At advising—

LORD M'LAREN—This case raises an important question of principle, but when the facts are clearly apprehended it does not present any real difficulty.

Referring to the case itself for the history of the transactions under which the right to certain heritable subjects in Glasgow came to be vested in the first parties (Forbes' trustees), I may begin by observing that the subjects were burdened with a bond for £1500 for which Forbes' trustees were liable to Miss Margaret Wingate, the heritable creditor. To enable the heritable creditor to be paid off, the agent of the trustees, Mr Carrick, advanced the sum of £1475, 1s. 6d. This sum, together with £24, 18s. 6d., from the trust funds, was paid at Whitsunday 1894 to Miss Wingate, who in exchange assigned the bond for £1500 to Mr Carrick as a security for the repayment of Mr Carrick's advance to the trustees.

The estates of Mr Carrick were eventually sequestrated, the confirmation by the Sheriff of Lanarkshire being dated 18th May 1897. The trustee in the sequestration is the second party to the case. From the account between Mr Carrick and Forbes' trustees it appears that Mr Carrick's advance had been extinguished by credit entries representing trust moneys received by Mr Carrick, and at the date of the sequestration there was a balance due by him to Forbes' trustees.

The first parties claim a reconveyance of the heritable bond and subjects disponed in security. The trustee in the sequestration claims to retain the bond on condition of allowing a ranking to the first parties in respect of their claim for a reconveyance of the security subjects.

My opinion is that the right of Mr Carrick in its inception was a redeemable right, that it was in fact redeemed by payments to account, and that the sequestration of Mr Carrick did not alter the character of the right. I should have come to this conclusion on the terms of the bond itself, which I assume to be in the ordinary form, because dispositions in security are always declared to be irredeemable only in the event of a sale under the powers of the bond. We see that after getting the assignation to the bond Mr Carrick granted a letter to Forbes' trustees acknowledging that he held the title in security only, and undertaking on payment of all sums due to him to reconvey the bond with the security subjects. I do not think that this letter was necessary to protect the right of Forbes' trustees; it merely expresses the legal result of the qualified title on which Mr Carrick was holding. But when it is once ascertained that Mr Carrick's title was a qualified title at the date of the sequestration, we have a measure of the right of the trustee, because creditors can only take such right as the debtor himself possessed, or in other words, they take his estate *tantum et tale*, as it stood in his person, being bound by all its conditions and qualifications.

This principle, I may observe, is very liberally applied in favour of the true owner against the creditors of a trustee or other person having a qualified title, because even where the title is *ex facie* unqualified and enters the records as such, the creditors of the *ex facie* absolute proprietor can take no higher right than he himself possessed. This was the point decided by the House of Lords in the case of the *Heritable Reversionary Company* v. *Miller*, 19 R. (H.L.) 43, and the principle of that decision obviously governs security titles as well as trusts. When Carrick was paid his debt, he ceased to have any pecuniary interest in the subjects, his title being then merely nominal. It follows, in my opinion, that the second party is bound to retransfer the subjects unconditionally.

I think that the first and second questions should be answered in the affirmative, and the third question in the negative.

LORD ADAM and the LORD PRESIDENT concurred.

LORD KINNEAR was absent.

The Court answered the first and second questions in the affirmative, and the third question in the negative.

Counsel for the First Parties—Johnston, Q.C.—M'Clure. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Second Party—Dundas, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Wednesday, June 1.

SECOND DIVISION.

[Sheriff of Argyllshire.

CAMPBELTOWN SHIPBUILDING COMPANY *v.* ROBERTSON.

Fishings — Waste or Uncultivated Land beyond High-Water Mark — Statute 11 *Geo. III. cap.* 31, *sec.* 11.

Where a firm of shipbuilders fenced a portion of waste ground belonging to them above high-water mark in order to use it as an extension of their shipbuilding yard and for storing material —*held* that the ground so fenced ceased to be "waste or uncultivated land," and that persons employed in the fisheries had no right to use it in terms of section 11 of 11 Geo. III. c. 31.

By section 11 of 11 Geo. III. cap. 31, intituled "an Act for the Encouragement of the White Herring Fishery," it is enacted that all persons employed in the said fisheries "shall have and exercise the free use of all ports, harbours, shores, and forelands in Great Britain or the islands belonging to the Crown of Great Britain, below the highest high-water mark and for the space of 100 yards on any waste or uncultivated land beyond such mark within the land, for landing their nets,

casks, and other materials, utensils, and stores, and for erecting tents, huts, and stages, and for the landing, pickling, curing, and reloading their fish and in drying their nets, without paying any foreland or other dues or any other sum or sums of money or other consideration whatsoever for such liberty (except as hereinafter is excepted), any law, statute, or custom to the contrary notwithstanding."

