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SECOND DIVISION

LORD ADVOCATE *v.* WALTER M'CULLOCH.

Property—Salmon Fishings—Part and Pertinent— Tenendas.

A proprietor under a barony title feued out part of his lands by feu-charter, which contained no reference to salmon fishings except the words "*cum piscationibus*" in the *tenendas*. As much possession of salmon fishings as the subject admitted of was had by the sub-vassal and his successors for 300 years.

Held—(1) This possession must, in a question with the Crown, be referred to the original barony title, though the same had been lost.

(2) The sub-vassal, so possessing, might found on the title and possession of his author, the Crown vassal.

Observed—(1) Even in a question with the Crown vassal, the sub-vassal's possession on such a title would have been sufficient to give him a complete title to the salmon fishing.

(2) More latitude is allowed in the case of charters from subject superiors than on Crown charters, to an extension of the dispositive clause by means of the *tenendas*.

This was an action at the instance of the Lord Advocate against Walter M'Culloch, Esq., of Ardwall, in the stewartry of Kircudbright. The summons concluded for declarator that the whole salmon fishings in the estuary of the river Fleet, and in the sea *ex adverso* of the lands, islands, and estates in the parishes of Anwoth and Borgue, in the stewartry of Kircudbright, the property of the said Walter M'Culloch, belonged to and formed part of the hereditary revenues of the Crown in Scotland falling under the management and control of the Commissioners of Woods, Forests, and Land Revenues, and that the said Walter M'Culloch had no right or title to fish for salmon, grilse, or salmon-trout in the estuary of the river Fleet, or in the sea *ex adverso* of any part of his said lands and estates, by means of bag nets, or by net or coble, and in any other manner of way.

It was averred for the Crown that these lands, islands, and estates belonging to Mr M'Culloch which are wholly or in part bounded by the estuary of the Water of Fleet and by the sea were held by him under titles containing no grant of salmon fishings.

Further, that he and his predecessors had not, by virtue of a barony title, or of a title *cum piscationibus*, or other title capable of being a basis for prescriptive possession, fished for salmon, grilse, or salmon-trout *ex adverso* of the said lands, islands, and estates; and *separatim*, that they had not done so for such a time nor in such a way as to give them a prescriptive right to these salmon fishings.

The defender in answer referred to his titles, and asserted his rights to the fishings in question.

He fully set forth his titles, showing that the five merk land of Nether Ardwall formed part of the barony of Cardiness, and were in possession of his ancestor William M'Culloch in and prior to January 1587.

By feu-charter dated 12th January 1587, the said William MakCulloch of Myretown, and his said spouse Maria, as conjunct fiars of the said barony, feued out to the defender's ancestor, the said William M'Culloch (therein designed as 'in Nether Ardwall'), the five-merk lands of Nether Ardwall, with the pertinents, including the fishings.

Finally, the defender averred that under the titles, he and his ancestors and predecessors, by themselves and their servants and tenants, had the exclusive and unchallenged and uninterrupted possession of these salmon fishings from time immemorial, at all events for a period greatly exceeding forty years before the date of this action, and that the fishing had been carried on by fishing for and taking salmon and fish of the salmon kind by means of stake nets, bag nets, net and coble, draught nets, and by all other modes which the nature of the shore permitted or rendered expedient.

The pursuer pleaded—"(1) The right of salmon fishing in Scotland, and in the sea round its coasts, and in the estuaries, bays, and rivers thereof, so

far as the same has not been granted out by the Crown by charter or otherwise, belongs exclusively to the Crown, and forms part of its hereditary revenue. (2) The titles of the defender to the said lands, islands, and estates, containing no grant of salmon fishings, and prescriptive possession of the said salmon fishings not having been had by the defender and his predecessors under and by virtue of titles capable of forming a basis for prescriptive possession, the said salmon fishings belong to the Crown, and the defender has no right thereto."

The defender pleaded—"The defender is entitled to be assoilzied, with expenses, in respect that, in virtue of the titles above set forth, and the universal possession of himself and his ancestors, he has a good prescriptive right to the salmon fishings *ex adverso* of his estate of Nether Ardwall and the said island of Knockbrex."

