stance what the late Doctor Gunning did was this. His main object was to endow certain academic, scientific, and religious bodies with capital sums, the interest of which was to be used by them for promoting public objects in which he was interested. If he had effected his purpose in the ordinary testamentary way the money so bequeathed would of course have formed part of his estate at his death, and would have been liable to estate-duty. He desired, however, that his benefactions should take effect during his life, some of them dating from the first jubilee of Queen Victoria and being associated with Her Majesty's name. The ordinary way of carrying out that part of his purpose would have been to pay the capital down to the various bodies, in which case, of course, the money so paid would have formed no part of his estate at his death, and would have borne no duty. But Dr Gunning desired to retain the capital in his own hands, and to pay merely the interest in the meantime, his reason, as explained by his executors, being that Brazilian securities, in which his fortune had been mainly invested, were difficult to realise at the time. Accordingly, about the year 1890 he granted the various bonds, specimens of which are set out. . . . It is true that under these bonds payment was legally due, and could have been enforced at the first half-yearly term after their respective dates. But in point of fact (as was natural, looking to the relation of the various bodies to their benefactor) the grantees were content to receive from Dr Gunning the interest during his life, and the capital sums contained in the bonds remained unpaid at his death, and were debts due by his executors.

"Now, the rule of the Finance Act of 1894 with respect to debts is to be found in section 7, sub-section (1). In determining the value of an estate for the purpose of estate-duty, allowance is to be made for reasonable funeral expenses and for debts and encumbrances; but an allowance is not to be made 'for debts incurred by the deceased, or encumbrances created by a disposition made by the deceased, unless such debts or encumbrances were incurred or created *bona fide* for full consideration in money or money's worth, wholly for the deceased's own use and benefit.'

"The question therefore is, whether the debts in these bonds were incurred for full consideration in money or money's worth, wholly for the deceased's own use and benefit; and I think it plain that the answer to that question must be that they were not. It is said that the consideration for the bonds was the carrying out of certain scientific and religious purposes in which Dr Gunning was interested. But that was not a consideration in money or money's worth. Neither was it for Dr Gunning's own use and benefit, except in the transcendental sense in which every philanthropist benefits by his own munificence.

"An alternative argument was maintained for the defenders, without, I think, much confidence in its success. It was to the effect that the capital sums in these bonds were not debts at all, but were property held by the deceased as trustee for the various grantees, and as such exempted from estate-duty by section 2, sub-section (3), of the Act. If every debtor is a trustee for his creditor this argument is a good one, but not otherwise. The truth is, that Dr Gunning by his own generous act made himself the debtor of these various bodies, and that was his sole legal relation to them. The defenders themselves quite properly recognised it when they gave up an inventory of his estate as including these sums, although they afterwards proceeded to deduct them as debts for which allowance ought to be made. Besides, section 2, sub-section (3), does not recognise as trust property anything which was held by the deceased under a disposition made by himself, unless 'possession and enjoyment of the property was *bona fide* assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise.' It is, of course, impossible to predicate that of the capital sums in these bonds."

The Lord Ordinary granted decree against the defenders for payment to the pursuer of the sum of £2013, and interest thereon as concluded for, with expenses.

Counsel for the Pursuer—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders—Guthrie, K.C. —Grainger Stewart. Agents — Auld & Macdonald, W.S.

Tuesday, March 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

PARKER *v.* THE LORD ADVOCATE.

Crown — Mussel-Fishing — Property — Exclusion of Public.

Held that mussel scalps on the foreshore and bed of an estuary, where such foreshore and bed are the property of the Crown, form part of the patrimony of the Crown, and may either be administered by the Crown through its officers, or conveyed by disposition or let in lease to an individual, to the effect of excluding the public from taking mussels from the scalps.

In June 1897 the Board of Trade granted to the Fishery Board for Scotland, for a yearly rent of £1, a lease for thirty-one years of the right of mussel-fishing and of maintaining mussel beds within a certain area in the river Clyde between Greenock and Cardross. In October 1897 a sub-lease of this right for a period of twenty-one years at the same rent was granted by

the Fishery Board to Dr John Hamilton Fullarton.

In July 1899 an action of declarator and interdict was raised by the Lord Advocate on behalf of Her late Majesty, and on behalf of the Commissioners of Woods, Forests and Land Revenues, and also on behalf of the Board of Trade, against Maurice Parker, mussel merchant, Greenock, and others.

On February 20th 1900 decree in absence was pronounced against the defenders. By this decree it was declared and decerned by the Court, in absence, that the sole and exclusive property in and right to the whole mussel beds, scalps, or fisheries upon or within All and Whole that area or piece of land being part of the foreshore and bed of the river Clyde below high water-mark situate between two imaginary straight lines drawn respectively from Ardmore Tower to the east end of the James Watt Dock, Greenock, and from Cardross to Newark Castle, in the counties of Dumbarton and Renfrew, which area was delineated and edged red upon the plan produced with the said summons of declarator and interdict, belonged to and was vested in the Crown, and that the sole and exclusive right and privilege of dredging, fishing for, gathering and taking and carrying away mussels from the said whole mussel beds, scalps, or fisheries comprehended within the boundaries foresaid belonged to and were vested in the Crown and the Crown's tenants, and that the said Maurice Parker and others, the defenders in the said action, had no right or title thereto, or to dredge or fish for, or to take or carry away, or in any way raise or disturb without the Crown's leave and authority any mussels from the said whole mussel beds, scalps, or fisheries comprehended within the boundaries foresaid. Decree of interdict against the defenders taking mussels was also pronounced.

Thereafter the said Maurice Park and others brought the present action against the Lord Advocate as acting under the Statute 20 and 21 Vict. c. 44, and the Statute 29 and 30 Vict. c. 62, on His Majesty's behalf, and on behalf of the Commissioners of Woods, Forests, and Land Revenues, and also on behalf of the Board of Trade, for reduction of this decree in absence.

