to a landed estate. Mortifications such as this did not require a formal written title. Any title must suffice to constitute them, such as a letter engrossed in the records of the kirk-session. The existence of such a title was presumed, and its terms were explained by long possession of the right. In this case there could be no doubt that the terms of the original obligation by the granter, whoever he was, bound himself and his successors in the estate. His Lordship referred to the proceedings in a Sheriff-court action in 1822 as shewing that the proprietors of the estate ought to be held bound. In regard to the contention that the proprietor who sold in 1840 was not bound to continue to pay the annuity, his Lordship would not go on the ground that the recipient was an ecclesiastic, but proceeded to show, by reference to authorities, that in similar cases the effect of long possession in raising a presumption of an anterior title had not been confined to the case of churchmen. His Lordship referred to the cases of dry multures (Ersk. ii. 9, 28), the constitution of corporations by prescription, fish teinds, &c. The Lord Justice-Clerk had not differed from his (Lord Deas's) view in regard to the obligation of the proprietor who sold in 1840; nor had he held that, if this had been a sale by a private party, the purchaser would have been bound to continue the payment. In regard to the question of judicial sale, he thought there was a fallacy in the Lord Justice-Clerk's view. Bell did not lay down that the purchaser in a judicial sale may shut his eyes to everything. Here he did look at the whole matter, and he was bound by his title to look at this matter. His Lordship then pointed out fully the nature of the purchaser's rights under a judicial sale, which was a lump sale, inferring no warrandice or rights which would not attach to a lump sale; and this was all that Mr Bell meant in the passage cited, where he was speaking simply of warrandice. In this case, the matter had been put most plainly before the purchaser, as his Lordship proceeded to show at some length. Under this branch the question was, in short, whether this was a public burden or was so dealt with in the sale as to be put on the same footing as a public burden, and so was not struck at by the reduction-improbation of all rights not produced which was implied in every ranking and sale. His Lordship held that, though the phrase public burden was somewhat vague, it meant not a burden paid by every body, but one paid for public purposes or to a public officer, even if it were paid only by an individual; and he referred to cases to show this. A public burden might originate in usage as well as in statute. This gentleman had paid it for twenty-five years, and was as much bound as his predecessors. It was really a question of relief, and the pursuer virtually admitted his own liability by not calling the other party, who must be bound if he were free. His Lordship should be sorry if the law of Scotland should be found to sanction as bold an attempt at injustice as he ever saw in a Court of justice.

Lord Benholme concurred with Lord Deas, holding that the opposite view deprived long possession of the chief effects that have been attached to it in our law.

Lord Neaves agreed with the Lord Justice-Clerk and Lord Ardmillan, pointing out the necessity of a written title for a burden or rent charge on land.

Lord Kinloch said, I have arrived at the same conclusion with Lords Deas and Benholme. I consider the payment now in question to stand in a wholly different legal category from a payment to a private party, alleged to form a real burden on lands. It is a due, or perquisite of office, payable to a known and recognised church officer. Whether in the abstract, and as a matter of legal terminology, the payment is properly designated a public burden, I think comparatively immaterial. I am of opinion that the long use of payment, and the proceedings in the ranking and sale, give to it, in a question with the pursuer, the essential character of such a burden; and make it a charge on the property. I consider the kirk-session, or the official himself, entitled to enforce the payment against the pursuer, in his character of proprietor of the lands.

The Lord President said that the facts, that this was a declarator of immunity of lands, that the pursuer was a singular successor, and that he acquired at a judicial sale, were the whole elements necessary for the decision of the case. It was not necessary to consider what would have been the result if the pursuer himself had paid for forty years, or if he were a descendant of the family who had done so. He was also unwilling to consider the effect of a purchase at a private sale, where the question would have depended on the terms of the disposition—*i.e.*, on whether the right was made a burden on the conveyance. He would also pass over the analogies pressed into his service by Lord Deas from servitudes, corporations, &c. The real question was, whether at the judicial sale the pursuer took the estate free of all burdens, except public burdens? In a judicial sale, public burdens were burdens affecting the lands, or the proprietor as such, and these only. These were good against the purchaser, whether mentioned in the memorial and abstract or not. The mention of the payment in question there, in the present case, was not for the information of the purchaser, but of the Court; and the reference in the articles of roup and decree, being for the special purpose of identifying the lands, could not on the ordinary principles of construction be held to import anything about the sum now in dispute into these documents. The kirk-session might have claimed against the bankrupt, and not having done so, their right was extinguished.