In October 1894 the Campbeltown Shipbuilding Company raised in the Sheriff Court at Campbeltown against Dugald Robertson, boatowner, Campbeltown, and his mother, Mrs Euphemia M'Millan or Robertson, residing with him, an action "to interdict the defenders and all others acting for them or either of them, or under the instructions of them or either of them, from entering upon the pursuers' property, called the Trench Point, lying within the burgh of Campbeltown and county of Argyll, and which is bounded on the north by an intended new road through the Trench field, and on the south and east and west by the sea, so far as said property extends above the line of high-water mark of ordinary spring tides, and injuring, destroying, and removing any pillars, posts, fences, and buildings, and foundations of any of the same, erected or to be erected by the pursuers on said subjects above said line, or any other way disturbing the pursuers in the possession of the same, or any part thereof."

Both defenders lodged defences, and pleaded, *inter alia*, that the fence was erected below high-water mark. The defender Dugald Robertson also pleaded—"(5) In any case the defender, the said Dugald Robertson, being employed in the British white herring fishery, is entitled under section 11 of the Act 11 Geo. III. c. 31, to the free use of the shores below the highest high-water mark and for the space of one hundred yards on any waste or uncultivated land beyond such mark within the land for all purposes connected with the said fishery."

A proof was taken, which disclosed the following facts. The pursuers' property at Trench Point extended both to the east and to the west of the point. Before 1894 they used the ground to the east of the point as their shipbuilding yard, that ground being enclosed. The ground to the west of the point was unenclosed. On a part of it wood was stored by the company, the rest was waste ground, and was used by the fishermen for hauling up boats upon, drying nets, &c. In the autumn of 1894 the pursuers found that some of the timber stored in the unenclosed ground had disappeared, and resolved to fence in the ground down to high-water mark with an iron fence. Before doing so they offered to put a gate in the fence so that Dugald Robertson would have a passage through which to reach his boats, but to this Robertson would not agree. On 23rd October 1894, while the fence was being erected, Mrs Robertson entered on the ground and scraped about half a barrowful of cement from the foundation of one of the uprights of the fence and refused to desist when asked to do so by the pursuers' cashier. The action of interdict was consequently raised. In April 1895 Robertson erected a gangway over the fence, having its supports in the pursuers' ground on each side of the fence. He also tied his fishing-boats to the fence and continued to use the ground for grounding and repairing his boats, &c. After the action was raised the pursuers determined to use the ground within the fence for extending their shipbuilding yard, for building ships upon it, and storing material and such like purposes, and applied to the Board of Trade for permission to build a retaining-wall partly on the foreshore.

On 24th November 1897 the Sheriff-Substitute (MACWATT) granted interdict against Mrs Robertson, but assoilzied the male defender on the ground that he did not threaten to injure the fence before the action was raised.

The defenders appealed to the Sheriff (DUNDAS), who on 2nd February 1898 pronounced the following interlocutor:—"Recals the interlocutor of the Sheriff-Substitute, dated 24th November 1897, complained of: Finds in fact (1) that the pursuers have erected an iron fence upon their property at Trench Point, referred to in prayer of the petition; (2) that the said fence is situated wholly above, or landward of the limit of high-water mark of ordinary spring tides; (3) that on 23rd October 1894, while the said fence was being erected by the pursuers, the defender Mrs Euphemia M'Millan or Robertson entered upon the pursuers' ground and scraped about half a barrowful of cement from the foundation of the third upright from the north end of the said fence, and declined to desist when asked to do so by Latimer M'Innes, the pursuers' cashier; (4) that the defender Dugald Robertson lodged defences to this action, that in April 1895 he erected a gangway over the said fence, having its supports in the pursuers' ground on either side of the fence, that he has on various occasions tied his fishing boats to the said fence, and that he has used and still asserts his right to use the ground to the east of the said fence above the high-water mark of ordinary spring tides, being part of the property of the pursuers for grounding and repairing his boats and for other purposes: Finds in law that neither of the defenders is entitled either at common law nor in virtue of the Act 11 Geo. III., cap. 31, to enter upon the pursuers' property, subject as after mentioned, nor to interfere with, use, or injure the said fence or the foundations thereof: Therefore recals the *interim* interdict, and interdicts the defenders from entering upon the pursuers' property, called the Trench Point, lying within the parish of Campbeltown and county of Argyll, and to the south of the road intended to be made through the Trench Point field in continuation of the road known as Askomil Walk, bounded by the line of the said intended road on the north, and by the sea on the other parts, so far as the said property extends above high-water mark of

ordinary spring tides, subject always to any right which the defender Dugald Robertson may have under the said Act 11 Geo. III., cap. 31, to enter upon or use the said ground westwards of the said fence, and from injuring, destroying, or removing the said fence, being an iron fence erected by the pursuers upon or towards the west side of their said property, and the pillars, posts and foundations of the said fence, or in any other way disturbing the pursuers in the possession of the same."

