reasonable interpretation. The policy here seems to be in the form usually adopted. There is no doubt that in certain circumstances a vessel in tow is looked upon as one with the towing vessel, and the real question here is whether that view is applicable to such a case as the present. It would have been better if the policy had been more clearly expressed, but I think, after giving the matter my best consideration, although not without hesitation at first, that the policy means that if a collision is caused by the vessel itself or the towing vessel, that collision is insured against. That in my opinion is the true interpretation of the policy applicable to rather peculiar facts.

LORD YOUNG—I am of the same opinion, and I entirely concur in the judgment of the Lord Ordinary.

I understand the proposition that according to this bargain no liability was to attach to the insurers unless a collision with the "Niobe" took place immediately and directly, and that the policy did not apply to any other collision although one for which the "Niobe" might be held liable. I quite understand that proposition, but there is nothing in it to recommend it to my mind. It is one of these arguments which illustrate the legal maxim *qui hæret in litera, hæret in cortice*, and which if given effect to would not carry out the intentions of parties but would defeat the whole of them. Payment by the ship intended to be insured was, in my opinion, payment of a premium against precisely such a risk as occurred here. The circumstances here were not of an exceptional character, but just such as were looked forward to as possible to happen to a ship in tow. I cannot resist the conclusion of the Lord Ordinary that this was the very kind of collision the possibility of which was contemplated and insured against. I have no doubt in my mind at all nor any hesitation in concurring with the Lord Ordinary.

LORD RUTHERFURD CLARK—With your Lordship in the chair I have had doubts as to whether this case comes within the class of cases in which a tow and a tug are to be regarded as one. My doubts have not been removed, but as your Lordships are agreed I need not say more.

LORD LEE—I concur in thinking that this contract must be construed as a contract against risks having reference to a ship in tow. The policy in one place applies in express terms to a ship in tow, although in another place it refers only to "the ship." I agree with the Lord Ordinary.

The Court adhered.

Counsel for Pursuers and Respondents—Dickson—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender and Reclaimer—Sir C. Pearson—Ure. Agents—J. & J. Ross, W.S.

Tuesday, June 17.

SECOND DIVISION.

[Sheriff-Substitute of Caithness, Orkney, and Zetland.

BRUCE *v.* SMITH AND OTHERS.

Local Custom—Essentials for Local Custom having the Force of Law—Reasonableness—Right to "Caaing" (Stranded) Whales in Shetland.

Held (*diss.* Lord Lee) that the custom by which the heritors of Shetland, without giving any consideration therefor, claimed one-third share of all caaing whales stranded and killed on the sea shores of their respective lands, as a pertinent of said lands and as in conformity with the immemorial usage of the islands, was unjust and unreasonable and had not the force of law.

Upon 14th September 1888 a shoal of "caaing" whales (so called because they are "caaed" or driven ashore) was driven into Hoswick Bay, Shetland, from a distance of some miles at sea. The whales were stranded upon the sea shore of or adjacent to the lands of Hoswick, and were killed in the sea by the captors wading in water waist deep. They were thereafter dragged upon the beach, flenched, and sold by auction, the sum realised being £450.

John Bruce, Esquire, of Sumburgh, proprietor of 33¼ merks of the 72 merks of which the lands of Hoswick consisted, who had in no way either directly or indirectly taken part in the capture, brought an action in the Sheriff Court at Lerwick against Robert Smith, fisherman, Sandwick, and others—a committee acting for the captors and in possession of the sum realised—for payment of £69, 7s. 3d, as his share of the said sum.

He averred—"The heritors of Shetland have, as a pertinent of their lands, and conformably to the laws, usages, and rights of the islands, right to one-third share of all caaing whales stranded and killed on the shores of their lands. . . . According to the custom and the laws, usages, and rights of the islands, the largest heritor or proprietor sells the caaing whales so stranded, retaining his proportion and dividing the remainder among the salvors, and others interested. . . . In this case, however, the salvors repudiated the heritors' rights, and without consulting the pursuer, who is the largest heritor, at their own hands realised the whales."

The pursuer pleaded—"(2) The heritors of Shetland having as a pertinent of their lands, and by the laws, usages, and rights of the said islands, right to one-third share of all caaing whales stranded and killed on the sea-shores of their respective lands. (3) The pursuer being a proprietor of 33 merks 2 ures land in the town or room of Hoswick, is entitled to decree for £69, 7s. 3d., being the proportion effeiring thereto of the heritors' share of the whales before referred to."

The defenders pleaded—"*Preliminary*—(1) This action is irrelevant as laid. *On the merits*—(1) The whales having been killed below low-water mark, and pursuer having no right nor title to the ground below high-water mark, he has no title to pursue this action, and defenders are entitled to absolvitor, with expenses. (2) The defenders being ready and willing to pay to the pursuer his proportional share of any damage done to the beach, should be assoilzied from the conclusions of this action. (3) In any event, the expenses connected with the preparation of the blubber for market, and the sale thereof, must be deducted before the pursuer's alleged share can be calculated, and this not having been done by pursuer before raising this action defenders are entitled to their expenses. (4) Even should a custom such as is alleged by pursuer have existed in the past, it existed on account of the inability of the captors to resist the landlord's demands, is opposed to recent legislation, and should not be looked to as a rule for settling this action."

Upon 24th December 1888 the Sheriff-Substitute (MACKENZIE) repelled the preliminary pleas for the defenders, and allowed a proof.

"*Note.*—With regard to the plea of irrelevancy, it is to be noted that the claim made by the pursuer is a most unusual one, and one which, although not unknown to the courts of law in Scotland, is opposed to the general principles of the common law of the country, and can only rely for its substantiation on the grounds of local usage and custom. The question of relevancy therefore resolves itself, as it seems to me, into the question whether the pursuer has stated the existence of a usage which, on being established as a fact, would render his claim a legitimate inference therefrom.

"To this extent I am of opinion that the pursuer has stated a case which he may be allowed to prove.

"It was argued by the defenders that as the pursuer does not allege any property in the 'foreshore' of his lands that his other allegations are irrelevant. But it is to be remembered that we have here to deal with a peculiar and unique claim founded upon usage alone, and it is difficult to conceive a claim which, if consistent with public policy, might not be proved in this way. It appears to me to be sufficient for the relevancy of the present action that the pursuer asserts a usage, and brings himself under the operation of that usage in language which is sufficient to convey the necessary and logical inference.

"'The customs, and the laws, usages, and rights of the islands' is a phrase which is perhaps a little too comprehensive and ill-defined.

"It would have been well had the word 'immemorial' been used, but neither of these objections are to my mind sufficient to render the pursuer's case irrelevant. . . .

"An unreported case—*Scott* v. *Reid and Others* — decided by the Lord Ordinary (Lord Cockburn) in the year 1838, has been referred to, but except as an authority in support of the relevancy of the pursuer's averments, it does not, in my opinion, fall to be discussed at the present stage of the case."

The unreported judgment of Lord Cockburn was as follows—"The Lord Ordinary finds that the pursuers (the proprietors) have right to one-third of all caaing whales stranded and killed on the shores of their respective lands, and that the defenders are not entitled to carry off or intromit with this, the pursuers' share thereof, and declares, prohibits, and decerns accordingly: Finds the pursuers entitled to their expenses incurred under these declaratory and prohibitory conclusions, &c.

"*Note.*—The pursuers are infefted 'with pertinents and privileges,' and the main point at issue in this process of conjoined advocation and declarator is whether the pursuers as heritors in Zetland be entitled to any portion of whales of a certain description termed caaing whales when they are stranded, whether by natural or by artificial means, on the seashores bounding their lands.

"The Sheriff-Substitute disposed of the case which forms the subject of the advocation, and related to a single shoal, by deciding they were not. But no weight can be attached to this judgment, because though it professed to proceed expressly on evidence of usage, no proof had been taken or allowed. The Lord Ordinary (Corehouse) before whom the cause then depended recalled that interlocutor, and a declarator having been brought, his Lordship allowed 'a proof of the averment that by the immemorial usage of the Zetland Islands the landholders of Zetland have a right to a share of all caaing whales stranded and killed on the shores of their properties.'

