BAIRD, ... APPELLANT.
FORTUNE, ... RESPONDENT (a).

1861. March 14th, 15th, and April 25th.

Barony—Severed Portion—Right to Sea-ware. — An inland farm, part of a barony situated on the seacoast, was sold off, and severed from the bulk of the property. Circumstances under which it was held by the House (reversing the judgment of the Court of Session) that the owner of this severed inland farm had no right, either by grant or by prescription, or upon any view of the evidence, to take or interfere with the wrack and ware drifted on the shore of the barony.

"*Part and pertinent.*"—Inefficacy of these words when unsupported by proof of enjoyment.

Servitude.—There must be two tenements ; one enjoying, the other sustaining, the servitude. When the same individual becomes owner of both, the servitude ceases, for *res sua nemini servit*, and the use subsequently made of the servient tenement is an exercise, not of the right of servitude, but of the right of property.

Prescription—Disability.—Per the Lord Chancellor : The law of Scotland says that prescription shall not run at all against minors ; but the law of England, after prescription has once begun to run, disregards supervening disabilities; p. 139.

THE Appellant, Mr. Baird, as heritable proprietor of the barony of Ardross, and others, in the county of Fife, in June 1854, sought an interdict against Mr. Fortune, and commenced an action to have it found and declared that he (Mr. Baird) had the sole and exclusive right to the sea-ware growing or drifted upon the seashores adjacent to his estates.

The summons further sought to have it found and declared that the Defender, Mr. Fortune, the owner

(a) See this case very fully reported, as decided by the Court of Session, in the Second Series, vol. 21, p. 848.

BAIRD v. FORTUNE.

of an inland farm which had once formed a part of the baronial estates, but which had been severed therefrom by alienation so far back as the year 1778, had no right or title to the said sea-ware, or to remove or otherwise interfere with it; and that he ought to be decerned and ordained to desist and cease from removing or otherwise interfering with the said sea-ware in any manner of way.

The estate of Mr. Fortune thus severed from the barony is called North Muir Cambus. It is an inland farm, lying between two and three miles from the seacoast; and Mr. Fortune's chief contention was, that much as it had once formed part of the barony, the right of taking drifted sea-ware had passed along with it as a "pertinent."

The *Lord Ordinary*, on the 20th March 1856, granted the interdict sought, declared in terms of the libel, and found Mr. Fortune liable in expenses. To this Interlocutor his Lordship annexed a Note, which was partly as follows:—

The question seems to turn upon the terms of the conveyance by which Mr. Fortune's father acquired this detached farm in 1814. At the time when the purchase was made, this farm, along with another called Longfolds, a part of the barony, was under lease to a person of the name of Edie, which lease contained a privilege to the tenant, along with the other tenants of the barony, of taking the driven sea-ware for manuring North Muir Cambus and Longfolds. But in the conveyance no special mention is made of sea-ware, and no reference at all to the possession of Edie. The question comes to be whether by the general terms of the conveyance it is to be held that the privilege of sea-ware, which formed part of the barony rights, was conveyed as part and pertinent of this farm. Considering that North Muir Cambus lies quite disjoined from the seashore, the Lord Ordinary has come to be of opinion that this question ought to be answered in the negative. When an inland farm alone is conveyed, it is not to be presumed that, as part and pertinent of it, the privilege of sea-ware is to pass.

Upon a reclaiming note, a proof was allowed, and after proof, the First Division of the Court of

BAIRD v. FORTUNE.

Session, on the 27th November 1858, ordered the parties respectively to prepare and lodge cases, which order having been complied with, the same Court, on the 25th of May, after full consideration, recalled the Interlocutor of the *Lord Ordinary*, sustained the defences of Mr. Fortune, assoilzied him from the whole conclusions of the summons, and condemned Mr. Baird in expenses.

Against this judgment Mr. Baird appealed to the House.

The *Attorney-General* (*a*) and Mr. *Anderson* were of Counsel for the Appellant, Mr. Baird. They insisted that the Respondent, Mr. Fortune, had no right to collect wrack or ware *ex adverso* of the Appellant's baronial estate. There was nothing in his title to authorize such a privilege, which could not be held to pass under the general words "parts and pertinents." The case was not one of grant, and the claim of prescription was equally untenable. In fact, it was abandoned by the Respondent in his printed case.

The *Lord Advocate* (*b*) and Mr. *Rolt* for the Respondent, argued that the words "parts, pendicles, and pertinents," when explained by usage, were sufficient to carry the right to sea-ware for the use of the farm, and they contended that the liberty which was granted to the tenants prior to the alienation justified the inference that the conveyance included the privilege in question.

The arguments on both sides are fully examined in the following opinions which fell from the Law Peers.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*c*):

My Lords, in considering this case I have been much perplexed by the difficulty I have experienced in try-

(*a*) Sir Richard Bethell. (*b*) Mr. Moncrieff.
(*c*) Lord Campbell.

BAIRD v. FORTUNE.

Lord Chancellor's opinion.

ing to discover the *ratio decidendi* on which the Judges of the First Division of the Court of Session have proceeded in reversing the Interlocutor of the *Lord Ordinary.*

It is not disputed that the *onus probandi* lies on the Respondent to establish the right which he claims.

In his pleas in law he relies on "grant" and on "prescription" as separate and distinct defences.

The *Lord Ordinary,* whether rightly or erroneously, in a very short but lucid and logical judgment, decided against him on both questions. In pursuance of an opinion which Lord *Deas* delivered, and in which his brethren of the First Division unanimously acquiesced (although we are not told, whether for the same, or what other reasons), the interdict which had been granted was recalled, and the Respondent was assoilzied from all the conclusions of the libel.

The opinion in favour of the Respondent anxiously declares, that it was not founded either on "grant" or "prescription," but on "a complex view of the titles of the parties, and the proof;" the learned Judge adding, "I take into view all the elements afforded by the titles and the proof, without saying what might have been the effect of the absence of any one of these elements."

