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Tuesday, March 1.

SECOND DIVISION.

[Lord Low, Ordinary.

AITKEN'S TRUSTEES *v.* CALEDONIAN RAILWAY COMPANY AND ANOTHER.

Property—Foreshore—Sea-Greens—Possession—Prescription.

A proprietor whose lands were *de facto* bounded by the sea brought an action of declarator of property in the whole foreshore *ex adverso* of his lands. The pursuer founded on possession for the prescriptive period of a strip of "sea-greens" or ground next the sea on which grass grew suitable for pasturage, which he maintained was part of the foreshore. The foreshore seaward of the strip of ground referred to consisted of mud. *Held* (*aff.* judgment of Lord Low) that the possession relied on was insufficient to found prescriptive right to the whole foreshore.

Question—Whether by possession of a part of the foreshore for the prescriptive period right to the whole foreshore could be acquired?

Opinions reserved per Lord Justice-Clerk and Lord Trayner.

Opinion (*per* Lord Moncreiff) that it could not.

Opinions that sea-greens are not part of the foreshore.

This was an action at the instance of James Aitken, Darroch, Falkirk, and others, the trustees of the deceased Henry Aitken of Darroch, against the Caledonian Railway Company and the Lord Advocate as representing the Crown. The pursuers sought declarator that they were the proprietors of the whole foreshore of the Firth of Forth *ex adverso* of the lands of North Powdrake and South Powdrake, near Grangemouth; and interdict against the Caledonian Railway Company from interfering with or occupying the foreshore *ex adverso* of those lands.

Of the grounds on which the pursuers maintained their right to the foreshore it is only necessary, for the purposes of this report, to refer particularly to one, viz., that they had acquired the right by possession of "sea-greens." The sea-greens consisted of a strip of ground at the edge of the pursuers' lands next the Forth, on which grass grew, which was suitable for pasturage, and which had been possessed by the pursuers and their authors from time immemorial. The foreshore seaward of the sea-greens consisted of mud flats about three-quarters of a mile wide.

There were other facts and circumstances relied on by the pursuers as constituting possession, all of which are related in detail in the opinion of the Lord Ordinary (Low), who on 30th July 1903, after a proof assoilzied the defenders.

Opinion.—"The pursuers are proprietors of the lands of North Powdrake and of one-half *pro indiviso* of the lands of South Powdrake. These properties are adjacent to each other, and are situated upon the shores of the Firth of Forth to the east of Grangemouth.

"The defenders the Caledonian Railway Company are constructing certain harbour works at Grangemouth, which extend over the foreshores of both the properties of Powdrake. The object of this action is to have it declared that the foreshore *ex adverso* of these properties belongs to the pursuers. The pursuers' claim is opposed both by the Railway Company and by the Crown.

"The pursuers have no express grant of foreshore, and the question is, whether they have established right thereto by possession for the prescriptive period.

"I shall consider first the evidence in regard to South Powdrake, which raises a simpler question than in the case of North Powdrake.

"The pursuers maintain that right to the foreshore *ex adverso* of South Powdrake has been acquired—(1) by possession of sea-greens, and (2) by opposing in Parliament certain bills by which it was proposed to interfere with the foreshores.

"In regard to the first of these points it is proved that sea-greens *ex adverso* of the lands have been possessed from time immemorial. These sea-greens are a narrow strip lying close to the sea-wall by which the sea is prevented from encroaching upon the cultivated land. To seaward of the sea-greens the foreshore consists of mud-flats, which extend to a distance of about three-quarters of a mile. The pursuers contend that possession of the sea-greens gave them right to the whole foreshore, because looking to the nature of the foreshore, that was practically the only kind of possession which was possible. Now if it had been proved that there had been operations upon the foreshore for the purpose and with the effect of extending by artificial means the area of the sea-greens, that might have been sufficient possession to establish right to the foreshore. But as regards South Powdrake there has been nothing of that sort, and what has been possessed has only been a strip of natural sea-greens lying alongside the sea-wall. I do not think that that can be regarded as possession of the foreshore. I know of no authority for saying that natural sea-greens form part of the foreshore, and they are exempt from the public uses to which the foreshore is liable. Further, the foreshore is the area between low water and high water of ordinary spring tides. Sea-greens are not within that area, because although they are occasionally covered by the sea they are not covered by ordinary tides. Indeed, I understand the grass of which

sea-greens is composed can only exist upon ground that is not covered by the ordinary tides.