Note.— . . . . . "3. As regards Dugald Robertson, the pursuers have taken advantage of the defenders' appeal to argue that interdict ought to have been granted against him also. I have, differing from the conclusion at which the Sheriff-Substitute has arrived upon this point, given effect to the pursuers' contention. I think that the nature of the defences lodged by this defender, his actings since the proceedings have been in Court, and his own evidence in the witness-box, afford quite sufficient warrant for pronouncing interdict against him as well as against his mother, unless the separate defence stated by him, to be immediately noticed, can be successfully maintained.

"4. The separate defence to which I refer is based upon the provisions of the Act 11, Geo. III., cap. 31, sec. 11. The defender Dugald Robertson insists that this plea should be definitely dealt with, and I shall therefore express my views upon it. The Act does not in my opinion confer upon fishermen a right to enter upon ground above the foreshore as defined in the Act, unless the same is 'waste or uncultivated' (see *Hoyle* v. *M'Cunn*, 21 D. 96, decided upon a construction of exactly similar words occurring in the Act 29 Geo. II., cap. 23, sec. 2, since repealed, and *Scott* v. *Gray*, 15 R. 27). The ground here in question is certainly 'uncultivated.' But I do not think it can fairly be characterised as 'waste.' It is part of the pursuers' shipbuilding yard, and they have enclosed it by the fence in question with the view apparently of levelling the ground and using it for the purposes of their increasing business as shipbuilders. This they could not do if the defender or other fishermen is free to occupy the ground for the purposes indicated in the Act. The defence under consideration is therefore, in my judgment, bad. My interlocutor, however, reserves to the defender Dugald Robertson any rights which he may have as a fisherman in virtue of the said Act, as regards the unenclosed portion of Trench Point lying to the west of the fence." . . .

The defenders appealed, and argued—At the date of the raising of the action the ground west of Trench Point was waste ground, and the fishermen were entitled to beach their boats upon it in terms of 11 Geo. III., c. 31, sec. 11. In the record there was not a word about using the ground fenced as part of the shipbuilding yard. Making use of the ground for storing wood was not changing waste or uncultivated land into cultivated ground. Interdict should be refused.

Argued for pursuers — The only right given to fishermen by the statute was to use ground which for the time being was waste or uncultivated. But their having done so for a lengthy period did not prevent the proprietor from making use of his ground for industrial purposes. Whenever he did so the ground ceased to be waste or uncultivated. The pursuers were entitled to fence their own ground in order to enclose it as part of their shipbuilding yard or for storing purposes. When this was done the ground ceased to be waste, and the fishermen were not entitled to interfere with the fence or trespass on the ground—*Hoyle* v. *M'Cunn*, December 10, 1858, 21 D. 96; *Scott* v. *Gray*, November 15, 1887, 15 R. 27.

LORD JUSTICE-CLERK — The question originally intended to be discussed is now out of the case. It was whether a certain fence extended below high-water mark, and this, it is now admitted, it did not. The defender had a right to draw up a boat at the point of land where the fence was placed so long as it was waste or uncultivated ground. The pursuers did not and do not now dispute that they first erected the fence because they found that wood was being removed from their yard, and they put up the fence to prevent this. At that time they did not intend to occupy the ground as part of the yard, and they told the male defender that he would have a passage through the fence to reach his boat as before. They were within their right in doing so. There may be a question whether their closing in the ground by a fence for such a purpose caused it to cease to be regarded as "waste or uncultivated ground," but the pursuers afterwards determined to occupy the ground for industrial purposes, that is to say, for increasing their shipbuilding yard, and they have applied to the Board of Trade for permission to build a retaining-wall. It is contended by the defender that if he, as a fisherman had used the ground for a long period of time as ground on which to draw up his boat and to dry nets, the pursuers have no right to exclude him by using the ground for extending their yard or for any other purpose except cultivation. I cannot entertain that proposition. It is not a question of time at all. They have right under an Act to use ground which belongs to the pursuers for drawing up their boats, but the Act says that the right is only to be exercised on waste or uncultivated ground. The right extends only to that point of time at which the proprietor sees fit to use his ground for useful purposes. When he does so it gives way to his right of property.

