on the other. It was the nature of the subject-matter which alone gave pertinency to the allegation of usage in the case of the franchise. The franchise is a public function from which, from its nature, the presumption is that women are debarred unless there be a specific law to the contrary. The usage was justly held to prove that the general terms of the Act of Parliament could not be regarded as a specific law to the contrary. The presumption in the present case is exactly the reverse.

Lastly, as to the supposed public nature of a University degree. The argument on this head, although very able, runs into untenable refinements. There is nothing cabalistic or mysterious in a University degree. It is simply an attestation of academical merit. It may, like the ownership of property, be taken as a test for civil functions, but it does not follow that a woman, although a graduate, is competent to discharge them. While the analogies drawn from the continental practice do not greatly aid the general argument, I think it has sufficiently dispelled the notion that it ever was the academical law of Europe that a woman could not be a graduate. On the contrary, in the cases which have been handed down to us, the European Universities of yore hailed and proclaimed the successes of those of the gentler sex who were thought worthy of the honours of the learned. I find in Bayle, in his notice of the works of Ronaldini, an Italian mathematical writer, published in 1684 (Bayle Ouvres, i, 361), that that author published a treatise in which he discussed the question, "If it be competent to confer on women the degree of Doctor in Theology" (Caroli Ronaldinii, Mathematica Analyticæ, pars tertia. 1684). His theme was taken from the case of Helen Piscopia Cornara, "of glorious memory," as the writer says, on whom the University of Padua wished to confer this distinction, but who found, as the pursuers have found an antagonist, in the shape of Cardinal Barbarigo, the Bishop of Padua, who protested successfully against that theological honour being conferred on a woman, and she was accordingly obliged to content herself with the degree of Doctor of Philosophy. The account of this lady (Cornara) in Moreri's Dictionary says that this honour was conferred upon her in the presence of many Venetian nobles and other grandees of Italy, and more than a hundred ladies of rank who had come express to Padua to witness so unusual a ceremony. We may smile at the enthusiasm of the seventeenth century; nor is it for us to judge which of the two ancient Universities might best maintain the true academic spirit—one in throwing open their gates with acclamation to these aspirants to their honours, the other in sternly shutting them. But, on the whole, I think the defenders have entirely failed to prove that graduation is, or has ever been held to be, among the great Continental Universities, beyond the ambition of a woman; or that there exist any solid grounds, even could the question be raised in this action, for questioning the power of the University authorities to pass the Regulations in dispute.

The Court pronounced the following interlocutor:—

> The Lords having resumed consideration of the cause, with the written opinions of the Consulted Judges, in conformity with the opinions of a majority of the whole Judges, recall the interlocutor of the Lord Ordinary of date 27th July 1872; assoilzie the defenders from the whole conclusions of the summons, and decern; find the defenders, the Senatus Academicus, entitled to expenses, and remit to the Auditor to tax the same and to report; and in respect it is stated for the defender the Chancellor of the University that he makes no claim for expenses, find no expenses payable to him.

Counsel for Pursuers—J. M'Laren, P. Fraser, and Solicitor-General (Clark). Agents—Millar, Allardice, & Robson, W.S.

Counsel for Senatus Academicus—H. H. Lancaster. Agents—W. & J. Cook, W.S.

Counsel for the Chancellor—W. Watson. Agent—James Allan, S.S.C.

Wednesday, July 2.

FIRST DIVISION.

[Lord Mure, Ordinary.

DRUMMOND-HAY *v.* TOWN OF PERTH.

Fisheries—Local Custom—Boundary.

Held that in certain river fishings the privilege derived from local custom must be fixed by the boundary line laid down by the Court, not the boundary line by the privilege.

