was an implied grant to Drynan when the tan yard was conveyed to him in 1819. If that is so, there can be no question whatever but, that the judgment of the Court of Session is perfectly right, and that the interlocutors ought to be affirmed.

LORD KINGSDOWN.—My Lords, I am of the same opinion.

Interlocutors affirmed, with costs.

For Appellants, Loch and Maclaurin, Solicitors, Westminster; John Ronald, S.S.C., Edinburgh.—*For Respondents*, Deans and Rogers, Solicitors, Westminster; Patrick, M'Ewen, and Carment, W.S., Edinburgh.

APRIL 25, 1861.

WILLIAM BAIRD, *Appellant*, *v.* WILLIAM RANKEN FORTUNE, *Respondent.*

Sea Shore—Sea Ware—Title to exclude—Servitude—Barony—Conveyance—Part and Pertinent—Possession—Proof—Evidence—*The proprietor of the barony of E., which in some places is bounded by the sea, sold a portion thereof which was separated from the coast by the other lands of the barony remaining with the seller.*

HELD (reversing judgment), *That the owner of the lands thus disponed, who had no express grant of "sea ware" in his conveyance, but who founded on a clause of part and pertinent, and alleged possession, as giving him the right, was not entitled to take sea ware from the shores of the remaining lands of the barony.*[1]

The question in dispute in this case was, whether the defender, as proprietor of North Muircambus, at one time forming part of the barony of Elie and Ardross, in Fife, had a right to take sea ware from the shore *ex adverso* of the lands and baronies of Elie, Ardross, and Anstruther, belonging to the pursuer; or whether the pursuer had an exclusive right to the sea ware *ex adverso* of the lands.

The action commenced by a note of suspension and interdict at the instance of Mr. Baird, praying that the respondent should be interdicted from taking sea ware "from the shore of the sea *ex adverso* of the complainer's lands and estates of Elie and others."

The pursuer, on 14th June 1854, raised a summons of declarator, as "heritable proprietor of the baronies of Elie, Ardross, Anstruther, and others." The summons concluded for declarator, "that the pursuer has the sole and exclusive right to the sea ware, whether growing or drifted upon the shores adjacent to his said lands and estates, and to remove or dispose thereof at pleasure by himself, his tenants, or others having his permission; and it ought and should be found and declared, by decree foresaid, that the defender has no right or title to the said sea ware, or to remove or otherwise interfere with the same."

The pursuer's title was a disposition, dated May 1853, on which infeftment had followed, of the lands and baronies of Elie, Ardross, Anstruther, St. Monance, and Pittenweem, from the trust disponees of Sir William Carmichael Anstruther, with his consent.

From the title deeds produced, it appeared that, by Crown charter of resignation, dated 29th April 1704, in favour of Sir William Anstruther, there were conveyed to him the baronies of Anstruther, Ardross, and Elie, with parts and pertinents; and the tenendas set forth as follows:—"In perpetuum per omnes rectas metas suas antiquas et divisas, prout jacent in longitudine et latitudine in domibus, edificiis hortis planis moris maresiis viis semitis aquis stagnis, revolis pratis pascuis et pasturis molendinis multuris et eorum sequelis aucupationibus venationibus piscationibus petariis turbariis carbonibus carbonariis cuniculis cunicularis columbis columbariis, fabrilibus brasuris brueriis, et genestis silvis nemoribus et virgultis lignis tignis lapicidiis lapide et calce, cum curiis et earum exitibus herezeldis et bludewitis cum furca, fossa, sock, sack, thoill, thame, WRACK WAIR, waith, vert, venisone," &c.

The baronies, which were *de facto* properties lying along the sea shore, were not described by boundaries, and the "wrack wair" was mentioned in the clause of tenendas only.

At that date the lands of North Muircambus (the property of the defender) formed a part of the barony of Ardross.

On 10th March 1778, Sir John Anstruther, the then proprietor, executed an entail of the lands and baronies of Anstruther, Elie, and Ardross. The deed contained the following clause:—

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[1] See previous report 21 D. 848: 31 Sc. Jur. 469. S. C. 4 Macq. Ap. 127: 33 Sc. Jur. 437.

"Excepting always herefrom the north farm of Muircambus, as also excepting the east half of Newton of Rires, and the lands of Grangemuirs, with the pertinents formerly united to the barony of Ardross, but are not meant to be hereby disponed."

In 1793 he executed another entail of the lands of St. Monance and Pittenweem, along with, *inter alia*, the lands of North Muircambus; but in 1794 he executed a trust disposition, by which he revoked this latter entail, and conveyed to trustees, *inter alia*, "All and haill the north farm of Muircambus, as the same is now, or was sometime possessed by Thomas Foulis, with houses, biggings, yards, orchards, tofts, crofts, cuningaries, dependancies, annexis, connexis, parts, pendicles, and pertinents whatsoever," with full powers of sale.

The trustees, in 1808, sold the lands of North Muircambus to John Anstruther, (grandson of Sir John Anstruther, the truster,) who again sold the lands to his father, the Right Hon. Sir John Anstruther.

He died in 1811, leaving his affairs in embarrassment; and his son made up titles to the heritable estate held by his father in fee simple, including the lands of North Muircambus, and conveyed the heritable estate to Charles Ferrier, accountant in Edinburgh, for behoof of creditors.

Mr. Ferrier, after infeftment, sold the lands of North Muircambus to the defender's father, in terms of a conveyance dated 20th June 1814, and which described the entry to the lands to have been at Martinmas 1812. The lands were described in the conveyance to the defender's father in the same terms as in the trust deed of 1794.

The defender's father obtained a Crown charter, on which he was infeft in 1817. He died in 1835. His testamentary trustees possessed the lands till 13th November 1845, when they conveyed them to the defender.

The lands were not described as part of a barony in any of these deeds, excepting in the entail of 1778.

The lease in favour of Thomas Fowlis, mentioned in the trust deed of 1794 and in the disposition by Ferrier to the defender's father of 1814, was not recovered. At the latter date, the tenant in the lands was not Fowlis, but another person of the name of Edie, who possessed in terms of a lease dated in 1804, granted by Sir John Anstruther's trustees of the lands of North Muircambus and of certain other portions of Sir John Anstruther's estate. By this lease the lands of North Muircambus and the other portions of Edie's farm were let to him, "as the same is presently possessed by Thomas Fowlis, the present tenant," and the lease contained the following clause:—"The tenant shall have liberty of the driven sea ware, along with the other tenants of the Elie barony, for manuring the farm."

The lands of North Muircambus do not adjoin the shore, but, at the nearest point, are distant from it more than a mile; but there is a road by which there is access from the farm to the shore.

The defender alleged that, from Martinmas 1812, his father, and thereafter his trustees, and he himself, down to the date of the present actions, had uninterruptedly and without hindrance taken sea ware from the shore opposite the lands of Elie and Ardross.

