

ish as either to purchase other ground for the erection of a new Hospital house before it is certain that a sale of the existing house and ground is to be carried into effect, or to announce beforehand what ground they may be desirous of obtaining, and in that way to enhance the price against them. If, however, the respondents should hereafter threaten to do anything reprehensible, or unduly abstain from carrying out the obligations incumbent on them as regards the purchase of other ground and the erection of another edifice, or in any other respect, redress will be open to them; but at present it cannot be presumed against the Governors that they intend to commit any breach of duty; and in the Lord Ordinary's opinion they have not as yet done or threatened to do so.

"The complainers also suggested, as the Lord Ordinary understood them, that in no view of the rights of the respondents were they entitled to enter into the transaction of sale in question without at least having first obtained the authority of the Court. The Lord Ordinary is, however, unable to see that there is much, if anything, in this suggestion. The respondents either have or have not the power to sell as proposed by them. If they have the power they can exercise it without the authority of the Court; and if they have not the power the Court cannot give it to them. The Court could only, at most, declare what is the power the respondents possess. But any such declaration is unnecessary, and probably would not be given, as the Court might be rather disposed to tell the respondents to act on their own responsibility, for, as was remarked by Lord Langdale in the case of *The Attorney-General v. The South Sea Company*, above referred to, 'that which the Court might have done upon its own consideration of what would have been beneficial to the charity, might have been done by the trustees upon their own authority, in the exercise of their legal powers.'

"In conclusion, the Lord Ordinary may notice that in the present case the sale complained of is only a conditional one—conditional on the Royal Infirmary obtaining statutory authority for transferring the site of their hospital from its present locality. They have accordingly applied to Parliament for such authority, and, according to the draft bill produced, which has been already moved in Parliament, not only is authority sought for transferring the site of the Infirmary, but compulsory powers are also sought for acquiring George Watson's Hospital and ground. The whole matter will thus be brought under the consideration of Parliament, and before anything can be done to carry into effect the proposed sale, statutory authority will be obtained for it. If the complainers think that such authority ought not to be granted, they can use the ordinary means of opposing the measure in Parliament. But in place of adopting that course they have resorted to the present suspension and interdict, which, if sustained, would have the effect of restraining the respondents from taking any steps for satisfying Parliament that the proposed transaction of sale is reasonable and unobjectionable. It is true that the complainers do not directly, or in express words, seek to interdict the respondents from appearing in Parliament in support of their desire to have the proposed sale carried into effect under statutory authority; but such, in reality, would be the result of the broad and unqualified interdict asked by the complainers

if granted; for they pray that the respondents may be interdicted 'from acting on, or attempting to carry into effect, any agreement or resolution to sell or alienate the said hospital or grounds;' and the complainers neither proposed nor indicated their willingness before the Lord Ordinary to qualify or restrict, in any respect or to any extent, the prayer of their application.

"In these circumstances, and for the reasons which have now been stated, the Lord Ordinary, being of opinion that the complainers have failed to establish a sufficient case for the interposition of the Court, has refused the suspension and interdict. It was stated in the course of the argument that the £12,000 originally left by George Watson for endowing the Hospital has fructified and increased to £200,000; and if this be so, the Lord Ordinary can very well understand that, in order not to defeat but to carry out the objects of the founder in a manner at once consistent with these objects and with modern requirements, a change of the Hospital house and grounds may be not only not objectionable, but highly desirable, if not absolutely indispensable."

Agents for Suspenders—Fyfe, Millar & Fyfe, S.S.C.

Agent for Merchant Company—Mr A. Kirk Mackie, S.S.C.

Agents for Infirmary Managers—Hope & Mackay, W S.

Wednesday, February 16.

SECOND DIVISION.

DUKE OF RICHMOND *v.* EARL OF SEAFIELD.

Salmon-Fishing—Barony Title—Rod Fishing—Net and Coble—Cairns and Stream—Possession—Titles. Held (1) that a barony title does not *per se* confer a right of salmon-fishing; (2) that fishing for salmon by means of the rod in places where fishing by net and coble may be practised is not available possession to acquire a right of salmon-fishing; (3) that fishing by means of cairns and stream is illegal, and therefore could not be founded on as possession available to establish a right.

Circumstances in which held that a proprietor of lands had under his titles, and the possession which had followed upon them, the exclusive right of salmon-fishing within certain boundaries in a river.

In this action the Duke of Richmond seeks to have it found and declared that he has the exclusive right to the salmon-fishings in the river Spey between two points described in the summons, including what are described as the Orton fishings, with a reservation to Captain Wharton Duff and his successors of the privilege of rod fishing, and the fishings *ex adverso* of the lands of Elie, Inchberry, and others, lying on the west side of the Spey. The pursuer founds upon Crown titles, containing an express grant of salmon-fishings. In explanation of these titles, he sets forth:—“(12) Under the titles specified in the first four articles above written, the pursuer and his predecessors and authors have for time immemorial, or at least for forty years and upwards prior to 1867, had the sole and exclusive possession of the salmon-fishings in the said river Spey between the points or

boundaries mentioned in the first conclusion of the summons; and under the titles specified in articles 6 to 9 inclusive above written, the pursuer and his predecessors and authors have had for time immemorial, or at least for forty years and upwards prior to 1867, the sole and exclusive possession of the salmon-fishings in the said river Spey between the points or boundaries mentioned in the second conclusion of the summons. For time immemorial, or at least during the whole of the said period of forty years and upwards, the pursuer and his predecessors and authors have regularly fished for salmon and other fish of the salmon kind in the said river between the point or boundary first mentioned in the first conclusion of the summons, and the point at which the burn of Aultdearg flows into the river Spey, being the point second mentioned in the second conclusion of the summons, by net and coble, rod and line, and every other lawful mode, and they had done so to the exclusion of all others. (13) It is necessary to the full and effectual exercise of the pursuer's said rights of salmon-fishing, to enter upon and use the right or east bank or shore of the said river belonging to the defender; and accordingly the pursuer and his predecessors and authors, besides fishing from the west bank of the river, have regularly been in use, for time immemorial, or at least for forty years and upwards, to enter upon and use the said right bank or shore for the purposes of fishing. They have, during the whole of the said period, been in use to shoot nets from, and haul the same upon, not only the said west bank or shore, but also the said right or east bank or shore, in fishing for salmon by net and coble at suitable places along the whole stretch of the said river, between the point or boundary first mentioned in the first conclusion of the summons and the point or boundary second mentioned in the second conclusion of the summons; and they have also been in use during the whole of the said period to erect and use huts for the purposes of their said fishing between the said points on the said east bank or shore. (14) The river Spey is comparatively narrow throughout the portion of its course which lies between the said points or boundaries, and a net shot from one side sweeps the whole area of water from bank to bank. Further, at various places between the said points a line thrown by an ordinary salmon rod reaches from one side to the other side of the said river. (15) Although the defender has no right or title to any salmon-fishing in the river Spey between the point or boundary first mentioned in the first conclusion of the summons and the point or boundary second mentioned in the second conclusion of the summons, he has recently put forward pretensions of right to fish, and has fished, for salmon at certain places between the said points or boundaries. The defender has thus invaded and encroached upon the pursuer's said rights of salmon-fishing, and as he has intimated that he intends to repeat the said fishing, the present action has become necessary."

The defender, on the other hand, while not denying the pursuer's right, maintains that it is not an exclusive right. The defender is proprietor of the barony of Mulben, which includes the lands of Cairntie on the right bank of the Spey, and he founds upon a Crown charter with a clause of fishings, followed by prescriptive possession of salmon-fishing by fishing with net and

coble at those portions of the river which admitted of being so fished, and also by cairns and streams and rod and line, *ex adverso* of the land of the barony. The defender also founds on a base right deduced from a feu-charter granted in 1633 by Sir John Grant of Freuchie, then proprietor of the barony, which contains an express grant of salmon-fishings, which right was re-acquired by the defender's predecessors. And the defender makes the following averments:—" (7) Since the *dominium utile* of the lands and salmon-fishings of Cairntie was re-acquired by the defender's predecessor, Sir Ludovic Grant, the defender's predecessors, and the defender himself, have constantly possessed the salmon-fishing in the Spey *ex adverso* of the lands of the said barony, including the said lands of Cairntie, from the burn of Aultdearg up to and above the Boat-o-brig, by themselves, their tenants, and others having their permission, and the fishing has been carried on in every way in which the nature of the river and of its right bank admitted, viz., by net and coble, rod and line, cairns and streams. From time immemorial until the year 1836, or thereby, each of the tenants of the farms of Cairntie which touched the Spey (of which there are several) was tenant of, and paid rent, for the salmon-fishings in the Spey opposite his farm, and fished for salmon accordingly, in whatever way he deemed most advisable, without any interruption on the part of the pursuer or his predecessors, or of any other person. Since the year 1843 the said salmon-fishings have been let by the defender and his predecessors along with the shootings of the barony, but as the tenants have used the water chiefly for the purposes of sport, the mode of fishing principally practised *ex adverso* of the right bank of the Spey during that period has been by rod and line. In whatever way the defender's tenants have during the said period exercised the right of salmon-fishing under their respective leases, they regularly fished for salmon and fish of the salmon kind in the Spey *ex adverso* of the whole lands of the barony of Mulben, including Cairntie, without interruption. (8) In 1843 negotiations were entered into between the late Duke of Richmond, the pursuer's father and predecessor, through his factor, Mr E. Wagstaff, Gordon Castle, and the late Earl of Seafield, the defender's father and predecessor, through his factor, Mr John Wilson, Tochineal, with reference to the shootings of the Keith and Boharm range and the said salmon-fishings on the Spey then belonging to the defender's father *ex adverso* of his lands of Cairntie, but excluding the Boat-o-brig salmon-fishing. It was at the time contemplated to let these to Mr William Grant Macdowall of Arndilly, and the late Duke of Richmond, as proprietor of the lands and others, in virtue of the titles under which his son, the pursuer, now claims the fishings in question, desired to be substituted in said lease of said shootings and said salmon-fishings, in place of Mr Grant Macdowall. Some correspondence took place between these parties, in the course of which Mr Wagstaff, for the said Duke, in answer to inquiries by him, was informed by Mr Wilson, on behalf of the late Earl of Seafield, that the salmon-fishings proposed to be let were the fishings *ex adverso* of Cairntie. In consequence of some misunderstanding between the said Duke and Mr Grant Macdowall, these negotiations were for