The pursuers in the present action averred that from time immemorial the mussel fishermen of Greenock and Port-Glasgow had engaged in mussel fishing in the estuary of the Clyde, including the area described in the summons, as a matter of right, and that "from time immemorial, and at least for several hundreds of years, the people of Scotland have exercised the right of fishing for and taking away, and have freely fished for and taken away, without let or hindrance on the part either of the Crown or of any subject both floating fish (other than salmon) and shell fish (including mussels), from the arms of the sea, estuaries, and navigable tidal rivers in Scotland, and from the foreshores thereof, unless in areas to which subjects had lawfully acquired private rights of property. Prior to the granting of the decree now under reduction, no exclusive right to mussel-fishings in deep water below low-water mark has ever been recognised as belonging either to the Crown or to any subject." The pursuers further averred that the lease granted by the Fishery Board was not within its statutory powers.

The pursuers pleaded—"(5) The area described in the summons being part of a public navigable arm of the sea, and the mussel fishermen and inhabitants of Port-Glasgow and Greenock having from time immemorial openly, and by way of legally vindicated right known to and acquiesced in by the Crown for upwards of forty years, exercised and followed the industry of mussel fishing within said area, any right which the Crown has therein is qualified by and subject to the said rights of the public, and said pretended decree in absence being a violation of said public rights it ought to be reduced as craved. (6) The Crown not having the sole and exclusive right of removing mussels from the said area, the present defender was not entitled to obtain the said pretended decree in absence, and the same ought to be reduced as concluded for. (7) The pursuers and the public generally being entitled freely and lawfully to fish for and remove mussels from the said area, decree of reduction should be pronounced as concluded for."

The defender admitted that the public had been in the habit of fishing for mussels in certain parts of the sea estuaries and navigable rivers of Scotland, but that only with the consent and permission of the Crown or of grantees of the Crown.

He pleaded—"(6) In respect that the sole and exclusive right of fishing for and taking mussels from the beds in question belongs to the Crown as a patrimonial right, decree of declarator and interdict was rightly obtained in said action, and the defender should be assoilzied from the conclusions hereof."

On 27th November 1901 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"... Finds that it has not been shown that the decree under reduction is erroneous, therefore repels the fifth, sixth, and seventh pleas-in-law for the pursuers: Sustains the sixth plea-in-law for the defender: Assoilzies the defender from the conclusions of the action and decerns: Finds the defender entitled to expenses," &c.

Opinion.—"In an action at the instance of the Crown against persons resident in Port-Glasgow and Greenock, who were concerned with mussel fishing, a decree in absence dated 20th February 1900 was pronounced, by which it was in substance declared that the sole and exclusive property in and right to the mussel beds within a certain area, being part of the foreshore and bed of the river Clyde below high-water mark, belonged to the Crown, and that the sole right to take mussels from these mussel beds was vested in the Crown and the Crown tenants, and that the defenders had no right or title thereto,

and no right to take mussels from these mussel beds, and by which decree these defenders were interdicted from taking such mussels. The decree was extracted. This is an action of reduction of that decree brought by Maurice Parker, a mussel merchant, and by James Campbell and Thomas Bonnar, mussel fishermen, who were three of the defenders against whom that decree was obtained. There are no other conclusions. What the pursuers have to do in such a case is to show that the decree ought not to have been pronounced. They are substantially defending that action, and maintaining in contradiction of the decree that the Crown has not the exclusive right of fishing for mussels there asserted.

The pursuers have averred that the mussel bed in question is an extensive mussel bed in the estuary of the Clyde *ex adverso* of Greenock and Port-Glasgow. That from time immemorial the mussel fishermen and inhabitants of Greenock and Port-Glasgow, including the pursuers, have fished for mussels there as matter of right, and that the mussel industry has been an important staple industry in Greenock and Port-Glasgow. They aver that in September 1897, a notice was posted on the quays of Port-Glasgow by order of the Fishery Board, intimating that the Fishery Board had obtained from the Board of Trade a lease of the right of mussel fishing within the area described in the summons, which was said to include the whole area of the estuary from shore to shore within which mussel fishing could profitably be carried on, including the navigable area below low-water mark; and that fishing for or removal of mussels from that area, except with the written permission of the Fishery Board, was strictly prohibited. It further appears that the Fishery Board sublet the fishing to John Hamilton Fullarton, who had been an officer of the Fishery Board.

"It is stated that in each lease the rent was £1, but the defender explains that the lease to Fullarton was an improving lease with a nominal rent, but that the Fishery Board was entitled by the lease to exact a royalty.

"It appears that after these leases were granted proceedings were taken against various mussel fishermen under the Act 10 and 11 Vict. cap. 92. which provides by the first section that persons unlawfully taking mussels from mussel beds, being the property and in the lawful occupation of any other person or body politic, shall be deemed guilty of theft, but that no conviction was obtained under any of these prosecutions until after the decree of declarator now under reduction was pronounced, when, in a prosecution under the Act in the Sheriff Court at Greenock, a conviction was obtained in respect of that decree.

"These are the circumstances in which this action has been raised. Various averments are made on record, but the question is really whether the decree under reduction is well founded in law; and it does not seem necessary to direct any inquiry into these averments. It does not appear to me that the averments amount to such averments of prescriptive possession as would be relevant to confer a right on the pursuers if they cannot establish a right otherwise. I did not understand either party to move for a proof.

"Various pleas-in-law have been stated by both parties of a preliminary nature, about which nothing was said in the argument, I suppose it is not intended to press them, and it will be proper to repel them. These are the first four pleas for the pursuers and the second and fourth for the defender. The questions at issue are fully raised by the other pleas. [*His Lordship quoted the pleas of parties as set out in the narrative supra*].

"The argument submitted was very elaborate, and the numerous authorities on these and cognate questions were fully examined. A careful study of these authorities, however, has satisfied me that although the law about several of the questions involved was at one time debateable, and although the various early institutional authorities might seem in favour of the pursuers, yet now they must be held to have been to a great extent decided, and cannot, in the Outer House at least, be regarded as open, and on that account I think it unnecessary to examine the authorities so fully as might otherwise have been proper,

"Rights to mussel-fishings are to be carefully distinguished from various cognate rights, such as rights to salmon-fishings, from which they are widely apart, rights to fishings of white and floating fish, rights to lobster fishings, and rights to take limpets, whelks, and other bait, from all of which rights to take mussels are to be distinguished because of the different habits and uses of the different animals, and on that account questions as to rights to mussels and to oysters have been assimilated. Decisions therefore as to other kinds of fishings are not directly or immediately applicable.