"The present Lord Ordinary presumes that that interlocutor was intended to fix the relevancy of the fact thus directed to be established. But if this point be still open, then he is of opinion that it is not only relevant but conclusive. The general legal rule no doubt is that he who takes a fish at sea is not bound to share it with the proprietor of the land on the shore adjoining which he strands it. But it is possible for this rule to be modified by a local inveterate usage. And there is the less aversion to recognise such a custom when the district where it has arisen is so distinguished by natural situation or local history that its growth may almost be accounted for by the peculiar circumstances of the place. The irreconcileableness of the custom to the common law, instead of being a reason for refusing effect to it, is only a fact which proves its inveteracy. . . .

"In appreciating the proof there is one point to which the pursuers attached great importance, but to which the Lord Ordinary can attach none whatever. In order to make the usage of letting the heritors have a share of the whales probable and accountable they state that these Zetland Islands were formerly part of Norway; that for a long while after they were ceded in pledge to Scotland they were expected to be redeemed; that for this and other reasons the law of Scotland did not extend

to them; that by the law of Norway the heritor participated in these fishes; and that therefore the usage on which the pursuers now found is, like many other customs still lingering in Zetland, the mere continuation of the old law of the place.

"Now, the Lord Ordinary thinks this inconclusive and unimportant, and for these reasons—First, There is no proof whatever what the Norwegian law on this subject was or is. A work called 'Gulathing's lang land leiger Balkr,' and another called 'Debes Feroa Reserata,' and 'Torfœus,' and the 'Log-Bok Islendinga,' all of which are said to be of great authority, have been referred to, but the opinion of no Norwegian or Danish lawyer has been produced to establish the actual fact of the law. In this situation the Court can know nothing either of the authority or the meaning of these or other foreign law books. What chance would a Norwegian Court have of being right on a point of Scotch law if, instead of examining a learned witness, it tried to grope its way through a few detached passages of Erskine or Morrison. Second, Whatever was the case originally, it is certain that the law of Scotland has prevailed in Zetland for at least two centuries. This is surely time sufficient to have worn out any pre-existing foreign law, at least to the extent of making the gradual growth of customs agreeable to our own law not improbable. Third, Whatever be the origin or the policy or the likelihood of the usage as contended for by either party, what the Court has now to ascertain is the actual fact of its existence. It may, as the defenders say, be an unfair and barbarous thing, and contrary to general legal principle, that captors who have all the trouble and risk should be obliged to share the spoil with landowners whose proper soil they never touch; or it may, as the pursuers say, be a remnant of the ancient Northern rule; and it may be politic, because, though at first brought to the public shores, the adjoining land is always practically used in saving and disposing of the animals; and because if matters were not accommodated by a fixed division, the heritors might ruinously compete with their people, or might prevent them taking the fish at all. These are considerations which, if we were to speculate on the subject, might deserve to be weighed; but they are of little use as evidence, when we must look to the fact, and not to its causes or its consequences.

"Now, whatever doubt there may be as to the origin or policy of the usage, or as to the exact share which it has been accustomed to assign to the heritor, it does not appear to the Lord Ordinary that there is any doubt, under the proof, of the fact that the practice of the heritors sharing to some extent or other has immemorially existed. According to the defenders, there has been no difference between Zetland and its whales and any other place and its ordinary fishes. The common rule of law, they say, has always been practically applied; and they altogether deny the existence of any usage of any division whatever.

"The Lord Ordinary conceives this view to be clearly repugnant to the great body of the parole proof. He conceives it established by the evidence for the pursuers—First, That the heritors have immemorially claimed as their right a portion of the whales stranded or brought to the shores adjoining to their lands, except perhaps when the shoal happened to be insignificant, or its arrival unknown, or it was hurriedly abstracted. Second, That though this claim has been oftener made by certain estates than by others, this has only been because these estates adjoined voes or bays better fitted to attract and receive the animals, and the claim has not depended on any arrangement peculiar to these places, but on the general usage and understanding of the islands. Third, That this claim, though often grudged by those who had to suffer from it, has nevertheless been immemorially submitted to as founded on practice and on right, except in the case of a few secret or violent abstractions, plainly felt by all parties to be improper. Fourth, That the stranding of whales has occurred with sufficient frequency, and in sufficient numbers, to show that the usage has not been casual or unimportant, but has extended over a long course of time, and to thousands of these animals, and has been practically acted upon as the rule for adjusting claims of great value.

"These results are confirmed rather than refuted by the witnesses for the defenders. . . .

"Now, there certainly seems to have been some grumbling. The people grumbled when the whales were shared by the heritors, and the heritors when they were abstracted by the people. But since the rule of partition was practically yielded to, this aversion to its being enforced or evaded only shows that it was no matter of indifference, but understood to be founded on deep-seated practice. It was, no doubt, occasionally resisted, but only as the exercise of some other rights are—secretly or by force. There is no appearance whatever of the heritors ever having shrunk from asserting their claim, or of the people openly and regularly setting it at defiance, as each would respectively have done if they had been conscious that the usage was a pretence. The contract of 1739 did not introduce the practice, but only regulated it, in so far as the Crown, through its admiral, and the heritors were interested. It is scarcely conceivable, indeed, that so peculiar an usage could not only be introduced for the first time, but maintained on any such private arrangement. Accordingly, the contract plainly proceeds on the pre-existence of the custom, and hence the long subsequent practice is never referred to by the witnesses, but went on upon the understanding of an independent and inveterate custom.

"The written evidence is strongly of the same tendency, but has far superior claims to credit. It consists chiefly of contracts, leases, and legal proceedings; and the light which these documents supply is not only valuable from its clearness, but because it

proceeds from a variety of real transactions, extending over a large portion of time, unconnected and free from all suspicion of being influenced, as living witnesses may be supposed to be, by the existence or anticipation of any dispute or law suit. The statements, admissions, and arrangements disclosed in these papers seem to the Lord Ordinary to be perfectly incomprehensible if it be true that all this idea of the usage in question was a mere dream. Its existence, as the basis of a real and valuable right, seems to have been acted upon on all occasions. . . .

"The Lord Ordinary, therefore, holds the custom as set forth by the pursuers to be proved; and if it be, then it is unnecessary to consider the effect in law of the existence at a subsequent period of a directly opposite custom, because no such case is raised by the evidence. The defenders have proved that occasionally whole whales, or even whole shoals, were removed by the people, particularly by those of Weisdale; but whatever force this fact may have in impeaching the evidence of the pursuers, it unquestionably does not create the case in which, assuming the pursuers' proof to be complete, the Court has to adjust the legal result of an equally complete proof of a posterior and opposite usage.

"In determining the extent of the pursuers' share, it must be recollected that their claim is adverse to the ordinary law, and that therefore they are entitled to no more than what it is proved that immemorial usage has given them. Now, the state of the fact seems to be this—The heritors sometimes got a half, and sometimes a third, never more than the one, and never less than the other. But this variation from the occasional presence and the occasional absence of the Crown, which seems to have always got one-third when it, by its officer the admiral, chose to assert its rights, leaving the other two-thirds to be divided among the captors and the heritors equally. Now, the Crown has stated in a minute in this case that it relinquished its claim on behalf of the captors. The exact meaning or effect of this, particularly as to the gift being permanent, cannot be determined under this declarator. It is, or may be, a question between the captors and the Crown: but *quoad* the pursuers, it is immaterial whether the Crown cedes or keeps its own share; for anyhow it is not theirs. The Lord Ordinary does not think that under the proof they can claim more than one-third.

"In awarding them this, the Lord Ordinary thinks that they are also entitled to costs, because the custom on which they found ought never to have been denied." . . .