a time suspended, and the said shootings and said salmon-fishings were, by minute of agreement between the defender's father and Mr Grant Macdowall, dated 26th September 1843, let to the latter for seven years from 12th August 1844. The said lease thereof was afterwards, by minute indorsed thereon dated 12th February 1845, signed by the said Mr Wagstaff for the said late Duke of Richmond, by Mr John M'Innes for Mr Grant Macdowall, and by Mr John Fraser for the late Earl of Seafield, transferred for the remaining six and a half years to the said Duke, who thereafter, during the subsistence of said lease, possessed in virtue thereof the said shootings and salmon-fishings, and paid therefor to the defender's father the rent of £52, 10s. stipulated in said lease. (9) The pursuer has recently asserted a right, which he does not possess, to draw his nets and fish for salmon on the right bank of the Spey *ex adverso* of the defender's lands of Cairntie, and has thus illegally encroached upon the defender and his lands and salmon-fishings. The defender is about to take measures to stop the encroachment."

The pursuer maintains that his titles alone give him the exclusive right to the salmon-fishings; but at any rate that he has that exclusive right in virtue of his titles, followed by prescriptive possession. In reference to the defender's titles and averments, the pursuer pleads specially—"The alleged express grant of salmon-fishings *ex adverso* of the lands of Cairntie founded on by the defender is wholly unavailing to constitute a right of salmon-fishing, in respect that (1) the said grant did not proceed from the Crown, but only from a subject-superior, who had himself no right or title to salmon-fishings; and (2) the whole salmon-fishings at the parts of the river in question belonged to the pursuer's predecessors at and prior to the date of the said grant. Fishing for salmon by cairns and streams, or by rod and line, is not such possession as can found a prescriptive title to salmon-fishings, or at least such fishing cannot found such a title where fishing by net and coble is practicable, and has been practised by parties having a competing and adverse title and interest. The defences should be repelled, in respect that the titles founded on by the defender are not sufficient to constitute or confer a right to salmon-fishings; and, *separatim*, in respect that the said titles have not been followed by lawful possession of salmon-fishings for the prescriptive period."

The following pleas, on the other hand, were maintained by the defender:—"The defender should be absolved from the whole other conclusions of the action, with expenses, in respect (1) that the pursuer's titles do not give him an exclusive right to the fishings in the Spey within the bounds libelled; (2) that he has had no exclusive possession of said fishings; (3) that the defender has, in virtue of his titles, an express grant of the salmon-fishings *ex adverso* of the lands of Cairntie; (4) that he has possessed said salmon-fishings from time immemorial in virtue of his titles; and (5) that the pursuer's predecessors and authors have acknowledged the right of the defender, by taking said fishings in lease from the defender's predecessors. In any view, the defender's Crown title *cum piscationibus* having been followed by immemorial possession of salmon-fishings within the boundaries libelled, the defender has good and undoubted right to the salmon-fishings *ex adverso*

of his said lands of Cairntie. *Separatim*, in virtue of his titles and possession, the defender is, in any event, entitled to fish for salmon and fish of the salmon kind by rod and line *ex adverso* of said lands. The defender having been from time immemorial, and being now, in the actual possession of salmon-fishings in the Spey in virtue of his barony title by means of net and coble *ex adverso* of his barony lands, he has thereby established, preserved, and maintained his right to fish for salmon and fish of the salmon kind, in virtue of his barony title, at any part of the Spey where the lands of the barony adjoin the river."

A proof having been allowed and taken before the Lord Ordinary (ORMIDALE), his Lordship pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument, the proof, and whole proceedings, finds—(1) that the salmon-fishings in the river Spey pertaining to the lands mentioned and referred to in the first two conclusions of the Summons are and have been held in property by the pursuer, his authors and predecessors, under charters or grants from the Crown, for a period extending back greatly more than forty years prior to the institution of the present action: Finds (2) that the pursuer, his authors and predecessors, have also, by themselves and their tenants, regularly fished by net and coble for salmon from both sides of the Spey, shooting their nets from, and hauling them upon, both sides between the point or boundary first mentioned in the first conclusion of the Summons and the point or boundary second mentioned in the second conclusion thereof, from the year 1802 down to the institution of the present action: Finds (3) that the pursuer has failed to prove that he, his authors and predecessors, have, for forty years or time immemorial prior to the institution of the action, possessed or exercised the exclusive right of fishing for salmon in the Spey between the said boundaries: Finds (4) that the lands of Cairntie and others, situated on the east or right bank of the Spey, opposite to the lands of Orton, and others, situated on the west or left bank of the Spey, between the foresaid points or boundaries, have, with the fishings thereof, belonged to and been possessed in property by the defender, his authors and predecessors, for a period extending back for greatly more than forty years prior to the institution of this action, under and in virtue of a barony title from the Crown, which expressly includes fishings, and also under and in virtue of titles flowing from private parties, expressly including salmon-fishing in the Spey: And finds (5) that, in virtue of the titles referred to in the last finding, the defender, his predecessors and authors, have, by themselves, their tenants, and others, for a period greatly exceeding forty years prior to the institution of this action, possessed and exercised the right of fishing-salmon in the Spey *ex adverso* of the said lands of Cairntie and others: Finds, in these circumstances, that in law the pursuer is not entitled to prevail in this action, or to obtain decree therein, except to the extent after mentioned, and that, *quoad ultra*, the defender is entitled to absolvitor: Therefore decerns and declares in favour of the pursuer, in terms of the two alternative conclusions of the Summons, to the effect that he has right to the salmon-fishings, and to fish for salmon and fish of the salmon kind in the Spey *ex adverso* of the lands of Orton and others,

lying on the west side of the river Spey; and also *ex adverso* of the lands of Orton and Insch, or Insch of Cairntie, Elie, Inchberry, and others, also lying on the west side of said river, between the points or boundaries referred to in the said two alternative conclusions; and, *quoad ultra*, assolizies the defender from the whole other conclusions of the Summons, and decerns: Finds the defender entitled to expenses, under reservation of the question whether there ought to be any, and if any, what modification thereof, on which question the parties will be heard when the Auditor has made his report: Allows an account of the defender's expenses to be lodged, and remits it, when lodged, to the Auditor to tax and report.

"*Note.*—The titles of the parties, and the possession which has been had under them, form the foundation of the questions which the Lord Ordinary has had to consider and determine in this case.

"That the pursuer has right to salmon-fishing in the river Spey under and in virtue of grants from the Crown there can be no doubt, and was not questioned. It seemed, however, to be maintained for the pursuer in the course of the argument, that, in virtue of his titles alone, he had an exclusive right to the whole salmon-fishing in the Spey within the limits or boundaries referred to in the Summons, and his first plea in law in the record is to that effect. But the Lord Ordinary could not sustain this view, which, indeed, did not seem to be much pressed. The pursuer's titles do not constitute an unqualified right to salmon-fishing in the Spey separate and independent of lands. The right is always referred to as in connexion with certain lands. Thus, in the Crown charter of 1766, being the leading title founded on by the pursuer applicable to the lands of Orton and others, these lands are conveyed 'cum salmonum piscatione super aquam de Spey usitate et consuet;' and the disposition of 1829 by Mr Wharton Duff in favour of the Duke of Gordon conveys merely 'All and Whole the salmon-fishings and other fishings in the river Spey belonging or attached to the lands and estate of Orton.' It is obvious, therefore, that the extent of the salmon-fishing—and whether within the limits of its extent it is exclusive of the defender and all others, as was contended for by the pursuer—must depend on what has been the state of the possession.

"In regard, again, to the defender's titles, it was maintained for him that, as a barony includes salmon-fishing as well as other subjects *inter regalia*, and as such a right is not lost *non utendo*, proof of possession on his part was unnecessary.

"The Lord Ordinary, however, cannot adopt this reasoning, which he does not think is sound. A barony title is no doubt sufficient to comprehend salmon-fishing, and will be held to do so, but to the effect and extent only to which it is proved to have been possessed for the prescriptive period. And as the other titles of the defender, although they expressly bear a right to salmon-fishing, flow from private individuals, and may be sufficient, as was admitted on the part of the pursuer, along with prescriptive possession, to constitute a good right to salmon-fishing, it is equally obvious, in regard to the defender's right, that everything depends, just as in regard to the pursuer's right, upon what has been the state of the possession.

"That the pursuer's possession has been such as to entitle him to the decree now pronounced in his favour there can be no doubt, and this was con-

ceded at the debate by the defender, whose admission, indeed, not only in the record, but also in the Note of Admissions, No. 96 of process, left no room for question on the subject.

"But what the defender disputed was the claim maintained by the pursuer to the exclusive right of salmon-fishing within the limits and boundaries referred to in the conclusions of the summons, and in regard to this matter the Lord Ordinary has felt the case to be attended with some difficulty.