"It is, I think, settled law, and has been so considered for a long period, that a Crown grant of mussel fishings may confer an exclusive right on the grantee. This is a point on which there seems to be now a consensus of judicial opinion. It does not agree with, but must be held, I think, to modify the law stated in Balfour's Practicks, 626, which is the starting point of the argument against the Crown and for the public; and it is probably not quite consistent with the law as stated in Hale on the Foreshore (Moore's History of the Foreshore, 377, 387), or it may be in Stair, ii. 3, 69; yet in *Ramsay* v. *Kellies*, 5 Brown's Supp. 445, so early as 1776, it is stated that many such grants were known to exist and to be recognised; and in the case of *The Duke of Portland* v. *Gray*, November 12, 1832, 11 S. 14, Lord Corehouse laid it down as then settled law that 'a right to fish for oysters and mussels in the sea from the scalp or bed to which they are attached may be appropriated,' and I do not know that this dictum has ever been

seriously questioned. It is perhaps worth while to notice that this case appears to have been very elaborately argued, if one may judge from the list of authorities cited; and Lord Corehouse's statement of the law must be held to be the result of his consideration of these authorities.

"I do not think it necessary to quote other authorities on this point. The law is thus summed up in Bell's Principles, section 646—'An exclusive right to take oysters, mussels, &c., which are affixed to the spot is effectual within the 3 mile limit where expressly granted.' The point was hardly taken, or at least not confidently maintained by the pursuers.

"It appears to me that the law as thus settled imports a modification of the earlier law; and that the reason for it appears in the judgment in the important case of *Grant* v. *Rose*, July 6, 1764, M. 12,801, which was affirmed on appeal. The report bears that in a public river a mussel scalp belongs, like white fish, to the public, and consequently the use of it is open to every one of the lieges. But as such general use tends to root out every mussel scalp, expediency supported by practice has introduced a prerogative in the Crown of gifting mussel scalps to individuals, 'which has the effect to preserve them by the exclusive use given to the grantees.' By the judgment an earlier Crown grantee was preferred to a later. I do not think that the use of the word prerogative in this passage is against the view now generally adopted, that the right is a right of property in the Crown.

"The pursuers stated an argument on this point — the validity of the leases — which I am not sure that I fully appreciated. It was to the effect, if I understood it rightly, that it followed from the provisions of Magna Charta that a several right of fishery in the sea could not be created in England after a very early date, I think the reign of Henry II.; and that it followed from articles 4 and 11 of the Treaty of Union that these provisions of Magna Charta applied, after the Union, to Scotland, and the conclusion seemed to be that there could be no valid grant of fishings in the sea which was dated later than the Union. I may have misunderstood this argument, which has the merit of ingenuity and originality, and which is very far reaching, because it seems to apply to grants of salmon fishings as well as of mussels, and would have been open in many such cases, which have almost always been elaborately argued—as, for example, in *Gammell* v. *Commissioners of Woods and Forests*, 1859, 3 Macq. 419. But it was never, so far as I know, referred to. I am not fully informed about the law of England on this matter, but I am satisfied that it is not imported into Scotland by the Treaty of Union, and that questions as to the law of mussel fishings, like questions as to salmon fishings, depend solely on the law of Scotland, and have always been so treated in the Courts of Scotland and in the House of Lords.

"I am therefore of opinion that a Crown grant of mussel fishings is, or may be, effectual to give an exclusive right to the grantee which will enable him to exclude the public.

"The pursuers, however, maintained that, even if that were so, it did not solve this case, because there was no question in this case as to the validity of the leases, and it did not follow that the decree of declarator affirming the exclusive right of the Crown to the mussel fishings in question was well founded in law. They maintained, what seems a very difficult proposition, that the grant might be effectual, although prior to the grant there was no exclusive right in the Crown. Their interest to maintain this proposition is not obvious, because the prosecutions to which they have been subjected have been at the instance of the Crown lessee or sub-lessee, and apparently they must have been so, because the Crown could not, except in the character of public prosecutor, pursue for the invasion of a right which had been given away by the lease to the Fishery Board. But that consideration does not seem to affect the pursuers' title to sue. The argument which they maintained seems to be to this effect, that antecedently to the lease to the Fishery Board the right to take the mussels from the mussel beds was in the public, and that if it became a proprietary right it became so by the grant itself, which, it was argued, was not an alienation of the Crown patrimony, but a limitation of the right of the public; and it cannot be said that this view, although I do not find it easy to follow, is unsupported by weighty authority. Apparently it was the view taken by Lord Barcaple in dealing with a grant of white fishings in the case of *Nicol* v. *Lord Advocate*, 1868, 6 Macph. 972. The pursuers founded on the case of *Grant* v. *Rose*, July 6, 1764, as supporting it; on Lord Barcaple's opinion on a dictum by Lord Curriehill in *Argyle* v. *Robertson*, December 17, 1859, 22 D. 261; on Lord Barcaple's charge in *Lindsay* v. *Robertson*, 1868, 7 Macph. 239; and on the somewhat unsatisfactory case of *Hall* v. *Whillis*, January 14, 1851, 14 D. 324, which was about limpets and other small shellfish of the nature of bait, but in which the opinion of the Lord Justice-Clerk, who adopted without qualification the doctrine of Balfour, may have gone further.

"It is not easy to understand how one who has not a right can confer it, unless in the exercise of some special power from one in whom the right was vested; and I am unable to adopt that view, and do not think it consistent with the later decisions; and I am inclined to think that if it be admitted or settled in law that the Crown can confer a right to fishings which will give an exclusive right to the grantee, it is an inevitable inference that such exclusive right must have been vested in the Crown.