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor, with Note appended:—

"*Edinburgh, 12th November* 1873.—The Lord Ordinary having heard counsel for the parties on the pursuer's second plea in law, and having considered the argument and proceedings, finds it is proper and advisable, before disposing of the pursuer's said plea, or of any of the pleas of either the pursuer or the defender, that the disputed facts of the case, especially the facts relating to the possession of the salmon-fishings in dispute, and the allegation by the defender, to the effect that exclusive possession of them has been had by him and his predecessors ever since the date of the feu-charter of 1587, referred to in Article 3 of his statement of facts, ought to be cleared up: Therefor appoints the case to be enrolled, in order that the necessary steps may be taken for that purpose.

"*Note.*—The disputed question between the Crown and the defender in this case is, whether the defender has right to the salmon fishings *ex adverso* of his lands of Ardwall or Nether Ardwall.

"It was admitted on the part of the Crown at the debate, that the defender had a sufficient title to enable him to prove a right to the salmon fishings *ex adverso* of his lands of Knockbrex.

"In regard to the question whether the defender has right to the salmon fishings *ex adverso* of his other lands of Ardwall or Nether Ardwall, the Lord Ordinary thinks it right that the same course should be followed as was followed in the case of the *Crown* v. *Sinclair*, decided in this Court 14th June 1865, 3 Macph. 981, and in the House of Lords 7th June 1867, 5 Macph. 97, viz.; that the facts relating to the possession of the salmon fishings by the defender and his predecessors should, *ante omnia*, be cleared up. It is presumed that the investigation for this purpose will be by a proof before the Lord Ordinary in the usual way, and that the defender will lead in the proof.

"It was maintained, however, on the part of the Crown, that as the titles relied on by the defender did not directly and expressly dispone to him salmon fishings, or even fishings, they were insufficient to form a basis for prescriptive possession, and therefore that decree ought at once, and without any investigation at all into the disputed facts, to be pronounced in terms of the conclusions of the summons, except as regards the fishing *ex adverso* of the lands of Knockbrex.

While the Lord Ordinary is not to be understood as determining anything in the meantime as regards any of the pleas of either party, he may state that he is not prepared at present to hold that the possession which may have been had of the salmon fishings in question by the defender and his predecessors is wholly immaterial. On the contrary, he is inclined to think that the state of possession of the salmon fishings in dispute may be material in considering and determining what was truly meant by the expression 'pertinents' in the titles relied on by the defender, it having been held in the case of the *Crown* v. *Sinclair* that such an expression in title-deeds admits of construction. And it must be kept in view, that although the defender appears to be unable to refer to a Crown charter directly in favour of himself or any of his predecessors subsequently to the feu-charter of 1587, containing in its dispositive clause a right to salmon fishings, or even simply to 'fishings,' he has referred to and produced a Crown charter in favour of his author, by whom the feu-charter of 1587 was granted, of the barony of Cardiness, with a clause therein of *novodamus* containing a disposition to 'fishings.' This being so, the fact, if proved, that the defender and his predecessors have, by regular titles proceeding from the Baron of Cardiness to the lands of Ardwall or Nether Ardwall, which formed part of that barony, with their 'pertinents' in the dispositive clause, and with fishings in the *tenendas* clause, may, the Lord Ordinary thinks, be of importance. The Crown had, by its charter to the barony of Cardiness with 'fishings,' granted such a title as was habile and sufficient to establish by prescriptive possession a right to salmon-fishings; and may not the benefit of that title be held to have accrued to the present defender and his predecessors under their feu rights from the Crown vassal in the barony of Cardiness, especially if it were to be proved that since the date of the Crown-charter in favour of that vassal there has been no salmon-fishing by the Crown *ex adverso* of the lands in question, on the one hand, and that, on the other, the fishing for salmon *ex adverso* of these lands has been exercised exclusively by the defender and his predecessors and authors? But while the Lord Ordinary is not prepared to say that it may not be so, he thinks that it is unnecessary, and would be inexpedient, to discuss that or any other point in the case further at present."

Thereafter a proof was allowed, and ultimately the Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"*Edinburgh, 17th March* 1874.—The Lord Ordinary having considered the record, with the proof and productions, and heard counsel for the parties, sustains the defences, assoilzies the defender from the conclusions of the action, and decerns: Finds the pursuer liable in expenses, and remits the account thereof, when lodged, to the Auditor to tax and report."

The pursuer reclaimed.

At advising:—

LORD JUSTICE-CLERK — There are some very important questions raised in this case, out of proportion to the value of the right in dispute; but as they have been raised we must decide them.