"As to the second point, I do not think that the opposing of bills in Parliament can be regarded as possession at all, although it may have amounted to an assertion of right or a claim to the foreshore

"I am therefore of opinion that the pursuers have not established right to the foreshore *ex adverso* of South Powdrake.

"Turning now to North Powdrake, the pursuers obtained in February 1874 a disposition from the Crown of part of the foreshore *ex adverso* of that property.

"The memorial which the pursuers sent to the Board of Trade when applying for a grant of the foreshore states that the reason of the application was that they had agreed to allow the Caledonian Railway Company to deposit upon the foreshore earth to be excavated in making the new dock, and that under the agreement the pursuers were 'obliged to purchase any right the Crown may have in the foreshore in order to allow the Caledonian Railway Company to deposit the before-mentioned earth on the *alveus* or foreshore.'

The pursuers applied for a grant of the whole of the foreshore *ex adverso* of North Powdrake, but the Crown only disponed to them a portion thereof, extending to 76 acres, which left some 39 acres between the portion granted and low-water mark to which the pursuers did not obtain an express title.

"Of course there is no dispute in regard to the portion of the foreshore contained in the Crown grant of 1874, but the pursuers maintain that they have also right, by virtue of the possession had by them and their authors, to the portion of the foreshore not included in the grant.

"The pursuers have since 1874 reclaimed a considerable portion of the foreshore *ex adverso* of North Powdrake and planted it with grass. These operations, however, were entirely within the area acquired from the Crown, and cannot therefore, in my judgment, be founded on as giving right to the area outside of the Crown grant. I think that it is impossible to regard operations following the grant, and upon ground included in the grant, as being possession, adverse to the Crown, of an area outside the grant, and upon which no operations were conducted.

"In order that the pursuers may succeed, therefore, I think that it is necessary for them to show that in 1874 they had already acquired, by possession for the prescriptive period, a right to the whole foreshore, and that the Crown disposition of that year (for which by the way they appear to have paid some £350) was unnecessary, as the right which they purchased was already in them.

"The pursuers rely, in the first place, as they do in the case of South Powdrake, upon possession of natural sea-greens, and petitions presented to Parliament. For the reasons which I have already given, I do not think that these acts avail them.

"In the next place, the pursuers say that by a sea-wall which was built about 1835 a small part of what had previously been foreshore was taken in. I do not think that that is proved, because it seems to be plain that any ground which was brought within the sea-wall in 1835 was taken from the sea-greens and not from the foreshore proper.

"Then Mr Aitken, one of the pursuers, produced a copy of entries appearing in account books relating to North Powdrake, which he said showed that considerable sums of money were expended between 1842 and 1880 'with a view to silting up the foreshore and planting grass.'

"The first entry is dated 23rd March 1842, and is in these terms—'To paid Mr Black for plan of sleeches at Powdrake, £2, 17s. 6d,' and in 1845 a sum of 5s. is entered in the same terms. 'Sleeches,' I may explain, is the local name for the mud-flats. Now, getting a plan made of the foreshore is not in itself an act of possession, and the inference rather seems to be that the plan referred to was made in view of a proposed arrangement with Lord Zetland, which was actually carried out in 1849, and to which I shall refer presently.

"The next entries founded on do not occur until 1849, when there are four sums, amounting in all to £41, which are entered as 'paid Malcolm to account contract at Powdrake.' Mr Aitken, however, admits that he cannot ascertain what these sums were paid for, and there is nothing to show that the work had anything to do with the sleeches.

