hended in such a grant. But exactly as in the ordinary case of a grant *cum piscationibus*, there is no right thereby created unless where a forty years' possession of salmon-fishings has been had, and to the precise extent to which such possession has been held, and not beyond.

The argument which was presented to us on the part of the defenders was, that the possession in such a case did not properly constitute the right, but explained it, giving to the phrase *cum piscationibus* the same meaning as if it had run *cum salmonum piscationibus*—that possession of any part of the salmon-fishings within a barony explained the charter to contain a grant of salmon-fishings, and placed matters in the same position as if such a grant was expressly contained in it—and that so all the salmon-fishings locally situated within the barony were in law to be considered as conveyed. The argument was stated ingeniously, but is to my mind not satisfactory.

It may be fairly said, not only in the case of fishings, but of other rights, that the possession which forms the foundation of a prescriptive title not merely constitutes but explains and defines the right; it does so unquestionably in the case where the title is expressed in general terms, and the possession serves to give to it its special applicability. But it is a fallacy to regard the possession, in such a case as the present, as merely an explanatory possession. If it were so, there is no reason why a possession of thirty-five or thirty-six years should not be as effectual as one of forty. The law requires the full measure of forty years' possession, just because it considers the possession, in connection with the title, as creating or constituting the right. When it finds what it considers a habile title, that is to say, a title which, though not express, it holds a sufficient foundation of prescription, to be followed by a forty years' possession, it does not hold to be thereby operated the explanation of a right previously existing; what it holds to be operated is the formation of a right which did not previously exist. Anterior to the termination of the forty years no right at all existed; it emerged by the completion of that period. It hence necessarily follows that the extent of the right created is measured by the extent of the possession. So it undoubtedly holds good in regard to a right of salmon-fishings resting on a grant *cum piscationibus*. And so it may be stated to hold good in regard to all rights whatever to the constitution of which a forty years' possession is indispensable. There is no ground for holding any different rule to apply to the case of salmon-fishings locally situated within a barony. The barony right is a habile title of prescription; which possession for forty years makes a good right to salmon-fishings. But the right extends no further than to the salmon-fishings actually possessed.

The argument of the defenders seemed to me to proceed to a large extent on the fallacy of begging the question. Holding the possession to be explanatory of the title, they assume the possession of the river fishings to turn into salmon-fishings the whole fishings within the barony. But this is to take for granted the very thing which is the subject of inquiry. They say that this possession stamps with its own character the whole "fishings of the barony." I doubt whether this phrase, "the fishings of the barony," is a strictly accurate one. The fishings are those of the different lands which go to form the barony. The erection into a barony is simply the union into this legal entity of these different lands with their respective pertinents. In holding the title constructively to convey fishings, nothing more is meant than that each parcel of lands has fishings conveyed along with it. The case becomes the same as if each parcel of lands was conveyed *cum piscationibus*. The effect of possessing the salmon-fishings of any one particular parcel for more than forty years is to give a valid right to the salmon-fishings of that parcel. But it does nothing more than this.

For these reasons I am of opinion that the Lord Ordinary has correctly found the possession of the river fishings to afford to the defender no right to the sea fishings brought in question, but that these belong to the Crown, by virtue of its supereminent title.

The Court adhered, with expenses to the pursuer since the date of the Lord Ordinary's interlocutor.

Agent for Pursuer—D. Beith, Solicitor Her Majesty's Woods, &c.

Agents for Defenders—A. & A. Campbell, W.S.

Friday, May 19.

SECOND DIVISION.

STEVENSON *v.* MAGISTRATES OF HAWICK.

Procurator-Fiscal—Burgh. The Procurator-Fiscal presented a petition setting forth that a mill-lade in a burgh was not properly fenced, and that it was dangerous to the lieges, and praying that it should be fenced. *Held* that this was a proper application, and that the magistrates were not entitled to oppose it.

This question arose out of a petition to the Sheriff at the instance of the Procurator-Fiscal of Roxburgh against certain proprietors of a mill-lade adjoining the Haugh of Hawick and the Magistrates of Hawick. The proprietors of the mill-lade did not oppose the petition, but the Magistrates did. The petition stated—"That the Common Haugh, being a place of public resort, especially of children and young persons, it is necessary for the public interest that the said mill-lade should be fenced off from it. That upon several occasions young children and old persons and others have fallen into said mill-lade from the south or Common Haugh side, and had assistance not been at hand they would have been drowned, and the said mill-lade is in a condition dangerous to the lieges."

The prayer of the petition was that the petitioners should be ordained to erect a sufficient fence along the side of the mill-lade where it adjoins the Common Haugh.

The Sheriff-Substitute (RUSSEL), after a proof, pronounced an interlocutor finding, *inter alia*, "That the respondents, the Town-Council of Hawick, as representing the community, have, in the circumstances, sufficient title and interest to oppose the erection of any fence on the Common Haugh, or on the wall which bounds the mill-lade on the side thereof adjoining the Common Haugh, which would abridge or interfere with the use of the waters of the mill-lade for the purposes of the washing, rinsing, and bleaching of clothes, or of bathing; and that the petitioner has failed to prove that the mill-lade in its present condition is to any considerable degree a cause of danger to

the lieges, or that it is necessary, in the public interest, that the same should be fenced: Therefore dismisses the petition."

