr. § 754.) The Lord Ordinary is therefore of opinion that the pursuers have a good title on which they may establish right to salmon-fishings by prescriptive possession, unless the ordinary effect of a barony title can be held to be excluded in the present case by the specialty to be immediately noticed.

"The description of the subjects is in these terms: 'Totas et integras terras et baroniam de Muchalls cum messuagio et maneriei loco ejusdem toftas croftas et pertinentiis earundem comprehendend. villas et terras de Pityot &c., una cum decimis rectoriis et vicariis earundem et piscationibus alborum piscium et cymbis piscariis lie fisherboats cum molendino de Muchalls,' &c. The defenders contend that the special mention of white-fishing excludes the construction by which, on proof of prescriptive possession, the grant of barony might otherwise be held to have included a grant of salmon-fishings. The Lord Ordinary feels this to be a question of considerable difficulty. The defenders found upon a maxim—*Expressio unius est exclusio alterius*; and there is

much to be said for its application, on the ground that the right which is expressed, and that which it is sought to include by construction, are both rights of fishing. The defenders also refer to the opinions delivered in the case of the *Commissioners of Woods and Forests v. Gammell*, by Lord Medwyn in this Court, 18 D. 876, and by the Lord Chancellor in the House of Lords, 3 Macq. 458. The question as to the right of the defender in that case to the salmon-fishings opposite his lands was not decided, and, indeed, was never before the Inner-House, or the House of Lords. The matter in discussion was entirely the judgment of the Lord Ordinary decerning in terms of the first declaratory conclusion, viz., that the salmon-fishings round the sea coast of Scotland belong exclusively to the Crown in so far as they have not been granted out. The interlocutor, which was adhered to, decerned in terms of that conclusion, and appointed the parties to be heard on the defence, that the defender 'is proprietor of lands erected into a barony, and has the right of salmon-fishing adjoining thereto.' But though the effect or construction of the title of the defender in that case neither was nor could be before the Court or the House of Lords, the *dicta* referred to are of the greatest authority, if it can be held that they were intended to express an opinion as to the effect of a special grant of white-fishing, occurring in the way in which it does in the present case, in a barony-charter. But the Lord Ordinary sees no reason to think that any question of that kind was present to the mind of Lord Medwyn or the Lord Chancellor, or that, if it had been, they would have expressed an opinion upon it, seeing that it was the question on which the parties were appointed to be heard by the interlocutor which was then adhered to. The opinions were delivered in reference to the argument for the defender, Mr Gammell, against the general claim of the Crown to salmon-fishings on the sea-coast so far as not expressly granted out, and without any reference to the peculiar bearing of a barony title upon the question of the defender's claim to the salmon-fishings *ex adverso* of his lands.

"Holding the question to be open, the Lord Ordinary is of opinion that the mention of white-fishings, as it here occurs, does not exclude the ordinary effect attributed by law to a barony title as importing a grant of salmon-fishings, where they have been possessed for the period of prescription. The charter disposes the lands and barony of Muchalls, comprehending certain lands named. If the description had stopped there, there would have been a good title on which by possession to prescribe a right to salmon-fishings as included in the conveyance, just as in the case of an ordinary grant of lands with fishings. But the charter proceeds: 'Una cum decimis rectoriis et vicariis earundem et piscationibus alborum piscium et cymbis picariis lie fisherboats cum molendino de Muchalls,' &c. If, upon a legal construction of the former part of the description, it must be held that, taken by itself, it gives right to salmon-fishings, does the mention of white-fishings, among the additional subjects conveyed, teinds and others, change its import and effect in that respect? The Lord Ordinary thinks it should not be held to do so. Although they are both rights of fishing, salmon-fishing and the exclusive right of white-fishing are rights materially different in their legal character. The former may be effectually conferred by a grant of a barony in general terms, provided the title is so interpreted by prescriptive possession. The latter cannot be