The pursuer alleged, and it was admitted, that, from 1818 to 1832, the lands and baronies to which he had right were held by the late Sir John Carmichael-Anstruther as heir in possession, and, that he died *in minority* in 1832.

The Court of Session held, that the defence was valid, and assoilzied the defender.

The pursuer having appealed, he maintained in his case, that the judgment of the Court of Session should be reversed for the following reasons:—1. Because the respondent has no legal title to collect wrack or ware on the sea shore *ex adverso* of the appellant's lands. Bell's Prin. § 979; *Nicolson* v. *Melville*, Mor. 14,516. 2. Because it was incompetent to construe the respondent's written title by extrinsic evidence, and more especially by parole evidence. *Miller* v. *Miller*, 1 Sh. Ap. 308. 3. Because, on the assumption, that extrinsic evidence was competent for the purpose of construing the conveyance in favour of the respondent's father, the evidence adduced is insufficient to warrant the judgment, that the privilege of gathering wrack and ware on the sea shore *ex adverso* of the appellant's lands was conveyed. Stair's Institutes, 2, 12, 18.

The respondent in his *printed case* supported the judgment on the following grounds:—1. The whole barony of Ardross, including the lands of North Muircambus, having been held, prior to July 1794, by one proprietor, without any express right to sea ware, but with a clause of parts and pertinents, including amongst these a right to take sea ware from the shore for the use of the whole barony, it was competent to the proprietor to sell and dispone any portion of the barony, with a proportional share of the right or privilege of sea ware, corresponding to the extent of the portion so sold and disponed, as a part and pertinent thereof. 2. The terms of the trust deed of 12th July 1794, by which Sir John Anstruther, then proprietor of the whole barony of Ardross, conveyed to the persons therein mentioned, that part of the barony, consisting of "All and Whole the north farm of Muircambus, as the same is now or was sometime possessed by Thomas Fowlis, with houses, biggings, yards, orchards, tofts, crofts, cunningaries, dependencies, annexis, connexis, parts, pendicles, and pertinents whatsoever," were apt and sufficient to convey to the

disponees in the said deed the said north farm of Muircambus, with a right to take sea ware from the shore for the use of the said farm. 3. The said farm, having been possessed by the disponees in the deed of 12th July 1794, with the privilege of taking ware from the sea shore for the use of the farm, and having been let by them to a tenant in 1804, with "liberty of the driven sea ware, along with the other tenants of the Elie barony, for manuring the farm, and Longfords Park," it must now be held, that the farm was conveyed to the disponees with the right and privilege of taking sea ware from the shore as a part and pertinent thereof. 4. The description of the farm, in the several transmissions of the same which intervened betwixt the deed of 1794 and the conveyance to the respondent's immediate predecessor in June 1814, as also in the conveyance itself, having been identical with that in the deed of 1794, the said transmissions, including the disposition to the respondent's predecessor of 20th June 1814, were apt and sufficient to convey the said farm, with the privilege of sea ware as a pertinent thereof. 5. The said farm, at the date of the purchase by the respondent's predecessor in 1813, having been in the possession of the tenant in the tack granted, as aforesaid, in 1804, with the liberty or privilege of sea ware, it is to be presumed, in the absence of an express declaration to the contrary, that the respondent's predecessor purchased and paid for the said farm, with the said privilege of sea ware as a pertinent thereof. 6. The said farm having been conveyed to the respondent's predecessor in terms apt and sufficient to convey, along therewith, the privilege of sea ware, and having been actually possessed, along with the privilege of sea ware as a pertinent thereof, by the respondent and his predecessor, without interruption or complaint from 1813 until the commencement of the present proceedings at the instance of the appellant in 1854, the appellant's attempt to debar the respondent from the continued exercise of the said privilege was wholly unwarranted, and was properly disallowed by the Court below.

The *Attorney General* (Bethell), and *Anderson*, Q.C., for the appellant.—The right which the respondent claimed was not a servitude, but a mere personal privilege, forming no part of the title or agreement. Thus where the seller of a flat, who was bound to uphold the roof, did not insert this obligation in the disposition, the purchaser was held not bound, because the obligation was personal to the seller—*Nicolson* v. *Melville*, M. 14,516. Such an obligation was not binding on a singular successor. The question therefore was, whether this was a mere privilege or a servitude. It is said a like right was held a servitude in *Fullerton* v. *Baillie*, M. 13,524; but there was no such decision of the Court, the word being merely used descriptively by the reporter, and on the erroneous assumption, that wrack and ware were *inter regalia*—*Morton* v. *Covingtree*, M. 13,528.

It is admitted there is no express conveyance of the right, but it is said it was conveyed, if the parties so meant it. The deed itself is, however, the sole admissible evidence of the meaning. Such a right, being a right to take wrack and sea ware from the shore several miles off, could not possibly pass under the common words of style "parts and pertinents." It is only by extrinsic evidence, therefore, that the respondents seek to import into the deed a meaning which does not exist *ex facie;* but extraneous and collateral writings are not admissible for such a purpose—*Hughes* v. *Gordon*, 1 Bligh, 287; *Miller* v. *Miller*, 1 Sh. Ap. 308. Even if the extrinsic evidence were here admitted, it was insufficient to prove, that the right to the sea ware passed with the conveyance, for all it proved was merely, that the landlord used generally to allow his tenants to take the sea ware. That was, however, merely as a favour or personal privilege, and not as a right. It was a right used as beneficial to the landlord, and not adversely to him.

The Lord Advocate (Moncreiff), and *Rolt* Q.C., for the respondent.—It is not necessary here to discuss whether, and how far, the owner of a barony, bounded by the sea, is owner of the fee of the sea shore. He can only appropriate the shore under a special grant from the Crown—*Magistrates of Culross* v. *Dundonald*, M. 12,810; *Paterson* v. *M'Ailsa*, 8 D. 752; *Lord Saltoun* v. *Park*, 20 D. 89; *Smith* v. *Officers of State*, 8 D. 711. But whether the adjoining owner has a right of property in the sea shore or not, the right to gather sea ware does not arise out of the right of property in the shore, but out of the right to the lands adjacent, and is a proper pertinent of such lands. The right to sea greens differs from the right to the sea shore, and rests on the principle of alluvion—*Magistrates of St. Monance* v. *Mackie*, 7 D. 582, *per* Lord Justice Clerk Hope. The proprietor of a barony bounded by the sea has no greater or better right to the sea ware than the owner of land so bounded—*Macalister* v. *Campbell*, 15 S. 491. The right of the appellant to the sea ware is therefore a right to a mere pertinent of his lands. That right was parted with to the respondent, being conveyed under the words, "parts and pertinents," and also under the descriptive words "as now possessed by Thomas Fowlis." As the right of the sea ware belonged as a pertinent to the lands of the barony, such right passed to the proprietor of each part of the barony, when the lands were severed. The lands of Muircambus had been possessed with that right from 1794 to the present time. Such a right is closely analogous to a right of pasturage, which may be held over a common, not immediately adjacent to the lands, and may pass under the clause of part and pertinent—*Borthwick*, M. 9632.