The action is one, at the instance of the Crown, for the purpose of having it declared that the Crown is in right of the salmon fishings mentioned in the summons, lying along the river Fleet and *ex adverso* of the defender's lands of

Ardwall; and to have it found that Mr M'Culloch, the defender, has no right or title to these salmon fishings. The defender defends himself upon his titles; and he says that he and his predecessors have been in possession for time immemorial. If he has a title to prescribe, and prescriptive possession, that will be sufficient.

The first question in all such cases is of course the possession. The Lord Ordinary has found that the defender has proved his allegation in regard to possession; and upon the best consideration that I can give the proof I concur in the Lord Ordinary's view. The proof of possession is not exuberant undoubtedly, but it is exclusive as far as it goes. It is not exuberant — not because the defender and his predecessors did not try to catch salmon, but apparently because there were very few salmon to catch, or at least they were not able to catch them. But the right of salmon fishing may be exercised although nothing is caught; indeed that is not at all an uncommon result of that occupation. And, therefore, on the whole matter, looking to the evidence, especially of Mr M'Culloch himself, which is very distinct and clear and at the same time candid, and to the nature of the possession which is proved, I think there is sufficient proof of immemorial exercise of the right of salmon fishing along the shores of the Fleet *ex adverso* of the defender's property. There is not the slightest trace of any one else, without the authority of Mr M'Culloch, ever attempting to use the right. Now, if that be so, it has a most important bearing on all the other questions. The next question is, when must this possession be presumed to have commenced? Now, I imagine that it must be presumed to have been contemporaneous with the original grant or title to which it has been attributed. That was laid down on the authority of Lord Stair by Lord Curriehill in the case of *Sinclair*, in some important observations. And Lord Cranworth, in the same case, says, in the House of Lords, that the English rule is the same. The result is, that the possession being from time immemorial must be held to have commenced with the right or title to which it is attributed. It may be different if there be proof of the commencement of the possession; but otherwise this presumption is consistent with principle as well as with reason, for undisputed possession is the indication and the fulfilment of a valid title. A second general principle is laid down by Lord Stair in words which, in this case, have a very important effect. He says (b. 2, t. 1, § 26) "So effectual is possession *activé*, besides that it is the ground of prescription whereby property and all other rights are introduced; and *passivé*, sufficient to hold out all others who have not a good right, and it is always favourable in dubious cases." And then he says, "Possession, as distinct from right, is ascribable only to that title by which it did begin, in prejudice of him from whom the possession was acquired, and to whom it must be restored, notwithstanding any other right in the pursuer to which he might ascribe it, and which, after he had quitted the possession, might recover it. But as to all others from whom the possession flowed not, the same may be defended upon all rights in the possessor, or him from whom he hath tolerance or right." And therefore, in this case, when the right to possess is challenged by a third party who is not the immediate author of the possessor, the latter may defend himself on his author's title, whatever right he himself may have to the subject possessed; for it is enough that the true owner has authorised or tolerated a possession with which no one else has an interest to interfere. It also follows that the possessor may found upon his own possession in fortification of his author's title, because, whether his right to possess be absolute as between him and his author, or only temporary, as under a tack, or precarious, as by bare permission or tolerance, it is by authority and in fulfilment of his author's right. We come now to consider the feudal titles in this case. There can be no doubt that before possession can have the effect of an express grant of salmon fishing there must be a title and sasine to which the possession can be referred; and this may be either a grant with the general words *cum piscationibus*, or a general grant of barony. In both these cases the right is carried not as a separate tenement, although salmon fishing may be of course a separate tenement, but as the accessory or pertinent of that which is expressed; and in both—that is both in the barony title and in the title *cum piscationibus*—the possession serves to define the extent of what is comprehended in the general words. I apply these general principles, which I think are sound, to the position of the titles in the present case. The first title which we have is not an original title. It is a grant of confirmation and *novodamus* — confirmation of a prior title, and a new grant, the prior title being a right of barony in the person of Mary M'Culloch, and the re-grant being a grant to her and her husband, who are the grantees in the charter of 1584. It seems to have been assumed on the part of the Crown that prior to 1584 it could not be said that there was any title to the salmon fishings of this portion of the barony vested in the author of Mr M'Culloch, the defender. I doubt that very much. The possession, as I have shown, must be assumed to have been contemporaneous, not with the charter of confirmation and *novodamus*, but with the original Crown grant. The original Crown grant is not before us, and we do not know the date of it; but this we do know, that it was a grant of barony, and that it must have been granted before 1584—how long before we cannot tell. After the long possession for three hundred years, I should have been very much inclined to say that that was quite enough for the decision of the present case, and that the presumption was that the possession had existed before 1584, and that it existed upon a sufficient title, and that it had existed long enough to show that the barony included the fishings—it being quite certain that the barony title was antecedent, and probably long antecedent, to the title of 1584. And that is all the stronger that the date of these rights is prior both to the introduction by the Statute 1617 of the long positive prescription, and also prior to the institution of the registers. But I do not think it necessary to put my opinion in this case upon that ground. It is certain that the charter of 1584 was quite a sufficient title on which, if followed by possession, the right of salmon fishing might be acquired, but it was followed by possession, and has been so until now; and, on the grounds which I have already stated, I do not think it signifies in the least to this challenge on the part of the Crown whether the possession has been by the Crown vassal himself or by one deriving right from the Crown vassal, or by one whose possession was tolerated and permitted by the Crown vassal. The Crown