"The next point of law arising in this case, which I think is quite settled, is that the solum of the estuary of the Clyde belongs in patrimonial right to the Crown, not in trust for the public, but as part of

the estate of the Crown, although no doubt it is burdened by the rights of the public.

"This was, in my opinion, conclusively decided in the case of the *Lord Advocate* v. *The Clyde Navigation Trustees*, November 25, 1891, 19 R. 174, and I need not refer to other cases on that point, and need not do more than quote that case.

"If I do not mistake, cases in regard to mussel fishings have all as yet been with Crown grantees, and none of them with the Crown. So that while the rights of the Crown grantees have been affirmed, I do not know that there has been an express judgment affirming the right of the Crown, so that to that extent this action seems to be novel. But the judgments in favour of the Crown grantees have, generally at least, proceeded on an affirmation of the right of the Crown, and I think these cases decide as to that right almost as authoritatively as though the Crown had been parties to them. I have quoted several of these authorities, and I do not think I need do more in addition than refer to the *Duchess of Sutherland* v. *Watson*, January 10, 1868, 6 Macph. 199, which is certainly much the most important case in the books on this question, and to my mind concludes the cause, at least in the Outer House. The following passage from Lord Cowan's judgment precisely expresses what I conceive to be the law on the point:—'Mussel fishings,' he says, 'are when not parted with by grant, within the patrimony of the Crown, without whose permission and consent, expressly or tacitly given, the public could not interfere with such fishings any more than with salmon fishings.' That affirms expressly the case embodied in the decree under reduction; and I think it altogether in accordance with the judgment in *Sutherland* v. *Watson*, and I consider that it is binding on me.

"In the same case Lord Neaves ascribes the right of the Crown to ownership of the solum, and to the fact that it is the habit of mussels to remain attached to the mussel beds, and he holds that they are the property of the Crown as *partes soli*. This has not, so far as I know, been as yet made matter of express decision, but it appears to be reasonable and consistent with law and with the authorities, and to follow from the proposition that the solum of the estuary of the Clyde is the property of the Crown. If it be sound, it would follow that a disposition of the solum would confer a right to the mussel beds without any grant of fishing at all—a conclusion which has not yet been drawn, so far as I am aware, in any decision.

"Further, I assent to the argument that the Act of 10 and 11 Vict. cap. 92, imports a statutory recognition of the Crown right in this matter.

"The law, according to the latest decisions, seems very well summarised by Professor Rankine. After stating that the right to take limpets, cockles, and other small shell fish is open to all the lieges, he proceeds: 'Oysters and mussels are in a different position. If the scalps on which they lie are situated within the three-mile limit, the Crown has an exclusive right as part of the hereditary revenue on one of two theories—either to the fish themselves as *partes soli*, in which case the Crown must be regarded as having a right to the *ipsa corpora* of the fish, or to the incorporeal right of fishing for them on the analogy of salmon fishings. The reasons for originally distinguishing between these and other shell fish seem to have been their greater value and adaptability not for bait only but for human food, and the importance of preserving them from indiscriminate fishing.' (Land Ownership, p. 238.) Of the alternative theories here put forward by Professor Rankine, I would incline, if it were necessary to choose between them, to prefer that which regards mussels as *partes soli*, the theory put forward by Lord Neaves; but they do not seem necessarily to conflict.

"On the whole, I think that the pursuers have not established that the decree in absence under reduction is erroneous in law, and ought not to have been pronounced, and that therefore the defender is entitled to absolvitor."

The pursuers reclaimed, and argued—This was the first case in which the question of the Crown's right to mussel fishings had been affirmed as against the public, the former cases having been between lessees, &c., and members of the public. Accordingly, different considerations would come in as to the constitutional position of the Crown which had never been expressly decided. 1. The pursuer did not (as stated by the Lord Ordinary) intend to abandon the preliminary objections which, however, necessarily entered into the merits of the case. The decree under reduction found that the sole and exclusive property in and right to mussel beds in the Clyde belonged to and was vested in the Crown. But the public had been in possession of these mussel beds from time immemorial. Their right had only once been challenged, in 1857, and then unsuccessfully. Accordingly, what the Crown was doing was to invert this immemorial possession established by custom. The fact that the Crown had never had possession explained the form of their action of declarator, which concluded for a general declarator against the public at large, but contained no averment of fact to support such a declarator. This was not a proper form of action. The Crown ought to have assumed the possession of the right, and obtained decree against individuals, as in *The Lord Advocate* v. *Clyde Navigation Trustees*, November 25, 1891, 19 R. 174, 29 S.L.R. 153. The effect of this declarator was to constitute that a crime which was not before a crime, which was tantamount to legislation. 2. There were three categories within one of which mussels must fall, viz., (*a*) salmon, which were part of the hereditary revenue of the Crown; (*b*) white fish, which, if in the Crown at all, were held for the public use; and (*c*) *partes soli*. They must in fact belong to the second of these classes. Salmon fishing was treated always as different from any