Sir R. Bethell replied.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—In considering this case I have been much perplexed by the difficulty I have experienced in discovering the *ratio decidendi* on which the Judges of the First Division of the Court of Session have proceeded in reversing the interlocutor of the Lord Ordinary.

It is not disputed, that the *onus probandi* lies on the respondent to establish, the right which he claims. In his pleas in law he relies on grant and on prescription as separate and distinct defences. The Lord Ordinary, whether rightly or erroneously, in a very short but lucid and logical judgment, decided against him on both questions. In pursuance of an opinion which Lord Deas delivered, and in which his brethren of the First Division unanimously acquiesced, although we are not told whether for the same or what other reasons, the interdict which had been granted was recalled, and the respondent was assoilzied from all the conclusions of the libel. The opinion in favour of the respondent anxiously declares, that it was not founded either on grant or prescription, but on a complex view of the titles of the parties and the proof, the learned Judge adding—"I take into view all the elements afforded by the titles and the proof, without saying what might have been the effect of the absence of any one of these elements."

I must confess, that after having frequently read and reconsidered this opinion, I am very much at a loss to say what doctrine is to be deduced from the judgment founded upon it, and I am left to conjecture whether the right which the respondent is supposed to have established is to be considered a servitude or a privilege, and if a privilege, to what category of privileges it is to be ascribed. Should the judgment stand, I am afraid, that the law of Scotland respecting the right to take wrack and ware drifted on the sea shore would be left in a very uncertain and unsatisfactory state. After much consideration I must advise your Lordships to reverse the interlocutor appealed against, and to restore the reversed interlocutor of the Lord Ordinary.

It is material to begin with considering the nature of the right of the owner of this barony to the wrack and ware drifted from time to time on the shores of the barony. In the present cause the baron's right to the wrack and ware must be considered irrespective of any claim to the soil of the shore between high water and low water mark. The pursuer does not assert any distinct claim to property in the soil, and the defender over and over again denies that the pursuer has any such title. But the defender does not dispute, and Lord Deas adjudges, that the pursuer, as proprietor of the barony, has a good title to appropriate the wrack and ware drifted from time to time on the shores of the barony. This he has by virtue of the Crown charter under which he holds, as he might have the right to all wrack of the sea drifted on the shore *ex adverso* of his barony. His right is to so much of the wrack and ware as should be required to manure the lands within the barony, but the whole is absolutely his property as soon as he has taken possession of it for any purpose whatsoever.

It must be observed, that this is not a right to herbage or other renewable produce growing on the soil of the barony, of which another might have a qualified right to take a portion by virtue of servitude as owner of a dominant tenement. The wrack and ware, or sea weed, so drifted on the shore of the barony, belonged to the proprietor of the barony, and he had power to do what he liked with his own. He might, by special agreement with his tenants within the barony, give each of them a right to take as much of the sea weed as could be usefully employed by the tenants in manuring their respective farms; or, without conferring upon any of them any such privilege, he might have appropriated the whole of the sea weed drifted on the shore of the barony to the manufacturing of kelp or barilla. The manufacture being carried on either by himself, or by some person to whom he let or sold the whole of the sea weed so drifted, a part of this sea weed actually had been, and the whole of it might have been, lawfully so appropriated. But, at the same time, I doubt not that, according to the case of *Fullarton* v. *Baillie*, the proprietor of the barony might have granted to the owner of land beyond the limits of his barony the right to take so much of this sea weed as would be required to manure such lands; or in selling and alienating a portion of land within the barony so dissevered from the barony, he might have granted to the alienee a right to take so much of the sea weed so drifted as would be required to manure the portion of land so alienated, and this right so granted might pass as part and pertinent of the land so alienated. This would be a right established by grant; but, in the present case, is there any evidence to prove the grant claimed?

The defender is owner of the farm of North Muircambus, formerly parcel of the barony of Anstruther, but, since the year 1778, it was severed, and held under a different title. This farm is entirely inland, and there is no part of it nearer the seashore than about two miles. The barony extends several miles along the shore of the Firth of Forth, and all the drifted sea weed to be found on the sea shore *ex adverso* of the barony was the property of the baron, to be used and disposed of as he thought fit. The defender insists on a right for himself, and all who are to come after him, to go to any part of the shore *ex adverso*, to take as much sea weed as may be required for manuring any part of the farm of North Muircambus, with a consequent power of subdividing this farm, and feuing it out to an indefinite number of purchasers, and conferring on each of them proportionately a similar right as part and pertinent. If this be established, the baron is not only prevented from ever again appropriating the sea weed to the manufacturing

of kelp or barilla, but he could not sell off any portion of the barony bordering on the sea shore, and give the purchaser the exclusive right to take the sea weed drifted on the shore *ex adverso* of the portion of the barony so sold.

The defender, by his pleas in law, asserts, that when the defender's lands were disjoined from the rest of the barony, the privilege must be held to have been conferred on the whole lands, including Muircambus, and to have passed with other pertinents under the transmission of Muircambus; and the defender being now in right of part of the said barony, with all parts and pertinents at any time belonging to the same, is entitled to take ware for the use of his lands for similar purposes, and the same extent proportionally as the pursuer is entitled to do for the rest of the barony; but this right has not the slightest resemblance to a right of pasture, or any such servitude appurtenant to a dominant over a servient tenement. Here there is a servient tenement, and the right of the owner of the barony is merely to take personal chattels, the property in which is vested in him by the Crown. If a right to take the sea weed drifted on the shore *ex adverso* of the barony bounded by the sea might be supposed to pass by general words to a purchaser, it is absurd to suggest, that such a right could be supposed to pass impliedly by conveyance of a part of a mountain several miles from the sea, although it had once been within the barony. The defender must therefore shew, that the right which he claims was actually granted to his father, and, that his father's author had this right in him to grant.

The disposition of Charles Ferrier to John Fortune, dated 20th June 1814, is "of all and whole those parts of the town and lands of Muircambus, as the same now is or was sometime possessed by Thomas Fowlis, with the houses, and parts, pendicles, and pertinents whatsoever." To see whether such a right was in Ferrier, let us trace the title of North Muircambus from 1778. This farm was then severed from the barony, and Sir John Anstruther, the third baronet, executed a new entail of the barony. We must remember, that the right to take the wrack and ware "drifted on the shore *ex adverso* of the barony" was attached to the barony, wholly unconnected with the farm of North Muircambus. The tenant of that farm probably had in his lease, like the other tenants within the barony, expressly granted to him by his landlord leave to take sea weed for manuring the farm; but this, being matter of personal contract between landlord and tenant, would expire with the period for which it was granted.