This case came up by Reclaiming Note against the interlocutor of the Lord Ordinary, which stated the circumstances, and was as follows:—

"*6th March* 1873.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process: Finds and declares that in the existing state of the river Tay, and of the *alveus* thereof *ex adverso* of the pursuers' lands and barony of Seggieden, the pursuers have the exclusive right of fishing for salmon and fish of the salmon kind in the river Tay *ex adverso* of the said lands and barony, to the eastward of a line drawn from a point on the north bank of the river, 118 yards to the westward of the centre of the Seggieden burn, to another point on the south bank of the river, 34 yards to the westward of the west gable of a lodge known as 'Lower Mary Lodge,' and including therein the exclusive right of fishing, as in a question with the defenders, from the bank lying in the said river opposite to the said lands and barony to the eastward of the said line; and that the defenders have no right to fish for salmon or fish of the salmon kind in the said river *ex adverso* of the said lands and barony to the eastward of the said line; and before further answer, remits to Mr John Young C.E., Perth, to mark off the said line upon the plan No. 7 of process; and also to put down upon the north bank of the river a march stone, or other distinctive mark at the point to the westward of Seggieden burn, from which the said line is drawn; and, in the meantime, reserves all questions of expenses.

"*Note.*—There are certain points which appear to the Lord Ordinary to be clearly established in the evidence in this case, viz.:—

"(1) That at and for long prior to the date when the north channel of the river Tay was shut up by the Navigation Commissioners at the upper end of Darry Island, in or about the year 1840, the tenants of the pursuers' fishings were in use to

fish the upper part of what is called the Flookie Station of the Seggieden fishings, starting from Seggieden pier, and rowing close past the lower or east end of Darry Island in a southerly direction, across to the south channel of the river, and thence returning to the hauling ground on the north side of the river below the Seggieden burn; (2) that after the north channel was so shut up the pursuers' tenants continued to fish the Flookie Station, beginning a little below Seggieden pier and rowing out across the river in the same direction as before, and thence down to the hauling ground beyond Seggieden burn; (3) that since the north channel was so shut up, a gravel bank has been formed in the *alveus* of the river *ex adverso* of the pursuers' lands, to the eastward of Darry Island, and to the north of the *medium filum* of the river, and that the lower part of this bank is separated from the part adjacent to the island by what is described by the witnesses as a narrow trink or gully, running from north to south across the bank, somewhat below the line of Seggieden pier; (4) that since the formation of this bank the pursuers' tenants have been in the habit of fishing on all necessary occasions from immediately below this trink or gully at low water from the bank itself, and at other times by means of the Beard-money boat; (5) that the tenants in the defenders' fishings have never fished below the line of this trink or gully, and have never at any period been in use to fish regularly from the east or lower end of Darry Island, although they may have taken an occasional shot there, as deponed to by several of the witnesses adduced on their behalf.

"In this state of the facts, it is the formation of this bank which has given rise to the main difficulty which the Lord Ordinary has felt in dealing with the case. Because, if the views maintained on the part of the defenders are correct, to the effect that the whole of this bank is in reality an extension of Darry Island itself, created by a process of gradual and imperceptible accretion from natural causes, it might be difficult to hold that the defenders were not entitled to follow the island, or that the pursuers were entitled to the exclusive right of fishing from and across this bank, although resting on what was beyond doubt prior to 1840 the *alveus* of the river *ex adverso* of the property of the pursuers.

"But the case cannot, in the opinion of the Lord Ordinary, be dealt with as one of the gradual increase of an island from natural causes, because, 1*st*, it is not quite clear upon the evidence that the formation of the bank began exclusively at the lower end of the island, and extended downwards; for there are some of the witnesses who seem to speak of it as running 'from Seggieden burn up towards the east end of the island.' 2*d*, The trink or gully which runs across the upper part of the bank in a line below Seggieden pier, and prevents the two portions of the bank from being joined together, separates the larger portion of the bank from the island, and tends to confirm the view that the bank was partly formed by accretion upwards from the direction of Seggieden burn. And, 3*d*, the formation of this bank can scarcely be said to be the result of natural causes, inasmuch as it is proved by all the witnesses to have been occasioned by the alterations in the current of the river consequent upon the shutting up of the north channel of the river by artificial operations.

"In these circumstances, it appears to the Lord Ordinary that the boundaries of the rights of fishing in question must be regulated with reference to the position of the island as it existed at the time the north channel was closed up, and to the possession which the parties may respectively have had of their fishings since that alteration was made. And if an action of this description had been brought before the north channel was closed, the Lord Ordinary does not think that the pursuers would have been entitled to have a boundary line drawn so far to the westward of Seggieden burn as that proposed by them. Because this line, in the view the Lord Ordinary takes of the case, would have given them an exclusive right to a portion of water to the eastward of the lower end of the island, over which, according to the custom of the Tay, and the occasional exercise which the defenders appear to have had of a right of fishing at that place, the defenders were, it is thought, entitled to let their nets sweep when necessary in fishing at that end of the island.

