" to pass with floats and rafts down the said river to the " sea, from the 26th of August to the 15th May, and that " from the 26th August to the end of March, they are en- " titled to the exercise of the said right of floating indis- " criminately, without any restriction or limitation, but that " in the exercise of that right from the last day of March " to the 15th May, the persons employed in the floating " must give notice to the tacksman of the Duke's cruive- " fishing, or their manager personally, or at the wauk-mill " of Fochabers, now called the fishing quarters, between " sun rising and sun setting, and that at least four hours " before the floats are to pass, that the Duke's fishers, or " others concerned in the cruives, may make a passage for " the floats or rafts passing the cruive-dykes, and failing " their opening a passage to the floats or rafts within four " hours of such notice, allow the person attending the floats " to open a passage for themselves on the cruive-dyke, and " to pass freely without interruption."

The Duke reclaimed, and the Court pronounced this interlocutor :—" That the superior heritors are only to float " from sun rising to sun setting ; also that they are to pass " the cruive-dyke *seriatim*, at the place pointed out to them " by the Duke's fishers, who are always to make the said " openings, so as to allow the floats to pass freely and con- " veniently."

Against this interlocutor the present appeal was brought.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Henry Dundas* (*Lord Advocate*), *Ilay Campbell, Jas. Grant, Wm. Grant.*

For Respondent, *Alex. Murray, Ar. Macdonald, Dav. Rae, J. Maclaurin, R. Dundas.*

LORD MACDONALD, - - *Appellant.*

NORMAN M'LEOD, Esq. - *Respondent.*

House of Lords, 2*d February* 1781.

RIGHT OF PROPERTY—POSSESSION—PART AND PERTINENT—ACCESSION.—Certain rocks or islands on the coast lay between the estates of two parties. In neither of their rights or titles were there any express mention of those islands or rocks in dispute,

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but both claimed them, as part and pertinent of their estates, by virtue of possession exercised in pasturing sheep and carrying off kelp. The island was nearer to the appellant's estate than the respondent's, and he contended that it must have formed a part, at one time, of his land, by accession thereto: Held the proof of long possession on the part of the respondent, of said rocks or islands as part and pertinent of his estate, by pasturing sheep, and carrying off the kelp, and every other act of ownership of which they were capable, gave him the right of property to the same.

Mutual actions of declarator having been brought by the appellant's and respondent's ancestors, to settle the right to several kelp rocks, lying between the island of Uist, belonging to the appellant, and the island of Harries, belonging to the respondent.

The appellant's ancestors claimed the Barony of Macdonald, comprehending the lands of "North Uist, and nine "penny land and island of Halisker, in North Uist, together "with all and sundry privileges and immunities, as well by "sea as by land, used and wont, lying within the Lordship "of the Isles, and Sheriffdom of Inverness, by virtue where-"of, and of Sir James and his predecessors and authors, "their right and infeftments of the said lands and Barony "of Macdonald, he and they had by themselves and their "tenants, past all memory of man, been in the peaceable "possession of the islands or rocks called Grinam and North "Rangus, being parts and pertinents of the farms of Kylis "and Balliviephail, lying in the island of North Uist, and "that by pasturing of sheep upon, and cutting and carrying "off sea-ware from the said islands or rocks called Grinam "and North Rangus."

The respondent's ancestors declarator concluded, "That "by virtue of their rights and infeftments, their predeces-"sors and authors of their lands of Harries, otherwise called "Ardmeank, pertinents thereof, and small islands thereto "belonging, he and they had, by themselves and their ten-"ants, been immemorially in the peaceable possession, as "their own undoubted property of the island of Bernera, and "the several small islands and rocks adjacent thereto, as "parts and pertinents of the same; and particularly of the "two islands or rocks called *Grinam*, *Sabay*, and *North* "*Rangus*, as proper parts and pertinents of the puruer's "said lands of Harries, and that by pasturing horse, nolt, "and sheep upon, and cutting and carrying off the sea ware "for manuring the land, making kelp from the said islands

" or rocks of Grinam, Sabay, and North Rangus, and by " using all other acts of property thereon.