Sir John Anstruther, the third baronet, holding the farm of North Muircambus in fee simple, on 4th September 1793 executed a trust disposition, whereby he conveyed it to trustees, who sold it to his grandson John, afterwards Sir John Carmichael Anstruther, the sixth baronet; and he, in September 1808, sold and conveyed the farm to his father, the Right Honourable Sir John Anstruther, Chief Justice of Calcutta, the next baronet. The ex-chief justice having died in 1811 seized in fee simple of the farm of North Muircambus, leaving his affairs in a very embarrassed condition, his eldest son and heir, Sir John Carmichael Anstruther, the sixth baronet, made up his titles to the farm, and conveyed it to Charles Ferrier, the author of the defender's father. These dispositions convey "the farm of North Muircambus, as the same now is or was sometime possessed by Thomas Fowlis, "with parts and pertinents," using words of style to be found in all conveyances of real property, of whatsoever description. The dispositions do not, like the leases to the tenants, give any right or leave or license to take wrack and ware from the sea shore *ex adverso* of the barony, or make any mention or allusion to the barony whatever.

The defender, however, relies on the alleged exercise of the right by the tenants of this farm, and the grant of it to one of them in his lease. Fowlis was tenant till 1804—this lease cannot be found; but it may fairly be supposed to have had a clause similar to that contained in above 50 leases to the Anstruther tenants, which are extant,—"The tenant shall have liberty of the drove sea ware, along with the other tenants of the barony, for manuring the farm." In 1804 a lease was granted to Edie of North Muircambus, and a park called Longfolds, for twenty years, by Robert Anstruther, acting on behalf of the trustees of Sir John Anstruther, the third baronet; and this lease contains the clause: "The tenant shall have liberty of the drove sea ware, along with the other tenants of the barony, for manuring the farm and Longfolds Park." The very next clause in the lease is,—"The tenant to have the use of the East Upper Granary, near Elie Lent Miln, for holding 100 or 150 bolls of victual, when the proprietor has no victual in it himself."

There is evidence, that both Fowlis and Edie were in the habit of taking sea weed from the shore of the barony to manure their farm. But if evidence had been given, that they had the use of "the East Upper Granary," near Elie Lent Miln, for holding victual, would this shew, that such a use of the East Upper Granary, near Elie Lent Miln, passed as a *part* and *pertinent* to the defender's father, under the conveyance of North Muircambus Farm, with its *parts* and *pertinents?* The right to dispose of the sea weed on the shore *ex adverso* of the barony never was in the trustees, but remained in Sir John Anstruther as owner of the barony, under the new entail which he executed; and if the trustees had expressly granted the right claimed to be for ever annexed to North Muircambus, this grant would have been void against the pursuer as a singular successor.

Indeed, I think it is admitted, that the defender's claim cannot be supported on the ground of "grant" alone.

The claim on the ground of "prescription" alone is still more untenable, and may be more briefly disposed of. The defence of "prescription" is set up by the fourth plea in law,—"The defender and his predecessors having actually taken sea ware from the adjacent shore constantly and uninterruptedly, for upwards of 40 years, have now a prescriptive right to the exercise of that privilege."

Supposing, however, this to be a right which could be acquired by *prescription*, and, that the defender has a title on which the *prescription* could be founded, unless arithmetic is to be neglected as well as law, there is no pretence for this plea. This prescription could not possibly begin till the year 1814, after the conveyance of North Muircambus to the defender's father. To be sure, there are forty years from 1814 to 1854, and this suit was not commenced till 1857; but from these forty years are to be deducted thirteen years between 1818, the death of Sir John Carmichael Anstruther, the sixth baronet, and 1831, the death of Sir John Carmichael Anstruther, the seventh baronet, when the latter, being the undoubted owner of the barony, was a minor, reducing the period of prescription, if the right had been actually exercised as alleged, to 33 years. Therefore the defence on pure prescription, like the defence on "pure grant," vanishes. But, although each defence be imperfect by itself, it is said, "*juncta juvant*,"—that they establish, with the conveyances, a perfect title.

This "complex view" of the subject is novel, and I must say rather startling. Hitherto, both in England and in Scotland, a title by "grant" and a title by "prescription" have been considered quite distinct, each being required to be perfect in itself. The effect of a grant may to a certain degree depend on *enjoyment* before and at the time of the grant, but this has nothing to do with title by prescription. In the present case, had there been proof of a grant resting in the owner of North Muircambus, (under whom the defender's father took,) a perpetual right, as against the owner of the barony, to carry off the sea ware from all parts of the shore *ex adverso* of the barony to manure the farm of North Muircambus, it might have been material to shew, that Fowlis and Edie were in the habit of doing something which might have been considered as done in the exercise of this right. But when there is no evidence of the grant of such a right to be perpetually an appurtenance to the farm of North Muircambus, and, on the contrary, there is clear proof, that what was done by the tenants of this farm was done under the liberty given to them during their *tacks*, as this liberty might have been withheld, the supposed usage can neither support *grant* nor *prescription*, nor generate any new composite title partaking of the qualities of both.

Lord Deas seems to think, that, irrespective of the subsequent usage since the conveyance to the defender's father, his claim could hardly have been supported; but that, although the subsequent usage will not make out a title by prescription, it establishes a conclusive title of a different sort, when coupled with the previous conveyances. Although contemporaneous and subsequent usage may explain the meaning of ancient ambiguous grants, I am not aware of usage being called in to explain the meaning of a deed so recent as the conveyance of North Muircambus to the defender's father. At all events, the usage relied upon may more properly be referred to the personal leave expressly given to the tenants, which is quite inconsistent with the interest or right supposed to belong to all the occupiers of his farm of North Muircambus.

I am afraid, that I cannot properly conclude without taking some notice of the dangerous conjecture hazarded by Lord Deas as to the meaning of the parties, beyond the force of the language to be found in the deeds which they had executed; and further, of the attempt to lessen the protection given to minors by the law of Scotland, which says the prescription shall not run against them during their minority. "It is true," Lord Deas observes, "there was a minority during part of the time, but the sellers knew what they had sold, and the heir's interests were doubtless attended to by those acting for him, just as if he had been major." If this House, when hearing an appeal from Scotland, had proposed to act upon the law of England, which disregarded a supervening disability after prescription has begun to run, we should have been justly blamed for seeking judicially to assimilate the discordant laws of the two portions of the United Kingdom; and I must say, that till the law of Scotland respecting the suspension of prescription by minority is legislatively altered, it is the duty of all tribunals in the United Kingdom to give full effect to it.

