

address—John Inglis, Steam Mills, Musselburgh
Should you not be careful on this point it may lead
to trouble in settling up—Yours, &c.

(Signed) "JOHN INGLIS, p. ROBT. LAMBERT."

On the adjustment of issues it was maintained by
the defender that there was no relevant matter to
warrant an issue, the latter not being of a calumni-
ous character, and the pursuer not being entitled to
inuendo calumnious intent, which could on no
reasonable construction be inferred from the words
used. The pursuer, on the other hand, having
inuendoed calumnious intent on the record, denied
the competency of the Court to judge of the sound-
ness of the inuendo.

The Court repelled the defender's objection, and
granted an issue, the Lord Justice-Clerk observing
that in a case of written slander, where it is alleged
that a writing has been circulated, it is of no conse-
quence whatever to represent that the terms of the
letter are apparently perfectly innocent if the pur-
suer alleges and offers to prove that the writing
conveyed, and was intended to convey, to others an
injurious charge against him. The following is the
issue which was adjusted.

"Whether the defender in or about July 1865 wrote
and circulated among the pursuer's customers a
letter in the terms set forth in the schedule
hereunto annexed: whether the said circular
is of and concerning the pursuer; and falsely
and calumniously represents that the pursuer
having without right or title obtained a num-
ber of the defender's empty sacks, dishonestly
retained said sacks, and dishonestly refused to
give them up to the defender, to the loss, injury,
and damage of the pursuer."

Tuesday, Feb. 20.

OUTER HOUSE.

(Before Lord Barcaple).

DUCHESS OF SUTHERLAND *v.* WATSON AND
OTHERS.

*Property—Mussel Scalps—Fishing—Barony—Pre-
scription.* Held (per Lord Barcaple) that a title
of barony, containing a grant of salmon fish-
ing, and power of killing and catching other fish
as well great as small, is not sufficient, though
followed by prescriptive possession, to confer an
exclusive right to mussel scalps.

Counsel for the Pursuer—Mr J. B. Balfour.
Agent—Mr Colin Mackenzie, W.S.

Counsel for the Defenders—Mr Watson. Agent—
Mr L. M. Macara, W.S.

This is an action of declarator at the instance of the
Duchess of Sutherland against the defenders, who
are fishermen residing in Cromarty and its vicinity,
to have it found that in virtue of her Grace's titles
to the lands and barony of Tarbat, she has the sole
and exclusive property in, and right to the mussel-
beds, scalps, or fisheries on the shores and sands of
Nigg and lands of Milntown in the bay of Cro-
marty, *ex adverso* of the lands of the barony of Tar-
bat. Founding upon her title as being one of barony,
and containing a grant of "salmon-fishing and power
of killing and catching other fish, as well great as
small," in any part of the said lands, the pursuer
further pleads that in respect of immemorial posses-
sion of the subjects libelled on the part of herself
and her ancestors, she is entitled to exclude the defen-
ders from taking bait from the mussel-beds in ques-
tion. Contrary usage and the insufficiency of the
titles produced to carry the right are averred on the
part of the defenders.

The Lord Ordinary has to-day pronounced an
interlocutor, finding that the title founded on by
the pursuer is not sufficient to give her the exclu-
sive right to the mussel-fisheries in question, or to
establish such a right in her by prescriptive possession.

His Lordship observes in his note:—

"The Lord Ordinary does not think that any
principle clearly involving the decision of this question
has been hitherto authoritatively settled, and he feels
it in the existing state of the authorities to be a ques-
tion of considerable difficulty. There are, however,
points having an important bearing upon it, which,
though they have been the subject of controversy, may
now be taken as fixed.

"The exclusive right to mussel-scalps and to take
mussels may be conferred by the Crown upon a sub-
ject-proprietor of lands. This was decided in the cases
of *Grant v. Rose*, in 1764 (M. 12,801), and *Erskine v.*
Magistrates of Montrose, 7th December 1819 (Hume,
538); and the doctrine has since been recognised.
Thus Lord Corehouse, in the case of the Duke of
Portland v. Gray, 15th November 1831 (11 S. 14), said—
'It is settled law that a right to fish oysters and mussels
in the sea from the scalp or bed to which they are
attached may be appropriated.' Mr Bell (Prin., s. 646)
says that the 'right is effectual when expressly granted.'
To this extent the doctrine must be held to be now
established in our law, and it is recognised by the Act
10 and 11 Vict., c. 62. But whether it is essential that
the grant shall be express, conferring the right to fish
mussels *eo nomine*, and whether even an express grant
is sufficient without prescriptive possession, are points
which have been controverted, and can hardly be said
to have been authoritatively settled.