was thus effectually divested of the right of salmon fishing, and it is wholly immaterial that the date of the original right is unknown. It was further maintained in argument for the Crown that neither the feu right of 1587—that is the feu right granted by the Crown vassal under the charter of 1584, which is a title on which Mr M'Culloch and his predecessors have possessed from that date till now—nor the disposition of the *dominium directum* in 1619, conveyed the salmon fishings on any title on which a right to them could be acquired by prescription; and it seemed to be contended that the original Crown vassal was left with a title to prescribe, but without possession, while his sub-vassal in the *dominium utile*, and his disponee in the *dominium directum*, had possession without a title. But the reasoning is fallacious, for even if the Crown vassal had not transferred to his sub-vassal the title to prescribe, as in a question with him or his successors, his sub-vassal in the lands is entitled to protect his possession by pleading his author's title against the Crown, and is also of course entitled to plead his own possession in fortification of that title. It is good adverse possession against a challenge by a third party.

Putting aside for the present the effect of the Crown charter of resignation as far as the superiority title is concerned, I go on to consider whether the feu right of 1587 is not in itself sufficient to support the possession of the salmon fishings, or to confer a title to prescribe as in a question with the Crown vassal from whom these rights flowed. I am of opinion that that is not the question with the Crown, who is a third party; but if it were necessary to decide it, I entirely concur in the view that the Lord Ordinary has taken of that question, and in the very able reasoning on which it appears that he proceeded. In regard to the privileges implied in the *nomen universitatis* of a barony, it does not follow that if a portion of the barony is parted with, all the privileges will follow that portion. It is clear that some of them cannot be so communicated; but the title to the lesser *regalia* as pertinents of the barony will pass to the disponee of that part of the barony to which they are naturally pertinent. Prescriptive possession will show conclusively that such is the case. As possession defines and fixes the limits of the barony itself, so possession will also define the extent of the part of it which is given off. It would have been a very hopeless contention on the part of the representative of the original Crown vassal, assuming that he originally had a right to the salmon fishing by his grant and possession, that the salmon fishing still remained with him after a possession for 300 years by the sub-vassal.

