

Counsel for Mrs Thomas or Taylor—Mackintosh  
—Low. Agent—John Cay, W.S.

Counsel for Children of George Brown—Shaw.  
Agents—Henry & Scott, S.S.C.

Counsel for the other Claimants—Darling—  
Baxter—Begg. Agents—J. Y. Guthrie, S.S.C.,  
Henry & Scott, S.S.C., Baxter & Burnet, W.S.

Thursday, December 2.

## SECOND DIVISION.

[Lord Lee, Ordinary.]

EARL OF STAIR *v.* AUSTIN AND OTHERS.

*Property—Foreshore—Interdict—Right to Levy  
Harbour Dues.*

S., a proprietor who held on a barony title without express grant of foreshore, erected on the foreshore for the convenience of the fishermen of D. a quay or pier, for the maintenance of which he was in use to exact dues from coasting vessels. He raised an action against the Crown tacksmen of certain adjacent oyster-fishings, and the fishermen employed by them, to interdict them from using the said quay without paying harbour dues. The Court *refused* the interdict, on the ground that S. had not shown any right sufficient to entitle him to interfere with the public use of the shore.

The pursuer in this case was the Earl of Stair, proprietor of the barony of Kilhilt, comprehending, *inter alia*, the five merk land of Drumore, lying in the parish of Kirkmaiden and sheriffdom of Wigtown. The defenders were Harry George Austin of the Archbishop's Palace, Canterbury, and others, the lessees from the Crown of the oyster fishings in the Bay of Luce, in the shire of Wigtown, and William Biggam and others, certain fishermen who resided in Drumore.

The lands of Drumore are situated on the south-western side of the Bay of Luce, and a point projecting from the said lands in a north-easterly direction into the sea forms a smaller bay, which is called Drumore Bay.

In 1809 Alexander M'Douall, younger in Curchie, entered into an arrangement with the Earl of Stair of that time, as proprietor of the said lands and barony of Drumore, by which he undertook to construct a pier or quay and a gravel bank running out from the shore a little to the westward, which should form a tidal harbour and be of use for the safety and mooring of vessels, and for the discharge and trading of cargoes—there being an obligation on the Earl of Stair to grant him a tack of the same. In terms of this arrangement, the quay so having been constructed, a tack was granted, dated 19th March 1822, for ninety-nine years from 1811, by the Earl of Stair in M'Douall's favour, of the quay or harbour of Drumore, and ground and houses connected therewith, with power to the said Alexander M'Douall and his foresaids to levy anchorage and reasonable dues for such vessels as might take the benefit of his works for their safety or for discharging their cargoes. The stipulated rent was £5, the tenant being bound to maintain the works and houses and hail other buildings in proper condition; there

was also a power of removal at any time on certain conditions. This tack having passed by successive assignations into various hands, came by assignation, dated 21st July 1842, into the hands of the Earl of Stair.

The present pursuer averred that he and his predecessors, since the original tack to M'Douall, had fixed and levied dues on vessels using the quay and harbour, and goods loaded or discharged there, according to rules and regulations published from time to time, and that the dues were necessary to meet the expenditure connected with the harbour and access thereto. He further averred that the defenders Harry Austin, Captain George Austin, and Thomas Gann, as joint lessees from the Crown of the oyster-fishings in the Bay of Luce, employed several decked vessels which used the quay and harbour, and that the defenders William Biggam, the owner of the "Vigilant," and others, fishermen engaged in the oyster-fishing, and residing at Drumore, also used the said quay and harbour, but all refused to pay the aforesaid dues. It was to enforce payment of them that he raised the present action, and the conclusions of his summons were (1) that it should be declared that the quay and adjacent shore of the lands of Drumore on both sides of the quay, and the access to the said quay and shore through the said lands, belong to and were the property of the pursuer, and that the defenders had no right or title to moor their vessels or boats by attaching them to the quay at Drumore, or to the stakes, buoys, anchors, or works thereon, or on the said shore now in connection with the said harbour, or to use the said quay, stakes, buoys, anchors, or other works, or the said access to the quay and adjacent shore, for the purpose of trading or discharging these vessels or boats, or otherwise as a landing-place in connection with the fishing in the Bay of Luce; and that the defenders should be interdicted and "discharged from mooring their vessels or boats at the said quay, or to the said stakes, buoys, anchors, or other works, and from using the said quay and access thereto, and to the adjacent shore, through the pursuer's lands, for the purpose of loading or discharging their vessels or boats, or otherwise as a landing-place in connection with the fishery in the Bay of Luce."