"It is to be kept in view that, as there is here no action at the instance of the defender, it was unnecessary to determine the precise nature and extent of his right of salmon-fishing in the Spey. It was enough to entitle him to the decree of absolutor that he has established a right of salmon-fishing to some extent within the limits or bounds referred to; for if he has, then the pursuer must be held to have failed in making out his claim to an exclusive right.

"The defender, in support of his right, and of the possession necessary to support it, has founded on fishing by himself and his predecessors for time immemorial, by means of what are called cairns and stream and rod and line. He has also founded in the record on fishing by net and coble, but as there is no evidence to show that this last mode of fishing has been exercised by the defender or his predecessors, it may be thrown out of view, and indeed was given up by the defender in the course of the debate as a point which could not be relied on by him. The defender's possession, therefore, depends entirely on fishing by cairns and stream and by rod and line.

"That the defender and his predecessors have, by their tenants, for time immemorial prior to 1836, fished for salmon by cairns and stream, neither was nor could have been disputed on the proof. But the pursuer argued that such modes of fishing, being of the nature of fishing by fixed engines, were illegal, and could not avail the defender, as has been determined in many cases, and particularly in the unreported case of *Grant v. M'William*, referred to at p. 666 of 10 D., and the case of *Ramsay v. Duke of Roxburgh*, 10 D. 661, and 7 Bell's Appeal Cases, 248. The decree in the former of these cases, which sets out the pleading of the parties and other procedure, has been produced, and is printed in the Joint Appendix, p. 50. Having regard to these authorities, the Lord Ordinary has not felt himself entitled to rely on the defender's proof of possession so far as founded on cairn and stream fishing. At the same time, it seems undoubted that till 1836 all parties concerned had been under the impression (and so acted) that cairn and stream fishing, as practised in the Spey was not liable to any legal objection. Accordingly, there does not appear to have been any attempt at any time on the part of the pursuer or his predecessors to put down the cairn and stream fishing, which, until 1836, were undoubtedly practised in the most open and public manner by the tenants of the defender or his predecessors. There was neither remonstrance nor challenge of any kind, or from any quarter. It cannot, indeed, be doubted that the defender's cairn and stream fishing was acquiesced in, and held by the authors and predecessors of the pursuer as legitimate modes of fishing, and that the defender and his predecessors had by such possession a good right to salmon-fishing in the Spey *ex adverso* of their lands of Cairntie.

"Independently, however, of cairn and stream fish-

ing, the Lord Ordinary is of opinion that, looking at all the circumstances of this case, the requisite possession has been established on the part of the defender. The fishing by rod and line since 1848 has been expressly admitted by the pursuer (see 2d head of Note of Admissions, No. 96 of process). And, independently of that admission, the Lord Ordinary is of opinion that possession for the defender by rod and line fishing for time immemorial, or at least for forty years prior to the institution of this action, has been fully established. In addition to the witnesses adduced for the defender—and there are many of them—who speak to this point, several of the pursuer's witnesses give evidence to the same effect. Nor does it appear to the Lord Ordinary to be of any importance that little or no fishing, even by rod and line, took place on the Cairntie (the defender's) side below Shianshillock, for there is evidence shewing that from the nature of the ground it was difficult to prosecute fishing of any kind from the banks of the Spey below Shianshillock. Besides, keeping in view that the defender's lands within the bounds in question were held under a barony title, fishing opposite to them in any part of the Spey may be sufficient, and, whether the defender had a barony title or not, it could not be reasonably maintained that in proof of possession he was bound to shew that he had fished in every part of the river opposite his lands.

"It was argued, however, on the part of the pursuer, that rod and line fishing is not in law sufficient to support a claim to salmon-fishing where proof of possession is requisite, net and coble being indispensable for that purpose. Now, although there are to be found in the reports of some cases *obiter dicta* to the effect that in questions touching the right to salmon-fishing, rod and line fishing being an inferior, or as it appears occasionally to have been called 'a mean description of fishing,' is not to be regarded, the Lord Ordinary has been unable to find and he was not referred to any positive decision to that effect. Accordingly, this appears to have been the view of the authorities taken by the House of Lords in the recent case of *Stuart v. M'Barnet*, 21st July 1868, Scotch Appeals, vol. i., p. 387; and in the case of *Dalhousie v. M'Inroy*, 3 Macph., p. 1168, it was held by Lord Mure, and acquiesced in, that sufficient possession of salmon-fishing following on a grant *cum piscationibus* was constituted by fishing by rod and line. Nor is it obvious to the Lord Ordinary upon what principle it could be held that rod and line fishing should not be a sufficient exercise of the right of salmon-fishing, for it can be readily enough supposed that in many instances it might be the most beneficial and effectual mode of exercising the right. In modern times rod-fishing has become a favourite, and also, to the proprietor of the water at least, a very lucrative description of sport, as is shewn to some extent by the proof in the present case. Since 1836 there can be no doubt, it is thought, that rod-fishing has been prosecuted on the defender's side of the Spey as an object of profit as well as of sport on the part of the defender or his tenants and others having right from him; and Alexander M'William says (printed proof, p. 31), he 'recollects Lord Seafield letting the salmon-fishing at Cairtie, along with the shooting, to two gentlemen of the name of Boyd and Smith, about 1827 or 1828,' the former of these years being more than forty years prior to the institution of this action. It is also very important, in the judgment of the Lord Ordinary, that the defender's right to fish for

salmon by rod and line was exercised by many persons expressly deriving right from the defender, not only in the knowledge of the pursuer, and without challenge on the part of him or his predecessors, but with their distinct acquiescence as a thing which could not be objected to by them.

"In addition to all this there is what also appears to the Lord Ordinary to be the very important circumstance that the pursuer's immediate predecessor, whom he represents, actually negotiated with Lord Seafield, and obtained from him in lease for a valuable pecuniary consideration, the Cairntie salmon-fishings for the years from 1845 to 1848. In the lease so obtained, as well as in the negotiations which preceded it, the right of Lord Seafield to the Cairntie salmon-fishing appears to have been not only not disputed, but expressly acknowledged.

"If, then, the proof shews, as the Lord Ordinary thinks it does, that the right of Lord Seafield to fish for salmon in the river Spey, and the exercise of that right by rod and line, have been for time immemorial admitted and acquiesced in by the pursuer and his authors and predecessors, it is not easy to resist the conclusion that the defender has had for the requisite period possession of, and exercised the right of, salmon-fishing in the Spey *ex adverso* of his lands of Cairntie, and if so, that the pursuer has failed to establish the exclusive right claimed by him.

"The defender having substantially succeeded in his defence, the Lord Ordinary has found him entitled generally to expenses, subject, however, to the question to be afterwards determined, whether there ought to be any and what modification."

The pursuer reclaimed.

SOLICITOR-GENERAL and BALFOUR for him.

DEAN OF FACULTY, GIFFORD, and JOHN MARSHALL in answer.

At advising—

LORD JUSTICE-CLERK—As your Lordships will probably think it right in a case which, in addition to the importance of the interests involved in it, raises many questions of wide application, to express your opinions at length, I shall, without going much into detail, indicate shortly the result at which I have arrived on the several matters which have been argued to us.

The Duke of Richmond, the pursuer, asks us for decree of declarator under two sets of alternative conclusions; and the substance of these conclusions is simply this. The dispute relates to the right of salmon-fishing in the Spey within certain bounds which are mentioned in the summons and delineated on the plan, extending substantially from Boat of Bridge on the south to the cruive at Ordiefish on the north. The question which is raised relates to the right of salmon-fishing in the Spey within these limits.

The summons concludes to have it found that the Duke of Richmond is entitled to the sole and exclusive right of salmon-fishing within these bounds; and otherwise, that he is entitled to the sole and exclusive right *ex adverso* of the lands on the left or west bank of the river. And then there is a third declaratory conclusion, that Lord Seafield has no right of salmon-fishing within these bounds; and there is a conclusion that he should be interdicted from exercising any right of salmon-fishing within these limits.

In considering how far the pursuer is entitled to decree to any extent in terms of these conclu-

sions, it is necessary, in the first place, to consider the state of the title on which they proceed.

The Duke of Richmond's title is substantially divided into two. He has a title to fishings, derived from the proprietor of the lands of Orton, which lie on the west or left bank on the southern portion of the part of the stream in dispute. Then there are the lands of Elie and Inchberry, lying immediately to the north of Orton, the fishings of which, as well as the lands also, belong to the pursuer.

The question is, in the first place, what right the Duke of Richmond acquired by the conveyances under which he claims in regard to these fishings?