But apart from the barony title, on which I do not enlarge, because the Lord Ordinary has exhausted that part of the case, I am very clearly of opinion, on the terms of the feu-right itself, that after the vassal had possessed for the prescriptive period, the Crown vassal could not have disputed his right. I think that although the extent and nature of the subject is properly to be looked for in the operative and disposing words of the feu-right, and not in the *tenendas*, this rule is not conclusive. This charter proceeds on a contract, the terms and tenor of which profess to follow, and the question which would have arisen between the granter of the charter and his vassal would have been, what was the true import and meaning of the contract between the parties as it related to the fishings? To ascertain this the whole deed may be consulted, and when we find the words *cum piscationibus* in the *tenendas*, we may, and indeed must, infer as a matter of ordinary reasoning that the contract referred to the fishings as well as to the other pertinents enumerated in the *tenendas*. No doubt the reference to the contract might not have applied in a question with singular successors, but still it is not to be thrown out of view in construing and ascertaining the true meaning of this feu right. In regard to the question, how far the *tenendas* can be looked at as qualifying the subject matter of the disposition—it is quite true that in Crown charters this is a matter which has been somewhat strictly dealt with, on the principle that the Crown is not to be assumed to give off more than the words of the dispositive clause express. Even that, however, in the case of *Sinclair*, was made to yield to the manifest and reasonable construction of the whole instrument and I simply refer to Lord Cranworth's and Lord Colonsay's views, expressed in their opinions in the House of Lords, as putting this matter now, as matter of Scotch conveyancing, entirely beyond doubt. The passage quoted from Mr Menzies' Lectures by Lord Colonsay in that opinion seems to express the true rule, viz., that although in an original right it cannot be held to have the effect of a dispositive clause, still the *tenendas* may be looked at, especially in a question in regard to the matters which it is the appropriate clause for expressing, in order to show what was the meaning of the grant, and the *tenendas* is the appropriate clause for specifying pertinents. But I am not aware of any case in which the same strictness has been observed in feu-charters from a subject superior, and I think the terms of the *tenendas* of the charter of 1587, coupled with the rest of the instrument, afford a sufficient support for the possession of the salmon fishings which has followed.

It only remains to say one word upon the argument founded on the Crown charter of resignation; but it will be observed that the defender does not require to defend his possession upon that charter at all. He holds still on apparency under the base right constituted in 1587; and if he has a good right under that, it is wholly immaterial to him what the effect of his Crown charter of resignation may be. But I shall only say that it seems to me that this is a much stronger case than the case of *Sinclair*, where it was very questionable whether the title had been continued through the progress. But in the present case the result is simply this—there is a title of barony in the original Crown vassal; he first gives off the *dominium utile* by a feu from himself, and then he conveys to his vassal the *dominium directum*. The disponee resigns into the hands of the Crown for new infeftment, and the charter of resignation is expressed in the same terms as those of the original disposition. One of two things follows, as was put in the case of *Sinclair*. If the title to prescribe a right to the salmon fishings was constituted by the conveyance of the *dominium directum*, and was resigned by the vassal, it was re-granted, because the terms are precisely the same. If, on the other hand, it was not re-granted, then it was not resigned, and it was not conveyed, and it remains still in the person of the original Crown vassal in

the barony. Whichever way that question is solved, the result is the same; and I am of opinion that there is no ground whatever, in any of the contentions that have been maintained, for this challenge on the part of the Crown.