These rocks or islands were situated on the coast, between Harries on the one hand, and North Uist on the other, only the rock called Grinam was locally situated nearer to the latter property.

After the parties gave in an articulate condescendence of what they could prove, and had described the boundaries of their properties, the Lord Ordinary allowed both parties a proof of their libel. Mar. 9, 1766.

For the appellant's ancestors there were 23 witnesses examined, and for the respondent 41 witnesses. And memorials being ordered on the import of the proof, the Court pronounced this interlocutor:—" Find that the defender, July 17, 1771. " Norman M'Leod, has the exclusive right of property of " the island of Grinam, and rocks thereto adjoining, de- " scribed in the plan and survey of the subject in dispute " betwixt the parties, in manner following, viz. the island " of Grinam, marked No. 4; the rock called by the witnesses " for the pursuer *Skernasholadray*, and by the witnesses for " the defender Skerbuy Grinam, marked No. 2 on the plan; " the rocks close adjoining to the said island of Grinam on " the north, called by the witnesses for the pursuer the " Flows of Grinam, and by those for the defender Sker- " neich, and marked No. 3 on the plan; the rock called " *Shenskernarunuch* by the witnesses for the pursuer, and " by the witnesses for the defender Skernarunuck, lying to " the north, and adjoining to the said island of Grinam, " marked No. 5 on the plan; and the two rocks called by " the witnesses for the pursuer Skerbuinashealad and " Shenskernacloichmore, and by the witnesses for the de- " fender Skershallum-Vic-Vulay, and Shensker, lying to " the north of the Harries side of the island of Grinam, " and marked on the plan with the letters A. B.; the rock, " called by both parties the Flows of Grinam, marked No. " 6 on the plan; and the rock called by the pursuer " Skerbuishensker, and by the defender Skernashiolad, " marked No. 8 on the plan; and find that the pursuer, " Sir Alexander Macdonald, has the exclusive right of pro- " perty of the whole other rocks in dispute by the parties, " viz. the rock called by the pursuer Skerad; the two rocks " called Skernascrave by the pursuer, and Skerinacher and " Skernaclachebrick by the defender, marked Nos. 7 and 9

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" on the plan; the two rocks called by both parties Sker-
" vyeyir and Skernay, marked Nos. 10 and 11; the rocks
" called by the pursuer Skernaroan, and by M'Leod Skern-
" buie Votersy, marked No. 12 on the plan: the two rocks
" called by both parties North Rangus, adjoining to South
" Rangus, marked on the plan No. 14; the small rocks
" called by both parties the Flows of North Rangus, marked
" on the plan No. 13, and the rock called by both parties
" the Beacon Rock, marked No. 15; and the rock called
" by the pursuer Skerbuinorestand, and by the defender
" Skerbuipolbacy, marked No. 16 in the plan, and decern
" and declare accordingly. And the Lords appoint the plan
" above mentioned to be marked in their presence by the
" President as relative hereto, and to remain among the
" warrants of the decree."

June 19, 1772. Both parties reclaimed, but the Court adhered.

Against these interlocutors, in so far as they decreed the property of the forementioned islands and rocks marked on the plan Nos. 2, 3, 4, 5, 6, 8, and A. B, to Norman M'Leod, Lord Macdonald brought the present appeal.

Pleaded for the Appellant.—It is admitted that neither party can shew any title or express right, by titles or plans, to this island of Grinam, and the adjacent rocks; but that it belongs to one or other of them as a part and pertinent of their respective estates. That from its vicinity to the appellant's estate of North Uist, from which, at full tide, it is not distant a gun shot, as the witnesses express it, and at ebb is easily accessible by foot passengers, the presumption is, that it was originally joined to the mainland by North Uist; and this is the more probable, as it appears from the proof that the sea has at that part made many encroachments on these islands, and has probably severed Grinam from the mainland of North Uist, and from every appearance of the general chart of these islands, as well as from the particular plan made in this cause, this presumption seems to be confirmed and established. But supposing it never to have been joined to the mainland of North Uist, yet as both parties claim it as part and pertinent of their larger estate, and as it is so near to the appellant's estate, and at the distance of several miles from the respondent's, the principles of general law, as well as of the law of Scotland, give the preferable title to the appellant, as appears from the authorities.