As regards the fishings of the lands of Orton, they stand on a disposition by Mr Wharton Duff, the proprietor of the lands, to the trustees of the late Duke of Gordon, dated 23d June 1829, by which he conveyed, "All and Whole the salmon-fishing and other fishings in the River Spey belonging or attached to my estate of Orton, in the title-deeds thereof." Then follows the description; and there is appended to the description, "as the same are all presently held in lease by Messrs Forbes, Hogarth, & Co.," and there is also a reservation by Mr Wharton Duff in favour of himself and his successors in the lands, of the right of rod-fishing "for amusement only." Now that title, as it stands, while on the one hand it refers to the state of possession as enjoyed by Messrs Hogarth & Co., on the other bears to be a title to salmon-fishings belonging to or attached to the estate of Orton. And therefore we are taken back to the former titles to see how these fishings stood in the person of the author of the Duke; and they stand substantially in this position. The earliest title which is referred to is a title in 1756, by which there is a disposition from Lord Braco to Arthur Duff conveying the lands and estate of Orton, "with the salmon-fishing in the water of Spey belonging to the said lands." That disposition is recorded in 1766, and a Crown charter of resignation is expedited upon it, the Crown charter of resignation bearing—"Totas et integras illas partes et portiones Baronie de Rothes Orientales et Occidentales Ortowns nuncupat. cum domibus aedificijs mossis moris partibus pendiculis et universis pertinent. ad easdem spectan. omnes jacen. infra Baroniam de Rothes parochiam de Dundurcas et vicecomitatum de Elgin et Forres aut tanquam dict. terrae aliter nominat. et designat. in antiquis vel alijs iuribus et infeofamentis earundem ac etiam totas et integras villas et terras de Daigens et Inch de Cardenie cum salmonum piscatione super aquam de Spey usitat. et consuet. cum domibus aedificijs hortis toftis croftis partibus pendiculis et pertinent. earundem omnes jacen. infra Baroniam de Barmuckety parochiam et vicecomitatum antedict. sicuti dict. terrae de Ortown aliaq. praedict. in Dispositione postea mentionat. concess. per dict. Gulielmum dominum Braco praefato magistro Arthuro Duff descripta sunt vizt. terras et statum de Ortown comprehendentes terras dominicales et maneriei locum de Ortown Windyhill Darnathills Boghead Hillockhead Daigens Chapel et Inch de Cardenie cum salmonum piscatione in aqua de Spey dict. terris spectan. una etiam cum molendino de Ortown terris molendinarijs multuris et sequelis earund. domibus aedificijs hortis pomarijs silvis mossis moris et universis pertinent. ad easdem spectan. jacen. in parochia de Dundurcas et vice-

comitatum de Elgin et Forres;" and the same form is carried through the rest of the title. There is a Crown charter in 1806, and the description there is "the salmon-fishings in the Spey *ad dictas terras spectante*," which is just the same as saying *ex adverso* of the lands. Now, if I were to construe these titles as they stand as regards the lands of Orton, it does not appear to me to be very doubtful that they convey the salmon-fishings *ex adverso* of the lands to which they refer. It is quite true that in the last disposition to the Duke of Gordon's trustees the disposition is of the salmon-fishings, and not of the lands; but that disposition very clearly bears that they are fishings attached to and belonging to the lands. The phrase in the Crown charter of resignation "used and wont" is unquestionably a phrase admitting of construction by possession; and what the effect of that possession may be is a question to which I shall speak immediately. But I think it right to draw attention to the fact that this is not a title which, in any view of it, on the face of it, can be held to be equivalent to a grant of the whole salmon-fishings in the Spey, without reference to the land on either side. The effect of that is another matter, which I shall say a word on immediately.

In regard to the titles to Elie and Inchberry, the matter is still more clear, because there is no conveyance of any kind in the progress in regard to the salmon-fishings belonging to the proprietor of Inchberry and Elie, which is not attached to the lands. The title in regard to that part of the subject begins by a charter of confirmation as far back as 1601, and is deduced from that time. That is a charter in favour of William Cumming of Earnside; and the words are these, "Cum omnibus salmonum piscariis omnium et singularum predictarum terrarum"—all the salmon-fishings of all and whole the said lands—"super dicta aqua de Spey solitis et consuetis"—the fishings used and wont of the said lands. In the charter of adjudication the phrase is "Totas et integras villas et terras de Elie et Inchberry cum salmonum piscatione super aqua de Spey iisdem pertinenti." The same phrase is carried down until, in the beginning of this century (I think in 1812), the lands, with the fishings of Elie and Inchberry, were conveyed to the Duke of Richmond. Now there can be no question at all that that is a good title to the salmon-fishings in the river *ex adverso* of these lands; and there can be as little doubt that it is a good title to prescribe a right to the whole salmon-fishings of the river. On the other hand, if anything turns upon it, in my opinion the title is not in itself equivalent to a grant from the Crown of the whole fishings in the river by falls to be interpreted by the possession had upon it. Now, in regard to that possession, I am of opinion that, looking at the evidence in the present case, the Duke of Richmond has for the prescriptive period, and for a considerably longer period, exercised the right of salmon-fishing by net and coble on both sides of the stream throughout the whole course of the bounds in question, and that he cannot be disturbed in the exercise of that right—that he has exercised the right of net and coble fishing within these limits for the whole of that time. The fact that he has done so since 1802 is matter of admission on the record; but I am of opinion that he has successfully carried his right farther back, although, perhaps, it was not necessary that he should do so. And I am farther of opinion that,

unless the defender has shown a title to fish with net and coble for salmon *ex adverso* of his own lands, that privilege is exclusive on the part of the pursuer, as far as the present defender is concerned. And therefore we are driven to consider what the title of Lord Seafield is.

Now, Lord Seafield is admittedly the proprietor of the whole lands upon the right or east bank of the river during the whole course in question; and his title is founded, first, on a charter to the barony of Mulben, dated 31st July 1616, which erected the lands of Mulben and Cairntie, *cum piscationibus*, into a free barony; and, secondly, on the base right flowing from Sir John Grant of Frenclue, the proprietor of the property, dated in 1633, by which were conveyed the lands of Cairntie, with the salmon-fishings, to John Mann. I should have mentioned, in regard to the lands of Orton, that, though not a barony in themselves, they are part of the barony of Rothies. This base right was subsequently re-acquired by Sir Ludovick Grant, an ancestor of the defender, and is now vested in the defender; but it never was confirmed by the Crown. In these circumstances, it is contended for the defender, first, that his barony title is sufficient, without possession, to entitle him to salmon-fishings; and, secondly, that at all events he has a sufficient title to support a proof of prescriptive possession. I do not think it was contended in the argument that the base right, without possession, could have been held available for that purpose; and if it had been, I should not have thought the contention was well founded. Now, it is sufficiently plain that the barony title is a perfectly good title for prescription. It would have been so even if the lands had not been erected into a barony, as it bears *cum piscationibus*, which in an ordinary charter would be sufficient. The only question on this head is whether, without possession, the barony title is sufficient to infer a right to salmon-fishings as being comprehended under the term *cum piscationibus*? This raises the question of the effect of a barony title as implying a conveyance of the minor regalia, and among them the right of salmon-fishing. That has been considered as an open question in recent times, and I don't think has ever been decided in terms; and the opinions of institutional writers are divided upon the subject. It is assumed to be laid down by Lord Stair, and by Mackenzie in the passages which were quoted to us, that a barony, being *nomen universitatis*, is presumed to convey the minor regalia, and especially salmon-fishings, though these are not expressed. I say it is assumed to be so laid down; because I have some doubt whether Lord Stair intended to lay down the doctrine in the full and explicit manner which perhaps his words as literally construed could imply. On the other hand, Craig states this matter to have been a subject of dispute among jurists even in his day, and his opinion rather seems to lean to the opposite conclusion. The passage in Craig is 2. 8. 15, where he states both views, and seems rather to think that those who think that a barony title does not infer a conveyance to the regalia hold the better opinion of the two. Erskine, on the other hand, entirely repudiates Stair's doctrine in respect to the minor regalia, and Mr Bell in his Principles lays down the opposite doctrine in the clearest and most explicit manner. But the whole current of the decisions is in favour of the later doctrine—viz., that a barony title implies no more than a title to prescribe, even without the words

cum piscationibus, and I am not aware of any case in which a barony title has received a higher effect. It is also worthy of remark, that although Lord Stair in three several passages in the same title states the general doctrine in very absolute terms, yet the only cases he cites are instances in which forty years' possession have followed upon the right. There is a passage in an opinion of Lord Curriehill in the case of the *Lord Advocate v. Sinclair*, which was referred to, and no doubt it seems to indicate an impression that a barony title without possession might at all events assist such a claim. But in that case it was not only not necessary to the case to decide the effect of a barony title without possession, but the question did not arise. There had been full and complete possession for more than a hundred years upon the titles in that case, and therefore the effect of a barony title not clad with possession did not arise there for judgment. There remains, therefore, only the question of possession, so far as Lord Seafield's title is concerned. It is not said by Lord Seafield that he has ever possessed by net and coble, but he says that he has exercised the right, in the first place, by cairn-fishing, and, in the second place, by rod-fishing; and the Lord Ordinary has sustained the second of these contentions. I shall consider the effect of rod-fishing first. I think it sufficiently proved that for forty years prior to the institution of this action Lord Seafield, by himself or his tenants, has exercised the right of rod-fishing. I don't say that it is amply proved, for unquestionably it is not; but for a period of nearly thirty years it appears that the rod-fishing has been let to a game tenant, and that the Duke of Richmond himself was at one time, or intended to be, the tenant; and I think it is established, though there is some conflict of evidence about it, that the tenants on the east bank of the stream—I mean on Lord Seafield's ground—had been in the habit of fishing for salmon with the rod as part of their possession. This is made still more clear by the fact that before the fishings were let to the game tenant renunciations were taken of the rights of salmon-fishing from the agricultural tenants—a proceeding which appears to me entirely inconsistent with the idea that there had been no practice on their part of rod-fishing previously. The question therefore arises, whether possession of this nature is sufficient to construe the barony title as comprehending salmon-fishing, or to support the base-right. Now, I am clearly of opinion that the cases on which the Lord Ordinary has sustained this plea have no application to the circumstances of the present case. The doctrine which received effect in the cases of *Stuart v. M'Barnet*, and *Dalhousie v. M'Inroy*, was one which had been frequently given effect to in the law of salmon-fishing; indeed from the earliest period, viz., that where fishing by net and coble is prevented by the nature of the stream, possession by rod-fishing might be sufficient, as being the only mode in which the right could be exercised. But that principle has manifestly no application to a case in which the ordinary mode of fishing by net and coble is practicable and practised. On the other hand, there is a clear and unbroken chain of decisions to the effect that taking salmon by the rod is not a sufficient mode of prescribing a right to salmon-fishings in a stream in which net and coble fishing is the ordinary mode of taking salmon. The authorities were all fully considered in the case of *Ross v. The Duke of Sutherland*, which I hold

as fixing conclusively that in places which admit of being fished by net and coble rod-fishing is not a sufficient assertion of the *jus regale*. That case was cited as leading conclusively to that result in the case of *Abercromby v. Breadalbane*, and in the case of *Milne v. Smith*, where Lord Moncrieff held that an allegation of possession by rod-fishing was not a relevant allegation of possession.