Lord Neaves—The views now stated, both as to the facts of this case and as to the law, are in perfect accordance with those I have arrived at, and that makes it therefore an easier thing for me to express my opinion on the subject. It appears to me impossible to distinguish this case from the case of *Sinclair*. Perhaps if there is any difference, the difference is in favour of the present case. The case of *Sinclair* was one most ably argued, most carefully considered, and authoritatively decided. It was not a unanimous judgment in this Court. On the contrary, there were three Judges on one side and two Judges on the other, but that circumstance, if ultimately the judgment stands, particularly in the Court of last resort, gives additional weight to the judgment pronounced, because it assures us—which we cannot read the reports of the case without seeing—that every point involved in the questions at issue was gravely considered, carefully brought forward, and authoritatively disposed of. The opinions on the other side were opinions of great weight. Lord Mackenzie in the Outer House, and the very able and characteristic opinion of Lord Deas in the Inner House, brought forward all the views adverse to the judgment that could possibly be urged, and brought them forward in the clearest and strongest way. It was decided here by a judgment of high authority—Lord Colonsay, Lord Curriehill, and Lord Ardmillan—against the Crown, and that judgment when taken to appeal was again confirmed, and unanimously confirmed by the three Judges who heard the case and disposed of it in the House of Lords. One of these was Lord Colonsay, who had joined in the judgment in the Court below; but Lord Colonsay, we all know, was a man of such candid mind that he would not have been slow to express a different opinion if he had been satisfied that there was any room for questioning the judgment that he had formerly concurred in. These three Judges in the House of Lords—Lord Colonsay and two English Chancellors—concurred in the ultimate judgment, and made the case of *Sinclair* one of clear authority, that must be followed. In that case various points were stated—I do not say were established, because after all they were points that could be deduced from the existing authorities in the law of Scotland before. Your Lordship has adverted to these. There is the point that immemorial possession is always to be traced back by presumption *retro* to the time when it might have begun under the titles that existed, whatever these were. The other point was that a grant of barony is a foundation, without any other special clause, for acquiring by prescription and possession a right of salmon fishing. And then there came questions of nicety, which may occasionally arise where there has been a splitting of a barony—whether that will give to each of the parties who are disponees a right to salmon fishing. There may be a dispute between them as to who shall have it—whether the grantee shall have it or whether the original baron shall retain it. But it could never be maintained that the splitting into parts of a barony which had a right of salmon fishing would re-invest the Crown with that right to salmon fishing which has been established against them in a habile manner. Here I see no reason to doubt that the right of salmon fishing by possession was alienated out of the barony title in such a way as to divest the Crown of it altogether. Your Lordship has well said that the success of salmon fishing is not the thing that is given. It is the right to fish that is given, with or without success, and there will be many a fishing without success; but if there is the positive continued assertion and exercise of the right to fish under a barony title, excluding the Crown, I see no reason for holding that it may not be quite good to that part of the lands with which the fishing has physically been connected. I would further say that suppose there were a base right given, that is assumed as helping to establish a right to salmon fishing; it is by no means necessary that that base right, if it excluded the Crown at first, requires to be continued by renewals. Unless the title is followed up by some non-entry and failure to renew, the right does not re-invest the superior. It may be possessed for years on apparency without any renewal of the right, and nothing will re-invest the Crown but either an utter cessation of possessing, so as to bring out the Crown's supereminent title as the only existing one, or a resignation *ad remanentiam*, of which there is not the slightest vestige or allegation in this case. On these grounds, I think it plain that there was immemorial possession here, and from the continued assertion of that right from time to time to the exclusion of the Crown, that that was amply sufficient to establish the right of this party, whether he stands upon the defensive merely, or would put himself in the further situation of taking an active title, which he does not require to do, in order to protect himself against this claim. On these grounds, I think, acting in complete accordance with the case of *Sinclair*, and having in that case a precedent and warrant for all we are now doing, this case must be decided in the way your Lordship has proposed, by adhering to the interlocutor of the Lord Ordinary.

Lord Ormidale—This case originally depended before me as Lord Ordinary in the Outer House; and a very elaborate argument was addressed to me there on the part of the Crown, with the view of satisfying me that no relevant defence had been stated, and that the pursuer was entitled at once to judgment, independently of any inquiry as to the state of the possession,—it being maintained that it was of no consequence what the possession was—there being an essentially defective title. I could not adopt that view, but, on the contrary, as explained in a note to my judgment allowing a proof, I indicated pretty plainly what would probably be the result, according to the views I then entertained of the case, if possession was proved to be with the defender.

Now, there was a proof which was adduced before me as Lord Ordinary, which I have since carefully considered, and I concur entirely with your Lordships, and with the Lord Ordinary, in thinking that in the particular circumstances of this case the possession has been sufficiently established. In the words of the Lord Ordinary they proved possession because there was little to possess; I think it is very obvious indeed that there was little to possess; and accordingly possession is not of a very large or extensive

character. But considering the nature of the subjects, the lie of the lands *ex adverso* of which the fishing is claimed, and all the other circumstances, I think we have here all the possession that could naturally or well have been expected. And there is no other party suggested by the proof that ever on any occasion laid claim to or exercised any right whatever on the river Fleet or estuary, so far as the present contention is concerned, to the salmon fishing.

Therefore, assuming that there has been possession, the next consideration for the Court is whether any of the points which were made on the part of the Crown in the argument addressed to us can entitle the pursuer to prevail. I so entirely concur in the views so well expressed by the Lord Ordinary in the note with which we have been furnished in an appendix, that it might probably be sufficient for me to refer to that note as embracing my own views and the opinion which I had formed when I allowed the proof. But out of respect to the very able and elaborate argument which was addressed to us here on the part of the Crown, I think it right to notice what appeared to me to be the three chief points in that argument.