Pleaded for the Respondent.—Where a subject, not specially contained, in either of their infeftments, is claimed by two parties, as part and pertinent of their respective estates; the question, Whether it belongs to the one or the other, must depend upon the fact of possession had by either of them for such a time, and in such manner, as to denote its being considered his property. The appellant has shewn, first, no evidence that Grinam was a part of North Uist. 2d. The doctrine which he pleads does not apply to an island in the sea. 3d. Vicinity alone can neither give him, as proprietor of North Uist, a right to the island, nor prevent the proprietor of Harries from acquiring a right to it. 4th. It does not appear, and is not shewn, that the island of Harries once belonged to the family of the appellant, nor that Grinam made a part of it. It is by possession alone, therefore, that the right to that island can be determined. Though Sir Norman M'Leod and William M'Leod, for part of the period in which they possessed *Bernera*, under rights from the family of Macleod, were also in possession of Kylis, under rights from the family of Macdonald; this can be no reason why their possession of Grinam should not avail the respondent, it appearing from the evidence that they possessed it in right of Bernera, belonging to the respondent, and not of Kylis. Besides, the respondent has brought evidence of these subjects being possessed by his predecessors, then wadsetters and tenants in Bernera, by a proof reaching as far back as can in any case be expected, and in such a manner as clearly denoted their being considered as part and pertinent of that island. The argument of the appellant, founded on the vicinity to North Uist, of the subjects in dispute, is more than balanced by that proof adduced, because it is proved that the general channel of Grinam was the passage for all vessels of any burden, and the generally reputed march between the estates of Macdonald and M'Leod, and also because that Grinam bore the name of Grinamasheabay, to denote its connection with Shibay in Bernera; and further, because the proof establishes that Grinam and other rocks in dispute, all of which are connected with the island of Bernera, are part and pertinent of his property, and have been enjoyed as such, and possessed by him and his tenants, not as a servitude but as his absolute property.

After hearing counsel, it was

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Ordered and adjudged that the interlocutor be affirmed, with £100 costs.

For Appellant, *Ilay Campbell, Thos. Crosbie.*
For Respondent, *Henry Dundas* (*Lord Advocate*), *B. W. M'Leod, J. H. Frazer.*

Unreported in Court of Session.

CATHERINE and WILLIAMINA FLEMINGS, daughters of WILLIAM FLEMING, Esq. deceased, - - - } *Appellants;*

MALCOLM FLEMING, Esq. - *Respondent.*

House of Lords, 12*th March* 1782.

ANTENUPTIAL CONTRACT—ENTAIL — FACULTY—JUS CREDITI.—Parties, before their marriage, entered into an antenuptial contract of marriage, conveying the estate of the husband to himself, and the heirs-male of the marriage, reserving power to limit the said heirs, with and under such irritant and resolutive clauses as he should think proper. He afterwards executed an entail, in favour of the same series of heirs, prohibiting selling, disponing, or contracting debt, and even selling to pay the entailer's debt. In the contract, he bound himself to "do no fact or deed, whereby the "order or course of succession might be altered or diverted." He thereafter contracted debts to a considerable amount: Held, in a reduction brought of the entail by the heir of the marriage, as in contravention of the contract, that, in the special circumstances of the case, the entail was reducible, and reduced accordingly.

William Fleming, Esq. of Barochan, and Catherine Durham, entered into an antenuptial contract of marriage, by which William Fleming conveyed his estate to himself, and the heirs-male of the marriage; whom failing, to the heirs-male lawfully to be procreated of the said William Fleming, his body, of any other marriage; whom failing, to James Fleming, brother to the said William Fleming, and the heirs-male of his body; whom failing, to the heirs female to be procreated of the marriage between the said William and Catherine, the eldest heir-female always succeeding, without division; whom failing, to the said William Fleming, his heirs and assignees whatsoever, *with power always to the*