I must confess, my Lords, that, after having frequently read and re-considered this opinion, I am very much at a loss to say what doctrine is to be deduced from the judgment founded upon it; and I am left to conjecture whether the right which the Respondent is supposed to have established is to be considered a "servitude" or a "privilege;" and, if a privilege, to what category of privileges it is to be ascribed. Should the judgment stand, I am afraid that the law of Scotland respecting the right to take "wrack and ware" drifted on the seashore would be left in a very

BAIRD v. FORTUNE.

Lord Chancellor's opinion.

uncertain and unsatisfactory state. But, my Lords, after much consideration, I must advise your Lordships to reverse the Interlocutor appealed against, and restore the reversed Interlocutor of the *Lord Ordinary*.

It is material to begin with considering the nature of the right of the owner of this barony to the "wrack and ware" drifted from time to time on the shores of the barony. In the present cause the baron's right to the "wrack and ware" must be considered irrespective of any claim to the soil of the shore between high-water and low-water mark. The Pursuer does not assert any distinct claim to property in the soil; and the Defender, over and over again, denies that the Pursuer has any such title. But the Defender does not dispute, and Lord *Deas* adjudges, "that the Pursuer, as proprietor of the barony, has a good title to appropriate the wrack and ware drifted from time to time on the shores of the barony." This he has by virtue of the Crown charter under which he holds, as he might have the right to all "wreck of the sea" drifted on the shore *ex adverso* of his barony.

His right is not to so much of the wrack and ware as should be required to manure the lands within the barony, but the whole is absolutely his property as soon as he has taken possession of it for any purpose whatsoever.

It must be observed that this is a right of a totally different nature from the right to herbage or other renewable produce growing on the soil of the baron, of which another might have a qualified right to take a portion, by way of servitude, as owner of a dominant tenement. The "wrack and ware," or seaweed, so drifted on the shore of the barony belonged to the proprietor of the barony, and he had power "to do

BAIRD v. FORTUNE.
Lord Chancellor's opinion.

what he liked with his own." He might, by special agreement with his tenants within the barony, give each of them a right to take as much of the seaweed as could be usefully employed by the tenants in manuring their respective farms; or, without conferring upon any of them any such privilege, he might have appropriated the whole of the seaweed drifted on the shore of the barony to the manufacturing of kelp or barilla; the manufacture being carried on either by himself or by some person to whom he let or sold the whole of the seaweed so drifted. A part of this seaweed actually had been, and the whole of it might have been, lawfully so appropriated.

But at the same time I doubt not that according to the case of *Fullarton* v. *Baillie* (*a*), the proprietor of the barony might have granted to the owner of land beyond the limits of his barony the right to take so much of this seaweed as would be required to manure such land; or, in selling and alienating a portion of land within the barony so dissevered from the barony, he might have granted to the alienee a right to take so much of the seaweed so drifted as would be required to manure the portion of land so alienated; and this right so granted might pass as "part and pertinent" of the land so alienated.

This would be a right established by "grant."

But in the present case is there any evidence to prove the grant claimed?

The Defender is owner of the farm of North Muir Cambus, formerly parcel of the barony of Anstruther, but since the year 1778 severed from it, and held under a different title. This farm is entirely inland, and there is no part of it nearer the seashore than about two miles. The barony extends several miles along the shore of the Firth of Forth, and all the drifted

(*a*) 16th July 1696, Morr. Dict. 13,524.

seaweed to be found on the shore *ex adverso* of the barony was the property of the baron, to be used and disposed of as he thought fit. The Defender insists on a right for himself, and all who are to come after him, to go to any part of the shore *ex adverso* of any part of the barony, and there to take as much seaweed as may be required for manuring any part of the farm of North Muir Cambus, with a consequent power of subdividing this farm, and feuing it out to an indefinite number of purchasers, and conferring on each of them proportionately, a similar right, as "part and pertinent." If this be established, the baron is not only prevented from ever again appropriating the seaweed to the manufacturing of kelp or barilla, but he could not sell off any portion of the barony bordering on the seashore, and give to the purchaser the exclusive right to take the seaweed drifted on the shore *ex adverso* of the portion of the barony so sold.

Lord Chancellor's opinion.

The Defender, by his pleas in law, asserts, that "when the Defender's lands were disjoined from the "rest of the barony, the privilege must be held to "have effeired to the whole lands, including Muir "Cambus, and to have passed with other pertinents "under the transmissions of Muir Cambus; and the "Defender, being now in right of part of the said "barony, with all parts and pertinents at any time "belonging to the same, is entitled to take ware for "the use of his lands, for similar purposes and to the "same extent proportionally as the Pursuer is entitled "to do for the rest of the barony." But this right has not the slightest resemblance to a right of common of pasture, or any such servitude appurtenant to a dominant over a servient tenement. Here there is no servient tenement, and the right of the owner of the barony is merely to take personal chattels, the property in which is vested in him by the Crown. If a right

BAIRD v. FORTUNE.

Lord Chancellor's opinion.

to take the seaweed drifted on the shore *ex adverso* of a part of the barony bounded by the sea might be supposed to pass by general words to a purchaser, it is absurd to suggest that such a right could be supposed to pass impliedly by a conveyance of a part of a mountain several miles from the sea, although it had once been within the barony.

The Defender must, therefore, show that the right which he claims was actually granted to his father, and that his father's author had this right in him to grant. The disposition of Charles Ferrier to John Fortune, dated 20th June 1814, is "of all and whole " those parts of the town and lands of Muir Cambus, " called the North farm of Muir Cambus, as the same " now is or was sometime possessed by Thomas " Fowlis, with the houses and parts, pendicles, and " pertinents whatsoever."

To see whether such a right was in Ferrier let us trace the title to North Muir Cambus from 1778, this farm being then severed from the barony when Sir John Anstruther, the third baronet, executed a new entail of the barony. We must remember that the right to take the "wrack and ware" drifted on the shore *ex adverso* of the barony was attached to the barony, wholly unconnected with the farm of North Muir Cambus. The tenant of that farm probably had in his lease, like the other tenants within the barony, expressly granted to him by his landlord leave to take seaweed for manuring the farm, but this being matter of personal contract between landlord and tenant, would expire with the period for which it was granted.