Before the proof it was admitted by the parties "that the custom in Orkney is different from that alleged by the pursuer to exist in Shetland with reference to driven or caaing whales. The custom in Orkney, the only other udal district or country in Scotland, does not recognise any claim by the landlord to a share in caaing whales."

Upon 18th June 1889 the Sheriff-Substitute, after a proof both oral and documentary (the import of which sufficiently appears from his note and from the opinions of the Judges), issued the following interlocutor:—"Finds in fact . . . (6) That under reference to the particulars contained in the subjoined note, the custom alleged by the pursuer has, in a very large number of instances, prevailed, but that it has not invariably done so; that there have been instances in which the alleged rule has not been observed, and in which it has varied, and that the alleged custom has not been submitted to by the salvors without great complaint, and in some cases has given rise to more formal though ineffectual protests; (7) That the custom in Orkney is opposed to that alleged by the pursuer: Finds in law that the custom alleged by the pursuer is not sufficiently inveterate, uniform, or uninterrupted, and is not of a kind to derogate from the ordinary rule of law with regard to wild animals: Finds that the pursuer is not entitled to the sum sued for; therefore assoilzies the defenders from the conclusions of the action, reserving all claims by the pursuer for damages which may have been done to his property by the operations of the defenders, &c.

"*Note.*—This is an action of a very peculiar character. It is brought by a proprietor of lands in Zetland against certain defenders who represent the captors or salvors of a shoal of whales which were driven to land and killed after a fashion common in this country at a part of the mainland of Zetland where the pursuer along with others is a *pro indiviso* proprietor. The claim of the pursuer is founded on title and usage, and a proof of that usage has been led in its support.

"The defence amounts to this, that even should such a usage exist, which is denied, it is not usage or custom of a kind which can constitute law. There are other minor points of defence as to the payment of the expenses of flensing the whales, and as to the pursuer's title to the foreshore below high-water mark. The defenders at the same time offer to pay their share of any damage which may have been done to the beach by their operations.

"The pursuer's title to his lands in Hoswick is contained in No. 67 of process, being a disposition in his favour which contains a clause of 'pertinents.' It has already been held in this Court that in Orkney and Zetland the foreshores belong to the riparian proprietors, as all the lands are udal or allodial—*Pottinger* v. *M'Combie & Company*, 1887. The question of title, however, is not the main point of dispute in this case, for the usage alleged by the pursuer is of a wide and general character, apparently irrespective of narrow distinctions between high-water mark and low-water mark. It is, that 'the heritors of Shetland having as a pertinent of their lands, and by the laws, usages and rights of the said islands, right to one-third share of all caaing whales stranded and killed on the sea shores of their respective lands, the pursuer being a proprietor of 33 merks 2 ures land in the town or room of Hoswick, is entitled to decree for £69, 7s. 3d., being

the proportion effeiring thereto of the heritor's share of the whales referred to.' This is the allegation of a usage which would interpret the expression 'pertinents,' and determine the extent of the pursuer's rights under his title.

"The pursuer is met at the outset of his case by the difficulty that a claim of this particular nature is elsewhere unknown to the law. It is a claim to the possession, or at least to a share in the possession, of wild animals.

"By the Roman law (Digest, xli. 1, 1, 1, and 1, 3; Justinian II., i. 12, 13; Gaius, ii. 66, 67) a wild animal when caught belonged to its captor—(Puffendorf, iv., vi., 'Grotius de Jure,' B. ac. P. ii., ii., sec. iii. 2, and sec. iv. and v.) This rule forms part of the law of Scotland. (Stair II., i. 5, 33; Erskine II., i. 10.) An exception which at first sight might lead to difficulty on this point is made in the case of 'whales.' It is not contended, however, by either side that the 'caaing whale,' the animal at present in question, comes under the designation of 'royal fish' (see Erskine, II., ii. 10, and reference to 'Leges Forestarum,' sec. 17); and even though the Crown at one time, either through the admiral or otherwise, exercised any right in these whales, there is none now claimed, and on the last occasion on which this matter formed the subject of an action (*Scott and Others* v. *Reid and Others*, July 11, 1838) it was pointed out by the Lord Ordinary [Lord Cockburn] that if the pursuers as proprietors were entitled to one-third share, it was immaterial to the issue how the other two-thirds were disposed of. Provisions are found in mediæval codes as to certain oil fish (Rolles d'Oleron, XXXVII.), but there is no evidence in this case which would differentiate a 'caaing whale' from an ordinary wild animal except the main custom in dispute. The contention that any other law than the law of Scotland falls to be applied in this case has been dealt with in the case above referred to, and the Lord Ordinary's remarks on that head need not be repeated. Nor have any foreign lawyers been adduced in this case to inform the Court as to foreign law. In the case above referred to (*Scott and Others* v. *Reid and Others*, July 11, 1838, unreported) the question of custom was decided by the Lord Ordinary in a conjoined action of advocation and declarator. That judgment is necessarily of great weight, but I have considered that while it is binding on the parties to it, and of retrospective effect as a declarator, it must be taken along with the other evidence which has accrued during the fifty years that have passed since its date.

"The parole proof is mainly confined to the last fifty years, and I may here state in a general way its import.

"In the year 1838 there were whales driven ashore at Hillswick. This shoal consisted of 300. L. Robertson, who speaks of it, was a tenant on the Busta estate on which it was driven. The proprietors took a third, though not without a grudge on the part of the men. The witness says that was the custom all his remembrance, 'but notwithstanding it was with a grudge. They got it because we had to give it. Possibly it was through fear. I suppose if we had objected to give it the proprietor could say we could leave the property, and we had nowhere else to go at that time.' This passage is quoted as being, practically speaking, a brief compendium of the plea which runs through the whole case of the defenders. . . .

"On the Quendale property there is evidence of a number of shoals from the year 1843 till 1868. In all of these the proprietor shared to the extent of one-third. Mr Grierson admits the fact of the men having grumbled, but says that they did so no more than about other things—such as private property in land.

"In the year 1871 a shoal of whales was captured in Lerwick Sound, and driven aground on the shores of Lady Nicolson's property. The blubber was bought by Mr Leask, and he, notwithstanding a protest by the salvors, paid one-third of the price to the proprietrix, and two-thirds to the men. James Angus, one of the salvors, says, 'the share was taken from me against my will.' . . .

"Lastly, the evidence as to the pursuer's own property, or of property in which he had a share or in his neighbourhood, falls to be noted. There is a considerable quantity of evidence with regard to whales, from 1820 to the date of the shoal now in dispute. In the earlier cases there appears to have been little expressed objection to the landlord's claim. At Channerwick, in 1832, there is evidence that some at least of the men carried off their full shares, and that the dispute was aggravated by the proprietor claiming a half instead of a third. In 1834, although the dates are not very clear, it appears that some of the Sandwick men refused to give their share to the proprietor on whose shores the whales had come. In 1843 there were whales at Sandwick and Hoswick. On that occasion it is proved that the question was openly discussed between the salvors and the proprietor. The men formed a committee, and approached the proprietor with a statement that they meant to keep the whole of the proceeds of the whales. Mr Bruce, the landlord, replied that they might take it, but that he would raise the rent. The men, calculating that whales came only occasionally, while rent is a constant charge, gave way. At other shoals, in 1853 and 1856, the proprietor got a third of the proceeds, but on the latter occasion not without a somewhat heated disputed with the captors. The books produced by the pursuer contain a record of the division of the shoals on his property.

"To put the result of the proof shortly, it appears that in a great majority of the occasions spoken to the proprietor obtained his one-third share. The exceptions are Vidlin in 1825, at Lerra Voe in 1826, at Flotta 1857, various instances at Weisdale, one instance at Melby, and the cases in which captors who were not tenants of the proprietor of the lands refused to give up

their full claims. See James Manson, and the other instances mentioned above.

"The proof led as to the stranding of the whales in the present case leaves the impression in my mind that the animals were driven and killed in the usual way, with the additional circumstance, if it be of any weight, that none of them were brought above high-water mark.