acquired in that way. Salmon-fishing is all along an existing patrimonial right—in the Sovereign before it is granted out, and in the grantee thereafter. But white-fishing only becomes a patrimonial right by being granted by the Crown to a subject. The grant is made, not out of the patrimony of the Sovereign, but as a limitation of the right of the public. Such an exercise of the power of the Crown is exceptional, and there is the strongest presumption against its having taken place where it does not appear expressly on the face of the grant. The Lord Ordinary knows no authority for holding that the right can be acquired by a mere grant of barony, or of lands *cum piscationibus* followed by possession; and he is of opinion it cannot be so acquired. It follows, that if it was intended to confer that right, it was absolutely necessary to give it expressly—as additional to anything that might pass under the general grant of barony. Salmon-fishings, on the other hand, may so pass by a mere grant of barony, provided prescriptive possession follows. In the cases where that occurs, the law holds that, by granting the subjects as a barony the Crown intended to include salmon-fishings in the grant. The Lord Ordinary does not think that the ordinary legal construction of the grant in such circumstances is excluded by the fact that the charter expressly gives the right of white-fishing, which could not be conferred in any other form, and must have been separately expressed, whether the right of salmon-fishing was intended to be given or not. Even if the charter had expressly borne to be *cum piscationibus*, on which a right to salmon-fishings might have been prescribed, or *cum piscationibus salmonum*, the grant of white-fishings must have been expressed if it was meant to be conferred. The Lord Ordinary, therefore, thinks that its expression in the present case cannot be taken as limiting, or in any way construing, the effect of the preceding portion of the clause"

The defenders reclaimed.

SOLICITOR-GENERAL and T. IVORY for reclaimers.

CLARK and HALL for respondents.

At advising—

The LORD PRESIDENT was of opinion, on the first point, that though it might be true that there was no recorded judgment fixing the matter, there was —what was much more weighty than one or two judgments—there was the concurrent testimony of all the institutional writers of the law of Scotland. Stair and Mackenzie were quite clear. Erskine was said to be doubtful; but, on examination, it was plain that in the passage in his "Institutes" (ii, 6, 18) relied on by the defenders, he agreed with Lord Stair on the special point in question; and in his "Principles," which was repeatedly revised by him, he stated the doctrine clearly. Bell stated the law to the same effect. As to the second point, there were many considerations which made it easy to understand that a Crown grant which was silent as to salmon-fishings might be intended to convey them, while at the same time it was natural to use express terms in conveying white-fishings. Salmon-fishings were the patrimonial property of the Crown; white-fishings were held by the Crown for the benefit of the public, and, assuming a grant of white-fishings to be within the power of the Crown, it was a grant of so anomalous a nature, and so uncertain in its effect, that if it was meant to give it, it was natural and proper to give it in express terms.

The other judges concurred.

Agents for Pursuers—Tods, Murray, & Jamieson, W.S.

Agent for Defenders—Andrew Murray jun., W.S.

## TEIND COURT.

Wednesday, July 1.

MINISTER OF WILTON, PETITIONER.

*Glebe—Glebe Lands (Scotland) Act 1866—Conditions and Restrictions—Conterminous Heritor—Agreement.* Held that the Court may competently give effect, under the 13th section of the Act, to an arrangement for feuing a part of the glebe to a particular heritor at a specified feu-duty.

The Reverend James Stewart presented a petition for authority to feu the glebe of Wilton. Laidlaw, a conterminous proprietor, objected to the prayer of the petition being granted in respect to the third lot of glebe lands mentioned in the petition, alleging that if the powers sought in regard to that lot were granted, the value and amenity of his property would be seriously injured.

The reporter to whom the Lord Ordinary remitted to consider the petition, reported that, in his opinion, "the respondent's property would be depreciated in value, and the amenity impaired, were the prayer of the petition granted in regard to the third portion, without any conditions or restrictions."