Sir John Anstruther, the third baronet, holding the farm of North Muir Cambus in fee simple, on the 12th July 1794 executed a trust disposition, whereby he conveyed it to trustees, who sold it to his grandson,

Lord Chancellor's opinion.

John, afterwards Sir John Carmichael Anstruther, the sixth baronet; and he, in September 1808, sold and conveyed the farm to his father, the Right Honourable Sir John Anstruther, Chief Justice of Calcutta, the fifth baronet. The ex-Chief Justice having died in 1811, seised in fee simple of the farm of North Muir Cambus, leaving his affairs in a very embarrassed condition, his eldest son and heir, Sir John Carmichael Anstruther, the sixth baronet, made up his titles to the farm, and conveyed it to Charles Ferrier, the author of the Defender's father. These dispositions convey "the farm of North Muir Cambus "as the same now is or was sometime possessed by "Thomas Fowlis, with parts and pertinents," using words of style to be found in all conveyances of real property of whatsoever description.

The dispositions do not, like the leases to the tenants, give any right or leave or licence to take wrack and ware from the seashore *ex adverso* of the barony, or make any mention of, or allusion to, the barony whatever.

The Defender, however, relies on the alleged exercise of the right by the tenants of this farm, and the grant of it to one of them in his lease. Fowlis was tenant till 1804. His lease cannot be found; but it may fairly be supposed to have had the clause similar to that contained in above 50 leases to the Anstruther tenants, which are extant:—"The tenant shall have liberty of the drove sea ware, along with the other tenants of the barony, for manuring the farm." In 1804 a lease was granted to Edie of North Muir Cambus, and a park called Longfolds, for twenty years, by Robert Anstruther, acting on behalf of the trustees of Sir John Anstruther, the third baronet; and this lease contains the clause, "the tenant shall have liberty of the drove sea-ware along with the other tenants of

BAIRD v. FORTUNE.

Lord Chancellor's opinion.

the barony for manuring the farm and Longfolds Park." The very next clause in the lease is, "the tenant to have the use of the east upper granary near Elie Lent Miln, for holding 100 or 150 bolls of victual, when the proprietor has no victual in it himself."

There is evidence that both Fowlis and Edie were in the habit of taking seaweed from the shore of the barony to manure their farm. But if evidence had been given that they had the use of "the east upper granary near Elie Lent Miln for holding victual," would this show that such a use of the east upper granary near Elie Lent Miln passed as a *part* and *pertinent* to the Defender's father, under the conveyance of North Muir Cambus farm with its *parts* and *pertinents?* The right to dispose of the seaweed on the shore *ex adverso* of the barony never was in the trustees, but remained in Sir John Anstruther, as owner of the barony, under the new entail which he executed; and if the trustees had expressly granted the right claimed, to be for ever annexed to North Muir Cambus, this grant would have been void against the Pursuer as a singular successor.

Indeed I think it is admitted that the Defender's claim cannot be supported on the ground of "grant" alone.

The claim on the ground of "prescription" alone is still more untenable, and may be more briefly disposed of.

The defence of "prescription" is set up by the fourth plea in law:—"The defender and his predecessors, having actually taken sea ware from the adjacent shore constantly and uninterruptedly for upwards of forty years, have now a prescriptive right to the exercise of that privilege."

But supposing this is to be a right which could be acquired by *prescription,* and that the Defender has a

BAIRD v. FORTUNE.

Lord Chancellor's opinion.

title on which the *prescription* could be founded, unless arithmetic is to be neglected as well as law, there is no pretence for this plea. The prescription could not possibly begin till the year 1814, after the conveyance of North Muir Cambus to the Defender's father. To be sure, there are forty years from 1814 to 1854, and this suit was not commenced till 1857; but from these forty years are to be deducted thirteen years between 1818, the death of Sir John Carmichael Anstruther, the sixth baronet, and 1831, the death of Sir John Carmichael Anstruther, the seventh baronet, when the latter, being the undoubted owner of the barony, was a minor, reducing the period of prescription, if the right had been actually exercised as alleged, to thirty-three years. Therefore, the defence on "pure prescription," like the defence on "pure grant," vanishes.

But although each defence be imperfect by itself, it is said "*juncta juvant*," and, the enjoyment being coupled with the conveyances, a perfect title is established.

This "complex view" of the subject is novel, and I must say rather startling. Hitherto, both in England and in Scotland, a title by "grant" and a title by "prescription" have been considered quite distinct, each being required to be perfect in itself. The effect of a grant may to a certain degree depend on *enjoyment* before and at the time of the grant; but this has nothing to do with title by *prescription.* In the present case, had there been proof of a grant vesting in the owner of North Muir Cambus (under whom the Defender's father took) a perpetual right as against the owner of the barony to carry off the sea ware from all parts of the shore *ex adverso* of the barony, to manure the farm of North Muir Cambus, it might have been material to show that Fowlis and

BAIRD v. FORTUNE.

Lord Chancellor's opinion.

Edie were in the habit of doing something which might have been considered as done in the exercise of this right. But when there is no evidence of the grant of such a right to be perpetually an appurtenance to the farm of North Muir Cambus, and, on the contrary, there is clear proof that what was done by the tenants of this farm was done under the liberty given to them during their *tacks,* this liberty, as it was given, so it might have been withheld ; and the supposed usage can neither support *grant* nor *prescription,* nor generate any new composite title, partaking of the qualities of both.

Lord *Deas* seems to think that, irrespective of the subsequent *usage* since the conveyance to the Defender's father, his claim could hardly have been supported ; but that, although the subsequent usage will not make out a title by "prescription," it establishes a conclusive title of a different sort, when coupled with the previous conveyances. Although contemporaneous and subsequent usage may explain the meaning of ancient ambiguous grants, I am not aware of *usage* being called in to explain the meaning of a deed so recent as the conveyance of North Muir Cambus to the Defender's father. At all events, the usage relied upon may more properly be referred to the personal leave expressly given to the tenants, which is quite inconsistent with the inherent right supposed to belong to all the occupiers of this farm of North Muir Cambus.