The Sheriff (PATTISON) recalled this interlocutor, and found, *inter alia*, "That the said mill-lade, in its present state, is dangerous to the public: Finds that the petitioner does not ask to have a fence erected on any part of the Common Haugh at a distance from the mill-lade, but asks to have it erected at the side of the mill-lade between the Common Haugh and run of water therein; Finds that the Magistrates and Town-Council of Hawick have not alleged any servitude as existing in their favour, or in favour of the inhabitants of Hawick, drawing water from the said mill-lade, or of otherwise using the same, or made any averment relevant or sufficient to infer a servitude in favour of themselves or the inhabitants: Finds that their averments in regard to the use of said water by the inhabitants of Hawick are not relevant as a defence against the prayer of the present petition: Therefore, repels the whole pleas of the said respondents, and ordains the said John Wilson & Son, Dicksons & Laings, and William Watson & Sons, forthwith to erect a sufficient wall and fence along the said mill-lade where it adjoins the said Common Haugh."

The Magistrates appealed.

WATSON and H. J. MONCREIFF for them.

The Solicitor-General (CLARK) and FRASER for the respondents.

At advising—

LORD NEAVES—This is a case of a peculiar kind. It is an application at the instance of the Procurator-Fiscal of Roxburghshire against certain parties who are mill-owners and proprietors of a mill-lade skirting the haugh, which belongs to the town of Hawick. The allegation is that the mill-lade, which is below the level of the ground and at present is accessible to all, is in a dangerous condition, and the Procurator-Fiscal's object is to have it rendered more safe for the public and particularly for young children, by placing a wall along the town side of the lade. This is therefore a summary application *ad factum præstandum* in order to abate a nuisance.

In considering the case I do not mean to lay down any general rule, and it would be difficult to do so, as to the duties of procurators-fiscal. I do not enter upon the question, whether the Procurator-Fiscal is intended to enter upon a crusade upon all lochs, streams, and waterfalls, with a view of rendering them safe for persons of tender years, I am not prepared to affirm such a proposition. The peculiarity of the case is that the mill-owners who were convened along with the Magistrates of Hawick, and who are proprietors of the mill-lade, have never sisted themselves and are willing to be decerned to erect the fence at their own expense. The only parties who resist are the Magistrates of Hawick. And when we look at their statement there is no objection to the title of the prosecutor nor to the relevancy. Their objection is on the merits solely. That being so, it is not our duty to find out objections unless it is quite clear that the application was incompetent. What we have to deal with is the application of the Procurator-Fiscal which has been considered by the Sheriff, and which we are now asked to overturn. It might have been more desirable for us to see exactly how the title of the ground stood, but it seems to be admitted that the haugh is vested in the magistrates for the benefit of the public. There is a difficulty on the part of the Procurator-Fiscal, that he is not seeking to prevent a recent nuisance, but one which is admitted to have existed for the last seventy years. It has been proved that the haugh has been used for the purpose of bleaching, and young persons have been in use to bathe in the mill-lade. An objection is raised that the fence proposed will encroach upon the haugh. But from all that I see the fence is to be erected on the retaining wall of the mill-lade. Now a *mill*-lade is a kind of box, and the proprietor of the lade is proprietor also of the bottom and sides, so far as they are necessary to support the lade. If therefore the fence is erected on the wall of the mill-lade, it is no encroachment on the *solum* of the haugh.

What other objection is there? It is said that the inhabitants have the right of bathing in the lade, and of drawing water from it. But I do not understand that it is proposed to interfere with the right of access in any way. I suppose that the gates which it is proposed to erect will be provided with steps by which the water may be reached. I do not see any reason for preventing the mill-owners from erecting the fence on their wall, and so making the public safe. This is a very material consideration for owners of mill-lades, who are liable in damages if any accident should happen from their lades not being properly fenced.

I should not like that the Magistrates should be prevented from stating any objections to the access which is proposed, and therefore I propose that we should repel the reasons of appeal, and remit the case back to the Sheriff, to give the Magistrates an opportunity of stating any objections they may have.

The other Judges concurred.

Agents for the Magistrates—Scott Moncreiff & Dalgety, W. S.

Agents for the Procurator-Fiscal—Pattison & Rhind, W.S.

Wednesday, May 24.

FIRST DIVISION.

SELIGMANN *v.* THE FLENSBURG STEAM SHIPPING COMPANY, *et e contra.*

Reparation—Damages—Collision at Sea—Merchant Shipping Amendment Act, 25 *and* 26 *Vict.*, *c.* 3, § 54. Where, in an action of damages arising out of a collision at sea, the jury had found for the pursuer, who was the owner of the injured ship, and had assessed the damage at the £8 per ton of the tonnage of the defender's vessel, the full amount allowed by the 54th sect. of the Merchant Shipping Amendment Act, 1862, *held* that it was no ground for a motion for a new trial that the jury had not apportioned the damages, or given any indication in their verdict that the sum given was not all due to the shipowner, but was apportionable between him and the owners of the cargo.

Observed that the proper course was still open to the defenders to secure themselves if they thought they were in danger.

These were counter actions of damage arising out of a collision which took place in the Firth of Forth on December 15, 1870, between the steam ship "Flora" of Glasgow, belonging to Mr Seligmann, merchant in Glasgow, and the steam ship