The first point which seemed to be relied upon by the pursuer was to the effect that as there is no express disposition or grant of salmon-fishings, or of fishings at all, in the defender's title, the reference to fishings in the *tenendas* clause of his title cannot supply this defect, let the possession have been what it may. Now, I am not to dispute that as a general rule the dispositive clause of a charter or disposition must be looked at in order to ascertain what are the subjects of the grant or conveyance. But quite consistently with this rule, not only the whole terms of the dispositive clause itself, but also when these, as in the present instance, from their generality or otherwise, require or admit of construction, all the other clauses, including the *tenendas*, can be competently examined and considered in order that the true and full meaning of the dispositive clause may be determined. Opinions in accordance with this view appear to have been expressed in the House of Lords in the case of *The Lord Advocate* v. *Sinclair*, (5 Macph. House of Lords Cases, p. 97), particularly by Lords Cranworth and Colonsay. The former observed, "I do not question the general proposition that nothing which is not mentioned in the dispositive clause can be held to pass merely because it is included in the *tenendas* clause. I will assume further that the word 'pertinents' cannot *prima facie* be taken to include fishing. But in construing Crown charters, as well as other written instruments, common sense suggests that we must look to the whole contents of the instrument before we can say with certainty what is the true meaning of any particular clause in it." And afterwards (page 104 of the report) the same noble and learned Lord remarked that 'there cannot be any principle which prevents us from discovering the true meaning of any part of an instrument by a fair examination of the whole." Lord Colonsay, again, who followed Lord Cranworth, in delivering his opinion does not repudiate, but on the contrary substantially adopts, and by illustration and authority supports and confirms it. I cannot therefore give effect to the pursuer's argument founded on the circumstance that in the defender's title deeds, or some of them essential for his case, fishings are not expressly mentioned in the dispositive, but only in the *tenendas* clause for I think that, in the words of Lord Cranworth, looking at the whole terms and contents of the deeds referred to, there is no room for reasonably doubting that a dispositive clause, such, for example, as that which we find in the charters and dispositions constituting the title of the defender and his predecessors, to the effect that their lands were conveyed with *annexis, connexis*, parts, pendicles, and pertinents, is sufficient,—keeping in view the reference to fishings contained in the *tenendas* clause as well as the whole tenor and contents of the deeds—to carry salmon fishings.

The second point relied upon by the pursuer is even more technical and formal in its nature than that which has just been noticed, and I am very clear that it is not well founded. It is to the effect that as the symbols of net and coble appropriate to the conveyance of salmon fishings are not expressed in the defender's title deeds, it cannot be held that any such right has ever been vested in him or his predecessors, let the possession have been what it may, and supposing the titles to be otherwise unobjectionable. But it is only fair I should explain that although a proposition to this effect appeared to be maintained for the pursuer at the outset of the discussion, I understood it to have been latterly abandoned, or, at any rate, not attempted to be enforced or supported. But whether I am right in this or not, it appears to me that the proposition as applicable to such a case as the present, where a right to salmon fishing separate and independent of certain specified lands is not the subject of conveyance, is wholly untenable and inconsistent with long established practice and precedent.

If I am right so far, nothing more is necessary for a determination of the present controversy in favour of the defender. It may be right, however, that I should notice the only remaining point in the pursuer's argument, to the effect that although the possession of the defender and his predecessors, if it had applied to the whole barony lands as an undivided estate, would have been sufficient to support a right to salmon fishings, it can have no such effect in regard to the separate portion of these lands which were separated from the barony and feued out to the defender's ancestor. In making this point, the pursuer has omitted, I think, to give sufficient effect to the circumstances —1st, that the possession of the defender and his predecessors of the salmon fishings *ex adverso* of the lands belonging to them has been proved to have existed for time immemorial; 2dly, that these lands are part of a barony, the titles to which are admittedly sufficient, with prescriptive possession, to constitute a right to salmon fishing; and 3dly, that there is neither proof nor even allegation by the pursuer that possession of the salmon fishing *ex adverso* of the barony lands, or any part of them, has ever, since the creation of the barony, been had or exercised by the Crown on any party other than those in right of the lands.

Having regard to these circumstances, and giving them the effect to which they are fairly entitled it appears to me to be a perfectly legitimate conclusion that at the time the defender's lands were feued out, the party then in right of the barony lands, including that portion of them now belonging to the defender, was in possession of, and had a right to, the salmon fishing *ex adverso* of the

whole of them; and, if so, that the defender's predecessor got along with his lands the salmon fishing *ex adverso* of them. It may be impossible now, owing to the lapse of time, to establish this by direct and positive evidence; but that is not necessary, for, according to a well established principle in the law of prescription noticed by Lord Curriehill in *Sinclair's* case, possession, when proved to have existed for time immemorial, is held, independently of direct or positive evidence, to draw back to the earliest title to which it can be ascribed; or, in the words of Lord Young, it is only "reasonable to regard the possession of the defender and his ancestors as a continuance with respect to that part of the lands of the previous possession while the barony was entire."