"The right of the defenders to fish round the island, as given by their charter, is very broad; and, in so far as the Lord Ordinary is aware, there is no direct authority on the question, how far such a right of fishing can be held to extend beyond either extremity of an island, in a question with proprietors of fishings on the banks of the river immediately above and below the island. In so far as regards the rights of a proprietor of island fishings, as in a question with proprietors of the banks on either side of and immediately opposite the island, there is no difficulty. Because, the island being interposed between the opposite banks, the proprietor of the fishings round an island is understood to have right to fish to the middle of each branch of the river, which in its natural course separates the island from the mainland. But when the question comes to be raised, as here, with reference to the extent to which such a right of fishing may be carried at the extreme end of an island, there is, in the view the Lord Ordinary takes of it, no room for the application of the rules relative to the *medium filum* of a river being the boundary. Because when the extreme point of the island is reached there is at that place no proprietor opposite to the owner of the island on the east; but the rights of the opposite proprietors, on the main banks of the river, come directly into operation as against each other.

"The conclusion, therefore, which the Lord Ordinary has, in this state of matters, arrived at, is that the defenders, in respect of the custom of the Tay, by which a proprietor of a fishing is entitled to a sweep or swing of 24 fathoms beyond his own march in paying out or hauling in his net, and of the occasional exercise which the defenders appear to have had of their right of fishing at the end of the island, are entitled to a sweep of 24 fathoms or 144 feet, at the east end of the island beyond low water mark, which is, in his opinion, the defenders' line of march at that place, into which they may row or allow their nets to swing when fishing at the point of the island. And, applying this rule to the present case, the Lord Ordinary has fixed the line to the eastward of which the pursuers are entitled to an exclusive right of fishing at 118 yards, or 354 feet, instead of 138 yards as claimed by them, to the westward of Seggieden burn, on the following

grounds:—The distance of that burn to the eastward of Seggieden pier, as proved by Mr Young's report, is 496 feet, and low water mark at the east end of the island, as shown upon Mr Stevenson's plan, is very nearly in a line, but a few feet to the westward, of the east end of the pier. The Lord Ordinary has therefore assumed 500 feet as the distance between Seggieden burn and the low water mark, and deducting 118 yards or 354 feet from that, there remains a clear 24 fathoms, within which the defenders will be free to fish beyond their own march, according to the custom of the Tay.

"In so fixing the line, the Lord Ordinary has guarded the interlocutor by the words 'in the existing state of the river,' a course which appears to have met with the approval of the Court in the case of *Wedderburn*, 22d March 1864, 'as leaving it open to the parties to try any question which may arise in the event of any substantial change in the *alveus* of the river.'—2 Macph. p. 909.

"It was contended on the part of the defenders that the case was not one in which it was necessary or proper that any line of boundary should be fixed, and that they were on that ground entitled to be assoilzied from the whole conclusions of the action. Even if the point were open, the Lord Ordinary would not, in the circumstances, have been disposed to give effect to it, because it is pretty clear upon the evidence that there have been several disputes, and that there may in all probability be further disputes between the tenants and of the respective fishings relative to the boundary lines. But the question is one which the defenders are, it is thought, precluded by the pleadings from now raising; as they distinctly state, in answer to the 8th article of the Condescendence, that they are 'willing that the limits of the fishings should be ascertained and determined,' and the defence is throughout prepared on that footing."

Against this interlocutor Mrs Drummond Hay, by leave of the Lord Ordinary, reclaimed, and argued that the Lord Ordinary had given the effect of law to the local custom of the river Tay as to the space of 24 fathoms allowed at either end of each proprietor's fishings. To that they objected.

Authorities cited—*Earl of Zetland* v. *Corporation of Perth*, 6 Macph. 292, Aff. 8 Macph. H. L. 144; *Wedderburn* v. *Paterson*, 2 Macph. 902.