This however belongs to a class of cases more likely to arise in the future than it has in the past. Rod-fishing having become a luxury, may in the end be the more profitable mode of using the right; and in such a case the question would occupy a different position from that which it has hitherto held. And if a proprietor with a title bearing *cum piscationibus* had for forty years not only let the rod-fishing in a stream for a considerable rent, but had debarred all others from the exercise of any right of salmon-fishing, the question would, in my opinion, present itself in a very different aspect from that which we have now to consider. But in the present case it is impossible to look on the rod-fishing as enjoyed by the defender as the assertion of a right to exercise the *jus regale*, seeing that during the whole period of that possession the pursuer was exercising that right in the most appropriate and profitable manner, by fishing without interruption with net and coble *ex adverso* of the defender's lands. In regard to the cairn-fishing, the question was raised, in the first place, whether it was legal; and secondly, whether, if it was legal, it could be held to be possession so as to validate the incomplete title of Lord Seafield. I am of opinion that, even if it had been legal, fishing by cairn-net was a very imperfect and partial way of exercising a right of salmon-fishing, and cannot in my opinion receive effect as an assertion of the *jus regale* against contrary possession. If that view be sound, it is unnecessary to consider either the legality of the mode of fishing, or the effect of its illegality, should it be made out. But I am very clearly of opinion that it was a mode of fishing by fixed engines, and comprehended within the prohibitions of the statutes. Indeed the description of the mode of fishing I think proves that beyond question. In these circumstances, I am of opinion that the Duke of Richmond has made good his title to the exclusive right of salmon-fishings *ex adverso* of the lands on the west bank of the river within the bounds mentioned, and the right of salmon-fishing by net and coble *ex adverso* of the defender's lands, and that the defender has no such right. I am also of opinion that the pursuer has a good title to prevent the defender from fishing by rod and line *ex adverso* of the east bank, in so far as that may be done in prejudice of his right to fish with rod and coble. The only difficulty that I have found in the case—and I only throw it out because it has pressed a good deal during my consideration of the case—is whether we should go farther in giving effect to the conclusions of the summons than what I have now said; and I shall state my difficulty in a single sentence. I think this title of the Duke of Richmond is not a title to the whole fishings in the Spey,—on the face of it, and construed by itself. It is a good title to salmon-fishings, but I think it a title limited to the lands in respect of which it is conveyed; and I think it falls under the description of the Lord Justice-Clerk Hope, in the case of *Breadalbane v. Campbell's Trustees*, where it was laid down that, if fishings are conveyed in connection with lands, the presumption always is that it is fishings *ex adverso*

of the lands that are granted, and no other. Now, it is quite true that the Duke of Richmond has for forty years and upwards fished *ex adverso* of the defender's lands by net and coble, which is the appropriate mode of exercising the legal right. The question in my mind is, Whether he has thereby prescribed the whole title of salmon-fishings in the river, or whether he has prescribed anything beyond the right to draw his nets as regards the east side. I understand that your Lordships do not participate in these doubts; and I am not disposed to press them to the extent of a difference of opinion. The real question comes to be this, and it is in my mind one of considerable difficulty,—Although he has the right of drawing his nets and fishing with net and coble absolutely and exclusively on the east as well as on the west bank, has he prescribed a right to go there for any other purpose, or to interfere with any person exercising any right of any kind there, so long as his fishing by net and coble is not impeded? It would come, therefore, to the question, whether the salmon-fishing on that side was not still in the Crown although burdened with the right of the proprietor of the fishings on the other bank to draw their nets on the east bank. I have some difficulty on that subject, but I do not intend to do more than simply indicate the ground of my doubt.

LORD COWAN—The leading conclusions of the summons seek to have it declared that his Grace the Duke of Richmond's right of salmon-fishing in the River Spey is sole and exclusive within the boundaries therein set forth. There are alternative conclusions, to the effect that the pursuer has right to the salmon-fishings in the said river within the said boundaries *ex adverso* of the lands specified; and that by net and coble, rod and line, and every other lawful mode. The Lord Ordinary by his interlocutor negatives the exclusive right claimed by the pursuer, but deems in his favour in terms of the other conclusions—as to which, indeed, no dispute existed between the parties. The real question at issue under the record is, Whether under the title-deeds on which he founds the pursuer is or is not entitled to have his undoubted right of salmon-fishing in the Spey within the specified bounds declared to be exclusive of any right to these fishings in the defender, the Earl of Seafield.

The right of salmon-fishing is *inter regalia*, but being in its nature patrimonial may be the subject of grant by the Crown. The grant may be of the salmon-fishing in any particular river or locality, and to be held of the Crown as *separatum tenementum*; or it may be granted along with lands whether constituted into a barony or not, bounded by the river—the extent of the grant in that case being for explanation by the possession which follows upon it. An inquiry regarding an alleged right of salmon-fishing therefore requires, in the first place, an examination of the titles from the Crown in virtue of which it is asserted; and, in the second place—when the title as regards its extent is not clear in its terms—evidence of the possession and enjoyment which the Crown vassal has had under his titles.

The ownership of the fishings within the boundary set forth in the first conclusion of the summons was acquired by the pursuer and his authors from Mr Wharton Duff of Orton by disposition dated in 1829,—Mr Duff retaining the ownership of the lands and estate of Orton, to which the right of

salmon-fishing was attached under his Crown titles, and in particular under charters of resignation in 1766 and 1806. The ownership of the fishings within the boundaries set forth in the second conclusion of the summons was acquired by the pursuer and his predecessors under various Crown-charters, some of which reach back for centuries, the right thereto having been given off by the Crown along with the lands on the left or west bank of the Spey, which now belong in property to the pursuer.

On the other hand, the defender is proprietor of the lands and estate extending along the whole of the east or right bank of the river, in so far as the boundaries of the disputed fishings extend from south to north, under Crown titles which do not confer any grant of salmon-fishing, but only a right of fishing—the sole Crown grant of salmon-fishing *per expressum* in the Spey within the specified boundaries being vested in the pursuer.

As regards the possession of salmon-fishing which has been enjoyed by the pursuer, and its extent and character in this competition with the defender, a lengthened proof has been led, both parole and documentary. Its bearing and effect on the exclusiveness of the pursuer's right will be hereafter noticed. Meanwhile it is important to keep in view the express admission by the defender, contained in the joint minute, No. 96 of process, viz., that the pursuer and his predecessors and authors have "regularly fished by net and coble for salmon from both sides of the Spey, shooting their nets from and hauling them upon both sides," along the whole extent of the fishing boundaries embraced within the conclusions of the summons "from the year 1802 down to the present time." The parole proof carries the possession so far back as 1793, and some of the tacks produced are dated in 1783 and 1808. But this admission in itself renders it unnecessary, in examining the proof, to do more than to inquire whether the right so enjoyed has been exclusive, or whether the defender or his predecessors have exercised a right of salmon-fishing in the Spey within these boundaries, on which he can found as a good answer to the pursuer's claim of exclusive right. Supposing that the possession admittedly enjoyed by the pursuer has not been so interfered with by the defender, then the Crown title of the pursuer must be held sufficient to have vested in him an absolutely exclusive right to these fishings.

The Orton fishings are described in the charter of 1766 thus—"ac etiam totas et integras villam et terras and cum salmonum piscatione super aquam de Spey vsitat et consuet," lying within the barony of Barmuckety, as the same are described in the disposition referred to which sets forth the lands and estate of Orton, comprehending the lands therein mentioned—"cum salmonum piscatione in aqua de Spey dict. terris spectan." The same description is contained in the subsequent Crown charter of 1806 in favour of Mr Wharton Duff; and in the conveyance of the fishings in favour of the ancestor of the pursuer in 1835, they are described as—"All and whole the salmon-fishings, and the other fishings in the River Spey, belonging or attached to my lands and estate of Orton," together with the hail privileges and pertinents belonging to the said fishings—"as the same are all presently held in lease by Messrs Hogarth & Co., conform to tack dated April 1817," under reservation to Mr Duff and his successors in the estate of Orton of the privilege of fishing with

rod for amusement only. The same description is contained in the pursuer's own charter of 1861, under which he is infest. The leases of the tenants here mentioned are produced, and are, with other leases, under which from 1782 downwards these fishings and those of the lower water were possessed, referred to in the proof, and will be found in the joint appendix.

The fishings of Elie, and Inchberry, and Ordiefish, again, are described in the Crown charter of 1861 as having been conveyed to the pursuer's authors along with the lands in these terms, "cum omnibus salmonum piscariis omnium et singularum prædictarum terrarum super dicta aqua de Spey usitat. et consuet;" and this description, in nearly the same terms, is to be found in all the subsequent titles by which the lands and the right of salmon-fishing attached have come to be vested in the pursuer under his Crown charter of 1861, the said lands and fishings being set forth as contained in the several baronies specified in the titles.