"The same remark applies to subsequent entries up to 1877, when the pursuers having obtained the disposition from the Crown, expended a considerable amount in reclaiming part of the foreshore and planting grass upon it. For the reasons which I have already given, I do not think that that expenditure, being subsequent to the Crown grant of 1874, and made upon foreshore included within that grant, can be founded on by the pursuers. Accordingly I do not think that the entries in the old account books aid the pursuers.

"I now come to what happened in 1849. North Powdrake is bounded on the west by the lands of Panstead, which belonged to the Earl of Zetland, and in 1849 an agreement was entered into between the late Mr Henry Aitken, the then proprietor of North Powdrake, and the Earl.

"The agreement proceeds upon the narrative that the two properties were separated by an open ditch, having a tunnel at the northern extremity thereof (where, I suppose, it passed through the sea-wall) for the purpose of carrying the water from the lands to the Forth; that in consequence 'of the silting up of the sleech ground beyond the high-water mark, the tunnel had been rendered useless, and the arable lands of the parties were in danger of being flooded; and that 'in order to guard against the risk of danger to their said lands,' the parties had agreed to the articles and conditions following.

"Upon that narrative the parties agreed *first* that a line coloured red upon a relative

plan should 'be held and acknowledged as the only march or boundary between the sleech grounds corresponding to the said lands of Panstead and those corresponding to the said lands of Powdrake'; and *secondly*, that Lord Zetland should be empowered, at his own expense, to construct a sea-wall along the line coloured red until it reached the embankment of the river Carron, and that the line should be the centre of the area occupied by the sea-wall, or in other words, that the sea-wall should be erected to the extent of one-half upon the part of the foreshore which by the agreement had been apportioned to Powdrake. In the *third* place, it was agreed that in order to form a proper outlet for the water, a new ditch and a new tunnel, in lieu of the old tunnel, should be made at mutual expense, the ditch to be carried the whole length of the proposed sea-wall, and carried under the embankment into the river Carron. In the *fourth* place, it was agreed that 'when the said intended sea-wall is constructed, and the said Henry Aitken and his successors shall have reclaimed the sleech ground corresponding to the said lands of Powdrake, but not sooner,' the sea-wall should be acknowledged as the march 'between the sleech lands of Panstead and the sleech lands of Powdrake,' and should be maintained at mutual expense in all time coming,

"It was further agreed (article six) that in the event of the Crown successfully claiming 'the sleech ground to be acquired from the river Forth by the construction' of the sea-wall, Mr Aitken, or his representatives, should be bound to refund to the Earl of Zetland one-half of the cost of the wall.

"The sea-wall was thereafter erected by Lord Zetland, and is shown upon the plan No. 203 of process running from the western boundary of North Powdrake to the embankment of the river Carron. The sea-wall, in so far as it is situated upon foreshore *ex adverso* of Powdrake, is entirely upon the portion of the foreshore disponed by the Crown to the pursuers in 1874.

"The effect of the erection of the sea-wall appears to have been that the 'sleeches' upon the Powdrake side silted up to some extent, with the result that the area of the sea-greens extended considerably. Mr Aitken may also have aided that process by laying down branches to retain the silt, but there is no clear evidence that he did so.

"Now, I think that the erection of the sea-wall was a clear act of possession, and it is also in my opinion the first act of possession of the foreshore on the part of the proprietors of North Powdrake which is proved. I am therefore inclined to think that if the pursuers had not taken the disposition from the Crown in 1874, the erection and maintenance of the wall might have been sufficient to establish their right to the whole foreshore.