The Court therefore, by a majority of one, altered the judgment of the Lord Ordinary, and gave judgment in terms of the conclusions of the summons.

Agents for Pursuer—Messrs Horne, Horne, & Lyell, W.S.

Agents for Defender—Messrs Menzies & Coventry, W.S.

Wednesday, February 23.

SECOND DIVISION.

WATSON *v.* THE EARL OF SEAFIELD.

Appeal—Act Geo. IV., c. 120—Jury Trial. An appeal was brought from a judgment in the Sheriff-court, in a case raising the question of the character and extent of the public right of white fishing in competition with a grantee of the Crown in salmon fishings, with a view to the trial of the case by jury. After some

discussion, *held* that proof in the case was necessary, but that it was inexpedient, considering the delicacy and difficulty of the questions raised in law, that there should be a jury trial, and proof appointed to proceed before the Court.

This is a question between the Earl of Seafield and a fisherman in the village of Whitehills, in the county of Banff. The Earl is proprietor of the salmon fishings *ex adverso* of his lands in Banffshire, which extend about 18 miles along the seaboard, his right thereto having been declared in an action at the instance of the Lord Advocate, by whom the fishings were claimed on behalf of the Crown in 1866. In the year 1868 the Earl of Seafield discovered that the respondent was setting fixed nets on the shore of the sea, between a point 10 yards below water and a distance of 70 yards, the length to which the net was carried into the sea. He thereupon brought a petition of interdict against the respondent, seeking to have him prevented from fixing or mooring such nets on the shore, alleging that thereby the respondent caught salmon, or at any rate obstructed the passage of salmon. The respondent, on the other hand, denied that the net was used either with the result or the intention of catching salmon, and maintained his right to use it in exercise of the public right of taking white fish from the sea, and further alleged that he and the fishermen along the coast had been accustomed to fish for white fish in that manner from time immemorial.

The respondent made the following statement in regard to the circumstances libelled in the petition:—"Upon Monday the 18th day of May last 1868, in the daytime, the respondent, in the exercise of his lawful calling, and assisted by George Williamson, labourer, Whitehills, set in the sea, within a mile of low water-mark, opposite the farm of Dollachy, in the parish of Boyndie and county of Banff, the three nets referred to in the answer to the second article of the condescendence, which nets are of the description, and were set in the manner after-mentioned for the capture of white fish, and, in particular, for the capture of 'codfish, scathes, and lithes.' The three nets were attached to each other, and made to form one net. One end thereof was made fast by means of a stone sunk in the sea. The net was carried out seaward in a straight line to the length of about 70 yards; it was there made fast by means of another stone sunk in like manner. The remainder of the entire combined net was brought round so as to form an angle, and the end was made fast by means of an anchor; the length of the part of the whole net, after the turn, being about 22 yards. Two nets and a part of the third one of the combined net were extended in the straight line, and it was the remaining part of the third net which formed the angle. Except the stone at one end, the stone at the turn, and the anchor at the other end, there was nothing to keep the net down to the bottom of the sea; and except at the ends and turn, the net did not at high water reach the *fundus* of the sea. The net was set at a distance of 10 yards or thereby from the low water-mark. The end nearest the land was in two fathom depth of water, and the other end in four fathom depth at low water. The net was not fastened to the rocks at all. The meshes of the net were partly 5½ and partly 4½ inches, being adapted for the capture of the larger size of the white fish before-mentioned; and the net, which altogether was an instrument well adapted for the capture of white fish, and different from the salmon net in use on this coast, and neither designed nor adapted for taking salmon, was set in the manner best calculated to a successful catch of white fish, and with no intention to interfere with, limit, or infringe, and it did not interfere with, limit, or infringe the right of salmon fishing belonging to the petitioner. Not known and not admitted that the stone sunk in the sea nearest the shore was sunk at the back of a piece of rock or large earthfast stone, which formed a sort of buttress or catch; but admitted that the stones and anchor were of themselves sufficient to prevent, and averred that they did prevent, the net from drifting. Admitted that the said nets were instruments well adapted to catch white fish. Denied that they were equally well adapted, or adapted at all, to catch salmon. Explained that they might possibly have caught a salmon. Admitted that the said nets were set in the manner best calculated to a catch of white fish. Denied that they were set in the manner best calculated to a catch of salmon, or for any such purpose. Admitted that the net was supported on the surface, and held downwards to the bottom of the sea in the manner admitted in the answer to the second article of the revised condescendence. Denied that the net was calculated to prevent or obstruct salmon, or fish of the salmon kind, from passing along the coast. Admitted that salmon often seek to creep along the coast towards and in search of rivers. Denied that the setting of such nets in the way claimed and averred by respondent is entirely or at all of a novel kind, or illegal or destructive of the rights in the petitioner, and the exercise and use thereof."