other kind of fishing—*Gammell* v. *Commissioners of Woods and Forests*, March 28, 1859, 3 Macq. 419, at 455; Craig's Jus Feudale, i. 15, 3; ii., 8, 15; *Nicol* v. *Lord Advocate*, July 1, 1868, 6 Macph. 972, 5 S.L.R. 629; *sub voce* "Property," 5 Brown's Supp. 556. Moreover, the law treated all other fishings except salmon under one head, and recognised them as being public —Stair ii. 1, 5; ii. 3, 60; ii. 3, 69; Bell's Pr. secs. 640–6; Hale in Moore on Foreshore, 377, 387; *M'Dowall* v. *Lord Advocate*, April 16, 1875, 2 R. (H.L.) 49. The public rights to navigation and fishing—not limited to white fishing—were recognised in *Lord Advocate* v. *Clyde Navigation Trustees*, *supra*; *Lord Advocate* v. *Wemyss*, July 31, 1899, 2 F. (H.L.) 1, at p. 8, 36 S.L.R. 977. See also the English cases of *Goodman* v. *Mayor of Saltash* [1882], 7 App. Ca. 633; *Malcolmson* v. *O'Shea* [1862], 10 H.L. 593, at 618. The legislative treatment of mussels was inconsistent with the idea of their being part of the private patrimony of the Crown. The original purpose of grants of mussel-fishing was to do what was now done by law, *i.e.*, to protect the mussels for the public. The legislation for the establishment of fishery boards, &c., now furnished adequate protection, and there was no longer any occasion for or any power to make such grants—See also Balfour's Practicks, 626; *Grant* v. *Rose*, 1764, M. 12,801, 1769, 6 Pat. App. 779; *Ramsay* v. *Kellies*, 1776, 5 Br. Sup. 445; *Hall* v. *Whillis*, January 14, 1852, 14 D. 324; *Duke of Argyll* v. *Robertson*, December 17, 1859, 22 D. 261, at 265; *Duchess of Sutherland* v. *Watson*, January 10, 1868, 6 Macph. 199, 5 S.L.R. 158; *Lindsay* v. *Robertson*, December 17, 1868, 7 Macph. 239, 6 S.L.R. 199; *Gilbertson* v. *Mackenzie*, February 2, 1878, 5 R. 610, 15 S.L.R. 334. The difficulty felt by the Courts had been that grants had in fact been given out, the deduction being that mussels must have been antecedently the property of the Crown, on the analogy of salmon-fishing or as *partes soli*. But grants of white-fishing had also been given out—Wight on Elections, 199; Bell on Elections, 52; Bell's Pr., sec. 646. Grants of mussels proceeded *ex prærogativâ*, not *ex patrimonio*, being made in the public interest, not in the interest of the Crown as proprietor. The position was the same in England — Chitty on Prerogative, 142; *Carter* v. *Murcot*, 1768, 4 Burr. 216; *Bagott* v. *Orr*, 1801, 2 Bosanquet & P. 472; *Reg.* v. *Downing*, 1870, 11 Cox C. C. 580. Mussels were not *partes soli*. In early life they were migratory, and they took no nutriment from the rock—*Goodman* v. *Mayor of Saltash*, *supra*, p. 646; Sea Fisheries Regulation (Scotland) Act 1895 (58 and 59 Vict. c. 42), sec. 25. They were capable of prescription under a grant of fishings—Ersk. ii. 6, 11; *Duchess of Sutherland* v. *Watson*, *supra*. They were in fact *ferœ naturæ*—Mussel Fisheries (Scotland) Act 1847 (10 and 11 Vict. c. 92); Sea Fisheries Act 1895, sec. 25. Grants of mussels could now no longer be made any more than those of white fishing. All grants of them existing were old and had been followed by prescriptive possession, equivalent to public acquiescence. Grants could not be made in England since Magna Charta, and the same law applied to both countries in public matters since 1707—Union with Scotland Act 1706, secs. 4 and 18; Bankton on Effect of Union, i. 82; *Strathmore Peerage* case, 1821, 6 Pat. 645, at 657; *Neilson* v. *Househill Coal and Iron Co.*, January 27, 1842, 4 D. 470, at 475; *Lord Advocate* v. *Barbour & Lang*, November 30, 1866, 5 Macph. 84, 3 S.L.R. 75; *Advocate-General* v. *Magistrates of Inverness*, January 29, 1856, 18 D. 366; *Roebuck* v. *Stirling*, 1774, 8 Cl. & F. 446; *Brown* v. *Annandale*, 1842, 8 Cl. & F. 437.

Argued for the respondent—The right claimed by the pursuers was one of property in the mussels in a scalp or bed where the foreshore and *solum* of the Clyde was the property of the Crown, and the answer to that claim was that the right to the mussels was similarly a right of property in the Crown, which had now been leased out by it. There was no such immemorial use as was alleged by the pursuers. All public use of mussel beds must be attributed to acquiescence on the part of the Crown, and the pursuers had no title upon which to prescribe a right of property. The question was one of Scotch municipal law, and the alleged analogy of a public right in England had no bearing on it—*Gammell* v. *Commissioners of Woods*, *supra*, at pp. 860, 866, and 871. That case decided the question of salmon-fishing in the sea in favour of the Crown. The next question was whether the Crown had any rights in fishings other than salmon-fishings. There was no reason in principle why this should not be the case, for unlike navigation and commerce they were capable of occupancy and exclusive possession. The Crown's right in the *solum* and foreshore had been recognised absolutely in *Lord Advocate* v. *Clyde Navigation Trustees*, *supra*. But this right was one of property to be exercised in connection with the land to which mussels were attached, being by their nature and habits very nearly *partes soli*. Accordingly this case was *a fortiori* of that one, where the mere throwing of dredgings into the sea was held to be a trespass. The right to mussels was clearly a heritable right, and necessarily belonged to the Crown if not granted out, as did all heritable estate in Scotland—Ersk. ii. 3, 6; Stair ii. 3, 1, 2. Nor was it a *jus publicum*, such as navigation and passage, but a *jus privatum* which might be alienated at pleasure. White-fishing had originally been within the last-named category, but it had proved to be incapable of appropriation, and accordingly Crown grants had not in fact been effectually vindicated, and the right had been given to the public by a series of statutes. But the statutes never gave any licence to fish for mussels or oysters, only for floating fish. That this right was one of property might be inferred from the statutes dealing with such subjects—Oyster Fisheries (Scotland) Act 1840 (3 and 4 Vict. cap. 74); Mussel Fisheries (Scotland) Act 1847 (10 and 11 Vict. cap. 92; Sea Fisheries (Scotland) Amendment Act 1885 (48 and 49 Vict. cap. 70), sec. 11; Sea