For these reasons, I feel it my duty in this case to advise your Lordships to reverse the interlocutor appealed against, and to affirm the interlocutor of the Lord Ordinary in favour of the appellant.

LORD CRANWORTH.—Prior to the entail of 1778, the farm of North Muircambus formed part of the barony of Ardross and Elie. Sir John, the entailer, was the owner of the whole in fee simple, and there could not then have been any right to be exercised by the occupier of any one part of the barony over any other part against the will of the owner of the whole. The right of

every tenant must have been derived wholly from the goodwill of his landlord. He might have authorized any tenant to take drifted sea ware for the manurance of his land, or he might have refused to do so, as he thought fit. By the entail of 1778, the farm of North Muircambus, with its pertinents, was severed from the rest of the barony, and with all deference to the opinion of the Court of Session, as delivered by Lord Deas, I think it clear, that as there is not and cannot be any claim founded on prescription, the question whether the right now contended for by the respondent really belongs to him, must be decided precisely as if it had arisen upon a sale of Muircambus with his pertinents; made by Sir John, the entailer, immediately after the completion of the entail. If he had then sold and conveyed the farm with its pertinents, would that have conferred on the purchaser the right to take drifted sea ware for the use of the farm? If it would not, then the interlocutor of the Court of Session cannot, in my opinion, be supported.

The parole evidence may be taken as proving, that at the time of the severance in 1778, the occupiers of North Muircambus farm were in the enjoyment of the right now contended for by the respondent. This is a fair presumption of fact. It has certainly been enjoyed by the respondent and his father before him since the year 1824, when Edie's lease expired. It was certainly enjoyed by Edie during his twenty four years' tack, and by Fowlis, his immediate predecessor, as far back as living testimony can go, that is, to the year 1793 or thereabouts. The presumption is not unreasonable, that the practice had existed long previously. It was beneficial to the landlord, as well as to the tenant, that the land should be well tilled; and in the arrangements made from time to time between them, the great probability is, that the tenant would stipulate for, and that the landlord would concede, the right now in dispute.

The question, therefore, seems to me to be reduced to this, whether the word "pertinents," as connected with North Muircambus farm, in the exception contained in the deed of entail, and in the subsequent conveyances, can be understood to include the privileges theretofore conceded by Sir John, the entailer, in favour of the tenants of that farm. There could not in strictness of language be any pertinents of one part of the entailer's fee simple estates, as against any other part of them. There might be pertinents in the nature of rights to be exercised over the lands of other proprietors; but where one person is the absolute owner of two estates, it is impossible to speak of his having, in respect of his ownership or possession of one of them, any rights over the other. His right over both is absolute—*res sua nemini servit.* Unless, therefore, the word "pertinents" can be interpreted in the more extended sense which I have suggested, *i.e.*, as including the privileges conferred by the landlord on the tenant, and enjoyed by him at the time of the severance, the right now contended for does not exist. The conclusion at which I have arrived is, that it is impossible to give this extended signification to the word "pertinent." Privileges enjoyed by the tenant in consequence of arrangements with the landlord, are in no fair sense attached or pertinent to the land; they are merely personal rights; and that the right of taking sea ware for the farm was so considered, may reasonably be inferred from the fact, that in the tack of the farm to Edie, 1804, to which the commissioner representing the owner of the entailed property was a party, there was an express stipulation, that the tenant should, during the tack, have the liberty of driven sea ware for manuring, as well the North Muircambus farm as the entailed lands included in the same tack, and he was to have this liberty along with the other tenants of the barony, from which it is reasonable to infer, that the liberty was one not considered as attached to the lands, but conceded to the tenants by the landlord.

It was argued, that the right of taking sea ware, attached as it certainly was to the whole barony, must be considered as belonging to every part of it, including North Muircambus farm, which, before its severance, formed part of the barony. But if this argument were to prevail, it would go to shew, that the right is much more extensive than that contended for. The right of the owners of the barony was and is to cut and take sea ware, whether driven or growing on the shore, and to use it for all purposes. It is impossible to parcel out this right so as to hold, that the occupier of every farm of the barony might take, not a portion of all the sea ware, whether driven or growing, and not for the purposes for which the owner of the barony might take it, but only a fair portion of the drifted sea ware for the single purpose of manuring his own lands. It was certainly in the power of the owner of the barony to concede such a limited right to all or any of his tenants; but it cannot be treated as attaching or belonging to every farm of the barony as a portion of the great general right.

The authority mainly relied on as shewing, that the right claimed might pass under the word "pertinents," is that of *Borthwick*, referred to in the judgment of the Court of Session. But I do not think it bears out the argument of the respondent. It appears that Lord Borthwick had wadsetted the lands of Halheriot to Mr. Borthwick, together with a common of pasture on Borthwick Muir, which muir belonged to his lordship. Lord Borthwick afterwards entered into a minute of agreement to sell to Mr. Borthwick the lands of Halheriot, with the pertinents, but not expressly mentioning the right of common. I collect from the report, that a dispute arose when the parties proceeded to implement this agreement, Mr. Borthwick contending, that he was to have, as part of what he had agreed to purchase, the right of common expressly included in his wadset, and Lord Borthwick resisting this because the right of common was not mentioned

in the minute or agreement of sale. In this state of things, Mr. Borthwick proceeded against Lord Borthwick to recover from him the money due on the wadset. Lord Borthwick against this demand insisted on the agreement for sale, and contended, that Mr. Borthwick, the charger, ought to be compelled to fulfil his agreement. To this Mr. Borthwick, the charger, answered, he was ready so to do if Lord Borthwick would extend the minute so as to include the common of pasture. The Court held, on the facts of the case, that Lord Borthwick was bound to extend the minute so as to include the common of pasturage in the muir, in respect the same was a pertinent of the lands sold at the time of the sale.

The ground of the decision was, that what was agreed to be sold to Mr. Borthwick was all which he then actually held by virtue of his wadset, *i.e.*, the lands of Halheriot then separated from the other lands of Lord Borthwick, together with the common of pasturage, then, in fact, held as pertinent under the wadset. The right, then, in question was not improperly described as a pertinent of the lands wadsetted. It was a right over the lands of another, to be exercised by a person who, though liable to redemption, was in a sense the owner of Halheriot. The Court, therefore, properly held, that Lord Borthwick could not rely on his minute or agreement for sale, without giving to the charger, that which he had manifestly bargained for.

I cannot think, that this decision warrants the interlocutor of the Court of Session now under review. Nothing was excepted from the entail but the farm with the pertinents. There are no facts leading to the inference, that anything was intended to be excepted beyond that which the words used *primâ facie* import; and a right contracted for by the tenant, to take for the manurance of his farm sea ware drifted from other property of the landlord, cannot be described as a pertinent of the farm, even when it is established, as I think it is established, that at the time of the exception the tenant was in the actual enjoyment of the privilege in question by express contract with his landlord.