He pleaded that (1) being proprietor of the quay at Drumore and adjacent lands, he was entitled to decree of declarator as concluded for; and that (2) the defenders having no right or title, ought to be interdicted from using the said quay or access thereto.

The defenders, on the other hand, averred that prior to the time when the defenders leased the oyster fishings from the Crown, the local fishermen and others from a distance had for years carried on the oyster dredging in the Bay of Luce; that the pursuer's predecessors had not, and the pursuer had not, any royal or parliamentary grant of harbour or other title authorising the erection of a harbour or the levying of harbour dues. Further, that although dues on coasting vessels using said quay had been exacted for some years, no dues had been paid by the owners or users of fishing-boats, and no demand was ever made for payment of dues on such boats till recently. The defenders, like the other boat-owners, moored or anchored their oyster fishing-boats, which were only ten or fifteen tons burden,

in the said creek or bay, but these boats very seldom used, and some of them had never yet used, the said quay, and they did not discharge their oysters thereat.

They pleaded—“(1) The pursuer has produced and has no title to sue. (2) The pursuer's statement is irrelevant and insufficient in law to support the conclusions of the summons. (3) The quay in question being erected on and forming part of the seashore, is not the property of the pursuer. (4) The quay in question not having been erected by the pursuer or his predecessors, and neither he nor they having acquired any title thereto, and it not being situated on or forming part of the pursuer's lands, the defenders are entitled to absolvitor. (5) In any view, the pursuer is not entitled to the decrees of declarator and interdict concluded for, in so far as these are directed against the defenders mooring their vessels in the bay and using the seashore for the purpose of loading or discharging their vessels or boats, or otherwise using the shore as a landing-place in connection with the fishings in the Bay of Luce.”

The import of the proof which was held in the case will sufficiently appear from the Lord Ordinary's note and the opinions of Lord Young and Lord Gifford.

On 30th July 1880 the Lord Ordinary (LEE) pronounced this interlocutor:—“Finds it sufficiently established by the titles produced, and by the possession which has been had under them by the pursuer and his predecessors, that the quay at Drumore Harbour, in the Bay of Luce, and the road leading thereto from the village of Drumore, and also the adjacent shore from which such quay extends, form part of the lands and barony of Kilhilt, belonging to the pursuer, and are the property of the pursuer, and that the defenders, the lessees of the oyster scalps and oyster fishings in the bed of the sea in the Bay of Luce, and others fishing oysters there in their right, have no right or title to use the said quay or road or other property of the pursuer for the purposes of the oyster fishings in the Bay of Luce: To the extent and effect of so finding, repels the defences, and finds and declares in terms of the conclusions of the summons: Grants interdict in terms of the conclusions thereof, so far as applicable to the oyster fishery, and decerns: *Quoad ultra* finds that no grounds have been established for pronouncing decree in terms of the conclusions of the summons, and particularly that no grounds have been established for excluding the defenders, who are called as fishermen residing in Drumore, from the use of the shore in connection with the fishing of white fish in the Bay of Luce: Dismisses the action excepting to the extent and effect above expressed, and decerns: Finds the pursuer entitled to the expenses of process incurred by him, and remits to the Auditor to tax the account thereof when lodged, and to report.”

He appended this note:—“The Lord Ordinary has been somewhat puzzled how to dispose of this action owing to the general terms used in the conclusions of the summons, and to the fact that no distinction has been taken by the defenders as between the rights of those exercising the Crown's right of oyster fishing and the rights of fishermen generally.