"With regard to the documentary evidence, it of course mainly consists of writings by the proprietors themselves; and except where these writings constitute contracts with individuals, it is obvious that they can only be taken as evidence of the alleged custom from the proprietors' point of view. The complaints, grumblings, and refusals of the captors are not recorded in writing—we only now hear them from the lips of men, some of whom are far advanced in years.

"As to what I may call the literary and historical evidence, it has to be looked at as competent, contemporary, and so far skilled evidence; but on a subject which, even in the earlier years of this century, had given rise to controversy, due allowance must be given for the warmth of contending opinions, and care must be taken to eliminate evidence of contemporary fact of expressions of economic theory.

"The question, on the whole evidence, oral and written, as I apprehend, may be stated thus—'Has such a usage been proved as entitles the pursuer, as a heritor in Zetland, to the share of the proceeds of whales which he claims?'

"That the usage of a particular locality may derogate from a general rule of law is clear. It is also, I think, obvious that Zetland forms a locality of sufficient definiteness and historical individuality to warrant a distinctive consideration of its custom. It is not simply a small estate, as in *Allen* v. *Thomson*, 7 Shaw, p. 784. At the same time it must be remarked that by the minute of admissions in process (No. 97), the custom in Orkney is admitted to be different from that alleged by the pursuer, and that there no claim by the landlord to a share in caaing whales is recognised. . . . I think this consideration is relevant and important.

"The nature of the usage itself has to be considered apart from its locality. According to Erskine, i. 1, 43, 'unwritten law is that which, without any express enactment of the supreme power, derives its force from its tacit consent, which consent is presumed from the inveterate or immemorial usage of the community.' Local usage, in order to be available, must be proved to be uniform and notorious—*Morrison* v. *Allardyce*, 2 S. 434—uninterrupted and uniform—*Scott* v. *Wilson*, February 4, 1829.

"Is the usage alleged here founded upon the consent of the community? Is it immemorial, inveterate, uniform, and uninterrupted? Unless it complies with these conditions it cannot alter the law.

"First, as to consent. No one who has carefully considered the proof here led can say that this landlord's share was given with the consent of the captors, unless that consent is construed as the choice of two evils—the submission to a burden under the knowledge that a greater harm would come from resisting. It is quite possible to strain this consideration into something like an absurdity. Every payment or claim, such as rent or taxes, is no doubt felt by many to be a hard thing, and one that they would gladly be relieved from, but which they, for obvious reasons, are compelled to pay. The difficulty in this question arises from the fact, spoken to by a large number of witnesses, that the payment of this claim became associated in the minds of the people with their tenure of their homes. It in fact, and apart from special agreement, formed no part of the rent of land properly speaking, as the landlords on their side would demand and have demanded it from those who were not their tenants. But the fear that a refusal would be followed by removal runs through almost the whole of the proof. It cannot be said that this fear was altogether fanciful. In 1843 Mr Bruce stated that if his share was kept he would lay it on the rent—one witness states that he said he would lay 5s. on every merk of land. . . . Another difficulty in the way of enforcing their claims, which the salvors had to contend against, arose from the circumstance that the proceeds of the sale of the whales was generally lodged with the proprietor or his factor, and consequently, except by raising an action at law, there was no method of disputing the division of the money. There is no doubt that the landlords in these proceedings were acting in perfect good faith, and in a belief that the share was no exceptional impost, but a tribute which was legally theirs. Equal credit must be given to those other proprietors who were of an opposite opinion, and did not seek to enforce their right. This leads to the consideration of the uniformity and uninterruptedness of the alleged custom. The case at Vidlin in 1825 is sworn to by L. Henderson, but the production, No. 20 of process, bears that in that year a shoal came to Vidlin, of which the landlord got not a third but a half. In 1824, 1825, 1826, and 1827, this landlord appears to have got a half of the whales as his share. This claim of one-half appears elsewhere in the proof, and the case of *Stove* v. *Colvin*, May 26, 1831, 9 S. 633, shows that the present claim of one-third is not consistent with the older practice. . . . It is here to be remarked, as in former instances, that when the salvors did not happen to be tenants, there was less difficulty in asserting their claims. . . .

"It may be said that the weight of the evidence is to the effect that, as matter of fact, the landlord's share of one-third has been deducted or paid in the great majority of cases spoken to. But that usage has not been free from interruption and variation. It has been accompanied by continual complaints, and has been successfully resisted principally by those between whom and the proprietor of the shore the relation of landlord and tenant did not exist. I am of opinion that the alleged right of the pursuer has not been proved by the evidence

of custom which has been led, as that custom, so far as it has been proved, has not been uniform, has not been exercised without objection, and has not been uninterrupted. In connection with the defenders' plea-in-law, it is a significant fact that on the first occasion on which the distinction between those who are tenants and those who are not loses much of its force, that is the first occasion of a whale hunt after the passing of the 'Crofters Holdings (Scotland) Act of 1886,' the captors should have determined to have their rights ascertained and this harassing matter put to rest.

"This is a very exceptional case. I am not insensible to the apparent hardship which the cessation of such payments in respect of whales may occasion to those who have looked upon them as legally due, and I do not forget that property may have changed hands under such an impression. This is to be regretted, but an exceptional custom must be proved by exceptionally strong evidence, and I do not think, although I arrive at the conclusion with difficulty, that the proof led is sufficient to establish the pursuer's case."

The pursuer appealed to the Court of Session, and argued—The general principles of law laid down by the Sheriff-Substitute were not disputed. He had admitted—as he was bound to do—that there might be a local custom having the force of law—Ersk. i., 1, 43, 44; Stair, i., 1, 16; but he had found that the custom here sought to be enforced did not satisfy the necessary conditions. In this he was wrong. The right claimed was established by immemorial custom of immense antiquity—before the cession of the island by Norway in 1468—and of uninterrupted exercise. The Sheriff-Substitute had admitted that upon almost all the occasions to which he had referred the right had been *de facto* exercised, but he had held that there had not been the necessary consent because there had been grumbling, that the custom had not been uniform, and that it had been interrupted. Now, the grumbling was not more than was common about the payment of rent, and the variation was only as to the amount of the landowner's claim, whether a half or a third, and the interruption only amounted to a few occasions when the heritors had voluntarily abstained from making the claim. The custom had been more than once judicially recognised—*e.g.*, *Stove* v. *Colvin*, May 26, 1831, 9 S. 633, and notably by Lord Cockburn in *Scott and Others* v. *Reid and Others*, July 11, 1838, *supra*. It had been recognised in 1739 in an agreement between the Earl of Morton and the heritors of Shetland, and by such well-known writers upon Shetland as Thomas Gifford (1733), Patrick Neill (1806), and Dr Arthur Edmonston (1809). That the custom had continued down to the present day was proved in this case by the oral evidence, and by the documentary evidence supplied by the leases, contracts, and excerpts from the valuation roll which had been produced. The custom was not grossly unreasonable. It was a fair pertinent of the lands. The claim was only for a share of stranded whales, not for a share of those taken at sea. Some use was always taken of the land, and damage might easily be done, as hundreds of people assembled there at such times.