"If, however, I am right in thinking that the erection of the sea-wall was the first act of possession, then, as the law then stood, it would have required the elapse of forty years before an unchallengeable right to the foreshore could have been set up. But that period had not expired when in February 1874 the pursuers obtained the disposition from the Crown of the portion of the foreshore upon which the sea-wall had been erected, and I think that thereafter their possession must be ascribed to that disposition. The pursuers argued that this was really a case of double titles, and that they were entitled to attribute their possession to the title which was most favourable to them. Even assuming that the rules laid down in regard to double titles in cases of disputed succession apply to such circumstances as exist in this case, I am of opinion that the argument is not well founded, because I do not think that the pursuers ever had a double title. If the view which I have taken of the facts is sound, the pursuers had no title to the foreshore when they took the disposition of 1874. They had then a title to the lands of North Powdrake which admittedly afforded a good basis of prescription, but they had not at that date possessed the foreshore thereunder for the prescriptive period. In 1874, however, they obtained an express title to the greater part of the foreshore, and possession was not required either to explain or complete the right which they thereby obtained. Conversely it seems to me that possession under the disposition of 1874 of the subjects thereby conveyed, and of nothing more, could never give the pursuers a right to foreshore not included in the conveyance. It might have been different if the pursuers had actually possessed the portion of the foreshore not included in the Crown grant. If, for example, the sea-wall had extended into that portion of the foreshore, the pursuers might have successfully contended that they had continued to possess it all along under their title to the lands. But no such thing has happened. On the contrary, the pursuers have never had any possession whatever of any part of the foreshore which lies beyond the limits of the Crown grant.

"I am therefore of opinion that the pursuers have also failed to establish the right which they claim to the whole foreshore *ex adverso* of North Powdrake, and I shall therefore assoilzie the defenders from the conclusions of the summons."

The pursuers reclaimed, and argued—The case of *Bruce* v. *Rashiehill*, November 25, 1714, M. 9342, relied on by the defenders, did not decide that sea-greens were not part of the foreshore. In the present case, as the foreshore other than the sea-greens was incapable of use or possession, possession of the sea-greens was to be interpreted as possession of the whole foreshore—Ersk. ii. 1. 30; Bell's Prin. 2020; *Agnew* v. *Lord Advocate*, January 21, 1873, 11 Macph. 309, 10 S.L.R. 229; *Lord Advocate* v. *Wemyss*, July 31, 1899; 2 F. (H.L.) 1, 36 S.L.R. 977; *Lord Advocate, &c.*, v. *Lord Blantyre*, June 19, 1879, 6 R. (H.L.) 72, 16 S.L.R. 661; *Buchanan & Geils* v. *Lord Advocate*, July 20, 1882, 9 R. 1218, 19 S.L.R. 842; *Young* v. *North British*

Railway Company, August 1, 1887, 14, R. (H.L.) 53, 24 S.L.R. 763; *Auld* v. *Hay*, March 5, 1880, 7 R. 663, 17 S.L.R. 465.

Argued for the respondents—Sea-greens were not part of the foreshore—Rankine, Land Ownership, 3rd ed., 249; *Bruce* v. *Rashiehill, cit. sup.*; Ersk. ii. 6, 17; Bell's Prin. 644. Such meagre possession as was here proved could not set up a title to the whole foreshore—*Keiller* v. *Magistrates of Dundee*, December 7, 1886, 14 R. 191, 24 S.L.R. 120. The pursuer's averments as to boundaries did not aid them—*Darling's Trustees* v. *Caledonian Railway Company*, June 23, 1903, 5 F. 1001, 40 S.L.R. 785.

At advising—

LORD JUSTICE-CLERK—The pursuers claim a right to the foreshore opposite North and South Powdrake. They maintain that, first, they have acquired right to foreshore *ex adverso* of their lands in respect that they have possessed sea-greens.

It appears that there are sea-greens at the edge of the pursuers' lands, and that beyond the sea-greens the foreshore consists of flats covered with deep sludge.

I am of opinion with the Lord Ordinary that the possession of the sea-greens cannot confer a right to the foreshore seawards of these greens. The sea-greens are pieces of ground next the sea where grass grows suitable for pasturing. This is inconsistent with their being covered by water at ordinary spring tides. If ordinarily covered they could not be producing grass pasturage. It has never been held that such greens are subject to the public uses to which foreshore is subject. Indeed, I am under the impression that it is only by statutory authority that fishermen can invade such greens for the limited purpose of drying nets.

The pursuers further allege that they opposed bills in Parliament which were promoted for the purpose of affecting the foreshore. It is difficult to see how this could be held as establishing a right to ownership of the foreshores.

