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HAY
v.
SCOTT, &c.

House of Lords, 21st February 1816.

BUILDING CONTRACT—EXTRA CHARGES—Circumstances in which in a building contract, extra charges were sustained.

This was an action raised by the trustees on Inglis' bankrupt estate for £1612 due to the bankrupt, under a building contract with the appellant, whereby Inglis built him several houses in Blair Street, Edinburgh.

The question turned upon the particular facts; and, *inter alia*, the amount of extra charges made, in which, after having allowed a proof, the Court finally decerned against the appellant for £769.

He took these interlocutors by appeal to the House of Lords, and that House affirmed the judgment of the Court below, with £100 costs.

For the Appellant, *Wm. Adam, Fra. Horner, Andrew Rutherfurd.*

For the Respondents, *Sir Saml. Romilly, John Tawse.*

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RICHAN
v.
STOVE, &c.

WILLIAM RICHAN, Esq. of Rapness, . *Appellant;*

ROBERT STOVE of Windbreck, in the county of Orkney, and ALEXANDER GUILD, Writer in Edinburgh, his Agent in the Court of Session, ... *Respondents.*

House of Lords, 21st February 1816.

PROPERTY—UDAL TENURE—SEA WARE—KELP—PRESCRIPTIVE POSSESSION—A party was held entitled to cut tangle, also to sea-ware, pasturage, and kelp, as immemorially possessed by him, though his property was at a distance from the shore, and though he could produce no written title—the tenure being udal.

The appellant raised an action of declarator before the Court of Session, concluding that it should be found that he had sole and exclusive right and title to the whole shores of the lands of Braebuster, and to the whole kelp, ware, or tang growing thereupon, and in the sea opposite thereto: and also to the whole kelp and other ware thrown in by the sea on the sea shores, in all time coming; and that it should be found that he had good right and title to exclude and debar the respondent and all others, proprietors and possessors of the one farthing land of Windbreck, at present possessed by him,

from cutting, manufacturing, and carrying away any part of the kelp, ware, or tang growing upon the said appellant's lands. And that his lands of Braebuster are free from any servitudes or right of common of that nature.

The respondent alleged and offered to prove, 1st, That he was udal proprietor of the lands of North Windbreck, which form a part of, and are situated in the town of Braebuster, and parish of Dunness. There was no written title, the tenure being udal, but an excambion had taken place in 1773, in which five ridges of lands had been exchanged by the respondent, for as much land adjoining to the house of Windbreck belonging to George Richan. 2d, That to this town a proportion of the kelp shores is attached, to which ware the proprietor has a right corresponding to his right in the town. 3d, That between the arable lands of Braebuster and the shore, there intervenes a proportion of pasture ground, which was enjoyed as an undivided common by the different proprietors in the town. 4th, That neither at the planking and excambion which took place in 1773, nor since that period, had any division of the grass and pasture been made. 5th, That the defender (respondent) had a proportional right to this common, and he and his ancestors had exercised a right of common pasturage, and of casting peat and divot thereon, past the memory of man. That the appellant has appropriated to himself a considerable part of this common, and enclosed it without any authority from the other proprietors. 6th, That the defender and his ancestors had enjoyed, as their own property, a certain portion of the kelp shores opposite to the Ness of Braebuster, and have cut tang, and manufactured kelp there, for more than forty years. That his right to this portion of the kelp shores, was always recognized by the pursuer (appellant), and his predecessors, previous to the commencement of this process, and the pursuer had offered to give the defender a portion of ground in exchange for his part of the shores. 7th, That the said planking and excambion in 1773, was considered as unfavourable for the defender's (respondent's) father.

A proof was allowed and taken. From this it appeared, that the town of Braebuster was situated a little distance from the shore, and between it and the sea shore lay interjected the Ness of Braebuster, which had been immemorially possessed as an undivided common by the proprietors of the whole town of Urisland; and upon this common the respondent's ancestors, jointly with the other proprietors, exercised

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all the rights of property. They pastured cattle, cut peats for fuel, and carried off the sea ware for manure. The respondent's ancestors had also, for the period of forty years, exercised the right of manufacturing kelp, and had set off a portion of the shore of the Ness, for the exercise of that right; and this portion of the shore had been enjoyed by him and his predecessor for that period up to the present time.

The appellant founded very much on this, that the respondent's lands were remote from the shore, though coming down in a point on it, and in terms of the decision in the Earl of Morton *v.* Covingtry, he was not entitled to cut tang for kelp, reserving to him the servitude to carry off wreck and ware cast on shore.

June 20, 1760, Fac. Coll, vol. ii., p. 406; et Mor. 13528.