In order to prevent further opposition on the part of Laidlaw, a mutual agreement was entered into between him and the petitioner, and embodied in a joint minute, whereby Laidlaw was to get a feu, for £10 per acre, of 10½ acres of the lot in question, with the further condition that the authority to be granted to the petitioner, so far as concerned the remainder of the portion of the glebe third described in his petition, should be limited and restricted, so that the same should be feued for villa residences only. Were this arrangement authorised and approved of by the Court, and carried into effect by the petitioner and respondent, the reporter was of opinion that the value and amenity of the respondent's property would not be materially affected. He thought the rate of feu-duty reasonable, taking into account the large area thus at once feued out, and the increased value of the remainder, and recommended that the proposed arrangement should be sanctioned.

The Lord Ordinary (BARCAPLE) reported the case, indicating an opinion in favour of the arrangement as of advantage to both parties, but stating, "it is for consideration whether it can be competently carried out. The Court have only power under the Statute, § 18, to give authority to grant feus for the highest feu-duty that can be obtained. By the 17th section there is a power given to conterminous heritors to come forward after the minister has got authority to feu or lease, and intimate his willingness to feu, lease, or purchase so much of the glebe at such price, feu-duty, or rent as the Court may, on consideration of the whole circumstances, and after such inquiry as they think necessary, determine. But there is no provision for the Court granting power to feu to any particular person, whether a conterminous heritor or

not, at a specified rate of feu-duty." Thereafter, in terms of instructions by the Court, he remitted to the reporter "to report his opinion as to the minimum rates of feu-duty and of rent, and also the highest rates which, in his opinion, can be obtained for the whole thirty acres, being the third portion of the glebe specified in the petition, if the same should be feued, irrespective of the proposed arrangement with Mr Laidlaw, and also his opinion as to the minimum rate of feu-duty and rent of the portion proposed to be taken by Mr Laidlaw, if feued or leased in one lot, and also the highest rates which in his opinion can be obtained for said portion, if so feued or leased." A supplementary report was accordingly prepared and reported to the Court, the Lord Ordinary again stating his opinion "that it establishes the expediency of the proposed arrangement with Mr Laidlaw, if the Court has power under the Statute, to authorise a feu being granted to a particular party at a fixed rate of feu-duty."

Parties were heard on the Report.

DUNCAN for petitioner.

ASHER for respondent.

At advising—

The majority of the Court were of opinion that the Court could competently give effect to the arrangement between the petitioner and respondent, as a "condition and restriction" under the 13th section of the Glebe Lands (Scotland) Act, and an interlocutor was pronounced bearing that the Court, "having resumed consideration of the petition, with the reports of the Lord Ordinary, and also considered the terms of the joint minute for the parties, No. 22 of process, the terms of arrangement therein set forth being concurred in by the presbytery of the bounds and by the heritor of the parish, as appearing from the minutes Nos. and of process, and having heard parties' procurators, interpose authority to the said joint minutes, and to the terms of arrangement therein set forth, authorise and empower the petitioner and his successors in office, ministers of the said parish, to dispense in feu, and to grant leases of the portions of the glebe of Wilton described in the petition, subject to the provisions of the Glebe Lands (Scotland) Act 1866, and to the conditions and restrictions mentioned in the said joint minute, and hereinafter mentioned or referred to; authorise and empower the petitioner to dispense in feu to Mr Thomas Laidlaw of at a feu-duty of £10 per imperial acre per annum, the portions of the glebe specified in said joint minute, in terms of the draft feu-charter now produced, No. of process, subject to security for the feu-duty being granted over the adjoining property belonging to the respondent, the said Thomas Laidlaw, in terms of the draft bond and disposition in security now produced, No. of process; further authorise and empower the petitioner to dispense in feu the fields marked No. 609 on the Ordnance Survey Map No. 9 of process, excepting those portions of the said field to be dispensed to the said Thomas Wardlaw, but subject to the conditions specified in the said joint minute, and that for the highest feu-duty or feu-duties that can be obtained for the same, not being less than £11 per imperial acre, at such time as he may find expedient." &c.

Agent for Petitioner—R. Hill, W.S.

Agents for Respondent—Paterson & Romanes, W.S.