At advising—

Lord President—My Lords, the apparent difficulty of this case has arisen from the impossibility of getting from the parties, or either of them, a due explanation of the points at issue. When I had come at length to understand the pursuer's objection to the Lord Ordinary's interlocutor, I was unable to see what was the ground for the defender's objection to the proposed modification of it.

The matter appears, however, to resolve itself into a question contained in but small compass. The defenders when fishing off the east end of the Isle of Darry may do so to the full extent which the water allows. It has been fixed by the Lord Ordinary, and no objection is taken to this finding, that the Isle of Darry does not include all the banks of mud or gravel which may have formed or may form around it, but that, on the contrary, the island proper cannot be held to extend further down than a certain point—a narrow gully or trink—and below that point the fishings belong exclusively to the pursuers.

The complaint of the pursuers is, that by his interlocutor the Lord Ordinary did not give them exclusive rights as far as the boundary to the west, and I think their contention is well-founded. Such right does not in any way affect or interfere with—(1) the defender's right to fish off the east end of Darry Isle; or (2) the custom of the river Tay as regards fishing at the boundaries of the water of adjacent proprietors.

(1.) As to the first, the defenders may exercise their rights to fish off the east end of Darry Island at different stages of the tide. At high water it is an easy matter, but at low water the fishing ground off the east end of the island is dry land, so of course the right cannot then be exercised, and at such times they can only fish off the south side; I do not therefore think that in any way the pursuer's boundary line interferes with this right.

(2) As to the custom of the Tay (and I regard the custom as a very reasonable one) the proprietors avail themselves of that as a matter of privilege. Privileges such as these ought to be maintained on both sides, but I do not think they have anything to do with the boundary line as proposed. The privilege rather may be said to be fixed by the boundary line than the boundary line by the privilege.

I should suggest that the proper correction on the Lord Ordinary's interlocutor would be to find that the boundary line is the line marked on the plan and claimed by the pursuer, subject to the right of the upper heritors to the full sweep of their net, and subject also to a like right with the lower heritor.

Lord Deas—It is no great wonder that we should have had a difficulty in appreciating the views of the parties here and deciding upon them, for it has taken the parties the whole of this forenoon and a portion of yesterday to find out what they respectively want and to make these views intelligible.

Now that matters are pretty well explained, I am entirely of the same opinion as your Lordship.

Lord Ardmillan—I am of opinion that our interlocutor should lay down the line of boundary quite apart from, and without considering this custom of the Tay. Whether the custom existed or not, the line would be absolute. The Lord Ordinary's interlocutor must be so far altered in expression as not to give either party any exclusive rights of fishing, but under recognition of the custom of the river. I think the Lord Ordinary goes rather too far in limiting the defender's rights as to the length of the swing of the net.

Lord Jerviswoode concurred.

The Court pronounced the following interlocutor:—

> "Recall the said interlocutor; find and declare that in the existing state of the river Tay and of the *alveus* thereof *ex adverso* of the pursuers' lands and barony of Seggieden, the pursuers have the exclusive right of fishing for salmon and fish of the salmon kind in the river Tay *ex adverso* of the said lands and barony, to the eastward of the red line laid down on the plan No. 7 of process, and referred to in the conclusions of the summons, and including therein the exclusive right of fishing, as in a question with the defenders, from the bank lying in the said

river opposite to the said lands and barony to the eastward of the said line, but subject to the custom of the river Tay, which entitles the defenders in making a shot to the westward of the said boundary line, to the full swing of their nets to the eastward of the said boundary line, and entitles the pursuers in making a shot to the east side of the said boundary line to row their boat 24 fathoms to the westward of the said boundary line; and find, subject to the said custom, that the defenders have no right to fish for salmon or fish of the salmon kind in the said river *ex adverso* of the said lands and barony to the eastward of the said line; and reserve the expenses incurred in the Inner House as well as the other expenses in the cause; and remit to the Lord Ordinary, with power to dispose of all questions of expenses."

Counsel for Pursuer and Reclaimer—Solicitor-General (Clark), Q.C., and Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders and Respondents—Fraser and Scott. Agent—John Galletly, S.S.C.

Thursday, July 3.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GILMOUR *v.* GILMOUR.

Trust Disposition for behoof of Creditors—Conveyance—Feudal Title—Infeftment.