Fisheries Regulation (Scotland) Act 1895 (58 and 59 Vict. cap. 42), secs. 11 and 12. So far from taking away the inherent right of property in the Crown these statutes recognised and protected it. Without exception all the decided cases showed the right to be one of property which could be asserted by grantees of the Crown, and which necessarily therefore the Crown must itself have had before it could grant it out—*Agnew* v. *Magistrates of Stranraer*, November 27, 1822, 2 S. 42; *Duke of Buccleuch* v. *Magistrates of Edinburgh*, March 7, 1843, 5 D. 846; *Grant* v. *Rose*, 1764, M. 12,801; *Lindsay* v. *Robertson*, June 13, 1867, 5 Macph. 864, December 11, 1868, 7 Macph. 239, 6 S.L.R. 199; *Duchess of Sutherland* v. *Watson*, *supra*. For over thirty years mussel rights in Scotland had been regulated in accordance with the last-mentioned decision. Possibly English law might be different, but the possibility of a difference in the law of the two countries was recognised by the Lord Chancellor in the case of *Goodman* v. *Mayor of Saltash*, *supra*. Magna Charta, founded on by the pursuers as restricting the Crown's right, had no effect upon a question of Scotch municipal law. If it had such effect, then the case of *Gammell* v. *Commissioners of Woods* was wrongly decided in the House of Lords, since salmon-fishing in England followed the same rule as other fishings, and was not capable of being granted out since Magna Charta—Paterson on Fishing, p. 172; *Malcolmson* v. *O'Shea*, *supra*.

At advising—

LORD PRESIDENT—The question in this case is whether members of the public resident in Port-Glasgow and Greenock are entitled to take mussels from mussel scalps on the foreshore and in the bed of the estuary of the Clyde in disregard of the claims of the Crown and of a sub-lessee of the Crown to these mussel scalps.

The following are the circumstances under which the question arises. In July 1899 the Lord Advocate on behalf of the Crown, the Commissioners of Woods and Forests, and the Board of Trade, instituted an action against three of the present pursuers and certain other persons concluding to have it found and declared that the sole and exclusive property in and right to the mussel scalps in question within the area therein specified, and the sole and exclusive right of taking mussels from these scalps belonged to the Crown and its tenants, and that the defenders had no right or title to the scalps, and should be interdicted from taking away mussels from them. Decree in absence was pronounced against the defenders in that action on 20th February 1900, and on 7th March 1901 three of them raised the present action of reduction of that decree against the Lord Advocate as representing the Government Departments interested, and what we have now to decide is whether the pursuers have made statements in this action relevant or sufficient in law to entitle them to a proof.

Some of the points involved in the case appear to me to be now so settled by decisions as to be beyond controversy, at all events in this Court. In the first place, I think it is so settled that the Crown has a proprietary right not only in the foreshore but also in the bed of the river Clyde and its estuary. In the case of *The Lord Advocate* v. *The Clyde Navigation Trustees*, 19 R. 174, it was held that the Crown has a right in the water and the *solum* of the sea lochs *intra fauces terræ* below low-water mark, such as to entitle it to prevent persons from using them for purposes other than the recognised public uses, and that without any allegation of injury, actual or prospective, to these public uses, and opinions were expressed by the Judges that the right of the Crown to the *solum* of sea lochs *intra fauces terræ* is a proprietary right and not merely a trust for the public. The considerations upon which this judgment proceeded are in my opinion equally applicable to the estuary of the Clyde at the place to which the present question relates. So in the case of the *Lord Advocate* v. *Wemyss*, 2 F. (H.L,) 1, it was held that the Crown, as the proprietor of the *solum* of the bed of the sea within the three mile limit may make a grant of minerals therein to a subject. Upon these and other authorities it appears to me to be clear that the property not only in the banks but also in the bed of the Clyde at the places where the mussel scalps in question are situated belongs to the Crown, and that no one is without the consent of the Crown or of persons deriving right from the Crown entitled to interfere with that property, or to remove anything which could truly be described as part of it.

The next question is whether mussel scalps such as those to which this action relates form part of the patrimony of the Crown, which the Crown can either administer by its officers or convey by disposition, or let in lease, to a subject. The nature of the right, if any, which the Crown has in mussel scalps on the shores or within three miles of the territory of Scotland has been much discussed from time to time, but I consider that it must now be taken to be settled, in so far as a series of decisions of this Court not brought under review of the House of Lords can settle a question of Scots law, that such mussel scalps form parts of the patrimonial property of the Crown, which it can convey or let in lease to a subject as it can any other patrimonial property belonging to it, and which is not from its nature inalienable. It is unnecessary to go through the earlier authorities upon the subject, as these are satisfactorily dealt with by the Lord Ordinary, and were very carefully considered in the cases to which I shall now advert.

In the years 1867 and 1868 the character and extent of the right which the Crown has and can confer upon a grantee in mussel scalps on and near the shores of Scotland received much consideration from this Court in several cases. The first of these, *Lindsay* v. *Robertson*, reported 13th June