"The Lord Ordinary is also disposed to hold that
it must now be received as settled law that 'the
charter of a barony is a good title by prescription to
carry salmon fishing.' The law is so laid down by
Mr Bell (Prin., s. 754), in accordance with what ap-
pears to be the prevalent opinion. On the other hand,
though the opinion of Stair (ii. 3, s. 60-69) upon the
point is at least ambiguous, and is followed in an
adverse sense by Mackenzie (Inst. ii. 6, 3), the Lord
Ordinary thinks it must be held that a charter of
barony which does not mention salmon fishing will
not carry that right without the aid of prescriptive
possession. It remains to be inquired whether the
same principles can be applied to the different right to
mussel-beds which is now in question.

"In the case of *Grant v. Rose* there was an express
grant of mussel-scalps. It may be taken as the leading
authority for the proposition that mussel-scalps may
be appropriated by express grant; but it can go no
further.

"In the case of the Duke of Argyle *v.* Robertson,
the grant was in fishing as well in salt as in fresh
waters, with no mention of mussels. The Lord Ord-
inary in that case stated that 'he was not aware of any
authority for holding that such a title would be suffi-
cient to confer an exclusive right to fish for mussels on
the shores of the sea, even if it had been followed by
exclusive possession for the prescriptive period.' As
possession was not proved, it was unnecessary to deter-
mine that point; but the present Lord Ordinary, after
going over all the authorities, concurs in the view so
expressed by Lord Mackenzie.

"As the pursuer's title contains an express grant
of fishings, it does not appear to the Lord Ordinary
that her case is materially strengthened by the
circumstance that it is also a barony title. If fish-
ings had not been mentioned it might have been
maintained that a grant of fishings was to be implied
in a barony title. In a question as to salmon fish-
ings, a barony title is held to imply a grant of fish-
ings, which, by aid of prescriptive possession, may
be construed to include salmon fishings. If a
barony title can by prescriptive possession support
a claim to mussel-scalps which are not mentioned
in the grant, the Lord Ordinary does not see any reason
which is to him satisfactory why a mere grant of fish-
ings, without erection into a barony, should not have
the same effect.

"The Lord Ordinary has come to the conclusion
that neither a mere grant of fishings, nor a barony
title, nor, as in the present case, both combined,
constitute a sufficient title to prescribe an exclusive
right to mussel-scalps. He thinks that, in regard

to this question there is a broad distinction in principle between salmon and mussel fishings. Salmon fishing, while not granted out, is the patrimonial property of the Crown, in which the public has no right, either of property or use. The grant by the Crown to a subject merely transfers the property from one exclusive proprietor to another. The right to mussel-scalps on the shore of the sea or a navigable river is in the Crown, not as patrimonial property, but for public uses, like the shore itself. It may, indeed, be alienated to a subject, though the principle on which such alienation is sustained is not plain, and its validity must probably be referred to immemorial usage. But the effect of a grant of mussel-scalps is clearly quite different from that of salmon fishings. It deprives the public of a right which they previously possessed. And such being the nature and consequences of the grant, the Lord Ordinary thinks that not only is it not to be presumed, but that consistently with sound principle it cannot be inferred by construction or established in any way except by a conveyance in express terms. The Crown may have the power to alienate the right from the public, but the exercise of that power, when founded on by the grantee against the public, must, it is thought, have been carried out so as to be complete in itself, without the aid of possession by the grantee to construe it."

LYON v. MARTIN AND OTHERS (*ante*, p. 34).

(Before Lord Kinloch.)

Trust—Extinction—Declarator. Circumstances in which *held* (per Lord Kinloch and acquiesced in) that a trust constituted by a marriage contract had come to an end.

Vesting. A lady having directed, in her marriage contract, that upon the death or second marriage of her husband her property should descend and belong to her children, held (per Lord Kinloch and acquiesced in) that the fee vested in the children *a morte testatoris*.

Counsel for James Martin and Others—Mr Fraser. Agent—Mr John Galletly, S.S.C.

Counsel for Trustee—Mr MacLean. Agents—Messrs White-Millar & Robson, S.S.C.