“As the Crown is not called, the Lord Ordinary

assumes that no question was intended to be raised by the pursuer concerning the property of the foreshore, or the uses to which it may be subject on the part of fishermen exercising the right of fishing for white fish. He has therefore decided only upon the question raised with the oyster fishers as to their use of the quay.

“It appears from the narrative of the tack of 1822, and from the other evidence in the cause, that the quay in question was constructed about the year 1810, under an arrangement by virtue of which it was in the power of the proprietor to remove Mr M'Douall, who constructed it, on paying to him such a sum as he could instruct to have been expended upon it. Subject to this condition Mr M'Douall was promised by the then Earl of Stair a tack of the said quay and houses for ninety-nine years at a moderate rent, not exceeding £5 per annum, with Lord Stair's consent to the levying of anchorage and reasonable dues for such vessels as might take the benefit of the works. The whole of the adjacent lands belonged to the Earl. There was at that time no road leading to the quay from the village, and none of the public could obtain access to the quay, or could get from the quay to the village, without passing through the private property of the pursuer's predecessor. The regulations originally made would appear to have been submitted for adoption and approval to a meeting of masters and owners of vessels, merchants, farmers, &c., held at Drumore on 5th December 1810. But the evidence shows that the power of levying dues, though given originally to the tenants, with warrandice from fact and deed only, has always been exercised by the proprietor or those in his right. There is no evidence that there was at any time a public harbour at Drumore, and it appears to the Lord Ordinary to be proved that the road leading from the village of Drumore to the quay is a private road, constructed and maintained at the expense of the proprietor.

“It further appears that no objection has ever been taken on the part of the Crown to the use made of a portion of the foreshore in the construction of the quay. The Board of Trade seems to have been satisfied in 1872 that the quay was private property, and it was not contended at the debate that there is any free port or public harbour at that place.

“In these circumstances the question raised by the defenders is, Whether they have right, as lessees of the Crown's oyster fishings in the Bay of Luce, or as otherwise exercising the right of the Crown to the oyster fishings in the sea, to use the quay in question, or to dispute the pursuer's title to it as his private property?

“The Lord Ordinary is of opinion that the defenders have failed to instruct any right to the use of the quay. The lease of oyster fishings upon which they found deals with the oyster fishing in the bed of the sea as a distinct patrimonial right; and the Lord Ordinary does not doubt that they may be so regarded. But such a right gives them no title, and the lease does not profess to give them any title, to make use of the private property of the pursuer, or others holding property upon the seashore; nor does it give them any title to question the pursuer's right to maintain the quay as a part of his property—that not being questioned by the Crown, from whom the lease is derived.

“It is quite settled law, in the Lord Ordinary’s opinion, that the proprietor of a seaboard estate, held under a barony title, may establish by possession a right to the property of erections on the foreshore, and to the foreshore itself—*Agnew v. Lord Advocate*, Jan. 21, 1873, 11 M. 309; *Colquhoun v. Paton*, June 17, 1859, 21 D. 996. And although every right to the foreshore is subject to certain public uses, it is indisputable that the shore may be appropriated; and where it has been appropriated, with the authority, expressed or implied, of the Crown, a separate grant of oyster beds under the sea will not confer a right to make use of the shore so appropriated. Such oyster-fishings may be carried on from any neighbouring port, and imply no right to make use of the adjacent land or property connected therewith.

“The case of the fishermen of Drumore generally, however, is different—at least in so far as the use of the shore is referred to in the summons. By the Scots Act of Queen Anne’s reign (1705, c. 2) persons fishing for white fish obtained right to the use of the shores for bringing in and unloading their fish. The Lord Ordinary is not aware that this right has been taken away. It does not appear to be repealed by the Fisheries Act of 1868. It is necessary, therefore, in his opinion, to avoid deciding anything which might prejudice a claim not distinctly challenged in this action, although the terms of the conclusions might affect it.