There is a specialty as regards North Powdrake, the pursuers having obtained a grant from the Crown of part of the foreshore. The Crown refused to give a grant of the whole foreshore, but gave a grant of part for the special purpose for which it was desired. The pursuers now claim that they own the whole foreshore. In making this claim they are in this difficulty, that they negotiated for purchase, and did purchase, as I have stated, in 1874 a part, which seems to be inconsistent with their having had a right to the whole at that time.

But the pursuers maintain that they can prove their right by the erection of a sea wall in 1835, by which a small part of the foreshore was taken in. I am not prepared to say that even if that allegation was correct, the possession of a small portion of the foreshore would necessarily establish a prescriptive right to the whole, while I am equally not prepared to hold that partial possession, where that is all that is possible, may not entitle the proprietor of the lands to prescribe a right to the foreshore. But I am not satisfied from the evidence that any part of the ground used when the sea wall was built formed part of the true foreshore as distinguished from sea-green.

I do not think it necessary to examine in detail the various matters relating to the history of the arrangements between Mr Aitken and the Earl of Zetland. I agree with the Lord Ordinary in his careful analysis on the evidence, and with the result at which he has arrived upon it, and the law applicable to it.

Upon the whole matter I am satisfied with the Lord Ordinary's judgment, and would move your Lordships to adhere to his interlocutor.

LORD TRAYNER—I think the Lord Ordinary's judgment is right and should be affirmed. The pursuers have no doubt acquired right to the saltings or sea-greens, but these, in my opinion, are not part of the foreshore. I am not at present prepared to affirm—as contended for by the pursuers—that a proprietor having possession of a part of the foreshore for the prescriptive period necessarily thereby acquires right to the whole foreshore. I cannot reconcile that view with the doctrine expressed by the maxim *tantum prescriptum quantum possessum*. But I reserve my opinion on that question. I also reserve my opinion on the question whether the Crown grant to the pursuers interrupted the continuity of the pursuers' alleged possession.

LORD MONCREIFF—In this action the pursuers seek to have it declared that they are proprietors of the whole foreshore *ex adverso* of the lands of North Powdrake, except a certain quantity acquired from them by the Caledonian Railway Company in 1898; and also that they are *pro indiviso* proprietors to the extent of one-half of the whole foreshore *ex adverso* of the farm and lands of South Powdrake. The case raises a question of right of property in the foreshore, not with a subject proprietor but with the Crown, which asserts a heritable right to the foreshore in question. It is settled that a subject proprietor may, without express grant from the Crown, acquire right to the foreshore *ex adverso* of his property by prescriptive possession on a habile title; and accordingly the pursuers' case is rested upon the possession of the foreshore which they maintain that they and their predecessors have had.

The Lord Ordinary has assoilzied the defenders, and I am of opinion that his judgment is right. Dealing first with the foreshore *ex adverso* of South Powdrake (which was only acquired by the pursuers in 1876), the pursuers' case is that they and their predecessors have from time immemorial had exclusive use and possession of a fringe of sea-greens abutting upon the northern extremity of their property; and they maintain that these sea-greens being part of the foreshore, and the rest of the foreshore being mud and incapable of being used or possessed, they have had all the

use of the whole foreshore of which it was capable, and accordingly have acquired a right of property in it down to low-water mark.

Now, in the first place, I am not satisfied that the sea-greens are parts of the foreshore at all, because they are not covered by ordinary tides. It may be that the pursuers have acquired a prescriptive right to those sea-greens as a pertinent of their property, but if the sea-greens are not part of the foreshore prescriptive possession of them cannot in any case confer a right of property over the rest of the foreshore.

But even if the sea-greens can be regarded as part of the foreshore, it by no means follows that right to the remainder of the foreshore has been acquired in respect of prescriptive possession of the sea-greens. It is a startling proposition that use by grazing upon this fringe of grass could confer upon the proprietor a right of property in nearly a mile of foreshore of which he has had no possession whatever. I know of no case which gives any countenance to this proposition, and I think it proceeds upon a misapprehension of the opinions of the Judges in some of the cases to which we were referred.