A number of prejudicial pleas were stated by the respondent, and, *inter alia*, on the merits the petitioner maintained the following pleas:—(4) "The pursuer, in virtue of his said titles and right, and of his said possession, is entitled to be protected against any access by the respondent to the shore or *fundus* of the sea within the limits above mentioned—that is, an interference with said possession, or operates a limitation of, or infringement on, the petitioner's rights. (5) The respondent, as a member of the public, in exercise of his right of white-fishing, is not entitled to fix nets or other engines on the shore or *fundus* of the sea for the purpose of catching white fish. (6) The right of the public to take white fish from the sea being derived from the Crown, must be exercised in harmony with, and so as to preserve the full exercise of the other rights of the Crown, whether they are held by the Crown itself or by its grantees."

After some procedure, the Sheriff-Substitute (GORDON) dismissed the petition as craving an uncertain verdict. The Sheriff (BELL) recalled this interlocutor and allowed a proof. Thereupon the respondent appealed to the Court of Session with a view to jury trial.

SCOTT and RHIND for appellant (respondent in the Court below), moved that the petitioner should be appointed to lodge an issue, with the view of a jury trial, but that preliminarily the pleas for the petitioner on the merits, above stated, should be repelled.

JOHN MARSHALL, and W. A. BROWN, for the respondent (petitioner in the Court below), answered—The pleas sought to be repelled are available for the decision of the case against the appellant without proof. According to his own admission, he fixes engines on the shore; and the

nets used are of such a nature as necessarily to infer either that they will catch salmon, or obstruct the passage of the fish. It may be that the petitioner is not the grantee of the Crown in the *solum* of the sea, but he is the grantee of the salmon-fishings, and in exercise of that right he is entitled to use the shore. On the other hand, the appellant, as a member of the public, has no right to fix engines on the *fundus* of the shore in exercise of his right to catch white fish. The *solum* of the sea is feudal estate in the Crown, and no amount of possession can be available to acquire a right in it by the public, because the public right to take white fish is not a feudal title.

After considerable discussion, the Court expressed an opinion that it would be desirable to ascertain the facts before answer. The Court was further of opinion that the adjustment of issues, with a view to jury trial, would be a matter of great difficulty, looking to the intricate and important questions involved in the case, in which the parties might not eventually succeed. There were no doubt popular issues in the case, specially adapted for jury trial, but that consideration must yield to the important and difficult character of the legal questions involved. The proof was therefore appointed to take place before one of their Lordships.

Agent for Appellant—W. Officer, S.S.C.

Agents for Respondent—Mackenzie, Innes, & Logan, W.S.

Friday, February 24.

FIRST DIVISION.

PITCAIRN *v.* PITCAIRN.

Testament—Effects—Heritage—31 *and* 32 *Vict., c.* 101, § 20. A left his whole estate, heritable and moveable, to his eldest son B, whom failing to his second son C, whom failing to his third son D, subject to payment of certain legacies and provisions. On his death B made up titles, and died leaving a holograph will, in which, on the narrative of his desire to follow out his father's wishes, he declared that C "should not inherit any of my effects," but that they should all go to D. D maintained that under § 20 of the Titles to Land Consolidation Act 1868, this operated as a conveyance of heritage. *Held*, on a construction of B's intention, that "effects" did not include heritage.