I am afraid that I cannot properly conclude without taking some notice of the dangerous conjecture hazarded by Lord *Deas* as to the meaning of the parties, beyond the force of the language to be found in the deeds which they have executed, and, further of the attempt to lessen the protection given to minors by the law of Scotland, which says that prescription shall

BAIRD v. FORTUNE.

Lord Chancellor's opinion.

not run against them during their minority. "It is true," Lord *Deas* observes, "there was a minority during part of the time, but the sellers knew what they had sold, and the heir's interests were doubtless attended to by those acting for him, just as if he had been major." If this House, when hearing an Appeal from Scotland, had proposed to act upon the law of England, which disregards a supervening disability after prescription has begun to run (*a*), we should have been justly blamed for seeking judicially to assimilate the discordant laws of the two portions of the United Kingdom; and I must say that till the law of Scotland respecting the suspension of prescription by minority is legislatively altered, it is the duty of all tribunals in the United Kingdom to give full effect to it.

For these reasons, my Lords, I feel it my duty in this case to advise your Lordships to reverse the Interlocutor appealed against, and to affirm the Interlocutor of the *Lord Ordinary* in favour of the Appellant.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, prior to the entail of 1778, the farm of North Muir Cambus formed part of the barony of Ardross and Elie. Sir John, the entailer, was the owner of the whole in fee simple, and there could not then have been any right to be exercised by the occupier of any one part of the barony over any other part against the will of the owner of the whole. The right of every tenant must have been derived wholly from the goodwill of his landlord. He might have authorized any tenant to take drifted sea-ware for the

(*a*) In England it has always been held that if the period once begins to run, it shall run on, notwithstanding disabilities subsequently arising; First Report of Real Property Commissioners, of whom Lord Campbell was one, p. 44.

L

BAIRD v. FORTUNE.

Lord Cranworth's opinion.

manurance of his land, or he might have refused to do so, as he thought fit.

By the entail of 1778 the farm of North Muir Cambus with its pertinents was severed from the rest of the barony, and with all deference to the opinion of the Court of Session as delivered by Lord *Deas*, I think it clear that, as there is not and cannot be any claim founded on prescription the question whether the right now contended for by the Respondent really belongs to him must be decided precisely as if it had arisen upon a sale of Muir Cambus with its pertinents, made by Sir John the entailer immediately after the completion of the entail. If he had then sold and conveyed the farm with its pertinents, would that have conferred on the purchaser the right to take drifted sea-ware for the use of the farm? If it would not, then the Interlocutor of the Court of Session cannot, in my opinion, be supported.

The parol evidence may be taken as proving that at the time of the severance in 1778, the occupiers of North Muir Cambus farm were in the enjoyment of the right now contended for by the Respondent. This is a fair presumption of fact. It has certainly been enjoyed by the Respondent and his father before him since the year 1824, when Edie's lease expired. It was certainly enjoyed by Edie during his twenty-four years tack, and by Fowlis, his immediate predecessor, as far back as living testimony can go; that is, to the year 1793, or thereabouts. The presumption is not unreasonable that the practice had existed long previously. It was beneficial to the landlord as well as to the tenant that the land should be well tilled, and in the arrangements made from time to time between them the great probability is that the tenant would stipulate for, and that the landlord would concede the right now in dispute.

BAIRD v. FORTUNE.

Lord Cranworth's opinion.

The question, therefore, seems to me to be reduced to this, whether the word "*pertinents,*" as connected with North Muir Cambus farm, in the exception contained in the deed of entail, and in the subsequent conveyances, can be understood to include the privileges theretofore conceded by Sir John the entailer in favour of the tenants of that farm. There could not, in strictness of language, be any pertinents of one part of the entailer's fee simple estates as against any other part of them. There might be pertinents in the nature of rights to be exercised over the lands of other proprietors. But where one person is the absolute owner of two estates, it is impossible to speak of his having, in respect of his ownership or possession of one of them, any rights over the other. His right over both is absolute. *Res sua nemini servit* (*a*). Unless, therefore, the word "pertinents" can be interpreted in the more extended sense which I have suggested, *i.e.*, as including the privileges conferred by the landlord on the tenant, and enjoyed by him at the time of the severance, the right now contended for does not exist. The conclusion at which I have arrived is, that it is impossible to give this extended signification to the word "pertinents." Privileges enjoyed by the tenant in consequence of arrangements with the landlord are in no fair sense attached or pertinent to the land; they are merely personal rights, and that the right of taking sea-ware for the farm was so considered may reasonably be inferred from the fact that in the tack of the farm to Edie in 1804, to which the Commissioner, representing the owner of the entailed property was a party, there was an express stipulation that the tenant should during the tack have the liberty of driven sea-ware for manuring as well the

(*a*) Erskine's Principles, b. 2. t. 9. sect. 238.

BAIRD
v.
FORTUNE.

Lord Cranworth's opinion.

North Muir Cambus farm as the entailed lands included in the same tack. And he was to have this liberty along with the other tenants of the barony, from which it is reasonable to infer that the liberty was one not considered as attached to the lands, but conceded to the tenants by the landlord.

It was argued that the right of taking sea-ware, attached, as it certainly was, to the whole barony, must be considered as belonging to every part of it, including North Muir Cambus farm, which before its severance formed part of the barony. But if this argument were to prevail it would go to show that the right is much more extensive than that contended for. The right of the owners of the barony was and is to cut and take sea-ware, whether driven or growing on the shore, and to use it for all purposes. It is impossible to parcel out this right so as to hold that the occupier of every farm of the barony might take not a portion of all the sea-ware whether driven or growing, and not for the purposes for which the owner of the barony might take it, but only a fair portion of the drifted sea-ware for the single purpose of manuring his own lands. It was certainly in the power of the owner of the barony to concede such a limited right to all or any of his tenants, but it cannot be treated as attaching or belonging to every farm of the barony as a portion of the greater general right.

