HOUSE OF LORDS.

Monday, August 1.

(Before Lord Chancellor (Halsbury), Lords Watson, Fitzgerald, and Macnaghten.)

YOUNG *v.* THE NORTH BRITISH RAILWAY COMPANY AND THE LORD ADVOCATE.

(*Ante*, vol. xxiii. p. 196, and 13 R. 314.)

Property—Foreshore—Prescription—Possession.

A proprietor whose title, dated in 1804, flowed from a subject-superior, and described his property as "bounded on the south by the sea," brought a declarator of property in the foreshore *ex adverso* of his lands against the Crown. No evidence was produced of the superior's title, and the pursuer therefore founded on his own prescriptive possession on his title. He proved that his predecessor had built a retaining-wall, and so reclaimed a considerable portion of the foreshore; that he and his predecessors had been in use for more than the prescriptive period to cart drift sea-ware in large quantities from the shore for manure; that they had occasionally taken stones or gravel from the shore for various purposes; and that they had built and used a private bathing-house on the shore. The Crown in defence proved that a large quantity of stones had been taken by fishermen in their boats from that part of the coast to build a public breakwater, but it was not shown that any considerable quantity had been taken from the part of the foreshore claimed by the pursuer, or that he or his authors knew what was being done. The Crown also proved that members of the public had taken sea-ware from the foreshore claimed by the pursuer in creels or in barrows, but never in carts, as they had only a right of access by foot to that part of the shore, and that they had also taken whelks, mussels, and other shellfish, and shot gulls on the foreshore. *Held* (*aff.* judgment of the Second Division) that the pursuer had proved possession for the prescriptive period, and was entitled to decree of declarator.

This case is reported *ante*, vol. xxiii. p. 196, and 13 R. 314.

The Lord Advocate and the North British Railway Company appealed.

At delivering judgment—

Lord Watson—My Lords, the respondent and his predecessors in title have been infeft since 1809 in the lands of Colinswell, lying on the north shore of the Firth of Forth, under a charter from a subject-superior, dated 5th and 7th November 1804, in which, as well as in their successive infeftments, the subjects are described as a park or enclosure consisting of 22 acres and 3 roods Scots measure, with the pertinents, bounded on the south by "the sea." The measurement applies exclusively to the park or enclosure; the boundary includes not only the park or enclosure but "the pertinents," an expression which may aptly include the *solum* of the shore between high and low water-marks. I can therefore see no reason to doubt that the learned Judges of the Second Division, in holding that his title gives or purports to give to the respondent a right *per expressum* to the foreshore *ex adverso* of his land, followed the settled rule of the law of Scotland, which was thus expressed by Lord Glenlee in *Campbell* v. *Brown*, Nov. 18, 1813, F.C.—"When a landholder is bounded by the sea it is true he has a bounding charter. But it is a boundary moveable and fluctuating *sua natura*, and when the sea recedes he must be entitled still to preserve it as his boundary. The shore is indeed still *publici juris*, but when the sea goes back the shore advances, and the proprietor is entitled to follow the water to the point to which it may naturally retire or be artificially embanked."

In any question with the superior who granted the charter of 1804 and his successors the respondent and his predecessors have all along had a preferable right to the foreshore, but the charter cannot avail him in a question with the Crown unless he can show that his superior had a right to the foreshore derived from the Crown. No evidence has been produced of the superior's title, and the charter of 1804 must consequently be taken to have proceeded *a non habente potestatem*. But notwithstanding the defect of the superior's title the Act 1617, cap. 12, gives the respondent a valid right against the Crown if he can prove that he and his predecessors have, by virtue of their infeftments, had continuous possession of the foreshore without lawful interruption for the period of forty years, which have been reduced to twenty years by section 34 of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94).

The only substantial question raised by this appeal is whether the respondent has proved in point of fact that the foreshore in question has been possessed by the proprietors of Colinswell for the prescriptive period by virtue of their heritable infeftments? Counsel for the appellants did not dispute that the respondent's title affords a good basis of prescription; but they maintained that although his title is capable of being explained by possession so as to include the right of foreshore it does not expressly give him that right. The only material distinction in a question like the present between an express title from a subject-superior and a title not express but susceptible of explanation appears to me to consist in this, that there are certain acts of possession in relation to the foreshore which might in the latter case be attributed to a mere servitude (and would therefore be consistent with the property remaining in the Crown), but which must in the case of an express title be ascribed *prima facie* to a right of property in the subject.

It is in my opinion practically impossible to lay down any precise rule in regard to the character and amount of possession necessary in order to give a riparian proprietor a prescriptive right to foreshore. Each case must depend upon its own circumstances. The beneficial enjoyment of which the foreshore admits, consistently with the rights of navigation and of the general public, is an exceedingly variable quantity. I think it may be safely affirmed that in cases where the seashore admits of an appreciable and reasonable amount of beneficial possession consistently with these rights the riparian

proprietor must be held to have had possession within the meaning of the Act 1617, c. 12, if he has had all the beneficial uses of the foreshore which would naturally have been enjoyed by the direct grantee of the Crown. In estimating the character and extent of his possession it must always be kept in view that possession of the foreshore in its natural state can never be, in the strict sense of term, exclusive. The proprietor cannot exclude the public from it at any time, and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the subject.