“With regard to the claim which the defenders may have to the use of the shore as members of the public, it is only necessary to say that the foregoing interlocutor will not prejudice such claim. It disposes only of the question concerning the defenders’ right to use the quay and its adjuncts. Holding, as the Lord Ordinary has held, that these are the property of the pursuer, the case of *Colquhoun v. Paton* appears to him substantially to decide against the right of individual members of the public to make use of such structures without complying with the proprietor’s conditions, and to negative the title of private individuals to complain of such structures as an encroachment.

“The Lord Ordinary has found the pursuer entitled to expenses, because although decree has not been given exactly in terms of the conclusions of the summons, the only question really put in issue has been decided in his favour. The pleas of the defenders have rendered it necessary to dispose of that question.”

The defenders reclaimed, and argued—The pursuer here was in the same position as the pursuer in the case of *Agnew v. Lord Advocate*—i.e., his title was one of barony, without express grant of foreshore. If, then, he was to prevail, he must show either (1) that he had a right to the foreshore; or (2) that he had held exclusive possession of it since 1809. But (1) even if he had a right to the foreshore, he could only use that right in such a way as that it should not interfere with the public rights on the foreshore. *Vide Digest*, b. 3, t. 8, law 3; Lord Ivory’s ed. of Erskine, b. 2, t. 6, sec. 1, note 91, and cases there cited; *Smith v. Officers of State*, March 11, 1846, 8 D. 711; *Agnew v. Lord Advocate*, Jan. 21, 1873, 11 Macph. 309. And (2) on the evidence, his possession had not been exclusive, for he had not levied dues from the fishermen, and they had for long attached their boats to stakes. *Hagart v.*

*Fyfe*, Nov. 15, 1873, 9 Macph. 127; and case of *Agnew v. Lord Advocate*,

The pursuer, in support of his contention that a proprietor of a seaboard estate who held under a barony title might establish by permission a right to the property of erections on the foreshore and to the foreshore itself, quoted *Agnew v. Lord Advocate*, Jan. 21, 1873, 11 Macph. 309, and *Colquhoun v. Paton*, June 17, 1859, 21 D. 996.

At advising—

LORD YOUNG—It is clearly of advantage to the proprietor of an estate that fishings, whosoever may be the tenants, should be established which give profitable employment to the villagers residing upon his property. Drumore is really a fishing village, situated upon what may be called a sort of natural harbour or anchorage protected by a projected point. The oyster fisheries in the neighbourhood give employment to the inhabitants of the village, and are therefore of advantage to the district generally and to the proprietor in particular. It appears that a predecessor of the present Earl of Stair early in the present century, for the benefit of the district, made a road along the sea-shore to a convenient point for purposes of embarkation and disembarkation; and that he further improved this point for these purposes by making a quay at its extremity. One of the witnesses says:—“The quay was finished in 1810 so far as I remember, and the road was then cut out of one of the Earl of Stair’s fields down to a level with the quay. It was made by people employed by Mr M’Donall. Before that there was no road except to the sea-beach and the sand. After the road was made Mr M’Donall built a wall to prevent the sea from tearing away the road. The road was made no further west than near to the quay—cut out of the brae. Of late years a piece of road was made from the quay to the point of Drumore. It was said to be the Earl of Stair that did that—to one of his farms. The public at large in going to the harbour use the road from Drumore to the quay.” Nevertheless, it was an improvement upon the natural shore, and it would cost a certain amount of money. The making of the road to it was also an advantage; and that it and the road should be used by all and sundry who wanted to go to the shore was just the very thing that made it of advantage to the district, and indirectly to the proprietor of the district. It does not follow from all this—and even from Lord Stair having exacted certain payments from those who availed themselves of the improvements which he had made upon the previous natural state of things—that he could have appropriated, with or without the works by him for the improvement of the harbour, Drumore point as a place where he exclusively, or those having his special permission, should be entitled to embark and disembark, and that all others should be excluded. For him to have pointed out any part of the sea-shore there which should be exclusively appropriated to his own use, or to the use of those having his special permission, is, I think, an extravagant proposition with reference to public rights; but that he should have improved the natural state of things by certain works at his expense was the most natural thing in the world for any proprietor to do. It was not mere benevolence, although that perhaps had something to do with it. Whatever