An infeftment under a trust-disposition for payment of the truster's creditors does not divest the granter of the feudal title, but merely operates as a burden on the title, and, combined with a power of sale, gives a trustee powers to grant a valid conveyance to a purchaser. *Held*, further, that the heir of the granter cannot avail himself of the trust infeftment to accept a conveyance from the trustee as a feudal title, like a purchaser might have done.

This cause came up by Reclaiming Note against the judgment of the Lord Ordinary (ORMIDALE), in an action for reduction of a disposition in favour of the reclaimer and defender. William Gilmour, sometime timber merchant in Glasgow, acquired by purchase eleven heritable subjects, described in the conclusions of the summons. The whole of these heritable subjects were acquired prior to 1848. By trust-disposition, dated 23d February 1848, he conveyed to James Brock, accountant in Glasgow, as trustee for the purposes therein mentioned, his whole estate, heritable and moveable, including the heritable subjects above mentioned. William Gilmour directed his trustee to hold the means, estate, and effects thereby conveyed in trust for behoof of his whole just and lawful creditors at and preceding the date of the deed. Powers were thereby given to realise and divide the means and estate among the creditors, but under the burden that any surplus that might remain after payment of debts and expenses should be accounted for and paid over to William Gilmour, all as more fully expressed in the trust-disposition. Mr Brock accepted the office of trustee, and intromitted with the estate. William Gilmour died on January 25, 1848, and the trustee died in July 1851, before the whole debts had been paid off, and while a considerable portion of the heritable estate, including the whole of the heritable subjects, remained undisposed of. On 10th February 1852 the defender Alexander Gilmour, a brother of William Gilmour, was appointed judicial factor on the estate conveyed to James Brock in trust as aforesaid, "for the purpose of executing the purposes of the trust not yet fulfilled, contained in the trust-disposition dated 23d February 1848, executed by the said deceased William Gilmour in favour of James Brock, then accountant in Glasgow, and with all the powers conferred by the said trust-deed; and further, with power to him to make up a feudal title in his person to such portions of the heritable property of the said deceased William Gilmour as are still unsold, as well as those which have been sold but are not yet conveyed to the purchasers," and he entered upon the possession of the estates so conveyed in trust, and continued to possess and manage the property down to the year 1871. By that time the whole of the debts of the deceased William Gilmour had been paid out of the income of the estate so conveyed in trust and the proceeds of such portions of the estate as had been sold by the trustee and the judicial factor. The greater portion of the debts were paid by the trustee, and the remainder by the judicial factor. The deceased William Gilmour had only three children, all by his first marriage. One of these—a son—predeceased him without issue. He was survived by the other two, a son and daughter, named respectively John M'Ghie Gilmour, and Margaret Young Gilmour, both of whom were imbecile and incapable of managing their own affairs. Mrs Agnes Drew or Gilmour, the truster's second wife, is still alive. Margaret Young Gilmour died unmarried in 1869. By disposition, dated 17th March 1871, Alexander Gilmour, as judicial factor on the trust estate of the deceased William Gilmour, with the advice and consent of the said James Gilmour, who had been appointed on 3d December 1859 *curator bonis* to the two children of William Gilmour, alienated, assigned, disponed, conveyed, and made over to John M'Ghie Gilmour, and his heirs, assignees, and disponees whomsoever, heritably and irredeemably, the several lands and subjects above described. Alexander Gilmour, as judicial factor foresaid; did not apply for or receive any warrant or authority from the Court to grant the said disposition in favour of the said John M'Ghie Gilmour, and neither the said John M'Ghie Gilmour nor his *curator bonis* ever did make up a title to the property by service. John M'Ghie Gilmour died at Hamilton on the 30th April 1872, unmarried and without issue, and James Gilmour was his nearest heir in heritage. The pursuer is the immediate elder brother, and nearest lawful heir of conquest of the deceased William Gilmour, and claimed, on the death of John M'Ghie Gilmour without having completed his title thereto, to be entitled to succeed to the heritable subjects. He has been served nearest lawful heir of conquest in general to the deceased William Gilmour, and also to John M'Ghie Gilmour.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 26th November* 1872.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, Sustains the reasons of reduction. Repels the defences, and reduces, decerns, and declares in terms of the