The authority mainly relied on as showing that the right claimed might pass under the word "pertinents," is that of Borthwick (*a*), referred to in the judgment of

(*a*) *William Borthwick* v. *Lord Borthwick,* Morrison's Dict. 9632, where it was held that an agreement to convey with "parts and pertinents" passed a right of common pasturage possessed at the time of the bargain along with the lands. See Erskine's Inst., b. 2. tit. 9. sect. 16.

Lord Cranworth's opinion.

the Court of Session; but I do not think it bears out the argument of the Respondent. It appears that Lord Borthwick had wadsetted the lands of Halheriot to Mr. Borthwick, together with a common of pasture on Borthwick Muir, which muir belonged to his Lordship. Lord Borthwick afterwards entered into a minute of agreement to sell to Mr. Borthwick the lands of Halheriot with the pertinents, but not expressly mentioning the right of common. I collect from the report that a dispute arose when the parties proceeded to implement this agreement, Mr. Borthwick contending that he was to have, as part of what he had agreed to purchase, the right of common expressly included in his wadset, and Lord Borthwick resisting this, because the right of common was not mentioned in the minute or agreement of sale. In this state of things Mr. Borthwick proceeded against Lord Borthwick to recover from him the money due on the wadset. Lord Borthwick, against this demand, insisted on the agreement for sale, and contended that Mr. Borthwick, the charger, ought to be compelled to fulfil his agreement. To this Mr. Borthwick, the charger, answered he was ready so to do, if Lord Borthwick would extend the minute so as to include the common of pasture. The Court held, on the facts of the case, that Lord Borthwick was bound to extend the minute so as to include the common of pasturage on the muir, in respect the same was a pertinent of the lands sold at the time of the sale.

The ground of the decision was, that what was agreed to be sold to Mr. Borthwick was all which he then actually held by virtue of his wadset, *i e.*, the lands of Halheriot, then separated from the other lands of Lord Borthwick, together with the common of pasturage, then in fact held as pertinent under the wadset. The right then in question was not improperly de-

BAIRD v. FORTUNE.
Lord Cranworth's opinion.

scribed as a pertinent of the lands wadsetted; it was a right over the lands of another, to be exercised by a person who, though liable to redemption, was in a sense the owner of Halheriot. The Court therefore properly held that Lord Borthwick could not rely on his minute or agreement for sale, without giving to the charger that which he had manifestly bargained for.

I cannot think that this decision warrants the Interlocutor of the Court of Session now under review. Nothing was excepted from the entail but the farm with the pertinents. There are no facts leading to the inference that anything was intended to be excepted beyond that which the words used *primâ facie* import; and a right contracted for by the tenant to take, for the manurance of his farm, sea-ware drifted upon other property of the landlord, cannot be described as a pertinent of the farm, even when it is established, as I think it is established, that at the time of the exception the tenant was in the actual enjoyment of the privilege in question, by express contract with his landlord.

It is hardly necessary to add, that any claim by prescription is here out of the question. The Respondent, in his printed case, expressly abandons any claim on such a ground; but even if he had not done so, and even if there had been no minority, and assuming there to have been a title on which prescription might have been founded, still there clearly has not been forty years' possession, for up to the year 1824 the privilege was exercised, not adversely to the owners of the barony, but by their permission, and as part of the terms on which the tenants were occupying the land. After 1824 the case was different; but within much less than forty years from that time the present action was raised. On these grounds I have

BAIRD v. FORTUNE.

Lord Cranworth's opinion.

come to the conclusion that the decision of the Court below was erroneous, and that of the *Lord Ordinary* correct.

I observe that the words used in the conveyance to the Respondent's father, and in all the conveyances subsequently to the entail of 1778, are "parts, pendicles, and pertinents." I presume these words have in general no more extensive operation than the single word "pertinents," but at all events in this case they cannot have a more extensive operation, for in the deed of entail nothing was excepted but the farm with its pertinents.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

In this case, the Appellant applied by suspension and interdict to prohibit the Respondent from taking sea-ware *ex adverso* of the Complainer's lands of Elie, &c., or interfering with the Complainer in the cutting or removing of it, and sued out a summons of declarator on the 14th June 1854 against the Respondent, to establish his sole right to the sea-ware, whether growing or drifted, on the shores adjacent to his said lands, and to have it found that the Respondent had no right to the sea-ware, or to remove or interfere with it. The actions were conjoined.

The *Lord Ordinary* (Lord Benholme) decided in favour of the Appellant in both actions; and upon a reclaiming note being presented to the First Division of the Court of Session, that Court ordered revised cases, and a commission to issue to take proof, which was done; and upon hearing the report of proofs, and full consideration of the case, Lord *Deas* delivered the judgment of the First Division, recalling the Interlocutor of the *Lord Ordinary,* and decided the conjoined causes in favour of the Respondent. This Appeal is from that judgment.

BAIRD v. FORTUNE.

Lord Wensleydale's opinion.

It seems to me, after much consideration, that your Lordships ought to reverse that judgment.

Both the Appellant and Respondent derive title from the same authors. The Anstruther family were proprietors for many years of the barony of Ardross and Elie, &c., which extended some miles along the sea-coast. By the Crown charter of 29th April 1704, in favour of Sir William Anstruther, the baronies of Anstruther, Ardross, and Elie, with their parts and pendicles, with ports and stations for ships, and the harbour of Elie, and anchorge and tolls, were granted; and in the tenendas clause, wrack and ware are mentioned. In July 1794 Sir John Anstruther revoked a previous entail of 1793 (having reserved power to do so) of the farm of North Muir Cambus, and conveyed it, "as the same now is, as was some time possessed by Thomas Fowlis, with dependences, annexis, connexis, parts, pendicles, and pertinents whatsoever," to trustees for sale.