In the case of *Agnew* v. *Lord Advocate*, 11 Macph. 309, there was proof of acts of possession on the part of the proprietor over the whole of the foreshore *ex adverso* of his property. No doubt the acts of possession were chiefly the taking of sea-ware and gravel, sand and stones from the beach, and the granting of leases, with power to the tenants to exercise those rights. But these acts extended over the whole of the foreshore for the prescriptive period.

Again, in the case of the *Clyde Trustees* v. *Lord Blantyre*, 6 R. (H.L.) 72, there was evidence of distinct acts of possession by reclaiming land from the river, and using the foreshore in other ways to the exclusion of others. And lastly, in the case of *Young* v. *North British Railway Co.*, 14 R. (H.L.) 53, the proprietor had built a retaining wall enclosing a considerable portion of the foreshore, and had for more than the prescriptive period taken seaware, stones, and gravel from the rest of the shore. I do not read Lord Watson's opinion as indicating that a prescriptive right can be acquired over a substantial part of the foreshore without any possession at all. He guards himself by saying (p. 54)—"It is in my opinion practically impossible to lay down any precise rule in regard to the character and amount of possession necessary in order to give a riparian proprietor a prescriptive right to the foreshore. Each case must depend upon its own circumstances. The beneficial enjoyment of which the foreshore admits, consistently with the right of navigation and of the general public, is an exceedingly variable quantity. I think it may be safely affirmed that in cases where the sea-shore admits of an appreciable and reasonable amount of beneficial possession consistently with these rights the riparian proprietor must be held to have had possession within the meaning of the Act 1617, c. 12, if he has had all the beneficial uses of the foreshore which would naturally have been enjoyed by the direct grantee of the Crown. In estimating the character and extent of his possession it must always be kept in view that possession of the foreshore in its natural state can never be in the strict sense of the term exclusive."

In short, my opinion is that in a question of prescriptive possession the same tests must be applied to alleged possession of the foreshore as to possession of any other kind of heritable property. In both cases, in judging of the sufficiency of the possession, regard will be had to the nature of the subject and the uses to which it can be put. But there must be some evidence of exclusive possession over the whole of the ground, and I see no reason to think that the maxim *tantum prescriptum quantum possessum* does not apply to the acquisition of the foreshore as a pertinent of the landward part of the property.

In regard to the foreshore *ex adverso* of North Powdrake, it seems to me that the pursuers by their own dealings with the Crown have precluded themselves from making their present claim, which I understand to relate to the piece of foreshore extending to about 40 acres which lies to the north of the foreshore acquired from the Crown in 1874. In that year the pursuers, who were desirous of acquiring the whole of the Crown rights in the foreshore *ex adverso* of North Powdrake extending to 120 or 140 acres, were content to accept from the Crown a disposition of 76 acres of it on the footing that those 76 acres belonged patrimonially to the Crown. The Crown declined to give a grant of the foreshore to the north which is now claimed by the pursuers. The disposition is not granted by the Board of Trade merely as representing the Crown as trustee for the public, but professes to sell and in feu-farm dispone the Crown's whole right, title, and interest in the piece of foreshore in question. The rights of the public are separately reserved, and right is reserved to the Crown to repurchase the subjects.

Now, it seems to me that this transaction is quite inconsistent with the pursuers' present demand. I cannot understand how any acts of possession upon the piece of foreshore thus acquired could possibly infer a right of property in the foreshore to the north, which the Crown in 1874 expressly refused to convey to the pursuers. In that view it is not necessary to consider to what extent the pursuers have acquired a prescriptive right to the sea-greens abutting on the property of North Powdrake or to the small part of the adjoining foreshore which is said to have been reclaimed at that point. As to the wall built by Lord Zetland in 1849, that may perhaps be regarded as an act of possession on the part of Lord Zetland, but I fail to see how it can be regarded as an act of possession on the part of the pursuers, the wall having been built entirely upon Lord Zetland's ground. In any view, the ground enclosed by the

wall is cut off from the seaward part of the foreshore by the ground acquired from the Crown in 1874, and part of which was conveyed by the pursuers to the Caledonian Railway Company.