Argued for the respondents—The Sheriff-Substitute was right. The custom had not been established. Even if it had been it was not such a custom as the law would recognise as having the force of law. It did not represent the consensus of the community, for there had always been grumbling, but a succession of acts of oppression on the part of the landowners. The fact of its existence, although proved, was not enough. Its character, the locality where it was said to exist, the relations of the parties interested, must all be looked at. It was unreasonable and of the nature of a tax, for nothing was given in return. The impost was insisted upon in islands where the landowners had had the fishermen in their power, and their claims had been yielded to as a choice of evils. It had for long been felt a grievance, and when for the first time rents could not be raised in consequence of resisting such a demand the landowner's claim had been contested—Voet (on Pandects) i., 3, 27, 28; Blackstone's Introd, ii., sec. 3; Broom's Legal Maxims (6th ed.), pp. 872-878.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case is a proprietor in Shetland, and raises an action against certain fishermen and others for his alleged claim upon the value obtained from a school of caaing whales that were captured on the seashore next his property. He raises the action on an alleged custom having the force of law in that district, by which the proprietor of the place where these caaing whales are captured has a right to a certain proportion of the value. Historically it appears that long ago, when such whales were captured, although undoubtedly these were not whales among the *regalia*, one-third was taken for the Crown, by the Admiral, who was Sheriff of the county, one-third was taken by the heritors, and one-third by the captors. But for a long time past the Crown has asserted no right whatever, and has abandoned any share of the capture. Therefore that is entirely out of the case, and we do not need to inquire what was the origin of the Crown maintaining such a right. The heritors' right is now disputed, if indeed it has not been disputed all along, although in most cases submitted to. Now, Mr Bruce and the other heritors who found upon this custom found upon old documents and leases as indicating that such a custom existed, and upon reservations made in other grants and leases to different people, and they all found upon certain historical writings which recognise the custom as existing, and they also bring proof that this third which they demand as of right of the value of whales killed on the shore, has been yielded to them and their predecessors by the public.

Now, I think it desirable before going into the facts to see what are the legal principles upon which the matter must be dealt with. There cannot be the slightest doubt that such a custom as this may be law in a particular locality, and it is dis-

tinctly recognised in the institutional writers that this may be the case—that although a custom may be local, and exist only in a particular district, it may still have the force of law—but then the question arises, must not the custom be such as commends itself as reasonable, and in order that it may commend itself as a reasonable custom, must it not above all things be according to sound legal principles? In other words, does not the legality of the custom depend upon its conformity to the requirements of reason and of justice? It is quite plain that a custom of such a kind as this may come into existence in different ways. It may result from the common and universal consent of a locality, and in that case every presumption is in favour of its reasonableness and its justice, or rather every presumption is in favour of its reasonableness, and consequently of its being according to principle and justice, because it is not to be supposed that if in a law-abiding community a custom is accepted as of universal consent there can be anything in it contrary to the ordinary principles of justice. But, on the other hand, it is equally plain that such a custom may be the result of the exercise of power and compulsion on an unwilling people, possibly submitted to without active resistance, but certainly not existing by the consent of the community. I say it is a very serious question whether what is alleged to be a local custom having the force of law, can be established merely by evidence that the custom has existed for a long time without regard to the particular circumstances in which the custom has arisen. The nature of the custom, the relations of those who benefit by and suffer by the custom respectively, the position of power by the one party to enforce, and the position of feebleness of the other party effectively to resist, may all have a most important bearing on the question whether the custom is truly the outcome of a social consensus, or is truly of the nature of an impost, or the result of a law made by one part of the community against the other which that other could not effectively resist. My opinion is that no local custom can be proved to have the force of law merely by proof of its existence, unless it be in itself thoroughly consistent with the principle of justice and demonstrably proved on reasonable grounds to be so plainly the outcome of the consent of the local community as that there is absolute presumption that in the circumstances of the locality it was a custom based on just principles.

Now, I think in this case there can be no doubt that the custom is clearly established, but I think it is also not doubtful that nothing more is established. I can find nothing in the evidence to show that there is any basis of principle or of justice for the custom. It seems to be a thoroughly one-sided arrangement in which the heritor receives a great deal and practically gives nothing whatever in return. The only suggestion of a *quid pro quo* is passage given for the captors of those whales over the heritor's lands, but I see no ground for believing that any such right exists upon the part of the captors to cross the heritor's lands for the purpose of capture, and unless it was matter of right conceded to them, it could be no basis for a compulsory compensation. Even if such a right did exist to pass over the heritor's lands in the islands of Shetland, the disparity of price given in exchange would, I think, be too ludicrous to admit of the idea of reasonableness. But if there is no appearance of justice in the alleged custom itself, can it be said that it has been the result of a consent on the part of the community equivalent to an admission of its reasonableness? In forming an opinion as to the answer which should be made to that question, the whole circumstances must be considered, and whether those who suffered by the custom were in a position effectively to resist it. It would certainly appear that they were not. They had the choice before them either to submit to the exaction, or to be mulcted in other exactions, or warned out of their holdings. While the custom is distinctly proved, I hold it also to be proved that it was not the outcome of a consenting community, but a practical tax frequently protested against and submitted to, not willingly but as a choice of evils.

Now, that being my opinion of the facts of the case, I cannot hold such a custom is established as local law by its inherent reasonableness, and upon the facts I hold that it has not become local law by consensus of the community, and therefore I am for upholding the judgment of the Sheriff-Substitute in the Court below.

LORD YOUNG—This is an interesting case certainly, and I think it is unique. It is an action for money without alleging any contract, express or implied, between the pursuer and those against whom the claim is made, or that any damage had been done which would entitle the claimant to reparation. The facts of the case are as simple as may be—your Lordship has stated them. In September 1888 a number of whales were killed, I think we must take it, in the sea below low-water mark, which being sold realised over £400. The whales were taken by people numbering between 300 and 400. They were not taken under any contract with the pursuer of the action, and were not taken by his leave and license. No contract with him, no permission from him, was necessary to authorise the capture, and he was not himself one of the captors. The proceeds of the whales are, I assume, in the hands of those who are called as defenders, for distribution among those who are entitled to them, and probably a convenient and quite accurate way of regarding this case is to regard it as if it were a multiplepoinding brought by the holders of the money to ascertain who had right to it, and that the competition which we have to decide is between the captors of the whales which produced the money on the one hand—who are, I assume, agreed as to the mode of distribution among themselves—and the pursuer, who was not one of the captors, and who had no contract express or implied with those who were. I think this quite a fair way of taking it.

His claim is for £69, the sum concluded for here as his share of the money. Well, he cannot claim it on contract express or implied, or upon a liberty given to them which he was free to withhold, or upon any damage done to him or to his property in any way. He must, however, support his claim according to the law of Scotland, for we administer no other.

But it is quite rightly contended that the law of Scotland allows in certain circumstances particular or special customs to govern particular cases, but I think that the rule of the law of Scotland which allows particular or special customs to govern is limited in its application. I do not think it can be represented as so universal that any particular or special custom will according to the rules of the law of Scotland prevail and entitle a party founding upon it to a decree for a sum of money. The most common and familiar case of a particular or special custom prevailing is in construing contracts and especially in supplying and filling in terms which are not expressed. It is almost, if not altogether, impossible that most contracts should express the rights and obligations of the parties *hinc inde*, and accordingly the rules of the common law, which are just the rules founded on the general custom prevailing through the land, or in certain cases the particular or special customs, are allowed to be held to govern the rights and obligations of the parties, *hinc inde*, in so far as not specially expressed, and the particular or special customs may be within geographical areas or confined to certain trades or professions, and the law of Scotland is that if these are established in point of fact —many of them have been frequently so established in point of fact, and recognised by the Court—the Court will take judicial cognisance of them in particular cases, that is, will allow them to govern the rights of parties under contracts presumably made with reference to them. That is one, certainly the most extensive and familiar example of the law of Scotland permitting particular or special customs to prevail and govern the rights of parties. Until the General Weights and Measures Act, which prescribed a uniformity not to be departed from, particular and special customs were allowed to prevail in governing the rights of parties under contracts made in particular districts or in particular trades with reference to such weights and measures. That also is illustrative of the spirit and principle of the law of Scotland in admitting particular or special customs to prevail in individual cases over the general custom, which is simply the common law of the land. Another matter where a particular custom may prevail is in determining term days. The usual term days by the general custom of Scotland for entering upon or leaving subjects let, and paying interest on money borrowed, and so on, are Whitsunday and Martinmas, and these fall according to the general custom of the land upon particular days. But there are particular customs with reference to terms which, upon being established, the Court will allow to prevail within the district where these exist, because presumably parties within that district have contracted with reference to them, and these on examination really come to be just a case of the law allowing the rights and interests of parties under contract to be affected by particular customs with reference to which they presumably entered into the contract. I do not know that we have or ever had any special custom with respect to the law of succession in Scotland. If we have or had, it escapes my recollection at this moment. They have such still in England. There is the Gavelkind in Kent, and the Burgh English, and then there were customary successions in the City of London, or rather customary rights of widows and children. These were pretty numerous in England at one time the English writers inform us, but they have disappeared, I think, all but one or at most two. I think the law of Gavelkind still prevails. But that is a matter which may very well have been regulated by special custom, although public opinion has succeeded in putting an end to it in Scotland altogether, and in putting an end to it except in one or at most two cases in England. There must be a rule as to succession, and the party is supposed—a deceased owner is supposed—if he dies intestate, to have intended that the rule of succession known to him as the general rule of the land or of the district should govern his succession, knowing what it is and approving of it. That is a very intelligible ground, but as I have said, although one may appeal to it as illustrative of the policy, and principle, and considerations of good sense upon which the common law of the land admits the governing of a particular custom in particular cases—as we have no instances of any such in this country it would be a waste of time to pursue the topic any longer. The tenure of land may be influenced by special customs, but that is under contract. One of the most notable instances of that is kindly tenancy in Lochmaben, but these are the terms upon which they have agreed to hold their property, and with the permission of the feudal owners from whom it was derived. It is said to have a strong resemblance—I cannot well pronounce upon it, not being familiar with one of the subjects compared—but it is said—I have heard it said, and I have read it—by those who are competent to judge to have a strong resemblance to copyhold in England, which is a customary tenure. It is holding by the custom of the manor, the title being an entry in the books of the lord of the manor. But that again, although we have only one instance of it, is illustrative of the general view and principle upon which the law of Scotland like the law of England admits particular or local customs to prevail in particular matters.