This was an action of declarator, multipointing, and exoneration brought by the beneficiaries under a marriage contract, in name of the trustee under it. The deed under which the case arose was an antenuptial contract of marriage dated in 1841, entered into between James Martin and Elizabeth Horn, afterwards his wife, whereby James Martin renounced and made over his *jus mariti* and right of administration and courtesy to the said Elizabeth Horn, and power was reserved to the said Elizabeth Horn to dispose of her estate during her life or by *mortis causa* deed without his consent. In order more effectually to preserve and maintain her estate for behoof of herself and her heirs and assignees, Elizabeth Horn conveyed the same to trustees; and it was further declared that if Elizabeth Horn should not at the time of her death have disposed of her estate, heritable and moveable, in virtue of the powers to that effect reserved to her, and in case she should predecease James Martin at any time after the completion of the marriage, then, and in that event, the right of courtesy of James Martin should revive, and be as valid as if no renunciation of it had been made, but that his right of courtesy should be contingent upon his not entering into a second marriage, and should lapse if he should ever again marry—and upon the death or marriage of James Martin, the estate of Elizabeth Horn should descend and belong to her lawful child or children, if any were of the marriage, equally among them, share and share alike; and failing such children at the death of Elizabeth Horn, then the estate was to fall and belong to certain parties therein named in life-rent and fee.

Elizabeth Horn predeceased her husband, and died in 1844 without having otherwise than as above dis-

posed of her estate. James Martin, her husband, is still alive, and has not entered into a second marriage. There were two children born of the marriage between him and Elizabeth Horn, who have both attained majority,

In these circumstances James Martin and his two children brought the present action, in name of the only surviving trustee under the marriage-contract, to have it found and declared that the purposes for which the trust was constituted have been fulfilled, and that the right formerly vested in the trustees under the same was extinct, and for distribution of the estate of Elizabeth Horn.

They contended that the provisions in their favour vested *a morte testatoris*, and that as they were the only parties interested in the estate in the events which had occurred, and had all attained majority, and were desirous that the trust should be brought to an end, the Court should find and declare as concluded for.

The trustee was quite willing that the trust should be brought to a close, but he desired judicial sanction being given to this measure, and in discharge of his duty he contended (1) that the provisions in favour of the children of the marriage had not yet vested; (2) that at all events the period for payment of their shares had not come, and that it was the intention of the trust that the trust should continue till the death or second marriage of James Martin; and (3) that he was justified in resisting the conclusions of the action until it was judicially ascertained that the trust had come to an end.

Parties having been heard, the Lord Ordinary has issued an interlocutor which, we understand, has been acquiesced in by the parties, in which he "Finds and declares that the time has arrived for the nominal raiser, William Lyon, denuding and being exonerated of the trust constituted by the marriage contract libelled, and appoints the cause to be enrolled in order to be proceeded with in accordance with this finding." In a note to his interlocutor the Lord Ordinary says:—

"The Lord Ordinary has no doubt that the two daughters of the marriage (now both major) have the fee of the trust-estate fully vested in them. It was conceded that their father had a life-rent in the heritable subjects, defeasible by his contracting another marriage. There appears to the Lord Ordinary no reason why, with mutual consent, the daughters should not have the fee conveyed to them, subject to this defeasible life-rent."

HOUSE OF LORDS.

Monday, Feb. 26, and Tuesday, Feb. 27.

BECKETT v. HUTCHESON.

Road Trustees—Jurisdiction of Court of Session.

Held (aff. Court of Session) that Road Trustees acting in execution of an Act of Parliament were not controllable by the Court of Session in regard to a matter committed to their discretion, as to which the review of the Court of Session was excluded.

Counsel for Appellant—The Attorney-General (Palmer), and Mr Anderson, Q.C. Agents—Messrs J. & F. Anderson, W.S., and Messrs Deans & MacLuekie, London.

Counsel for Respondent—Mr Rolt, Q.C., and Mr Buller. Agents—Mr John Forrester, W.S., and Messrs Loch & M'Laurin, London.

This is an appeal from an interlocutor of the Second Division of the Court of Session, deciding that the Statute-Labour Road Trustees of the Eighth Statute-Labour District of Dumbartonshire have such a discretion vested in them by the Act from which they derive their authority (10 Geo. IV., cap. 71), as renders them uncontrollable by the Court of