It was contended by the defender that the right of salmon-fishing thus conferred did not purport to be of the *whole* fishings in the river Spey within the specified bounds, but only of the salmon-fishings *ex adverso* of the lands of Orton and of Elie and Inchberry, which extended only along the left or west side of the river; and this proposition has to a certain extent been affirmed by the Lord Ordinary. But it is undoubted that a baronial title so expressed, when followed by immemorial possession of the whole fishings in the water, with the use of both banks for drawing the nets, is as effectual as the grant of the whole salmon-fishings in the river to a party having no lands on either bank as *separatum tenementum*. Where the proprietors on either side of the river have grants of salmon-fishing from the Crown, their right of fishing is to be exercised so that each may draw his nets only on his own side. But where only one of the proprietors has the right of salmon-fishing in the river, he may under his Crown title acquire an exclusive right and the privilege of drawing his nets on both sides of the river by immemorial possession and enjoyment of that privilege. His title is thus explained, and the grant established to be as effective as if he had had a grant of salmon-fishing unconnected with land on either side of the river; in which case it is undoubted that the grantee may in the exercise of his right draw his nets on both sides. This was decided in the case of *Forbes* (10 D. 840) so long ago as 1623, referred to by Lord Stair, 2, 3. 69. "Prescription of forty years' possession of salmon-fishing sustained *ad hoc* that they might draw in other mens' lands than their own, albeit only infest in a barony with salmon-fishing upon a side of the water." This has ever been recognised as undoubted law where there is no competing right in the proprietor of the opposite bank of the river, and immemorial possession has followed on the grant contained in the baronial title. So recently as 12th March 1862, in disposing of the case of *Richardson v. Hay*, the opinions of the Court recognised this principle, although, because of there having been no possession, the decision was adverse to the pursuer's alleged right in that case.

It is not therefore to be disputed that the pursuer has acquired under his titles and admitted possession for time immemorial the right of salmon-fishing which he claims, unless there has been acquired by the defender on the grounds

stated in defence a right of salmon-fishing in the river legally effectual to limit or restrict the pursuer's right under his titles and possession.

The title of the defender to the lands on the right or east side of the river Spey bears "All and Whole the lands and barony of Mulben, comprehending," &c., "with the fishings thereof," and other pertinents of the same, used and wont, as also "all and whole the lands of Cairnty," &c., with "fishings" and whole pertinents thereof, used and wont, incorporated into the free barony of Mulben by royal charter dated in 1616. This is the only Crown title. It does not contain a grant of salmon-fishing, but only a grant of fishing; and under this title, although there has been fishing for salmon by cairns and by rod and line, there has been no possession at any time enjoyed by the defender or his predecessors of salmon-fishing by net and coble. The defender, as proprietor of other subjects along the banks of the Spey above the boundaries here in question, and in virtue of other titles, may have had salmon-fishings. But under the titles to his lands within the boundaries embraced by this action he has never had such fishing. The allegation to that effect in the record is not supported by the proof, and was not persisted in by the defender's counsel in the recent debate. But it is set forth that a sub-vassalage was created by one of the defender's predecessors in 1633 by the conveyance to John Mann of Greenhead of the lands of Cairntie, "una cum salmonum piscaria dictis terris de Cardenie et Delchurie supra australi latere dictæ aqua de Spey pertinet;" and that the subjects of this feu were reconveyed to the defender's predecessor in 1755 with the salmon-fishing pertaining to the said lands, and this sub-vassalage is alleged now to be in the person of the defender. But it is manifest that as the grantor of the original feu had no right to salmon-fishing himself, and as no possession of salmon-fishing by net and coble has followed on the feu right, the existence of this title can have no effect in competition with the grantee of the Crown, and under whose title alone there has been past memory the sole use and enjoyment of salmon-fishing by net and coble.

The defender, however, has alleged use and possession of fishing for salmon by cairns and by rod and line; and such possession, it is contended, is sufficient, having regard to his title *cum piscationibus*, to confer on him a general right of salmon-fishing *ex adverso* of his lands. Taking the possession alleged to have been established by the proof, its relevancy or sufficiency in law to support this assertion of right has to be considered, keeping in view the express grant of salmon-fishing held by the pursuer, and immemorial enjoyment and possession of fishing in the whole river by net and coble had by the pursuer and his predecessors.

1. As regards fishing by rod and line, it is quite established to be insufficient for the purpose. In *Duke of Sutherland v. Ross*, 11th June 1836, it was expressly decided that "a right of salmon-fishing cannot be constituted by a grant '*cum piscationibus*' and subsequent use of taking salmon by means of rod-fishing only." The earlier cases of *Forbes* and of *Colquhoun*, and of *Chisholm*, are referred to by the Lord Ordinary, who decided the case of *Sutherland v. Ross* as having substantially affirmed the same doctrine; and Lord Medwyn, when the case was advised in the Inner House, thus stated the principle—"A clause *cum piscationibus*, even in a charter from a subject superior, is sufficient if the

possession be complete by net and coble: but the mere exercise of rod-fishing for the supply of the table, or for amusement, is not evidence of such possession, especially in opposition to a clear and undoubted royal grant with full possession." And after referring to the older decisions, his Lordship observed "that the symbols of net and coble used in the conveyance of salmon fishings show the nature of the fishing which the law had in view." These views were concurred in by all the Judges, the Lord Justice-Clerk (Boyle) stating it was matter of every-day practice for adjoining proprietors on the Tay and the Tweed "to purchase the right of fishing salmon with the rod from the tacksman of the fishings." The more recent case of *Milne v. Smith*, 23d November 1850, proceeded on the same footing, the Lord Justice-Clerk (Hope) observing "fishing by rod is not a ground in our law for acquiring a right of salmon-fishing, even with a Scotch title *cum piscationibus*." Lord Medwyn said "that no right of salmon-fishing can be acquired by the exercise of it by the rod merely" under such a title; and Lord Moncrieff, referring to the case of the *Duke of Sutherland v. Ross*, which he held to be well decided, said "that a use of fishing by rod and line was altogether irrelevant and insufficient, however long continued, for establishing a right of salmon-fishing." With these authorities it would be quite inconsistent to hold that, with the title and possession here alleged, the defender can compete with the express grant of salmon-fishing vested in the pursuer.

2. The defender, however, maintains that he has proved such possession of fishing for salmon by means of cairns prior to 1835 as to support his right to dispute the exclusive character of the pursuer's right by net and coble, and all other lawful means. To this there are several answers—(1) On the proof, it is at least doubtful whether the necessary possession of this cairn-fishing in the river has been established. (2) Supposing it to have been so, the mode of fishing thus practised was in itself illegal, and as such was discontinued after the interdict obtained against it, or a similar mode of fishing, in 1835. And (3) even were it otherwise, it is not a kind of fishing, any more than rod-fishing, that can be held to support the defender's pretension that he has thereby, under his title *cum piscationibus*, acquired a right of salmon-fishing on which he can found in this competition.

(1) The proof does not establish cairn-fishing by the defender except at certain places within the bounds embraced in the first conclusion of the summons—viz., on the part of the river the fishings of which were acquired from Mr Duff of Orton, and, moreover, was only practised by tenants of houses and small tenements of land lying along the bank of the river. Nor was the fishing such as it was exercised under distinct leases granted by the defender, but was apparently practised by these tenants at their own hands because of their facility of access to the river. In this situation, and having been discontinued after 1835 because of its illegality, it does not appear on what ground it can now be available pleaded, though otherwise not objectionable. But apart from this, (2) cairn-fishing falls within the prohibition of the statutes, and is illegal. Accordingly, in 1836, complaint was made to this Court against the defender, his predecessors, and tenants, by the then proprietor of the salmon-fishings, because of the formation of dykes across

the stream, which prevented the fish from getting up the river, and also of the practice of fishing by means of hang nets in pools and streams. Interdict was pronounced, and the defenders ordained to remove the dykes and other erections in the river complained of at the sight of the Judge Ordinary. From that day the cairn-fishing in the river was discontinued by the parties who had previously practised it. And, on the footing of their having been deprived of the fishings they previously exercised, certain allowances were applied for and given them. Since that date there has been no cairn-fishing. The defender, however, now says that this mode of fishing was not that set forth in the interdict, and is in itself not illegal. But the description given by the witnesses Younie and Young, and which is in conformity with the rest of the evidence, sufficiently shews it to be within the prohibited modes of fishing. The true import of the Scotch Acts anent salmon-fishing has been the frequent subject of judicial consideration, and nowhere, more so than in the recent case of *Hay v. Magistrates of Perth*, 1863, 4 Macq. 635 (the Bermoney boat case). Having regard to the view taken of what is to be held fixed machinery or apparatus, and therefore illegal in these cases, and especially in the last of them as decided in the House of Lords, it is only necessary to read the statements of the witnesses to whom I have referred, viz., Younie and Young; "In cairn-fishing, the cairn is a kind of bulwark built out four or five feet from the bank, so as to cause an eddy in the river, and a net is fixed one end on the bank, and the other end is shoved out with a long pole into the water below the cairn, a man seated on the bank, holding the end of the net by what are called feeling strings, so that when a fish strikes the net in its passage up the river, it can be at once hauled in by a rope attached to the outer end of the net for that purpose." This is Younie's description, and Young's is substantially the same. And to the same effect, also, is the proof led by the defender. See Lobban's evidence, p. 20, and Robertson's, p. 25, who says that the cairns may project from the bank as far as you like, and that his went out into the water about five or six yards. This being the description of the cairn-fishing practised by some of the defender's tenants, it is not surprising that, after the judgment of the Court in 1836, the practice should have been discontinued, and that the lease to which the defender was a party in 1843 should describe the fishing intended to be let, as "whatever right of salmon-fishing legally belongs to the said Earl," and that it should be set forth that "fishings by cairns or streams had been recently declared by the Court of Session to be illegal.