It is hardly necessary to add, that any claim by prescription is here out of the question. The respondent in his *printed case* expressly abandons any claim on such a ground. But even if he had not done so, and even if there had been no minority, assuming there to have been a title on which prescription might have been founded, still there clearly has not been forty years' possession, for, up to the year 1824, the privilege was exercised, not adversely to the owners of the barony, but by their permission, and as part of the terms on which the tenants were occupying the land after 1824; and thus within much less than forty years from that time the present action was raised. On these grounds I have come to the conclusion, that the decision of the Court below was erroneous, and that of the Lord Ordinary correct.

I observe, that the words used in the conveyance to the respondent's father, and in all the conveyances subsequently to the entail of 1778, are, "parts, pendicles, and pertinents." I presume these words have in general no more extensive operation than the single word "pertinents;" but, at all events, in this case they cannot have a more extensive operation, for, in the deed of entail, nothing was expected but the farm with its pertinents.

LORD WENSLEYDALE.—In this case the appellant applied by suspension and interdict to prohibit the respondent from taking sea ware *ex adverso* of the complainer's lands of Elie, etc., or interfering with the complainer in the cutting or removing of it, and sued out a summons of declarator on 14th June 1854 against the respondent, to establish his sole right to the sea ware, whether growing or drifted on the shores adjacent to his said lands, and to have it found, that the respondent had no right to the sea ware, or to remove or interfere with it. The actions were conjoined.

The Lord Ordinary (Lord Benholme) decided in favour of the appellant in both actions. And, upon a reclaiming note being presented to the First Division of the Court of Session, that Court ordered revised cases and a commission to issue to take proof, which was done; and upon hearing the report of proofs and full consideration of the case, Lord Deas delivered the judgment of the First Division, recalling the interlocutor of the Lord Ordinary, and decided the conjoined causes in favour of the respondent. This appeal is from that judgment.

It seems to me, after much consideration, that your Lordships ought to reverse that judgment.

Both the appellant and the respondent derive title from the same authors. The Anstruther family were proprietors for many years of the barony of Ardross and Elie, etc., which extended some miles along the sea coast. By the Crown charter of 29th April 1704, in favour of Sir William Anstruther, the baronies of Anstruther, Ardross, and Elie, with their parts and pendicles, with ports and stations for ships, and the Harbour of Elie, and anchorage and tolls, were granted; and in the tenendas clause, wrack and wair are mentioned. In July 1794 Sir John Anstruther conveyed the farm of North Muircambus "as the same is now or was some time possessed by Thos. Fowlis, with dependencies, annexis, connexis, parts, pendicles, and pertinents whatsoever," to trustees for sale.

One of the trustees, (one having power to act,) in November 1804, let North Muircambus and a farm called Longfolds, "as possessed by Thos Fowlis," to Arthur Edie, for twenty years from Martinmas 1804. The lease contains a stipulation, that the tenant shall have liberty of the driven sea ware along with the other tenants of the Edie barony, for manuring the farm and

Longfolds Park. This lease expired in 1829. Afterwards, Sir John Anstruther, late Chief Justice of Bengal, dying in pecuniary difficulties, a Mr. Ferrier was, with the consent of his creditors and his heir at law, made trustee for sale of the North Muircambus estate. Mr. Ferrier agreed to sell to Mr. Fortune, the father of the respondent, in August 1813, the north farm of Muircambus, with property and superiority, "as the same were then, and were some time possessed by Thos. Fowlis," with the dependencies, annexis, parts, pendicles, and pertinents. On the 20th June 1814 Mr. Ferrier made a disposition of both, pursuant to his contract, and conveyed the superiority of the North Muircambus farm in the same terms to Mr. Fortune. Mr. Fortune's title was completed in 1817.

The pursuer's title to the barony of Ardross and Elie arises from a disposition by Sir Windham Carmichael Anstruther, dated 12th and 13th May 1853, completed by infeftment in June 1853. He has all the rights that remained in the Anstruther family in the lands conveyed to him.

The question is, whether the right to take sea ware on the sea shore opposite the appellant's estate, for manuring the lands of North Muircambus, belongs to the respondent in right of that estate which does not border on the sea coast, but is separated from his estate of North Muircambus by an intervening slip of land of considerable breadth.

The appellant, in his pleas in law, claims, by virtue of his title to the lands and baronies of Elie, etc., the sea ware on the shore adjacent to his property, etc., the property in the sea ware from immemorial usage in connexion with the estate.

The respondent, on his part, denies the title of the appellant, and claims the right to take ware as having passed as a pertinent to the farm of North Muircambus. He also claims by prescription, and insists on long user as a proof that it was a pertinent to North Muircambus.

In considering this case some things appear very clear. In the first place, there is no question as to the right to cut or separate sea ware from the shore that belongs to the appellant; and the respondent is, at all events, not entitled to interfere with that right. The question is confined to the drift sea ware. In the next place, it is also clear, that the respondent cannot sustain his claim on the ground of prescription. His user did not commence till June 1824, when Edie's lease determined, and the forty years did not end till after the commencement of this suit; and, besides, if it is to be considered as having commenced before, there was a minority in Sir John C. Anstruther, the owner of the baronies of Ardross and Elie, for several years—I think from 1818 to 1831.

The right of the respondent, therefore, if it can be supported, must be supported on some other grounds. Nor has it been contended, nor could it be, that the enjoyment from 1824 to 1857 could be sufficient evidence to raise a presumption of a grant of the right—(See Bell's Prin. § 993). Is there any other ground on which it can be supported?

Before considering this question, I think we may dismiss two others which were argued at your Lordships' bar. It is unnecessary to decide, whether the Crown charters to the Anstruther family were insufficient, because they mentioned wrack and ware in the tenendas clause only, to convey that right to them. For the long use and enjoyment which has been certainly proved in them, and persons claiming under them, leaves no doubt in my mind of their title to sea ware, either as conveyed with the barony, or by a totally independent right.

It is equally unnecessary to discuss the general question not yet clearly decided by the Scottish Courts, whether the sea shore below ordinary high water belongs, *primâ facie*, to the Crown or to the owners of the lands adjoining. I think, that the peculiar terms of the charter of the barony of Edie, coupled with the usage, gave the soil of the sea shore, not only above high water mark but below it, and the appellant has a title to the soil of the sea shore down to the low water mark, and all the sea ware growing or driven upon it.

The main question then is, whether a right to take sea ware cast on the shore above and below high water mark, both or either, passed under the description of "parts and pertinents" in the conveyance from the trustee for sale of North Muircambus to Mr. Fortune, the father. I think, that prior and contemporaneous enjoyment of a privilege which may be attached to land, and subsequent enjoyment, are evidence which is admissible to explain the terms of the deed. No parole evidence can be used to add to or detract from the description in the deed, or to alter it in any respect; but such evidence is always admissible to shew the condition of every part of the property, and all other circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument. Continued usage in English law is considered as a practical exposition of that meaning, and modern usage of forty or fifty years' duration is evidence in the absence of any to the contrary, from which you may conclude, that it existed before it, and at the time of the deed.