improves the state of things in a district is a benefit to the proprietor; and it is just the multiplication and continuance of such benefits that has raised things in this harbour from the state in which they were in 1809 to the very different condition in which they are now. Lord Stair or his advisers—probably he was entirely in the hands of advisers in the matter—conceived he had a right of harbour and a right to exact dues from all resorting to the place; but I suppose, consistently with the argument which we have heard, that it was a right of harbour of this particular sort, that he could admit those whom he pleased and exclude whom he pleased. Where there is a grant of harbour—that is, where there is a grant recognised by law—all the world (I mean all at peace with the Queen) are entitled to resort there upon paying the reasonable dues which may be exacted; but the harbour here is a harbour to which some may be admitted and from which others may be excluded at the will of the alleged proprietor. Now, that is altogether out of the question. I do not know how much of this shore the proprietor would include within the space that he so subjects to his entire control that he may admit whom he pleases or exclude whom he pleases. An indefinite space is included. It is a pier—what we are told can scarcely be called a pier, more of a dyke—which was put upon the old natural promontory Drumore Point and the shore adjacent on either side. How much that includes we were told, upon appealing to the bar for information, had not yet been thought of. But it is manifest that the inhabitants of this village upon the sea-shore are entitled to put to the sea in boats and to come back again. From anything that appears they might have to embark twenty miles off on either side; that would be their only way of getting to sea. But they are entitled to land and embark as heretofore in all past time from the adjacent sea-shore, and to moor their boats to the rings which have been put there for the purpose; and they have never been doing more. What in the world is the meaning of this action? I understand it in any other than a legal point of view. Lord Stair says:—"It costs me £20 a-year to keep up this pier"—or whatever is the proper name of it; dyke or anything else,—“and to clear away the periodical silting up; and as a certain number of the villagers have profitable employment in the oyster-fishing, and use their boats in connection with that fishing, I think it is proper that they or their employers should relieve me of that expense because of the convenience which they have in anchoring in the bay, which is to a certain extent protected by this dyke.” That may be more or less reasonable, but I am afraid the legal answer is conclusive:—"Take away your dyke if you like. We don't object to your keeping it there if it serves your purpose; but if you wish to take it away, remove it by all means, and we will land our boats just the same; they may then be as well protected or not as it happens. There is a difference of opinion about that; some say the bank would protect us well enough but for the stones that have been taken out of it to make this pier." But there is no manner of right by which Lord Stair can exact harbour dues. When they land on shore and fasten their boats to the rings, they are just doing what has been done in time past and has not been objected to. They may