Again (3) even were the illegality of cairn-fishing less clear than it is, this kind of fishing could not, any more than fishing by rod and line, be held sufficient to explain the general term "fishings" in the defender's title to be inclusive of salmon-fishing. The absence of fishing by net and coble is destructive of such inference in competition with the pursuer's right. It is, however, enough to say that the illegality of this kind of fishing excludes it from being founded on as conferring any right through prescriptive possession to any effect; far less a complete title to salmon-fishing. To complete such a title the prescriptive possession founded on must have been exercised in a legal manner, and no possession, however long, which

is exercised in a manner contrary to statute will suffice to confer salmon-fishing, under a title which requires prescriptive possession to explain or complete the right.

(4) As neither of the modes of fishing on which the defender founds is sufficient to support his alleged right, it is equally unavailing for this purpose that the title on which he founds is a baronial title. The mere erection of lands and pertinents into a barony will not by itself confer a right of salmon-fishing. This may now be held to be authoritatively ruled, notwithstanding of the passages in Lord Stair's work, on which some argument to the contrary was founded. Mr Erskine is clear on this point, as also Mr Bell. It is, however, a good foundation for acquiring a right of salmon-fishing by prescriptive possession, provided that possession has been by net and coble. The effect of a baronial title under the Crown goes no farther. The various decisions reported in the Dictionary under the section "Title requisite to carry right of salmon-fishing" afford authority for this proposition, as do also the modern decisions referred to in Mr Stewart's book on rights of fishing, where the law on this point is well explained.

On these grounds, I have arrived at the opinion that the pursuer is entitled to have decree under the leading conclusions of the summons to the effect there stated—viz., "that the pursuer has the sole and exclusive right to the salmon-fishing in the river Spey" within the several boundaries therein specified; and that he "is entitled to fish for salmon and fish of the salmon kind, by net and coble, rod and line, and every lawful mode, from the right or east bank or shore of the said river Spey belonging to the defender, between the said points or boundaries, as also to enter upon and use the said portion of the said right or east bank or shore for the purposes of fishing, at least in so far as necessary for the full and effectual exercise of the pursuer's said rights of salmon-fishing."

Two questions are raised as to rod and line-fishing by the latter branch of these conclusions and by the relative interdict concluded for.

(1) One of those questions relate to the defender's alleged right to fish by rod and line along his own bank. On this point I consider that the defender has not placed himself in a situation effectively to plead this defence. Throughout the proceedings in this action the defender has stood entirely on the defensive. Although his title merely confers on him "fishings," he has not attempted, except in answer to the exclusive right claimed by the pursuer, to make out that under his general title he can exercise salmon-fishing by rod and line in limitation and so far to the injury of the full right of the pursuer. In any view I apprehend that such limited right must be judicially declared to belong to the defender, as no express title to that effect is in his Crown grant, before it can be effectually pleaded. But I know of no case where such a limited Crown grant has been given or been recognised, where the full right and title of salmon-fishing in a river has been conferred on another grantee. A grant of salmon-fishing by net and coble includes rod and line-fishing—*Major includit minorem*; and a competing right to fish with rod and line rested in the mere use of that mode of fishing under a general title cannot be effectively pleaded to the detriment of the Crown grantee's perfect right.

(2) The second question regards the power of the pursuer to use the east bank of the river in the

exercise of his salmon-fishing by rod and line. It arises under the conclusions in which the pursuer demands a recognition of his right to go upon the east or right bank of the river, which belongs to the Earl of Seafield, for the purpose of exercising his right of fishing by rod and line. Upon that part of the case I have had some difficulty; but, looking at the pursuer's title as giving him a right to salmon-fishing in the whole river—equivalent, I apprehend, to a grant of fishing in the river Spey as a *separatum tenementum*,—and having regard to the statements by several witnesses, to the effect that the pursuer, his predecessors, and parties having permission from them or their factors, did within the last thirty or forty years exercise the right of rod-fishing on the lands belonging to the defender, I have come to be of opinion that the conclusion of the summons should be given effect to. The pursuer having an undoubted right of access to the east bank of the river for the purpose of drawing his nets at any part of it, and the privilege of erecting huts, with a view of exercising his right of fishing on the east or right bank, it seems to me that it would be an inconsistent and illogical result that, though the pursuer could throw a net from the east or right bank, and fish by net and coble, he could not cast a line and catch a fish by means of the rod. I think the greater right must be held to carry with it the minor right. Holding the pursuer to have the exclusive right to fish for salmon by net and coble on the east or north bank, it seems necessarily to follow that he must have a right to fish by rod and line along that side of the river, as well as along his own side, and in the river itself.

LORD BENHOLME—This is a very important case from the stake at issue; but it is more important in this way, that the interlocutor which your Lordship has proposed, and which my brother and I are to concur in, is an alteration of the Lord Ordinary's interlocutor in a very substantial matter. For that reason we need not offer any apology for stating our views. At the same time, after the very full explanation of those views which Lord Cowan has given, in all of which, except the few last sentences, I am inclined to concur, it shall be my endeavour to limit any observations I have to make to the matters on which your Lordship entertains doubts. Were it not for those doubts I think I might satisfy myself by merely concurring in Lord Cowan's opinion. But those doubts are of such importance, and they seem to spring so much from principle,—a principle which I cannot myself adopt, but which, as your Lordships deal with it, assumes very considerable interest and importance,—that I must briefly refer to those considerations which in my mind remove those doubts altogether. The first important thing is to attend to the titles of the pursuer; and I must say that I do not concur in the view that your Lordship entertains of these titles. I think these titles are *ex facie* titles to the whole river fishing opposite the lands to which they relate. I read the title "super aquam de Spey" as meaning over the whole, not half, the river. We all know that where coterminous rights of fishing have been conferred on heritors on the opposite sides of a river the existence of the two rights necessarily leads to a modification of each; and it is that circumstance that leads to the inference that each has right to one-half of the river fishing, that is to say, to fish half across the river. But where there are no compet-

ing grants—where the Crown has granted nothing except on one side, and that *super aquam*,—I look on that as a title *ex facie* embracing the whole river; for "super aquam de Spey" appears to me to mean the whole river,—quite across the river, and not half across. Now, in the present case it may perhaps be said to be of little consequence to examine the precise effect of the titles taken by themselves, since there has been superadded to them an amount of possession so long continued as to leave no doubt as to their present efficacy. But I have thought it right to say that in my view the possession which has followed, coupled with the words *usitat et consuet* is a possession that explains the titles, rather than serves to enlarge or extend them in the way of acquisition by prescription. And this is a distinction which I think touches very closely the doubts that your Lordship has expressed upon another part of the case, viz., the matter of rod-fishing. If the Duke of Richmond's rights to salmon-fishing are founded as to their nature and extent mainly upon prescriptive possession rather than on the contents of his Grace's titles, then no doubt the maxim would apply *Tantum prescriptum quantum possessum*, and whatever the Duke had not possessed for forty years continuously he is not to be entitled to enjoy. Now my view of the Duke's title is much more extensive. I think it is a grant of the *regale* over the whole of these bounds, and I think it is a grant which embraces the salmon-fishings on both sides, and with right to draw the nets on both sides. I think that the right of fishing with net and coble, which is the larger right, necessarily carries along with it the smaller right of fishing by the rod. Being a right of salmon-fishing quite across the river, and to be exercised on both sides of the river so far as net and coble (the proper *regale*) is concerned, I look on these minor rights, which in fact are inseparable from the larger right, as to be exercised in the same way, and understood to be enjoyed to the same amplitude as the other. Your Lordship will see that this view serves in a great measure to remove from my mind any doubt that I might otherwise have entertained as to the right of the Duke to fish with rod from the other side of the river, because, if I am at all correct in my view of the Duke's title of salmon-fishing, it is a right of salmon-fishing which, from its very constitution, by the terms in which it is expressed, contains the royal right quite across the river, and with the royal right every inferior right quite across the river, and with the right of exercising it on both sides. Now, as to the possession of the salmon-fishings; after what has been said by both your Lordships, it would be idle in me to say a word, I will only observe that this is certainly one of the most extensive enjoyments that I have ever known of salmon-fishing, for not only has the salmon-fishing been exercised on both sides (and it would appear from the evidence of the witnesses more beneficially on the east side than on the other), but the pursuer and his authors have actually been in the practice of erecting huts on the east bank for the accommodation of their salmon-fishers; and there are no less than three huts marked on the plan, the ruins of which, I believe, still remain to show how extensive the possession has been in former times of this right of salmon-fishing.