The case is unusual and of some importance in this respect, that the Crown claims to interject another grantee between the pursuers' property and the sea at low-water mark. But for the reasons which I have stated I think the Crown is within its rights, and that the pursuers have failed sufficiently to establish such prescriptive use and possession of the foreshore as to entitle them to the declarator and interdict which they seek.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers — Mackenzie, K.C. — Cooper. Agents—Drummond & Reid, W.S.

Counsel for the Defenders and Respondents the Caledonian Railway Company—Campbell, K.C. — Deas. Agents — Hope, Todd, & Kirk, W.S.

Counsel for the Defender and Respondent the Lord Advocate—Pitman. Agents —Davidson & Syme, W.S.

Tuesday, March 1.

SECOND DIVISION.

HARRIS'S TRUSTEES *v.* HARRIS.

Revenue—Estate-Duty—Settlement Estate-Duty—Raising Amount of Estate-Duty by Bond on Lands—Petition for Authority to Charge—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 9 (5)—*Expenses.*

Trustees acting under a last will and testament made up a title to the heritable estate of the truster and paid the estate and settlement estate-duties payable under the Finance Act 1894. Thereafter they presented a petition to the Court for authority to burden the estate with the amount of these duties and the expenses incurred in settling the duties and the expenses of the application. They averred that there was no power to borrow contained in the trust-deed, and that no lender could be found willing to advance the money unless the authority of the Court was received.

The Court, while of opinion that the trustees were entitled in terms of section 9 (5) of the Act to charge the estate with the duties without any authority, *authorised* the trustees to burden the estate by way of bond and disposition in security for the amount of the duties paid and the expenses incurred in settling these duties, but not the expenses of the petition to the Court.

Process — Petition to Charge — Petition to Charge Estate with Estate-Duties Competently Presented to Inner House.

Held that a petition by trustees for authority to burden an estate with the amount of the estate-duties paid under the Finance Act 1894 was an appeal to the *nobile officium* of the Court, and had been competently presented to the Inner House.

Section 9 of sub-section (5) of the Finance Act 1894 enacts—"A person authorised or required to pay the estate-duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty, and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of, or a terminable charge on, that property or any part thereof."

Colonel Henry William Harris, who died on 14th November 1899, left a last will and testament dated 30th July 1892, by which he conveyed to trustees for certain trust purposes his whole means and estate, including the lands and estate of the Cairnies.

The trustees made up a title to the Cairnies by notarial instrument, recorded 13th February 1902, and paid estate, succession, and settlement estate-duties due under the Finance Act 1894, amounting to £1079, 11s. 11d., and obtained official certificates for the said duties.

Thereafter the trustees presented a petition to the Court for authority to burden the estate of the Cairnies with the amount of the duties, together with the expenses incurred in respect thereof, including the expenses of the application.

Answers to the petition were lodged by Miss Edith Maud Winifred Harris and Miss Hilda Muriel Harris, who were conditional institutes to the fee of the estate under the will. They maintained (1) that the petition should be refused as unnecessary, and (2) that even if the petition was granted the prayer should be refused so far as it craved authority to burden the estate with the expense incurred in settling the amount of the duties and the expenses of the petition.

The petitioners stated that there was no power to borrow contained in the truster's will, and that they were unable to lend or borrow on account of the doubts entertained as to whether they were entitled to burden the estate without obtaining the authority of the Court.

They argued—(1) The petition was competently presented in the Inner House. It was an appeal to the *nobile officium* of the Court —*Laurie, infra.* (2) In the circumstances above stated the Court should grant the petition. In doing so they would follow the example of the First Division in *Laurie,* February 22, 1898, 25 R. 636, 35 S.L.R. 496. There was no distinction between the present case and *Laurie;* an heir of entail was in the same position as a fee-simple proprietor burdened with conditions. (3) It was proper that expenses incurred *in settling* the duties and the expenses of the petition should be charged against the heritable property and not against the general estate. In order that they might be so charged they must be included in the bond granted under authority of the Court.