be in greater numbers now; that is the amount of their prosperity, which it ought to rejoice the landlord's heart that these fishings have brought to the village and the people of the village. I say nothing about the Crown having appropriated the oyster fishings. They may be entitled to do that and let them to a London company, or they may not; that is not in question. But one result is to bring such additional prosperity to the village and the people thereof, as is indicated by the very concourse of fishing boats to this bay which is referred to; and to say that they are to pay dues because of this pier or dyke which was erected upon the sea-shore in 1809 is a legal proposition altogether out of the question. I entirely concur with the observation which has been made by Lord Gifford—to some extent by all of us, but more pointedly by him—that it is impossible to make any distinction between the people who are embarking or returning from oyster fishing and those who are embarking for or returning from any other kind of fishing; it is in pursuit of lawful business or pleasure upon the sea by the inhabitants of this village, or by the public at large, who are entitled to reach the sea-shore, and they are entitled to embark and to land as heretofore. It has been sufficiently pointed out in the course of the argument that there is really here no question about the use of the pier, that not having been taken by the fishermen in question; but if there had been a question about the use of the pier, as perhaps there formally is by the conclusions of the summons, it would be apparent, I think, from what I have said already that in my opinion there is no distinction between the pier and the rest of the shore. The site of the pier was just the shore, and the pier is nothing more than an artificial erection, and not of a very elaborate character, on a natural promontory which forms one of the parts of this bay, and I can make no distinction, if there was any legal question about it, between the pier and the rest. I have only further to say that I quite assume that Lord Stair has all the right of property in the sea-shore, including this improved natural promontory, which is properly enough called a quay, which any adjacent sea-board proprietor could have in the sea-shore. If there was any dispute about that we have no parties here to try it with. The action is directed against people who are making a use of the sea-shore, not as proprietors, not as claiming any right of property, but as the residents of the district—the inhabitants of this village, or the seafaring public who happen to be dwelling in this village; and although it is quite proper to state as an introduction to argument that the question is about this right of use by the fishermen, it is upon a challenge by the proprietor of the sea-shore. The proprietor of this barony, whose title to the barony is not in dispute, challenges a certain right. I am of opinion that there has been no invasion of his rights by the use of which he complains; therefore it is quite unnecessary to pronounce any decree of declarator of his right in the sea-shore any more than to his Stair estates, or to this barony, which is part of the Stair estates. We assume that; and assuming that, I am of opinion that he sets forth no denial or invasion of any legal right, and that therefore this action is untenable, and that the defenders are entitled to absolvitor.

LORD GIFFORD—I concur, and on the same ground. In a sense this may be said to be an important case, for its conclusions may be calculated to raise some important questions. But fortunately in this case the matter at issue is very trifling, and we are not called upon to give an opinion upon some of the questions. The conclusions of the summons are twofold—first, for a declarator that the pursuer Lord Stair is proprietor of a quay in the locality mentioned, and of a certain portion of the adjacent shore; and also for declarator that the defenders have no right to moor their boats at said quay or at the adjacent shore. Then there is a conclusion of interdict against the defenders, that they should be interdicted and discharged from mooring their vessels and boats at said quay, or said stakes, buoys, anchors, and other works; and these stakes, buoys, anchors, and other works are immediately above mentioned as being on the shore, so that really the attempt is to prevent these oyster-fishers, and all people whom they employ, from using this little harbour, natural bay, or dyke at Drumore for the purpose of oyster-fishing. I think the declaratory conclusions may fairly be regarded as introductory conclusions. I agree that so far as this is a declarator of right in the foreshore or any part of it there are no materials for pronouncing a judgment. The proper defender would be the Crown, but the Crown is not called. The defenders who are called are partly fishermen in Canterbury, in Kent, and seemingly having some connection with the Archbishop's palace, for they are designed as of the palace; and they have no right or interest to raise this question of property, and are eminently not defenders on that point. Neither are the other defenders, who are all residents in or near Drumore, and proprietors of small fishing boats. Plainly these are not the parties to try the question of right of property in the foreshore; and I do not think they have any interest to raise that, for none of them are claiming property in it; they are only claiming public use. I think, therefore, this declarator is really uncalled for. But that leaves open still the question of interdict. A proof has been led in this case, and I think the result of the proof is this, or rather the result of the admissions. The quay was made by the Earl of Stair, or by somebody by arrangement with him; it seems to have been by a tenant in 1809, and he has kept it up—he or his tenant by arrangement with him—ever since such as it is; and he has levied dues from coasting vessels, whatever that expression may mean. He admits that he has never levied dues from fishing boats resorting to the quay or coming into the bay and using the pails. Now, in that state of fact a demand is made that he shall levy dues from the fishing boats belonging to the defenders, the principal tacksmen of the oyster-fishing in the bay, and from all boats, to whomsoever belonging, employed by them in connection with the oyster-fishing. I do not think that conclusion has been supported in point of proof, or upon any ground intelligible or reasonable either in law or equity. If the dredging of oysters had gone on as it used to go on to a similar extent, and on a smaller scale, with vessels of somewhat less size, as it did before the Crown let the fishing to the Kent Company, I suppose there would have been no dues levied. No boat ever paid dues for bringing