But I am not prepared to extend that principle and to admit a particular or local custom to govern outwith that principle and outwith those considerations of utility and expediency and also of good sense

upon which all the local customs or admissions of them hitherto by our Court have rested. There have been customs which the Court was not even asked to sanction, very prevalent and very strongly in force. One might quote the custom of blackmail, a very prevalent custom, and submitted to, and for those who did not submit matters were made unpleasant, but I content myself by pointing out, I believe quite accurately, that the law of Scotland has admitted the government of cases by particular or local custom in no other cases except those such as I have mentioned, and upon no consideration or principle except that which I have adverted to.

Now, I have already pointed out that no relation whatever to be governed by any custom, local or otherwise—no legal relation exists or ever existed between the pursuer or the defenders here. Had the defenders been tenants upon the pursuer's estate, and had it been established as a matter of fact that the landlord exacted from the tenant a certain share of the fish which he captured opposite his ground, it might be allowed—I do not say whether it would or not—it might be allowed. Only, if it was, it would be as governing the contract between those two contracting parties who were related by contract, and one of the terms of which was supplied by local custom, namely, that the one contracting party, the tenants, should make certain payments or make certain deliveries to the other, namely, the landlord. But it is not alleged on record, and it is not established, that any relation ever existed between the captors of the whales and the pursuer in this action. There was no contract between them express or implied the terms of which are to be governed by local usage or custom. There was no lease or license on the part of the landlord to capture those whales with respect to which—had such existed or been needed—we might have implied that the leave and the license without which the capture could not be made was only given, and accordingly was received and acted on, in the terms prescribed by legal usage. But it is not contended, nor could it be contended, that the captors required the pursuer's permission to kill the whales, or that he could have prevented them from killing the whales. He might have been able to prevent them going on his lands. I do not know that they did go on his lands, and the point which I am now considering is altogether irrespective of that. They may have come from the sea and taken away the whales by the sea, not a foot ever being upon his lands. The local custom or usage, the particular special custom or usage which he founds on, is independent of consideration of that kind. This is not an action of damages for injury done to his property the amount of which is governed by local usages. There is no such action before us here. It is this, "if whales are killed in the sea *ex adverso* of ground of which I am the *pro indiviso* proprietor, although the capture is entirely due to the risks run and the exertions made by other people, I am entitled to share in the produce." Now, I know of no rule in the law of Scotland which will sanction a claim of that kind upon particular or special custom. If there is any such or any analogous to it we have not heard of it. I need not say that I am excepting the judgment pronounced by Lord Cockburn, which we have before us, and which I read with attention and interest, and from which I dissent. I do not agree with his Lordship. I do not think he took an accurate view of the law in this matter; but, with that exception, I think there was no instance of a custom having been allowed by the Court resembling this in any particular or general view. I think the exaction was submitted to, and very largely submitted to. I rather think more exactions are made, and very largely submitted to, which the law would not sanction. I have noticed one very curious illustration—blackmail. That was without any contract except an illegal contract, although I do not know why one should speak of it disrespectfully in that way, for it had a considerable resemblance to insurance,—those who did not insure with the office and pay a premium were apt to find things unpleasant. I can well understand the people in Shetland who run the risk and take the labour of pursuing and killing whales might have matters made disagreeable to them if they did not submit to such—I cannot use any other word than—exactions, and I do not think the law of Scotland will sanction an exaction although it has been submitted to—an exaction without contract express or implied—without any value whatever being given by the exactor to his victim. Now, nothing on earth was given by the pursuer here to his victims. I am using that word because I have no other word for it. It is accordingly my opinion, as I have already stated, that there was no legal relation existing or ever existed between the captors of the whales and the landlord.

I have thought it proper in this singular case to express my views at length and upon principle, but upon these views my point is that the Sheriff's judgment is right. I would not like just to put my judgment bluntly on the ground that a custom must in our opinion be reasonable in order to be admitted. For example, if there was a custom governing contracts in a certain region of merchandise, we should give effect to it in construing these contracts and enforcing them, even against our judgment as to its reasonableness. I would rather put it that we are not within the region of custom here,—of such custom as the law of Scotland will allow to prevail. I have endeavoured in the observations I have made to define that region, or at all events to specify its character and nature, and I am of opinion that this case does not come within it, and I therefore think that in the result the defenders are entitled to absolvitor with expenses in both Courts.

LORD RUTHERFURD CLARK—It is part of the fishing industry in Shetland to drive

on shore schools of whales which from time to time appear on these coasts. The whales are stranded and thereafter killed.

It is said that a custom prevails in Shetland having the force of law whereby the proceeds of these whales are divisible into three parts, of which one belongs to the Crown, one to the owner of the land *ex adverso* of which they were stranded, and the remaining third to the captors. For a long time past the Crown had ceased to make any claim, but the claim of the landlords is still insisted on, and this action has been raised in order to try the question of right.

Accordingly we have evidence from the pursuer intended to show that the custom has existed, and evidence on the part of the defenders to the contrary. The case of the pursuer besides is strongly supported by a judgment pronounced by Lord Cockburn in 1838 on the very same question, in which he held that the custom had been proved and that it was legal. Unfortunately the decision was not brought under review. But not the less is the pursuer entitled to say that the custom has received judicial sanction and that the landlords have had since its date the warrant of the Supreme Court for enforcing it.

The custom which is founded on is a particular custom affecting only the Shetland Isles. It is remarkable that it does not obtain in Orkney, which came to the Crown of Scotland under the same title, and at the same time. But that consideration only narrows the area to which it is applicable. It is of little if any moment on the question of its existence or its legality.

In the law of Scotland we have few examples of such custom. Probably from that cause the subject is very slightly treated of by our institutional writers, and we have not been referred to any decision except to that of Lord Cockburn; but principles of grave importance are involved, and I must take the best assistance which I can find for the solution of the question which is raised for our decision.

That a custom may have the force of law is an obvious proposition. A custom is "lex non scripta diuturni mores consensu utentium comprobati." A large portion of our law depends on custom, and as explained by Erskine the custom derives its coercive force from the implied assent of the Supreme Power. But it does not necessarily follow that every custom by the mere fact of its existence has legal force—where the custom prevails over the whole kingdom it may be that very circumstance becomes part of the law of the land. As Stair says (i. 1, 16)—"Nations were ruled by consuetude, which declareth equity and expediency." But exceptions are more likely to occur where the custom is confined to a particular locality, and is different from, or may be opposed to the general law; and that to which a whole nation submits may be considered to be either reasonable or expedient.