The cause came first before Lord Justice Clerk Hope, as Ordinary, who pronounced this interlocutor: "Finds, that as "there is no reservation of kelp shores in the excambion, the "defenders' (respondents') former right thereto, corresponding "to his five ridges in Braebuster, must be held to be com-"pensated by the extent of land given to him in exchange "by the plankers: Finds that he has not condescended on "any title which gives him a right of commonty in the "Ness of Braebuster, so as to support the further claim to "the kelp shores adjoining to the alleged common; therefore "repels the defences, and decerns in terms of the libel. But "in respect of the loose terms of the planking or excambion, "and the possession had by the defenders, finds no expenses "due."

The planking here alluded to was in the following terms: "Be it known unto all men whom it may concern, that I, "John Stove of Windbreck, doth hereby agree with George "Richan of Linklater, that the five ridges of land in the "township of Nether Braebuster, now in my possession, shall "be exchanged for as much land adjoining to the house of "Windbreck, the property of the said George Richan, and that "to be at the determination of George Johnstone, planker, "for equal quality and quantity; and further, when said "division is made, I agree, that this, if required, shall be "made out on stamped paper, in the due form of law. As "witness my hand, the 16th November, in the year 1773.

his
(Signed) "JOHN + STOVE.
mark.

(Signed) "In presence of MAGNUS SMITH.
"WM. BRISK."

In consequence of the deed of excambion, the following award took place,—

"Planker's Decision."

"The five ridges at Braebuster is now exchanged, which amounts to one-half plank and thirty square fathoms, for one thousand three hundred square fathoms below Windbreck, which was left to the determination of us, the subscribers.

his
(Signed) GEORGE + JOHNSTONE.
mark.
MAGNUS ISBISTER."

Both parties reclaimed against the above interlocutor, the appellant, in so far as it did not allow him expenses, and the Court, of this date, pronounced this interlocutor, "The May 15, 1810.
"Lords having resumed consideration of the petition and
"answers for Captain William Richan, the condescendence
"and answers and proof adduced and advised the whole,
"alter the interlocutors of the Lord Ordinary complained
"of in the petition of Robert Stove: Find him entitled to
"tangle, sea-ware, kelp, and pasturage, as formerly possessed
"by him, and therefore sustain the defences; assoilzie him
"from the conclusions of the pursuer's libel, and decern;
"and find the said Robert Stove entitled to the expense of
"process; and allow an account thereof to be given in, and
"remit to the auditor to examine the same and report." On another reclaiming petition the Court adhered. June 8, 1810.

Against these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The appellant is the sole proprietor of the lands of Braebuster. These lands run along the shore from the burn of Oyce on the north, to the burn of Milichan on the south; and as proprietor of the lands so running along the shore, he has the sole and exclusive right of cutting tang, and manufacturing kelp on these shores, as was established in the noted case of Lord Morton *v.* Covingtry, 20th June 1760. 2d, The contract of excambion contains no reservation of cutting tang or manufacturing kelp on the sea shores opposite to the land so alienated, and without such express reservation, it cannot be contended that the respondent has such right. It is proved distinctly, that the Ness of Braebuster is not, and never was a common; that it was once cultivated; that it lies in the middle of the appellant's property; that it belongs to, and is now exclusively

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occupied by him, and that the greatest part of it has been enclosed by him without molestation. Supposing the respondent to have proved a right of pasturage on the said Ness, which he has not done, this being a mere servitude, would not confer a right to the kelp shores.

Pleaded for the Respondent.—The question here depends solely upon immemorial possession, and the proof of that possession. The lands of Windbreck form a part of the town of Braebuster. To this town the kelp shores have been immemorially attached, and have been possessed by the respondent in proportion to his interest in the town. The lands in Orkney held by udal tenure have never been feudalized, so that the possessors are not required to exhibit written titles to instruct their right; but the overwhelming amount of evidence as to the respondent's possession, places this case beyond all doubt.

After hearing Counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed with £50 costs.

For the Appellant, *Sir Saml. Romilly, J. P. Grant.*

For the Respondent, *Fra. Horner, R. Jameson.*

NOTE.—Unreported in the Court of Session.

1816.

BALFOUR
v.
LUMSDAINE.

[Fac. Coll., vol. xvi., p. 299].

JOHN BALFOUR of Balbirnie, . . *Appellant;*

Major JOHN LUMSDAINE of Lathallan, . . *Respondent.*

House of Lords, 14th March 1816.

ENTAIL—PRESCRIPTION.—The heirs under a certain entail were also heirs of line, and, on succeeding, possessed on titles as heirs of line, and not under the entail for thirty years, and on apparency for a period beyond the negative prescription. A party having succeeded under this title, but who was excluded by the entail, an heir of entail raised the present action to set his right aside. Held that the negative prescription did not cut off the entail, there being no conflicting infeftments.

1753.

John Lumsdaine, W.S., was unlimited proprietor of the estates Blanerne and of Lumsdaine. In 1753, he executed an entail of these estates, "to and in favour of the said James "Lumsdaine, my eldest son, and the heirs male or female to "be procreate of his body, and the heirs of their bodies, whom