One of the trustees (one having power to act) in November 1804 let North Muir Cambus and a farm called Longfolds, "as possessed by Thomas Fowlis," to Arthur Edie for twenty years from Martinmas 1804. The lease contains a stipulation that the tenant shall have liberty of the driven sea-ware, along with the other tenants of the Edie barony, for manuring the farm and Longfolds. Park. This lease expired in 1824.

Afterwards Sir John Anstruther, late Chief Justice of Bengal, dying in pecuniary difficulties, a Mr. Ferrier was, with the consent of his creditors and his heir-at-law, made trustee for sale of the North Muir Cambus estate. Mr. Ferrier agreed to sell to Mr. Fortune, the father of the Respondent, in August 1813, the North farm of Muir Cambus, with property and superiority, "as the same were then and were sometime possessed

Lord Wensleydale's opinion.

by Thomas Fowlis," with the dependences, annexis, parts, pendicles, and purtenances. On the 20th June 1814 Mr. Ferrier made a disposition of both, pursuant to his contract, and conveyed the superiority of the North Muir Cambus farm in the same terms to Mr. Fortune. Mr. Fortune's title was completed in 1817.

The Pursuer's title to the barony of Ardross and Elie arises from a disposition by Sir Windham Carmichael Anstruther, dated the 12th and 13th May 1853, completed by infeftment in June 1853. He has all the rights that remained in the Anstruther family in the lands conveyed to him.

The question is, whether the right to take sea-ware on the seashore opposite the Appellant's estate, for manuring the lands of North Muir Cambus, belongs to the Respondent in right of that estate, which does not border on the sea-coast, but is separated from his estate of North Muir Cambus by an intervening slip of land of considerable breath.

The Appellant in his pleas in law, claims by virtue of his title to the lands and baronies of Elie, &c., the sea-ware on the shore adjacent as his property, or the property in the sea-ware from immemorial usage in connexion with the estate.

The Respondent on his part denies the title of the Appellant, and claims the right to take ware, as having passed as a *pertinent* to the farm of North Muir Cambus; he also claims by prescription, and insists on long user as a proof that it was a pertinent to North Muir Cambus.

In considering this case some things appear very clear. In the first place there is no question as to the right to *cut* or *separate* sea-ware from the shore. *That* belongs to the Appellant, and the Respondent is at all events not entitled to interfere with that right. The question is confined to the drift sea-ware. In the next

BAIRD v. FORTUNE.

Lord Wensleydale's opinion.

place, it is also clear that the Respondent cannot sustain the claim on the ground of prescription. His user did not commence till June 1824, when Edie's lease determined, and the forty years did not end till after the commencement of this suit; and besides, if it is to be considered as having commenced before, there was a minority in Sir John C. Anstruther, the owner of the baronies of Ardross and Elie, for several years, I think, from 1818 to 1831.

The right of the Respondent, therefore, if it can be supported, must be supported on some other grounds. Nor has it been contended, nor could it be, that the enjoyment from 1824 to 1857 could be sufficient evidence to raise a presumption of a grant of the right (a). Is there any other ground on which it can be supported?

Before considering this question, I think we may dismiss two others which were argued at your Lordships' bar. It is unnecessary to decide whether the Crown charters to the Anstruther family were insufficient, because they mentioned wrack and ware in the tenendas clause only, to convey that right to them, for the long use and enjoyment which has been certainly proved in them, and persons claiming under them, leaves no doubt in my mind of their title to sea-ware, either as conveyed with the manor, or by a totally independent right.

It is equally unnecessary to discuss the general question, not yet clearly decided by the Scottish Courts, whether the seashore, below ordinary high-water mark, belongs *primâ facie* to the Crown or to the owners of the lands adjoining. I think that the peculiar terms of the charter of the barony of Edie, coupled with the usage, gave the soil of the seashore, not only above high-water mark, but below it, and

(a) See Bell's Prin. 993.

BAIRD v. FORTUNE.

Lord Wensleydale's opinion.

the Appellant has a title to the soil of the seashore down to the low-water mark, and all the sea-ware growing or driven upon it.

The main question then is, whether a right to take sea-ware cast on the seashore above and below high-water mark, both or either, passed under the description of "parts and purtenants" in the conveyance from the trustee for sale of North Muir Cambus to Mr. Fortune the father. I think that prior and contemporaneous enjoyment of a privilege, which may be attached to land, and subsequent enjoyment, are evidence which is admissible to explain the terms of the deed. No parol evidence can be used to add to or detract from the description in the deed, or to alter it in any respect, but such evidence is always admissible to show the condition of every part of the property, and all other circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument. Continued usage, in English law, is considered as a practical exposition of that meaning, and modern usage of forty or fifty years' duration is evidence, in the absence of any to the contrary, from which you may conclude that it existed before and at the time of the deed (*a*).

Assuming that this maxim applies in Scotch as well as in English law, there is certainly some evidence, first, that before the deed under which the Respondent claims, the proprietors of the baronies certainly for many years past, by themselves and their tenants, had taken sea-ware from the shores opposite their lands for manuring them. Fowlis and Edie, former tenants of Muir Cambus farm, whilst they were occupiers, took sea-ware in their carts to this farm, which could

(*a*) Per Richardson, J., *Chad* v. *Tilsed*, 2 Brod. & Bing. 403.

BAIRD v. FORTUNE.

Lord Wensleydale's opinion.

only have come from the Elie shore, and after the Respondent's father got the North Muir Cambus farm, he constantly took sea-weed from the seashore, and his son, the Respondent, who succeeded to the farm in 1835, first as tenant and afterwards as owner, was in the habit of exercising the privilege of taking sea-ware to manure the farm from the shore opposite the Appellant's land.

But there is a great objection to connect the enjoyment of Mr. Fortune and his son subsequent to the deed with that of Edie immediately before it. Edie's right was specially given him by his lease in 1804. Whether Fowlis had such a grant, we do not know. So that Edie's right, enjoyed for twenty years, was not under an instrument in the same terms as that under which Mr. Fortune, the Respondent, claims, but by a special grant to take sea-ware *nominatim*.