Recognising that a custom owes its legal authority to the implied assent of the Supreme Power, Voet says—"Sicut in hujus modi regimine monarchico verum sit consuetudinis ususve longævi non vilem auctoritatem esse; verum non usque, adeo eam sui valituram momento ut aut rationem vincat aut legem;" (i. 3, 27), or in other words, the custom must be reasonable, and not inconsistent with legal principle. Again he says—"non minus autem in consuetudine quam legibus justitia desideratur et rationabilitas" (i. 3, 28). Blackstone deals somewhat at length with particular customs in his introduction to his Commentaries (iii. head 2). He gives a number of conditions on which alone they can be allowed to have legal efficacy, and *inter alia* he lays it down that "customs must be reasonable, or rather, taken negatively, they must not be unreasonable." In the case of *Cox* v. *The Mayor of London*, June 10, 1862, 1 Hurlstone & Coltman, 338, the Chief Baron thus speaks (p. 358)—"The Superior Courts have at all times investigated the customs under which justice has been administered by local jurisdictions, and unless they are found consonant to reason, and in harmony with the principles of law, they have always been rejected as illegal." His language was approved of by the House of Lords (L.R., 2 Eng. & Ir. App. 239), and it is remarkable that it should be so identical with that of the civilian from whose work I have already quoted. A number of cases which have occurred in the Courts of England, and which are cited as illustrations of the view that a particular custom in order to be legal must be reasonable and not opposed to legal principle, will be found in Broom's Legal Maxims, pp. 872-878.

These are high authorities, and although they are not conclusive, I think that in the absence of any rule in our law I am bound to follow them. They seem to be very sound, and to be based on considerations of the highest justice. They assert nothing more than we should not enforce a particular or local custom which consorts neither with legal principle nor with reason, for if it do not it must be unjust. We cannot believe or assume that any portion of the lieges assents to injustice. If a custom be unreasonable or unjust it cannot be due to assent, but to some constraining power which has enforced submission, and if that be so, the condition on which a custom has the force of law does not and cannot exist. It is not "mos consensu utentium comprobatus."

These considerations were, however, wholly disregarded by Lord Cockburn. I have the highest respect for any judgment of Lord Cockburn, but I cannot regard the passage which I have quoted from his opinion, and which expresses the ground on which the decision was based, as being in conformity with legal principle. No authority is quoted in support of it, and it is opposed to the authority which I have cited. I do not think that we can enforce particular local custom on the mere ground that it has existed from time immemorial, apart from all considerations of its justice. If the custom be proved, that fact may go a long way to show that it is founded on

equity and reason. But to my mind it is not conclusive, and if I am satisfied of the contrary I would refuse to enforce it, because I think that a court of law should never enforce what is unjust or unreasonable, however ancient the custom may be, or in other words, however long the injustice may have been submitted to.

To come to the facts of the case, I think that the alleged custom has been proved. Its existence was judicially ascertained by the judgment of 1838, and it seems to me that it has since been acted on. It is not necessary to examine the proof, which appears to me to be very strongly in favour of the pursuer. Indeed, the evidence led for the defenders seems to me to show that the custom was unwillingly submitted to rather more than that it did not exist.

But the defenders say that it is an unjust and unreasonable custom, on the ground that no consideration is given by the landowner for the third of the produce which he claimed. To my mind this is the crucial part of the case, and I doubt whether the parties have had it sufficiently in view when the proof was taken in the Court below

The right of the Crown to draw a third of the produce might possibly be defended on the ground that whales are *inter regalia minora*. As the Crown has surrendered its claim it is not necessary to enter on the examination of so obscure a chapter of the law. But in relation to the landowner, who, of course, can maintain no right of property in the fish, the custom can only be just and reasonable if he gives a consideration for what he claims. No other is alleged, save that the captors make use of his land not in the capture but in the disposal of the whales.

I do not think there is any sufficient proof of this allegation, or that the use of the land if it be taken or given at all is in any way commensurate with the price which is claimed. It cannot in my opinion be doubted that the shoremark may be used for the purposes of fishing, and so far as I can see the captors have made no further use of any lands. If it occasionally happens that the fish were drawn on the land as distinguished from the beach, the landowner may be making some contribution to the preparation of the fish for the market or to their disposal; even in that case it is not in any sense proportionate to the amount of his claim. But this occasional use could only justify the claim when it occurred. It could not be a ground for establishing a right to a third of the produce on every occasion on which whales were stranded. Nor does it appear that the captors can make use of the land as of right. We know nothing on this subject. I could not hold the custom to be reasonable unless I knew that it included a right to the use of the land, and the conditions on which that right was to be exercised. Perhaps if the matter had been more attended to the pursuers might have proved more, but I am bound to dispose of the case as it stands, and on the evidence before us I can come to no other conclusion than that which I have expressed Holding these views, I am of opinion that the custom is unreasonable and contrary to legal principle. It is of the nature of a tax on the fishing industry of Shetland which cannot be justified on any principle of law or equity. That it has been long submitted to is as I have said proved, and I have given my reasons why we should not enforce it. But its unreasonableness may be also shown from the circumstance that it has been very unwillingly borne, and I think there is a good deal in the evidence to show why the submission was so prolonged. It seems to me that it was due to the fear or threat that if compliance was refused the rents of the fishermen who were tenants at will would be raised. It is only for some such reason that I can conceive why they have been in use to surrender so large a portion of the fruits of their labour to a landlord who neither contributed to the capture of the fish nor aided in their being prepared or brought to the market. But whatever be the cause, I hold that we ought not to enforce a custom which is unreasonable and in violation of legal principle, and that in consequence the defenders are entitled to our judgment.

LORD LEE—I regret I have been unable to reach the same conclusion as your Lordships. I think it proved as a matter of fact that, according to the custom of Shetland, the practice of taking whales of a certain description ashore and then killing them and selling them and making oils from them, exists on the footing which has prevailed from time immemorial; that a third share belongs to the proprietors of the land on the shores of which the whales were stranded and converted into oil; and I am unable to concur in the view that the claim against the captors is so unreasonable that it cannot be recognised or enforced by the law. I regard the customary exaction of a share by the proprietors of the adjacent land as an incident of the customary right of taking whales upon the shore and there making them into oil, and I think it must rest with those who resist the exaction to show that it is unreasonable. It appears to be an accepted doctrine, and I do not understand it to be disputed, that a custom may be good although the particular reason of it cannot be assigned. It is enough if no good legal reason can be assigned against it. This is the doctrine of the law of England as stated by Broom's Common Law, Blackstone, and other authorities, and I think it consonant with the law of Scotland. The question then is, What is the customary law of Shetland upon a subject which is admittedly peculiar to the Shetland Islands, and which depends altogether, so far as appears, on ancient custom? and in the consideration of that question I think it necessary to keep in view that the whole system of law in Shetland is different from the common law of Scotland, excepting in so far as it has been assimilated by legislative enactments or gradual adoption. It is not clear that the

ordinary law of foreshore is applicable to the udal lands of Shetland where the tenure of land so far as not feudalised, and the whole system of valuation and taxation of land, are regulated by custom and nothing else. But however that may be, it nowhere appears that there is known to the common law of Scotland the public right of taking whales upon any part of the shore that may be most convenient to the persons engaged, and there assembling the people of the neighbourhood for the purpose of killing and selling and making oil of the whales. It is in reference to such a customary right that the question arises whether the exaction of a share by the proprietor is not one of the conditions of its existence, and I take leave to remark here incidentally that if a custom of exacting a share exists, we have not before us had debated any question as to the amount of the share being too great.