in oysters from time immemorial; that has been admitted and proved. Why shall the boats that come from Kent, or the fishermen who bring boats from Kent, pay any dues? The admission on proof was not that it was a gratuity given to the tenants of Drumore estate; the admission is that fishing boats came there, as undoubtedly they had a right to do, ever since there was such a thing as fishing there, or a sheltered bay upon the shore, and they came without paying dues. Why shall there be dues charged now? And that really reveals the secret of this case which underlies the foundation of it, when Lord Stair says he has not been able to show that he has a right of harbour or a right to levy harbour dues. In the statement on record he says—"The defenders nevertheless refuse to pay harbour dues to the Earl, and this action has therefore been rendered necessary." It is not that the defenders are doing wrong, or because any injury has been done, but because they are now refusing to pay harbour dues, although their boats are not coasting vessels, which alone have paid harbour dues hitherto, but fishing boats; and the foundation of Lord Stair's claim is the idea that he has the right to levy harbour dues, and, as the counterpart of that right, to interdict anybody from using the harbour who do not pay harbour dues. The claim of the pursuer comes to this—"I have the right of harbour in Drumore; you the fishing boats from Kent shall not enter that harbour and have the benefit of that harbour without paying me harbour dues." The answer to that is—"You have no right of harbour. Nobody has right of harbour who does not support the harbour, granted as such grants always are for advantage, and containing as they always do an obligation to maintain the harbour for the purposes of the public; and the right to levy dues is the counterpart of maintaining." Lord Stair is not bound to maintain this harbour; he is not bound to lay out that £20, which he seems to think so serious a matter, upon the harbour. He may give up paying and say to the tenants and to the oyster fishermen, "You are the only parties using the harbour; keep it up yourselves." That may be a reasonable thing for him to say, not a very generous thing certainly, but we have nothing to do with generosity. The question we have to decide here is whether Lord Stair is entitled to interdict anybody from going into Drumore harbour, or fastening boats to the pails, or even fixing anchors. They are not even to make a temporary fastening to the shore. I think the answer to that is conclusive—"You have no right to levy harbour dues; you do not pretend to have that right; nothing can be pointed to on which to rest it—no right of harbour, no immemorial usage; and therefore you cannot interdict parties from doing that which they have a right to do without that illegal condition, which you have no right to impose." That seems to me absolutely conclusive of the whole case. I cannot hold that the man who goes out to dredge oysters is not a fisherman, and to make a distinction between the "Vigilant" when she goes out to fish cod and when she goes out to help the oyster-fishing is absolutely absurd. You cannot make people pay in one case and not in another. I think the foundation of this action fails the moment it is seen that Lord Stair has no right of harbour and no right to levy dues; therefore

he cannot make the payment of these dues the condition of the public use of a public harbour.

LORD JUSTICE-CLERK (after referring to an observation by Lord Neaves in the case of *Hagart v. Pyffe*, 9 Macpherson, p. 128, which raised a similar question)—It is not necessary in this case to decide the question absolutely; but it would appear to me that no man by putting down a construction or building upon the sea-shore can prevent that being used as the sea-shore would have been had it never been put there. But the question in this case is really a question of interdict; and after what has been said by your Lordships it is quite unnecessary for me to go further into the case. I would notice, however, that the defenders are actually sought to be interdicted from the use of the shore adjacent to the quay, as well as the quay itself, as a landing-place in connection with the fishery in the Bay of Luce; so that fishermen are actually proposed to be prohibited from setting foot upon the adjacent shore if they happen to be out and returning from fishing oysters. That, in my opinion, is entirely and absolutely out of the question, and I am satisfied that both the declarator and conclusions for interdict are wholly and entirely untenable.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Reclaimers—Johnstone—W. C. Smith. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondent—Asher—Keir. Agents—Dundas & Wilson, C.S.

Friday, December 3.