I therefore agree with the view taken by my noble and learned friend on the woolsack as to the effect of that evidence, that it is not enough to show that it was intended by the parties to the deed to pass that right under the words "parts, pendicles, and appurtenances," supposing they would pass such a right if intended to do so.

My noble and learned friend says that the grant of the privilege to take sea-ware by the owner of it cannot be assimilated to a servitude. It would be so, if he had a right merely to the sea-weed as grantee of it by the Crown, and was not the owner of the shore on which it drifted. But I do not feel satisfied that it might not be a proper servitude if he was, as much as a right to fuel peat and divot, analogous to an English right of common of turbary (*a*). It is a right

(*a*) A right of common of turbary is a right to dig turfs on a common, or in another man's ground.

BAIRD v. FORTUNE.

Lord Wensleydale's opinion.

to be exercised only on the land, as a right of way is. Indeed, this right to enter and take sea-weed on the land involves in it a grant of way over the land, for it cannot be taken without it. Then, whether the Appellant be the owner of the whole shore down to low-water mark or down to high-water mark only, the right to go over his land would be a servitude when the land to which the right was attached belonged to a stranger.

But if I am right in supposing that a right to take sea-weed *in alieno solo* may be a servitude, the result would be the same. There is no grant of it in appropriate terms in the conveyance of the North Muir Cambus farm to the Respondent's father; and there are no terms that would operate as a grant, such as "all rights to get sea-ware as were then used and enjoyed,"—which would, coupled with the evidence of user, have operated as a grant. Nor is it necessary to consider the further question whether such a grant of servitude would have bound the Appellant as a singular successor, in the circumstances of this case.

But the word "appurtenances" alone would not, I conceive, convey a right of servitude to pass over the grantor's soil, the seashore or part of it, to take sea-ware. It would pass only those rights which were proper servitudes before, and those must be *in alieno solo,* for according to the maxim of the Civil Law, *Res sua nemini servit.* In the English law this is perfectly clear, as was fully explained in the case of *Barlow* v. *Rhodes* (*a*). To pass rights which were not properly servitudes, but were used in like manner, words amounting to a grant must be used.

I agree in advising your Lordships to reverse the judgment of the Court of Session.

(*a*) 1 Cramp. & Mee. 444.

BAIRD
v.
FORTUNE.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My noble and learned friends who have preceded me have gone so fully into the case, and have given such strong and sufficient reasons for their dissatisfaction with the Interlocutor appealed from, that, agreeing with them as I do, it is only necessary for me to state shortly the grounds of my opinion.

The Appellant in an action of declarator claimed, as proprietor of the baronies of Anstruther, Ardross, and Elie, to be entitled to the sole and exclusive right to the sea-ware upon the shores adjacent to his lands and estates, and that the Respondent, the Defender, should be decerned and ordained to desist and cease from removing or otherwise interfering with the said sea-ware. In support of his claim the Appellant gave evidence of ancient charters of the Crown, under the tenendas clauses of which, amongst many other things which were to be held with the barony, was included this right of wrack and ware. The Defender, who was owner of no part of the barony, but was proprietor of an estate called North Muir Cambus, which had formerly been part of the lands within the barony, was thereby called upon to show upon what grounds he asserted his title to interfere with the sea-ware. This he did by his pleas in law, alleging that the right to take the sea-ware had become part and pertinent to his estate of North Muir Cambus, either by grant or by prescription.

My noble and learned friends have shown most clearly that prescription is entirely out of the question, and the Respondent, in his printed case, disclaims this title, and in the reasons for his appeal confines himself entirely to the acquisition of the right by grant. The Court of Session, however, has decided in favour of the Respondent, neither upon the ground of prescription alone nor of grant alone, but upon usage short of

BAIRD
v.
FORTUNE.

Lord Chelmsford's opinion.

the proper period of prescription, as construing and explaining the terms "parts, pendicles, and pertinents" in his conveyance. But although the Respondent might have shown by evidence that the sea-ware at the time of the conveyance had been enjoyed in connexion with the estate so as to have given it the character of a "pertinent," yet evidence of usage after this modern grant appears to me to be inadmissible for the purpose of explaining the meaning of any unambiguous terms contained in it. Lord *Deas* in the commencement of his judgment, states the question to be, "Whether the Defender as purchaser of North Muir Cambus, *part of the barony,* is entitled to take drifted ware?" And he afterwards describes the right to wrack and ware to be "like a right of pasturage exercised for the benefit of every part and portion of the dominant tenement." Now upon this it is to be observed that North Muir Cambus is incorrectly described as having remained a part of the barony after the year 1778, when it was severed from it. A barony (to use the language of Mr. Erskine (*a*) is "*nomen universitatis,* that includes in it all the different subjects or rights of which it consists, though they be not expressed, and incorporates them so strongly together, as to make them *unum quid,* one individual right." The right, therefore, cannot properly be said to be for the benefit of every *part* and *portion* of the dominant tenement (except so far as the whole includes every part), the tenendas clauses in the Crown charters annexing the right to the barony, which is one entire individual subject of property.

It would be unnecessary to criticise the language of the judgment if it were not employed for the purpose of introducing a remark consequent upon it, that "when a part (*i.e.* of the barony) comes to be sold, it

(*a*) Book 2. tit. 6. s. 18.

BAIRD v. FORTUNE.

Lord Chelmsford's opinion.

is not difficult to raise a presumption, less or more strong according to circumstances, that the privilege is to remain *as before* attached not to a mere stripe along the shore, but to each part and portion of the land." Upon which it is only necessary to repeat that the privilege is not attached to the lands belonging to the barony, but to the barony itself, which may or may not include the particular lands.

It has not been questioned that it was competent to the proprietor of the barony, upon conveying North Muir Cambus to the Respondent's father, to annex to the lands this right to take sea-ware. This he might do either by precise words of grant, or by the use of general words which, from the previous exercise of the right in connexion with the lands, might have become descriptive of it. Thus, in Borthwick's case (*a*) the lands of Halheriot were wadsetted together with a common of pasture over other lands of the wadsetter. The right of common was thus made appurtenant to the wadsetted lands during the continuance of the wadset. When, therefore, the lands of Halheriot were agreed to be sold with the pertinents, it was properly held that the agreement must be taken to have intended to pass with the lands a right which was exactly described by the general word employed.