Assuming, that this maxim applies in Scotch as well as English law, there is certainly some evidence, first, that before the deed under which the respondent claims, the proprietors of the baronies certainly for many years past, by themselves and their tenants, had taken sea ware from the shores opposite their lands for manuring them. Fowlis and Edie, former tenants of Muircambus farm, whilst they were occupiers, took sea ware in their carts to this farm, which could only have come from the Elie shore; and after the respondent's father got the North Muircam-

bus farm he constantly took sea weed from the sea shore, and his son, the respondent, who succeeded to the farm in 1835, first as tenant and afterwards as owner, was in the habit of exercising the privilege of taking sea ware to manure the farm from the shore opposite the appellant's land.

But there is a great objection to connect the enjoyment of Mr. Fortune and his son, subsequent to the deed, with that of Edie immediately before it. Edie's right was specially given him by his lease in 1804. Whether Fowlis had such a grant we do not know. So that Edie's right, enjoyed for twenty years, was not under an instrument in the same terms as that under which Mr. Fortune, the respondent, claims, but by special grant to take sea ware *nominatim*.

I therefore agree with the view taken by my noble and learned friend on the woolsack as to the effect of that evidence. But it is not enough to shew, that it was intended by the parties to the deed to pass that right under the words "parts, pendicles, and pertinents," supposing they could pass such a right, if intending to do so.

My noble and learned friend says, that the grant of the privilege to take sea ware by the owner of it cannot be assimilated to a servitude. It would be so if he had a right merely to the sea weed, as grantee of it by the Crown, and was not the owner of the shore on which it drifted. But I do not feel satisfied, that it might not be a proper servitude if he was, as much as a right to fuel, peat, and divot, analogous to an English common of turbary. It is a right to be exercised only on the land, as a right of way is. Indeed, this right to enter and take sea weed on the land involves in it a grant of way over the land, for it cannot be taken without it. Then, whether the appellant be the owner of the whole shore down to low water mark, or down to high water only, the right to go over his land would be a servitude when the land to which the right was attached belonged to a stranger.

But if I am right in supposing, that a right to take sea weed *in alieno solo* may be a servitude, the result would be the same. There is no grant of it in appropriate terms in the conveyance of the North Muircambus farm to the respondent's father, and there are no terms in the conveyance, that would operate as a grant, such as all rights to get sea ware, which were then used and enjoyed, which would, coupled with the evidence of user, have operated as a grant. Nor is it necessary to consider the further question, whether such a grant of servitude would have bound the appellant as a singular successor in the circumstances of this case.

But the word "appurtenances" alone would not, I conceive, convey a right of servitude to pass over the granter's soil, the sea shore, or part of it, to take sea ware. It would pass only those rights which were proper servitudes before, and those must be *in alieno solo*, for, according to the maxim of the civil law—*Res sua nemini servit.* In the English law, this is perfectly clear, as was fully explained in the case of *Barlow* v. *Rhodes*, 1 Cr. & M. 444. To pass rights which were not properly servitudes, but were used in like manner, words amounting to a grant must be used.

I agree in advising your Lordships to reverse the judgment of the Court of Session.

LORD CHELMSFORD.—My noble and learned friends who have preceded me have gone so fully into the case, and have given such strong and sufficient reasons for their dissatisfaction with the interlocutor appealed from, that, agreeing with them as I do, it is only necessary for me to state shortly the grounds of my opinion.

The appellant, in an action of declarator, claimed, as proprietor of the baronies of Anstruther, Ardross, and Elie, to be entitled to the sole and exclusive right to the sea ware upon the shores adjacent to his lands and estates, and that the respondent, the defender, should be decerned and ordained to desist and cease from removing or otherwise interfering with the said sea ware. In support of this claim, the appellant gave evidence of ancient charters of the Crown, under the tenendas clauses of which, amongst many other things which were to be held with the barony, was included this right of wrack and ware. The defender, who was owner of no part of the barony, but was proprietor of an estate called North Muircambus, which had formerly been part of the lands within the barony, was thereby called upon to shew upon what grounds he asserted his title to interfere with the sea ware. This he did by his pleas in law, alleging, that the right to take the sea ware had become part and pertinent to his estate of North Muircambus, either by grant or by prescription.

My noble and learned friends have shewn most clearly, that prescription is entirely out of the question, and the respondent, in his *printed case*, disclaims this title, and, in the reasons for his appeal, confines himself entirely to the acquisition of the right by grant. The Court of Session, however, has decided in favour of the respondent, neither upon the ground of prescription alone, nor of grant alone, but upon usage short of the proper period of prescription as construing and explaining the terms "parts, pendicles, and pertinents," in his conveyance. But although the respondent might have shewn by evidence, that the sea ware, at the time of the conveyance, had been enjoyed in connexion with the estate, so as to have given it the character of a "pertinent," yet evidence of usage after this modern grant appears to me to be inadmissible for the purpose of explaining the meaning of any unambiguous terms contained in it. Lord Deas, in the commencement of his judgment, states the question to be, "Whether the defender, as purchaser of

North Muircambus, part of the barony, is entitled to take drifted ware?" And he afterwards describes the right to wrack and ware to be like a right of pasturage, exercised for the benefit of every part and portion of the dominant tenement. Now, upon this it is to be observed, that North Muircambus is incorrectly described as having remained a part of the barony after the year 1778, when it was severed from it. "A barony (to use the language of Erskine, 2, 6, 18,) is *nomen universitatis*, that includes in it all the different subjects or rights of which it consists, though they be not expressed, and incorporates them so strongly together as to make them *unum quid*, one individual right." The right, therefore, cannot properly be said to be for the benefit of every part and portion of the dominant tenement, (except so far as the whole includes every part,) the tenendas clauses in the Crown charters annexing the right to the barony, which is one entire individual subject of property.

It would be unnecessary to criticise the language of the judgment, if it were not employed for the purpose of introducing a remark consequent upon it, that "when a part (*i.e.*, of the barony) comes to be sold, it is not difficult to raise a presumption, less or more strong, according to circumstances, that the privilege is to remain as before, attached not to a mere stripe along the shore, but to each part and portion of the land." Upon which it is only necessary to repeat, that the privilege is not attached to the lands belonging to the barony itself, which may or may not include the particular lands.