### FIRST DIVISION.

THE MARQUIS OF BUTE *v.* STUART AND OTHERS (THE MARCHIONESS OF BUTE'S TRUSTEES), AND OTHERS.

*Trust—Foreign—“Heirloom”—Destination of Moveables on a Series of Heirs—Intention.*

Lady B., a domiciled Scotchwoman, by her trust-disposition and settlement, executed in Scotch form, directed, *inter alia*, that certain jewels, &c., should “be held as heirlooms” and settled upon “her only son the Marquis of B.,” and after him on the heirs “entitled to succeed to the B. estates in the county of Glamorgan;” and in the event of his dying without issue they should be sold and the proceeds applied in a certain manner. She also directed that certain plate should be “made an heirloom, and settled and secured upon the same series of heirs as are appointed to succeed to the said Marquis of B.'s Glamorganshire estates.” In an action by Lord B. against Lady B.'s trustees, to have himself declared absolute owner of the plate and jewels, &c., held that the settlement of these articles as “heirlooms” on a certain series of heirs, being competent by English law, the intention of the testatrix ought to be carried out by a deed to that effect, to be executed in English form, and action dismissed accordingly.

Sophia Marchioness of Bute died on 28th December 1859 leaving a trust-disposition and settlement dated in 1859, and duly recorded, by which she conveyed to the trustees therein appointed her whole estate, heritable and moveable. The said disposition contained the following purposes:—“*Fourthly*, I direct and appoint that the jewels, watches, seals, pocket and other personal trinkets and ornaments, bequeathed to me by the late John Marquess of Bute, my husband, shall be held as heirlooms and settled upon my dear and only child John Patrick, now Marquess of Bute, and after him on the heirs entitled to succeed to the Bute estates in the county of Glamorgan; and in the event of my dying before my son attains the age of twenty-one, I recommend and trust that the Court of Chancery will appoint as his guardians the foresaid Colonel Charles Stuart, Sir Francis Hastings Gilbert, Baronet, and Lady Elizabeth Moore, whose near relationship entitles them to the office, and in all of whom I have the most perfect confidence; and if any member of the Bute family shall interfere with or endeavour to prevent such appointment, or refuse to apply for and recommend it, then and in that case, or in the event of my son dying without issue, I direct the said jewels, trinkets, and others to be sold at his death by public auction, and the proceeds applied in the erection of almshouses in memory of my mother and my sister Flora, said almshouses to be erected in or near Edinburgh, their birthplace, and to be called the ‘Flora Almshouses,’ to be used and occupied by the widows and daughters of officers of the British or Indian army in necessitous circumstances, under such conditions or regulations as my trustees may from time to time appoint.” “*Sixthly*, I direct and appoint the plate purchased by me from the executors of the deceased Lord Dudley Stuart to be made an heirloom, and settled and secured upon the same series of heirs as are appointed to succeed to the Marquess of Bute's Glamorganshire estates; and in respect a portion thereof is much worn, I authorise any heir in possession to melt down and restore what may at the time be unfit for use.” The residue of the estate was directed to be applied to the purposes of the almshouses before mentioned, “or in such other manner as my said trustees and their foresaids shall consider most for the honour and benefit of my family.”

In 1873 the trustees, acting under the said trust-disposition, handed over the said jewels and plate to Lady Bute's son, the present Marquis, for his use, and took from him a receipt and obligation dated 12th July 1873. In that document the Marquis of Bute, after referring to the said trust-disposition, and acknowledging to have received the said jewels and plate, “but always on the terms and conditions of the said trust-disposition and settlement,” proceeded:—“Therefore I bind and oblige myself, and my heirs, executors, and successors, at any time (if and when called upon) to concur with the trustees and their successors in settling, by a formal deed or deeds, in such form as may be permitted by the rules of law and equity, the said jewels, watches, seals, pocket and other personal trinkets and ornaments, and the said plate above referred to, upon myself, and after me on the heirs entitled to succeed to the Bute estates in the county of Glamorgan, all in the terms of the said trust-disposition and settlement; and in the event of my