Lord *Deas* endeavours to assimilate the present case to that of Borthwick by observing that the privilege (to gather sea-ware) is a mere privilege to gather and appropriate what is previously the property of nobody. " So," he adds, " the right is more of the nature of a privilege over the property of a third party than a privilege over a retained portion of the proper *solum* of the barony." The sea-ware, however, cannot be correctly described as the property of nobody, as it was given to the proprietor of the barony by the

(*a*) Morr. 9632.

BAIRD v. FORTUNE.

Lord Chelmsford's opinion.

charters; nor can it in any sense be regarded as a privilege exercised by him over another's property. It is his own absolute property, to be granted or retained by him at his pleasure. He might undoubtedly have impressed upon it the character of a pertinent to certain lands, and if he had done so, then, according to the case of Borthwick, it would have passed in a grant of the lands by that description. But there has been no such dealing with this right or privilege in connexion with the lands of North Muir Cambus, as would annex it to the lands in such character. As far as we have any information, the leases of this farm contained a stipulation that the tenant should have the liberty of the driven sea-ware "along with the other tenants of the barony." A clause to this effect was probably contained in the lease to Fowlis, who was in possession of the farm at the time of the lease to Edie in 1804. But whether this was so or not, the effect of the clause was merely to confer upon the tenant during the term the privilege of using a portion of the lessor's property (the *drifted* sea-ware only) for the more beneficial enjoyment of the farm. It was, of course, for his interest that the farm should be well cultivated, and there is nothing in this arrangement with a tenant, which could so inseparably connect the right with the lands, as to pass it to a stranger under general words in a conveyance by which the lands were entirely severed from the barony.

But it is said by Lord *Deas*, that as Edie's lease shows substantially what had been the import of the lease to Fowlis, and, at any rate, as both the tenants are proved to have exercised and enjoyed the privilege, the more doubtful point is, whether the possession of Fowlis is referred to in the Defender's father's disposition simply as descriptive of the lands conveyed

BAIRD v. FORTUNE.

Lord Chelmsford's opinion.

or whether the meaning be that both lands and pertinents were conveyed as these had been possessed by Fowlis; and he states that he was inclined to think the latter to be the true meaning. But it appears to me that the place in which the words in question are found clearly shows that they are used as descriptive of the lands, and not of the different subjects held by Fowlis in conjunction with the lands. They follow immediately upon the name of the property conveyed, "the North Farm of Muir Cambus as the same is now or was sometime possessed by Thomas Fowlis," and after them come the general words, amongst which are found the terms upon which the whole stress of the argument is placed, "parts, pendicles, and pertinents." I think that the privilege of sea-ware had not been so dealt with previously to the conveyance as to make it a "pertinent" to the lands of North Muir Cambus, and that the conveyance itself did not pass it under that name with reference to the enjoyment of it by Fowlis during his tenancy.

I am of opinion, therefore, that the Interlocutor of the Court of Session ought to be reversed, and that of the *Lord Ordinary* to be affirmed.

The *Lord Advocate*: Will your Lordships allow me to make one observation upon the form of the judgment. Your Lordships will observe that the *Lord Ordinary* decided the case without any proof of the facts at all. Then the case went by a reclaiming note to the Inner House, and on the 3rd of March 1858 they pronounced the judgment, which appears in page 18, in which they allowed both parties proof of their averments. Amongst which was the averment of minority, which was an essential fact in the case, and it was upon considering the proofs that they pronounced the two judgments which appear in pages 50 and 51 which I

understand your Lordships now to reverse. What I would suggest is, that the second and third Interlocutors should be reversed, and that a remit should be made to the Court of Session to decide in the terms of the *Lord Ordinary's* judgment, so that there would then be a judgmeut by your Lordships upon the facts as well as upon the titles.

Mr. *Anderson:* With respect to costs, the greater part of the costs have been incurred subsequently to the *Lord Ordinary's* Interlocutor, and of course if the Court of Session had affirmed the *Lord Ordinary's* Interlocutor, they would have affirmed it with costs. I apprehend that your Lordships in adhering to the *Lord Ordinary's* Interlocutor will give us the costs subsequently incurred. I ought also to mention that I see the sum of 221*l.* taxed costs on the other side. Your Lordships will give us the usual order that when the costs are paid we shall have those returned.

The LORD CHANCELLOR: That will be of course.

The *Lord Advocate:* With regard to the question of costs I cannot make any struggle about that, but I thought that the form of the judgment ought perhaps to be that which I have suggested.

Mr. *Anderson:* I do not care about that.

The LORD CHANCELLOR: I do not see any difficulty in reversing the Interlocutor of the First Division of the Court of Session, and affirming the Interlocutor of the *Lord Ordinary.*

The *Lord Advocate:* What I took the liberty of suggesting is, that it will not be a judgment upon the facts. Your Lordships' affirmation of the *Lord Ordinary's* Interlocutor will be the affirmation of a judgment proceeding without evidence of the facts. What I suggest is, that there should be a remit to the Court of Sesssion to decide in the terms of the

Interlocutor of the *Lord Ordinary,* but upon proof of facts.

Lord CHELMSFORD: You said that the question of minority was not inquired into. I do not think that would assist you much.

The *Lord Advocate :* The allegation of minority was an allegation by the Pursuer. If they had not made out the allegation, in all probability the plea of prescription might have prevailed. It was necessary to inquire into that before giving judgment.

Mr. *Anderson :* They denied the minority, and we proved it.

Lord WENSLEYDALE: If the minority was established, there was not forty years' enjoyment before 1831.

Mr. *Anderson :* We succeeded in our proof upon that point as well as upon the other.

Interlocutors of the Court of Session appealed from reversed ; and Interlocutor of the Lord Ordinary affirmed, with directions as to Costs.

LOCH & MCLAURIN—CONNELL & HOPE.