Now what does Lord Seafield maintain? Your Lordships have spoken to his titles independently of prescription. Independently of prescriptive possession his title is quite insufficient. And as to

the allegation of prescriptive possession, I think it is equally clear that possession by net and coble he cannot well pretend to. Though in his record he does allege possession, yet he did not in argument pretend to it, and by minute of admission he abandons that altogether. The royal right he never has enjoyed at all, and therefore I do not think his grant can in any point of view be looked on as a grant of the royal right. But it is said that whilst he cannot compete with the Duke in so far as the royal right is concerned, he may have acquired somehow or other under this title a right of an inferior kind; and that is put in two ways. It is said, "you (the Duke) have not acquired a right of fishing by the rod on my side; for though you have a most ample right of fishing by net and coble, you have not acquired by prescriptive possession a right to fish with the rod on my side;" and, secondly, it may be said—"I the defender have by possession of rod-fishing (for I do not think he founds on cairn-fishing) acquired by prescription a right of an inferior kind in impediment and to the detriment of yours." Now with reference to the first of these points, upon which I understand your Lordship's doubt is mainly founded, you will see at once that my view of the title of the pursuer to my mind puts an end to that doubt. The Duke does not require to prescribe when his title gives it to him without prescription. I hold that he is entitled to fish quite across the water, and as a consequence of that to draw his nets on both sides so far as net and coble is concerned. I therefore hold that to be the effect of his title by mere explanation that use and wont have given—not by prescription, because that is a false foundation to put it on, for although prescription may do very well to confirm a right, it is a very different thing to say that you acquire by prescription. It sometimes may be acquisition, but it is more often confirmation or explanation; and in the present case I think the titles refer to possession (use and wont) as explaining, not as extending the title. The titles do not refer to an acquisition of something new, but to an explanation of something already given and enjoyed; and therefore I do not look to the Duke's title here, ample as it is, as standing on the footing of prescription. If that be so, he has a right to fish with the rod. It is an inferior right, but still it is a right of salmon-fishing, which I look on as held by all our authorities to be implied in the higher right of net and coble. If this be so, there will be an end of the contention. But further, I think there is very strong proof that the Duke has exercised this right by himself and his friends for more than forty years. The right of fishing by the rod we all know has come into importance only in later years. Formerly it was only used as a pastime, and it was seldom or never made the subject of a lease. There is no evidence of that till very late in this case. But we see that the noble pursuer's family, by themselves and their friends, have constantly been in the habit of fishing with the rod from the east side of the river, in virtue of their grant; and as this is a point which was not much dwelt upon in the debate, and as I think it may have been overlooked, I wish to call attention to some passages in the proof which have satisfied me that, so far from there having been any abandonment of the right (if such could be supposed) there has been a full exercise of it. At page 9 of the pursuer's proof, John Taylor says—"I have been fishing in the Spey since 1837, first for Forbes and Hoggarth, and afterwards for the

Duke of Richmond. I have fished the water between Boat-o'-Brig and the burn of Aultdearg with net and coble on both sides of the river all that time. We have some good shots at Cairntie side, and we take a good many salmon there. There have been no cairns on the water since I have fished it. I have seen some of the Duke of Richmond's people fishing that water with the rod since he took it into his own hands, about nineteen years ago. I have seen Lord Alexander Gordon Lennox fishing there; that is a son of the late Duke. I have also seen Alexander Wilson, one of the Earl of Seafield's tenants. I have seen Lord Alexander fishing from the Cairntie side between Boat-o'-Brig and Aultdearg, with a servant attending upon him. I have often seen him fishing with a boat on that part of the Spey. I have seen Mr Andrew Balmer fishing with the rod at that part of the Spey from the Cairntie side. I do not know from whom Mr Wilson got leave to fish with the rod there. I have seen some of the ladies from Gordon Castle fishing with the rod from Cairntie side. I think Lady Caroline, a daughter of the present Duke, was one of them. I have seen John Mackenzie, a water bailiff of the Duke's, fishing with the rod from the Cairntie side." I might go on at great length, but I shall only mention one or two others—(reads evidence of Alexander Robertson, page 10). The evidence of Thomas Balmer, who has been commissioner to the Duke of Richmond since 1852, is very much to the same purpose. He gave leave to a great many people to fish from that side. In short, the evidence is almost—I do not say altogether—sufficient to ascertain that the Duke has prescribed this right if he had not got it *in gremio* of his grant, but *a fortiori*, having it in his grant, I certainly think he retained it by himself and his family, and all his friends ever since. In reference to the second question, whether Lord Seafield has in his own person any right of fishing with the rod? Lord Cowan seemed inclined to think that although he cannot successfully resist this declarator by the Duke, he should have power to raise another action in which the same question is to be discussed and determined, and that we should qualify our present judgment accordingly. Now, I may fairly say that that was once my view in the present case, but I have been driven out of it by looking to the absolute weakness of Lord Seafield's pretensions in this respect. His title is a defective title, and his possession, I think, still more defective. As against the Duke's royal right, confirmed by such long and ample possession, I think the very least Lord Seafield could do would be to prove an absolute and prescriptive right for forty years of doing this very thing. If he cannot pretend that he has fished with net and coble, he might at all events show that he has fished with the rod. But his evidence of possession appears to me to be of the most weak and equivalent kind. Has he ever let the right of rod-fishing? Not till of very late years; and then how has he let it? Not as the honest, plain, distinct right of rod-fishing, but by leases in which he gives any right of salmon-fishing that he may have in the Spey. These are the terms of his leases, and by the general and equivocal terms he might be held to give a title to fish with net and coble as well as by any other inferior mode. But there is no mention of rod-fishing in any of his leases: and even that lease which was originally given or intended to be taken by Mr Grant, which was substantially a right of shooting deer, did not contain a definite and distinct right of

rod-fishing at all. It was said that the Duke by acquiring this lease had accepted for three years not only the right of shooting deer, but also Lord Seafield's right of salmon-fishing. It is said that he ought not to have taken it because there was within the lease this indefinite right of Lord Seafield, viz.—any right that he had to salmon-fishing in the River Spey; but that does not appear to me to amount to an acknowledgment of right in Lord Seafield, especially as the Duke never made any use of this lease, except as to the shootings. In is said that at an early period Lord Seafield let his right of cairn-fishing to his tenants. It is not so. The leases have been found to contain no right of salmon-fishing; and what they did was just this—that being on the spot, and having possession close to the river, it gave them an opportunity of using this illegal mode of fishing, which the persons not so favoured by that locality could not have. But their leases contained nothing of the kind. And when the renunciation of his leases took place, which it is supposed restored to Lord Seafield this inferior right which he is supposed to have previously let out, I do not find rod-fishing mentioned in them at all. There is just a renunciation of salmon-fishing; and as these renunciations apply to leases in which there was no right given, I do not very well see that the renunciations could effect much in the way of possession. Now, in the face of the proof of possession, extensive and fortified as it has been for such a length of time, and exercised in every sort of way, it would be a very difficult thing for Lord Seafield to establish a right of rod-fishing in his person. I think it is inconsistent with the royal right of the Duke, and could only be acquired by prescription uninterrupted for forty years, and by acts of possession much more unequivocal than any that we have here. The Duke of Richmond has challenged the defender to defend himself against his claim to fish exclusively with the rod upon his side of the water. He has put that in issue; and the Earl of Seafield has stated his defence. If we think that defence not well founded, I am for deciding the case in terms of the summons, which I think embraces no more than the Duke has actually established. I am not now—whatever I once was—in favour of qualifying our judgment by saying that the interdict is only to subsist until a declarator is successfully raised by Lord Seafield, or by qualifying our declaratory finding. I confess that at one time I did entertain some doubt whether we might not leave Lord Seafield (ill as I thought of his case upon the merits) to make out in a new action by prescriptive possession a right of rod-fishing; but I think it would be injustice to the Duke to waive that question now, which is distinctly raised by the summons, and to which I can see in the evidence no good answer. I am therefore for decerning in terms of the conclusion of the summons.

LORD COWAN—I may be allowed to say, after the observations made by Lord Benholme, that I have no desire to qualify the interlocutor to be pronounced. The reservation I proposed was only a suggestion, but I suppose it necessarily reserves itself, and the defender can bring an action if he sees fit. And therefore I withdraw my suggestion, as it is not in accordance with his Lordship's opinion.

LORD JUSTICE-CLERK—Having thrown out the

doubts which I did, I think it necessarily follows, from the views on which the case has been decided, that that reservation should not go in. It was no part of my opinion that Lord Seafield had made out a claim to salmon-fishing at all.

Agents for Pursuer—Gibson-Craig, Dalziel & Brodies, W.S.

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

Friday, March 4.

GELOT v. STEWART, *et e contra*.

Bill of Exchange—Force and Fear—Jury Trial—Facts emerging at Trial—Court of Session Act 1868—Amendment. A jury having found that a bill had been obtained by force and fear and without value, the Court, on a motion for a new trial, being satisfied from certain facts which emerged at the trial that the questions betwixt the parties had not been fairly raised by the record or issues, ordered a new trial on new issues to be adjusted on an amended record, on payment of the expenses of the first trial so far as not available for the second.

On 5th March 1869 M. Antoine Gelot of Paris raised an action against William Stewart, M.D., formerly of Paraguay, for £4000, being the amount of a bill of exchange, dated 8th May 1867, in the following terms:—

“£4000 stg.

Paraguay, 8th May 1867.

“Mr Robert Stewart, Royal Bank of Scotland, Galashiels, Scotland.

“Thirty days after sight please to pay to Mr Antoine Gelot, or his order, this first of exchange, for the amount of Four thousand pounds sterling.

“WM. STEWART, M.D.”

Dr Stewart pleaded in defence that the bill had been impetrated from him by force and fear; that he received no value therefor; and that M. Gelot had given no value for it, and was not a *bona fide* or onerous holder. He stated that for twelve years prior to the end of 1868 he had been chief medical officer of the army commanded by Marshal Lopez, President of the Republic of Paraguay; and that up to 1865 he had been treated with consideration and respect by the President and his father the former President; but that in August 1865 the conduct of Lopez towards him underwent a change. He then averred—“In the month of May 1867 the animosity of Lopez to the defender reached extremity. About that time Lopez subjected to torture and death many of the leading men in Paraguay. He did so on various pretexts; the most prominent being that a conspiracy had been formed against him. On or about 8th May 1867 Lopez, who had been unwell for some days, summoned the defender to his presence, and accused him of having administered drugs to him which had done him serious injury, and put his life in imminent danger. He then told him that his conduct could not be overlooked, that his life was in danger, and would probably be actually forfeited for the alleged offence. The charge so made against the defender was wholly unfounded. The defender, however, became anxious to leave Paraguay, to escape the danger he was thus placed in; but it was impossible for him to do so. No one was at that time able to leave the country without express permission. At that time, as for some time previously, there lived with Marshal Lopez, a lady