1867, 5 Macph. 864, May 29, 1868, 6 Macph. 889, and December 11, 1868, 7 Macph. 239, related to mussel scalps in the estuary of the river Eden near St Andrews. In that case the question whether the pursuers had acquired an exclusive right of property in the scalps was tried before a special jury, and Lord Barcaple, the presiding Judge, in charging the jury said—"The right to mussel fishings, and indeed the right to every kind of heritable property in Scotland, is originally and radically in the Crown, and no person has any heritable property, in any ordinary way at least, that has not come from the Crown by grant—either by express grant or by assumed grant—and in regard to this particular matter of mussel fishing, it remains with the Crown while it has not been granted out as a patrimonial right—that is, it is a right which the Crown is entitled to deal with as property," and similar opinions were expressed by the other Judges in the various stages of the case. The result of the case was that the right of the pursuers to the property of the scalps was affirmed. The case, however, in which the question was most fully considered was that of the *Duchess of Sutherland* v. *Watson*, January 10, 1868, 6 Macph. 199, in which it was held that Her Grace, in virtue of a Crown grant of barony with fishings on the sands of Nigg, had a sufficient title on which to establish by evidence of exclusive possession for the prescriptive period an exclusive right to mussel scalps between high-water mark and low-water mark on these sands. The question whether the right of the Crown to mussel scalps on the sea-shore and in the sea within the three-mile limit is a patrimonial right or a trust for the public was much discussed in that case, with the result that the right was held to be patrimonial. One of the questions fully argued and carefully considered by the Court was, whether the grants of mussel scalps or fishings which it had admittedly been the practice of the Crown to make to subjects were conveyances of a feudal estate by the Crown as originally the owner and superior of the whole territory of the realm, or the creation by the Crown of an exclusive privilege or monopoly in favour of the grantee by an exercise of the royal prerogative of something which did not belong to the Crown, and the Court, as I think rightly, adopted the former of these views. In giving judgment Lord Cowan said—"Were such rights of fishing not such as to fall within the class of patrimonial rights of the Crown, they could not be made the subject of a feudal grant to any of the lieges in individual property. That class of rights which is vested in the Crown as *res publicæ* is inalienable except in certain special cases, such as rights of harbour or ferry, to which when conveyed *jure prerogativæ* to a subject, are annexed conditions to secure their free use and enjoyment by all the lieges. Such is not the case with a right to fish mussel banks or scalps in bays of the sea or on the sea-shore. It is conferred as a patrimonial right." These decisions have settled the question so far as this Court is concerned for about thirty-four years, and many transactions in property have doubtless during that period been entered into and carried out in reliance on the view of the law which was so affirmed. If the right is thus patrimonial when granted to a subject, as I think it is, it is difficult to see how it could possess any other quality in the sovereign before it was granted, but this is the position which the pursuers maintain, and indeed must maintain in the present case.

I understood the counsel for the pursuers, in the very able argument which they addressed to us, to say that they did not dispute the soundness of the decisions in these cases, but they maintained that the cases related to old grants, and that the doctrines which there received effect did not entitle the Crown now for the first time to exclude the public from taking mussels from scalps which had never been granted to a subject. They contended that the Crown held the scalps as trustee for the public interest; that it could not now alienate the right in them to a subject, its alienable character having been taken away, as I understand them to maintain, by the legislation which has taken place with reference to mussel-fishings within the last thirty-five years. They referred especially to the Sea Fisheries Act 1868 (31 and 32 Vict. c. 45), which by Part III. (see 27 *et seq.*) made provision for the granting of orders for the establishment or improvement, and for the maintenance and regulation of oyster and mussel fisheries. It appears to me, however, that these provisions do not derogate from, but on the contrary recognise and conserve, the rights which the Crown had and still has in oyster and mussel fisheries where they have not been granted to a subject. Thus section 46 provides that where any portion of the seashore proposed to be comprised in an order under that part of the Act belongs to Her Majesty, her heirs and successors in right of the Crown, but is not under the management of the Board of Trade, that Board shall not make the order without the consent of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues or one of them.

The pursuers also submitted that this was the first case in which it had been proposed to invert the existing state of possession, and to exclude the public from taking mussels from scalps from which they had (as the pursuers allege) been previously in use to take them as a matter of public right.

They further argued that the right which the Crown had in such fishings before they were granted to a subject was not a patrimonial right, but was in the nature of a franchise which the Crown could not communicate to one or more subjects to the exclusion of others. In other words, their contention was that mussel scalps were not vested in the Crown in the same way as land or other real estate, antecedently to a grant of them being made in favour of a subject, that a grant of them was not

a conveyance of property previously vested in the Crown, but the exercise of the prerogative by which the Crown gave to a particular person what had previously belonged to the public as of common right, and that even assuming that such a grant *jure prerogativæ* had been competent in former days, it was not competent now when the Legislature had by statute provided for the protection of mussel fisheries. Reference was made to English authorities in support of the view that such grants must be held to have been made in the exercise of the royal prerogative, and not as conveyances of real estate, which according to the feudal system was originally vested in the sovereign, and was granted by him to his subjects.

The only Scotch authority to which the pursuers were able to refer in support of this view was the report by Lord Kames of the case of *Grant* v. *Rose* decided on 6th July 1764. This, however, appears to have been a question on which that eminent Judge held different views from all the other members of the Scottish Bench at the time. In the case of *Kelly* v. *Ramsay*, November 22, 1776, 2 Hailes 722, he alone of all the judges laid down the doctrine that "the Crown has no right to give away an oyster scalp"—a doctrine at variance with all the subsequent decisions as well as with all the statements of the text-writers. The session-papers in *Grant* v. *Rose* do not contain anything to warrant the statement with which the report sets out.

I do not know how the matter may stand in England, but I am of opinion, for the reasons already given, and in respect of the authorities already referred to, that in Scotland the making of a grant of mussel scalps was not and is not an exercise of the royal prerogative, withdrawing from the public any right which they had previously enjoyed and converting it to a private use, but was and is a conveyance to a subject of a part of what was originally the patrimonial right of the sovereign in all the land or other real estate in the country. The feudal system was consuetudinary, varying in different countries, and this case should in my judgment be decided in accordance with the form which it took in Scotland, not with the form which it assumed in England, if these forms were different. In the case of *The Officers of State* v. *Smith*, 8 D. 711, March 11, 1846, the Lord Justice-Clerk said—"Anterior to any grant which may be founded on, the right" (to the seashore) "clearly is in the Crown as a right of property;" and again, "I cannot agree to view the Crown's dominant right and title, as even the Solicitor-General put it, merely as the right of a trustee for the public. It is a far higher right." Oyster and mussel fishings were most commonly granted as parts of a barony, but they were sometimes made the subjects of separate grants, and in these cases the symbol of infeftment was a shell. In other words, the grant was made and completed in the manner appropriate to proper heritable estate. An observation made by Lord Chelmsford in the case of *The Commissioners of Woods and Forests* v. *Gammell*, 3 Macqueen 463, in regard to salmon fishings, seems to me to be equally applicable to mussel fishings. His Lordship said—"If the Crown held it for the public, the public could not be excluded by a grant to any of them." This *dictum* supports the view that mussel fishings must until alienated be the property of the Crown held for its own patrimonial benefit, not as a trustee for the public.