Upon the question of fact raised by the evidence in this case I have come to the same conclusion with the Second Division of the Court, and the reasons by which I have been influenced are very clearly stated in the judgment of Lord Young. I think the appropriation of part of the seashore since 1827, and the exclusive exercise of the right of taking drift sea-ware by the respondent and his predecessors, constitute such possession as might have been expected if they had been the grantees of the Crown, and are therefore, taken *per se*, sufficient to fortify the respondent's title against the claim now made by the Crown.

It was strongly urged by counsel for the appellants that the taking of drift sea-ware is not in itself a sufficiently definite act of possession, and that at all events it ought to be referred to a right of servitude, and not to a right of property in the riparian proprietor. I do not doubt that the right of taking such ware may, as they contended, be the subject of a proper servitude, a circumstance which is conclusive of its being incidental to and part of the property of the foreshore. Why the right ought to be ascribed to servitude, when exercised by a proprietor in virtue of a public sasine which professedly gives him the property of the foreshore, I confess that I have been unable to understand. With regard to the relative importance of taking loose ware and the cutting of growing tangle as acts evidencing proprietary right, I can only say that in my opinion it depends not so much upon attachment or non-attachment to the foreshore as upon the beneficial character of the right. I should certainly consider the exclusive taking of a valuable annual supply of loose ware to be at least as emphatic an assertion of his right of property by one having an express title to the foreshore as his taking from it a yearly crop of growing tangle of less value. In the present case it is proved that the drift ware taken by the proprietors of Colinswell and their tenants in their right is of considerable annual value, especially when the extent of the property is taken into account. The only difficulty which I have felt in considering this case has been in regard to what is sometimes referred to as *contraria possessio*, but is better described as concurrent possession by members of the public who have no grant or licence from the Crown. I attach not the slightest weight to the fact that some old women carried off sea-ware in creels for the purpose of manuring their gardens, which were not upon the lands of Colinswell. The removal of clay and stones from the foreshore, which is proved to have taken place at three several periods, is a very different matter. These were in no proper sense the acts of the Crown, but acts of that description, although done without title, tend to derogate from the possession of the riparian proprietor, and if carried far enough will deprive his possession of that exclusive character which is necessary in order to establish a prescriptive right. After careful consideration of the evidence bearing upon these acts, I am satisfied that they were neither of such extent nor of such duration in point of time as to affect the quality of the possession had by the respondent and his predecessors. It seems to be proved that these encroachments by the public (for in my view they were acts of encroachment) were not known to the proprietors of Colinswell, but I do not think the respondent would have benefited by their ignorance if the acts had been more marked in character or longer continued.

I am accordingly of opinion that in these appeals the judgment of the Court below ought to be affirmed with costs, and I move accordingly.

Lord Fitzgerald—My Lords, we are bound to determine this appeal by the light of Scotch law deduced from Scotch judicial decisions to which we have been referred, and now so well settled as not to be questioned. There seems to have been no difference of opinion between the Lord Ordinary and the Judges of the Second Division that if the feu-charter of 1804 had been a royal gift expressed in the same terms it would, as interpreted by Scotch law, have been sufficient to pass to William Young of Burntisland the exclusive rights which the pursuer now claims.

The grant of 1804 is not a Crown grant, nor was it made by one who was shown to have derived from the Crown, but on the interpretation of its terms, and especially in the use of the expression "pertinents" (which is of very potent and comprehensive meaning, and sufficient by Scotch law to pass every subject in connection with the land which usually goes to the vassal as accessory to the subject expressly granted), it would, as between the parties to that instrument, have passed to the grantee the seashore *ex adverso* the land actually granted. The grant not being from the Crown, or from one being a grantee of the Crown, though possibly from the evidence it would be practicable to infer a grant from the Crown, it seems admitted on all sides that the *onus* is cast upon the pursuer to show that he has had for twenty years at least continuously and as of right that quiet and peaceable possession without lawful interruption which under the Act of 1617 now protects him from being disquieted by the Crown or any other pretending right.

By possession is meant possession of that character of which the thing is capable. The difference between the Lord Ordinary and the Second Division was one of fact, and I have—but not without some difficulty—adopted the view of the facts and the inferences to be deduced from them propounded by my noble and learned friend.

If the appeal had related to similar rights either in England or in Ireland I would have hesitated much before reaching a conclusion favourable to the pursuer.

Lord Macnaghten—My Lords, I have had the

advantage of reading the opinion of my noble and learned friend opposite (Lord Watson), and I entirely agree with it.

LORD CHANCELLOR—My Lords, I also have had the advantage of reading the judgment of my noble and learned friend (Lord Watson), and I entirely concur in the judgment which he has delivered, and the grounds upon which he has founded it.

Interlocutor appealed from affirmed and appeals dismissed with costs.

Counsel for the Lord Advocate—Lord Adv. Macdonald — Sol.-Gen. Robertson — Vaughan Hawkins. Agent—Walter Murton, for Donald Beith, W.S.

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END OF VOLUME XXIV.