LORD YOUNG — I concur. What we decide is, that the pursuers have a right to enclose their ground and extend their shipbuilding yard. I have no doubt that within the limit of high-water mark the pursuers have right to make use of the ground formerly waste by enclosing it and using it as part of their shipbuilding yard.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore of new recal the interim interdict, and interdict the defenders from entering upon the pursuers' property called the Trench Point lying within the burgh of Campbeltown and county of Argyll, and which is bounded on the north by an intended new road through the Trench field, and on the south and east and west by the sea, so far as said property extends above the line of high-water mark of ordinary spring tide, and injuring, destroying, and removing any pillars, posts, fences, and buildings, and foundations of any of the same erected or to be erected by the pursuers on said subjects above said line, or in any other way disturbing the pursuers in the possession of the same or any part thereof, and decern."

Counsel for Pursuers — Guthrie, Q.C.—Cullen. Agent—F. J. Martin, W.S.

Counsel for Defenders — Craigie—T. B. Morison. Agent—Marcus J. Brown, S.S.C.

Friday, June 3.

SECOND DIVISION.

KARRMAN *v.* CROSBIE.

Expenses—Reparation—Expenses of Separate Actions against Same Defenders—Joint Defence—Fees to Jury.

Four pursuers raised separate actions of damages for injury against the same four defenders. The defenders concurred in a joint defence to each action. After the adjustment of issues the cases went to trial together, with the result that two of the defenders obtained a verdict in their favour, and were assoilzied and found entitled to expenses as against the pursuer, while as against the other two defenders verdicts were returned for the pursuers with varying sums of damages, and these defenders were found liable to the pursuers in expenses.

Held (1) that the two successful defenders were entitled as against the pursuers (*a*) to one-half of the expense of the joint defence, but (*b*) not to one-half of the fees paid to the jury, as this charge fell upon the unsuccessful defenders only; and (2) that all the pursuers were entitled as against the unsuccessful defenders to their separate expenses from the raising of their actions down to the time when the cases went to trial.

The question in this case arose on objections to the Auditor's reports on the taxation of the accounts of expenses in four separate actions brought by Mrs Rachel M'Masters or Karrman, Miss Elizabeth Macfarlane, Miss Jeanie Walker with consent of her father, and Miss Lizzie Walker, against Hugh Talbot Crosbie, James M'Glashan, John Swinton Woodburn, and William L. Dick, for injuries caused to the pursuers by their having been run down by the defenders while cycling.

The facts of the case and the arguments of parties so far as they are concerned with the points in question are fully set forth in the following opinion:—

LORD TRAYNER — The questions now before us arise under the following circumstances. There are four actions at the instance of different pursuers, each directed against the same four defenders, and claiming damages in each case for injury done to each pursuer through the fault of the defenders. One of the actions —the first—was raised on 19th March 1897, and the other three on 8th June thereafter. The whole defenders concurred in a joint defence to each action. After the adjustment of issues the cases went to trial together, with the result that two of the defenders obtained a verdict in their favour, and were assoilzied and found entitled to expenses against the pursuers, while as against the other two defenders verdicts were returned for the pursuers with varying sums of damages. For these damages decree was given, and the defenders found liable therein were also found liable to the pursuers in expenses. The accounts of the expenses thus severally allowed have been taxed by the Auditor, and objections to his reports are now stated by the parties for our determination.

1. The whole four pursuers object to the mode in which the Auditor has proceeded in reference to the account of expenses found due to the two successful defenders, who were assoilzied. The manner in which these defenders have stated their accounts against the pursuer in each case is as follows:—They set forth (1) those items of expense incurred in each case exclusively for their individual behoof (and to this no objection was taken), and (2) the items incurred in the joint defence of which they claim one-half, which the Auditor has allowed. The pursuers object to the successful defenders being allowed so large a proportion of the expense incurred by the joint defence, but I cannot say that I heard any very distinct ground stated in support of the objection, nor any suggestion as to what proportion of these expenses should be allowed to these defenders, if a half was disallowed. It was stated that two of the pursuers, to whom comparatively small sums of damages had been awarded, would suffer pecuniarily if the Auditor's view was supported, that one of them would scarcely receive anything in name of damages at all, while the other would be out of pocket. But that consideration is altogether irrelevant. If the pursuers raised actions against persons against whom they had no claim, they