As to the contention of the pursuers that the course of recent legislation has taken away or affected any right which the Crown or its grantees had to mussel scalps as a patrimonial estate, it appears to me that that course of legislation, so far from supporting that contention, tends to negative it. That there might be a private right in mussel beds and in mussels is fully recognised by the first statute on the subject (10 and 11 Vict. cap. 92), which provided "That if any person in that part of the United Kingdom called Scotland shall wilfully, knowingly, and wrongfully take and carry away any mussel or mussel brood from any mussel bed, scalp, laying, or fishery, being the property and in the lawful occupation of any other person or persons, body corporate or politic, and sufficiently marked out or known as such, every such offender shall be deemed guilty of theft, and being guilty thereof, shall be liable to imprisonment not exceeding the term of one year." Here and in other sections there is a clear recognition that prior to and apart from the Act a right of property might exist in mussel scalps and also in the mussels upon these scalps.

For these reasons I am of opinion that the contention of the pursuers that the right conferred upon a subject by a Crown grant of a mussel scalp in Scotland is not a transfer of property which had previously been vested in the Crown, but an appropriation from the common right of the public by virtue of the prerogative of what had not been a property or a patrimonial interest in the Crown is not in accordance with the law of Scotland. On the contrary, I think that the right which the Crown possessed, and frequently granted to subjects, in mussel scalps on or near to the shores of Scotland is a patrimonial right similar to that which (in theory at all events) the Crown originally had in the whole territory of the country.

The undoubted right of the Crown, in former times at all events, to alienate mussel scalps to a subject has by some judges been explained upon the ground that mussel scalps and the mussels in them are *partes soli*, and could be conveyed to a subject in the same way as any other *pars soli*. While this consideration is not to be disregarded, and while the position of mussels in a scalp is not dissimilar to that of trees or other vegetation growing on land, or to seaweed on kelp shores, which were frequently made the subjects of grants, I think that the safer ground upon which to rest my opinion is that the right to a mussel scalp and the mussels in it

is similar to the right to any other heritable estate in Scotland, although the circumstance that mussels are so closely associated with the ground that it may correctly be said that they are parts of it, may have been one of the reasons which originally led to mussel scalps being regarded and treated as patrimonial property. The scalps are certainly, apart from the living mussels, *partes soli*, generally consisting of an aggregation of material, often of considerable thickness, and composed in no small measure of mussel shells and other remains of dead mussels. This close connection of mussels with the ground may, in their case, as in the case of oysters, have led to their being treated differently by custom, decision, and legislation from floating fish (other than salmon) in the sea or in tidal waters, the right to take which is now free to all.

With reference to the contention of the pursuer that even assuming that a Crown grantee is entitled to protect the mussels in a scalp of which he is proprietor from being taken by the public, no such right of protection exists where the scalp has not been made the subject of a grant, but remains vested in the Crown or its officers, I may say that if I be correct in thinking that the right to mussels is patrimonial while it is vested in the Crown as well as after it is alienated to a subject, there can be no ground for holding that the Crown is not entitled to protect its property from depredation just as a subject would be entitled to do. It would certainly be most unfortunate in the public interest if the Crown did not possess this right, as if it did not possess it mussels would ere long cease to exist upon its scalps. But if it were necessary that the Crown should have made a grant of the scalps in some form to a third party in order to let in this right of protection, it would, in my judgment, be sufficient that the grantee is a lessee of the Crown, or a sub-lessee under the Scotch Fishery Board, as Dr Fullarton is. I can see no reason for holding that a lessee, although his tenure is of a temporary nature, should not have the same right to protect the subject of his lease against depredation as a disponee would have to protect the subject of his permanent grant.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers — Guthrie, K.C. — Macmillan. Agent — James A. B. Horn, S.S.C.

Counsel for the Defender and Respondent — Solicitor-General (Dickson, K.C.) — Pitman. Agents—Davidson & Syme, W.S.

Tuesday, January 28.

SECOND DIVISION.

[Sheriff-Substitute at Selkirk.

ROXBURGH, BERWICK, AND SELKIRK DISTRICT BOARD OF LUNACY *v.* PARISH COUNCIL OF SELKIRK.

Lunatic — Pauper Lunatic — Liability for Maintenance — "Parish in and from which" Lunatic Sent — Poor — Lunacy (Scotland) Act 1857 (20 *and* 21 *Vict. cap.* 71), *sec.* 78.

The Lunacy (Scotland) Act 1857, section 78, provides that the expense of maintaining a pauper lunatic, whose settlement is unknown, in a district asylum, shall be defrayed by the parish "in and from which he was taken and sent."

A man who had been apprehended and convicted at Rothesay was reapprehended on his liberation from prison upon a number of other charges, and after being taken to various places for examination with respect to these, was ultimately committed to the prison at Edinburgh. The Crown authorities thereafter ordered that he should be tried at Selkirk by sheriff and jury on charges of fraud alleged to have been committed in the counties of Selkirk and Roxburgh.

At the pleading diet, held in Edinburgh, medical certificates were produced to the effect that he was insane, and the question of insanity was reserved to the second diet at Selkirk, when a plea of insanity in bar of trial was sustained, and the accused was ordered to be detained during Her Majesty's pleasure. He was thereafter removed to Perth General Prison, and subsequently, by order of the Secretary for Scotland, to a district asylum as a pauper lunatic.

In an action brought by the asylum authorities against the Parish Council of Selkirk for recovery of the expenses of the lunatic's maintenance, *held* that Selkirk was not the parish "in and from which he had been taken and sent" within the meaning of section 78 of the Lunacy (Scotland) Act 1857, and consequently that the defenders were not liable in relief to the pursuers.

Process — Appeal — Competency — Finality of Sheriff — Sheriff — Poor — Lunatic — Lunacy (Scotland) Act 1857, *sec.* 78.

Held that an appeal to the Court of Session against an interlocutor pronounced by a Sheriff-Substitute in an action under section 78 of the Lunacy (Scotland) Act 1857, brought by a district lunacy board against a parish, for recovery of the expense of maintaining a pauper lunatic, was competent, in respect that the finality clause of that section applied only to proceedings thereunder for relief by one parish