Mr Pitcairn of Kinnaird, in Fifeshire, died in 1857, leaving a disposition and settlement dated 1854, and codicil thereto dated 1855. By this disposition and settlement he conveyed his estate of Kinnaird, and the rest of his estate, heritable and moveable, to David Pitcairn, his eldest son, and the heirs of his body, whom failing to the defender Hope Pitcairn and the heirs of his body, whom failing to the pursuer John Pitcairn and the heirs of his body, whom failing to his own nearest heirs and assignees. The deed farther contained an appointment of David Pitcairn, whom failing the parties succeeding under the foregoing destination, to be the testator's sole executor and universal legatory, but it was thereby declared that David Pitcairn, whom failing the party succeeding to the lands under the foregoing destination, should be obliged, out of the estate and effects heritable and moveable, therein conveyed, to make payment of and provide for the debts, provisions, and others therein mentioned. These were, *inter alia*, to pay to his son Hope Pitcairn, the defender, the sum of £500; to pay to the pursuer John Pitcairn, his son, the sum of £2500; to pay to his daughter Miss Mary Ann Pitcairn, the sum of £4000; and to pay to David Pitcairn, and others therein named as trustees, the sum of £6000, £1500 of which was, on the death of the liferentrix, to be paid equally among David, Hope, John, and Mary Ann Pitcairn, his children, or the survivors and their issue. Various provisions were also made in the event of the succession opening to Hope Pitcairn. And it was declared that the foregoing provisions and additional provision should be real and preferable burdens affecting the lands and barony of Kinnaird, and ground on the west bank of Pittencrieff, and the conveyance thereof therein contained, and appointed them to be engrossed as such in the infeftments to follow thereon, and in all the future transmissions of the lands, till complete payment of the sums and whole interest due thereon. By a codicil, dated 17th July 1855, Mr Pitcairn revoked the provision of £500 in favour of Hope Pitcairn, and directed David Pitcairn, whom failing the party succeeding under the foresaid destination, to make payment to David Pitcairn and the pursuer, and the survivor of them, as trustees for behoof of the children of Hope Pitcairn, of the sum of £1000, and he directed that Hope Pitcairn's share of the sum of £1500 should also be paid to David Pitcairn and John Pitcairn, as trustees for behoof of the children of the said Hope Pitcairn. He farther appointed that the sum to be paid to the pursuer, instead of £2500, should be £2000.

The estate of Kinnaird cost Mr Pitcairn about £12,000; and the burdens on it under it in his disposition and codicil were variously calculated at £13,000, and £15,000. His personal estate amounted to £11,187, odds. David Pitcairn made up a title to the property and possessed it till his death in 1869. He left a holograph will, admittedly made long before his death, in the following terms:—"I, David Pitcairn, merchant, Dundee, eldest son of the late John Pitcairn, Esq. of Kinnaird, being desirous of following out the wishes of said John Pitcairn, my father, as expressed in his last will or testament, hereby declare that Hope Pitcairn, my brother, shall not inherit any of my effects, but that they shall all descend to my brother John Pitcairn, subject to the following burdens," viz., certain legacies, and an annuity to his widow.

The pursuer contended that by this word "effects" David meant both his heritable and moveable estate; and he brought this action to have it declared that his brother was bound to enter as heir to David in whatever character was proper, and convey to him the whole heritable and moveable estate subject to the burdens imposed on it. The pursuer rested his contention on section 20 of the Lands Clauses Consolidation Act 1868, which enacts that words used in a testamentary or *mortis causa* deed with reference to heritable estate, and that would have sufficed to carry moveable estate, shall suffice to carry such heritage, and shall be valid, though the word dispone has not been used.

Lord Mure assoilzied the defender.

The pursuer reclaimed.

Solicitor-General and Asher for him.

Dean of Faculty and Marshall in answer.