It has not been questioned, that it was competent to the proprietor of the barony, upon conveying North Muircambus to the respondent's father, to annex to the lands this right to take sea ware. This he might do, either by precise words of grant, or by the use of general words, which, from the previous exercise of the right in connexion with the lands, might have become descriptive of it. Thus, in *Borthwick's case*, the lands of Halheriot were wadsetted, together with a common of pasture over the lands of the wadsetter. The right of common was thus made appurtenant to the wadsetted lands during the continuance of the wadset. When, therefore, the lands of Halheriot were agreed to be sold with the pertinents, it was properly held, that the agreement must be taken to have intended to pass with the lands a right which was exactly described by the general word employed.

Lord Deas endeavours to assimilate the present case to that of *Borthwick*, by observing, that the privilege (to gather sea ware) is a mere privilege to gather and appropriate what is previously the property of nobody. So he adds, "The right is more of the nature of a privilege over the property of a third party than a privilege over a retained portion of the proper solum of the barony." The sea ware, however, cannot be correctly described as the property of nobody, as it was given to the proprietor of the barony by the charters; nor can it, in any sense, be regarded as a privilege exercised by him over another's property. It is his own absolute property to be granted or retained by him at his pleasure. He might undoubtedly have impressed upon it the character of a pertinent to certain lands; and if he had done so, then, according to the case of *Borthwick*, it would have passed in a grant of the lands by that description. But there has been no such dealing with this right or privilege in connexion with the lands of North Muircambus, as would annex it to the lands in such character. As far as we have any information, the leases of this farm contained a stipulation, that the tenant should have the liberty of the driven sea ware, "along with the other tenants of the barony." A clause to this effect was probably contained in the lease to Fowlis, who was in possession of the farm at the time of the lease to Edie in 1804. But whether this was so or not, the effect of the clause was merely to confer upon the tenant during the term the privilege of using a portion of the lessor's property (the drifted sea ware only) for the more beneficial enjoyment of the farm. It was of course for his interest, that the farm should be well cultivated, and there is nothing in this arrangement with a tenant, which could so inseparably connect the right with the lands as to pass it to a stranger under general words in a conveyance, by which the lands were entirely severed from the barony.

But it is said by Lord Deas, that, as Edie's lease shews substantially what had been the import of the lease to Fowlis, and, at any rate, as both the tenants are proved to have exercised and enjoyed the privilege, the more doubtful point is, whether the possession of Fowlis is referred to in the defender's father's disposition, simply as descriptive of the lands conveyed, or whether the meaning be, that both lands and pertinents were conveyed, as these had been possessed by Fowlis; and he states, that he was inclined to think the latter to be the true meaning. But it appears to me, that the place in which the words in question are found clearly shews, that they are used as descriptive of the lands, and not of the different subjects held by Fowlis in conjunction with the lands. They follow immediately upon the name of the property conveyed, "The North Farm of Muircambus, as the same is now, or was sometime, possessed by Thomas Fowlis;" and after them came the general words, amongst which are found the terms upon which the whole stress of the argument is placed, "parts, pendicles, and pertinents." I think, that the privilege of sea ware had not been so dealt with previously to the conveyance as to make it a "pertinent" to the lands of North Muircambus, and that the conveyance itself

did not pass it under that name with reference to the enjoyment of it by Fowlis during his tenancy.

I am of opinion, therefore, that the interlocutor of the Court of Session ought to be reversed, and that of the Lord Ordinary to be affirmed.

Lord Advocate.—Your Lordships will observe, that the Lord Ordinary decided the case without any proof of the facts at all. And it was after considering the proofs, that the Inner House pronounced the two judgments which I understand your Lordships now to reverse. What I would suggest is, that the second and third interlocutors should be reversed, and that a remit should be made to the Court of Session to decide in the terms of the Lord Ordinary's judgment. So that there would then be a judgment by your Lordships upon the facts as well as upon the titles.

Mr. Anderson.—With respect to costs incurred subsequently to the Lord Ordinary's interlocutor, these, I apprehend, will be given to us, and also the usual order to have the costs we have paid returned to us.

LORD CHANCELLOR.—That will be of course. I do not see any difficulty in reversing the interlocutors of the First Division of the Court of Session, and affirming that of the Lord Ordinary.

Lord Advocate.—What I took the liberty of suggesting is, that it will not be a judgment upon the facts. Your Lordships' affirmation of the Lord Ordinary's interlocutor will be the affirmation of a judgment proceeding without evidence of the facts. What I suggest is, that there should be a remit to the Court of Session to decide in the terms of the interlocutor of the Lord Ordinary, but upon proof of facts.

LORD CHELMSFORD.—You said, that the question of minority was not inquired into. I do not think, that would assist you much.

Lord Advocate.—The allegation of minority was an allegation by the pursuer. If they had not made out the allegation, in all probability the plea of prescription might have prevailed. It was necessary to inquire into that before giving judgment.

Mr. Anderson.—They denied the minority, and we proved it.

LORD WENSLEYDALE.—If the minority was established, there was not forty years' enjoyment before 1831.

Mr. Anderson.—We succeeded on our proof upon that point as well as upon the other.

Interlocutors of Inner House reversed; interlocutor of Lord Ordinary affirmed; and cause remitted with directions as to costs.

For Appellant, Loch and Maclaurin, Solicitors, Westminster; H. G. and H. G. Dickson, W.S., Edinburgh.—*For Respondent*, Connell and Hope, Solicitors, Westminster; Alex. Stevenson, W.S., Edinburgh.

MAY 17, 1861.

Major Gen. STUART, *Appellant*, *v.* Lady ELIZ. MOORE and Lieut. Col. JAMES F. D. C. STUART, M.P., Tutor at Law of the Marquis of Bute, *Respondents*.

Guardian and Ward—Jurisdiction—Court of Session—English Court of Chancery—Tutor at Law—Pupil—*A and B having been appointed guardians in England to (the Marquis of Bute) a pupil, by the Court of Chancery, one of them, A, alleging that his co-guardian, B, had clandestinely carried off the pupil to Scotland, applied to the Court of Session to compel B, in pursuance of orders of the Vice Chancellor, to give up the person of the pupil to him in England—the domicile of the pupil and other particulars being made matter of question between the parties. The Scotch tutor at law of the pupil having appeared on service of A's application, he objected to the pupil being transferred to England and made a ward of Chancery.*

HELD (reversing judgment), *That the Court of Session ought to have given directions to obtemper and carry out the order of the Vice Chancellor.*

In matters of guardianship of children the benefit of the child is the main point to be kept in view.

Where the Courts of England as well as Scotland have each jurisdiction in regulating the guardianship of a child, the orders of the Court first exercising jurisdiction should be followed and assisted by the other Court.[1]

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[1] See previous reports 22 D. 1504; 23 D. 51, 446, 595; 32 Sc. Jur. 696; 33 Sc. Jur. 24, 287. S. C. 4 Macq. Ap. 2: 33 Sc. Jur. 445.