My opinion upon the evidence is that the pursuer's allegation is established beyond all room for doubt. I refer not only to the oral evidence which was brought under our notice, but to the documents and unwilling testimony of witnesses such as Patrick Neill, who wrote in 1806, and Dr Arthur Edmonston, who wrote in 1809. Nothing can be clearer than the account given by Thomas Gifford of Busta, in the historical description of the Zetland Islands, extracts from which are printed in the appendix, the accuracy of which has not been disputed before us. The practice, of course, to which they refer has no application whatever (it was not said to have any application) to whales caught and killed at sea, and I do not think that the issue which we have here to deal with can be confused by reference to the usage in the case of such whales. But the matter does not rest alone on evidence. It is established by the judgment of the Court pronounced by Lord Cockburn in 1838 and acquiesced in for 50 years. It is true that was the judgment of a single Judge in the Outer House, but it is none the less an explicit and unchallengeable judgment of the Supreme Court of Scotland. It may be competent for the Court of last resort in this case to take a different view, but I humbly think that this Court cannot disregard it as an authoritative judgment on the very point at issue. By that judgment it was expressly found in the declarator at the instance of certain proprietors "that the pursuers have right to one-third of all caaing whales stranded and killed on the shores of their respective lands, and that the defenders are not entitled to carry off and intromit with this, the pursuers' share, and declares and prohibits and decerns accordingly."

It has been said, however, that this judgment did not deal with the question whether the custom was bad in law as unreasonable, and, further, that no evidence was led in this case to show that the custom here had a reasonable origin, such as use of the land by those who captured and cut up the whales. I am unable to assent to the view that Lord Cockburn's judgment dealt only with the facts. I think it clear that he dealt with the law. He refers in his note to the interlocutor of Lord Corehouse allowing a proof on relevancy, and he adds, "but if this point be still open, then he is of opinion that it is not only relevant but conclusive. The general legal rule, no doubt, is that he who takes a fish at sea is not bound to share it with the proprietors of the land on the shore adjoining which he strands it. But it is possible for this to be modified by local inveterate usage. There is less aversion to recognise such a custom when the district where it has arisen is so distinguished by natural situation or local history that its growth may at most be accounted for by the peculiar circumstances of the place." I therefore think we have a judgment on the law both by Lord Corehouse and Lord Cockburn. With regard to the observation that the pursuer has not proved use of the land by the captors, or any reasonable origin for the custom, I think the pursuer has discharged the *onus* incumbent upon him. The question of reasonableness was not distinctly raised by the defenders on record. It is not specifically referred to in the Sheriff-Substitute's judgment, and it was scarcely a point put before us on argument, and no authority was cited to show that a principle of that kind was applicable to the case. But apart from this, my opinion is, assuming such custom was proved, that it was for the defenders to show that that part of it which gives a share of the whales to the proprietors was unreasonable. The pursuer was standing on the right that was sanctioned in 1838 by the decision of the Supreme Court, and the defenders accepted the *onus* of proving the unreasonableness of the custom. The defenders endeavoured to prove that the whales killed were stranded and killed below high-water mark, but the evidence, I think, by the defenders shows that the business is necessarily attended by an assemblage of people from all parts of the Island. Dr Edmonston in his work has the following passage:—"The end of summer and autumn are the seasons when the whales come into the bays, and from the state in which the crop then is, this is the period when by the tumultuous assemblage of the people their capture is most likely to be attended with injury to the ground." There are other passages of the evidence which indicate what to my mind was obvious without proof, that the work of cutting up and selling the whales and converting them into oil necessarily involves the use of the adjacent land by a large number of people. I have considered the English cases referred to as illustrating the doctrine that customs must not be unreasonable. They are collected, as has been said, in Broom's Legal Maxims. In my opinion they are not applicable to this case, and no case was cited in debate as applicable to the present. I am therefore unable to arrive at the conclusion that the custom is bad in law on the ground of unreasonableness.

The Court pronounced the following interlocutor:—

"Find (1) that the pursuer is a pro-

prietor, *pro indiviso*, of certain lands at Hoswick in Zetland; (2) that on 14th September 1888 a shoal of 'caaing' whales were driven towards the shore *ex adverso* of the said lands, and there killed in shallow water by inhabitants of the district, who are represented by the defenders as a committee of their number appointed at a meeting held on 17th September 1888; (3) that the said whales, after being killed as aforesaid, were by the said persons drawn on to the foreshore between high and low water mark and there flenched, and that the blubber and other marketable produce was then sold by public auction on 17th September 1888; (4) that the pursuer claims as a pertinent of his said lands, and conformably, as he alleges, to the laws, usages, and rights of the islands of Zetland, the sum of £69, 7s. 3d., as being his share of one-third of the proceeds of the said sale; (5) that it is established by the evidence that there has been a custom on the part of the proprietors of land in Zetland to demand a share, generally one-third, of the price or value of whales killed *ex adverso* of their lands in the manner aforesaid, and that the said demands have usually been complied with, though in some cases payment has been refused and not enforced; (6) that the said payments have usually been made not with the willing consent of the persons from whom they were demanded, but unwillingly, and frequently under threats on the part of the proprietors, which the said persons were not in a position to resist; (7) that no consideration was given by the pursuer for the sum claimed by him as aforesaid, and that it is not established that any consideration was given by the proprietors in respect of the sums which they demanded and received as aforesaid; (8) that the said custom is not just or reasonable, and that it has not the force of law: Therefore dismiss the appeal: Of new assoilzie the defenders from the conclusions of the action: Find them entitled to expenses in this Court . . . and decern."

Counsel for Pursuer and Appellant — Low—Dundas. Agents—R. C. Bell & J. Scott, W.S.

Counsel for Defenders and Respondents— D.-F. Balfour, Q.C. — Cosens. Agent — Thomas M. Horsburgh, S.S.C.

Friday, June 20.

SECOND DIVISION.

SPARKS AND ANOTHER (BURNETT'S TRUSTEES).

Insurance Policy—Right to Bonus Addition—Marriage-Contract.

By an antenuptial contract of marriage the trustees were directed to effect a policy of insurance for the sum of £2000 upon the joint-lives of the wife and her husband, the premiums to be paid out of moneys conveyed to the trustees by the wife for that among other purposes; and with respect to the division of "the said sum" to be derived from said policies on the death of the longest liver of the spouses, it was agreed that the sum should be invested on proper security, and the rights thereof taken to the children of the marriage in fee. The wife conveyed all her other estate including *acquirenda* to her husband. The wife survived the husband, and on her death the policy was worth with bonus additions upwards of £3183.

Held, inter alia, in a special case presented by the general disponee of the husband and the children of the marriage, that the children's right was not limited to the sum of £2000 contained in the policy, but they were entitled as well to the bonus additions, and that these did not pass under the general conveyance of the wife's estate including *acquirenda* to her husband.

By antenuptial contract of marriage, dated 11th July 1837, entered into between the late Sir James Horn Burnett of Leys, Bart., and his then intended wife, Mrs Lauderdale Ramsay or Duncan, the said Mrs Duncan disponed to trustees an annuity of £400 to which she was entitled under her contract of marriage with a former husband for, *inter alia*, the following purposes. "That the said trustees or trustee acting for the time may effect a policy of assurance on the joint lives of the said James Horn Burnett and Lauderdale Ramsay or Duncan, payable on the death of the survivor of the said James Horn Burnett and Lauderdale Ramsay or Duncan, with any respectable assurance company in Scotland, for the sum of £2000 sterling, and may, out of the said annuity or jointure, pay annually to such assurance company with which they may think it best to effect such policy the premium of assurance due thereon . . . and with respect to the division of the said sum to be derived at the death of the longest liver of the said James Horn Burnett and Lauderdale Ramsay or Duncan from the said policy, it is hereby agreed that the same shall be invested on proper heritable or moveable security, at the sight of the said trustees or their foresaids, and the rights thereof taken to the children of the said intended marriage in fee . . . and after payment of the annual premium of assurance on the said policy of assurance