With these observations, I concur with your Lordships in opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD JUSTICE-CLERK—As to the matter of possession, it is very unfortunate that there should have been any misunderstanding on that subject, but my recollection is that I made it quite clear that I thought it a reasonable course for counsel to follow to leave it to the Court to read the proof, and that if we felt difficulty we should ask for further argument, but that if we felt no difficulty we were to advise the case. We proceeded on that footing.

The Court pronounced the following interlocutor:—

> "Refuse the reclaiming note, and adhere to the interlocutor reclaimed against: Find the pursuer liable in additional expenses, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer—Lord Advocate and Ivory. Agent—D. Beith, H. M. Woods, &c.

Counsel for Defender—Dean of Faculty (Clark), Q.C., and Marshall. Agents—Wilson & Dunlop, W.S.

Thursday, October 15.

FIRST DIVISION.

[Lord Gifford, Ordinary.

CRAWFORD *v.* FIELD.

Feu—Superior and Vassal—Access.

A superior gave off certain feus which were described in the feu-charters as bounded by certain streets "with free ish and entry to the said area of ground by all the roads or streets made or to be made by me for the use and accommodation of my feuars." *Held* that he was not entitled, previous to the formation of the said streets, to occupy their solum with temporary erections so as to interfere with the feuar's free right of access.

The question in this case arose between a superior and his vassal, as to the right of the former to occupy with buildings and enclosures the solum of a projected street which formed one of the boundaries of the vassal's feu. In June 1864 the defender Mr Field feued to Thomas Bernard "All and Whole that area of ground containing 27 poles imperial measure, being part of my property of Bowling-green, Leith, bounded as follows:—on the north by the area of ground feued by me to Andrew Morton, ironfounder, and upon which he has built an iron foundry and other buildings; on the west by Bangor Road, on the east by Albert Road, and on the south by Burlington Street, and including the wall built upon the said area of ground, and forming the south boundary thereof, for which wall my said disponee has paid the sum of £33, 15s. as the value of the same, which has been fixed and ascertained by John Masterton, surveyor in Edinburgh, and Thomas Anderson, builder, Leith, two valuators mutually chosen by me and my said disponee, conform to their report, dated 26th May 1864; with free ish and entry to the said area of ground by all the roads or streets made or to be made by me for the use and accommodation of my feuars at Bowling-green."

The feu-charter also contained the following condition:—"Further, my said disponee and his foresaids shall be bound to pay a proportion of the expense of maintaining the streets and roadways leading to and from the said area of ground and the said property of Bowling-green, until the same shall be taken over as public streets and roads and assessed for as such, and also a proportion of the expense of the drains to be formed upon the said property of Bowling-green and Redhall, and of maintaining the same, such proportions to be according to frontage belonging to my said disponee and his foresaids."

In December 1867 Mr Field feued to John Philip "All and Whole those parts and portions of my lands of Bowling-green, consisting (*First*) of that narrow stripe of ground stretching from Great Junction Street on the north to Burlington Street on the south, and laid down on the feuing-plan of my lands of Bowling-green and Redhall as for the northmost part of a street or roadway to be called Albert Road, but which roadway is not now to be made, together with the wall two feet in thickness erected on the east and south boundaries of the said stripe of ground, and the ground upon which the said wall is built, the said stripe of ground and the ground upon which said wall is built being 42 feet in breadth or thereby; and (*Second*) That area of ground lying between the said stripe of ground above described and Bangor Road, as the said stripe and area of ground are delineated on the plan annexed, and signed as relative hereto, and which stripe and area of ground may be otherwise described as All and Whole that block or area of feuing ground, part of my said lands of Bowling-green, including the part thereof formerly intended to be made into the northmost end of a street or roadway to be called Albert Road."

In January 1868 Mr Philip granted a disposition to Mr Bernard in the following terms:—

"I, John Philip, wood merchant, Leith, heritable proprietor of the subjects hereinafter disponed, considering that Thomas Bernard, brewer in Edinburgh, is entitled to a certain right of servitude over a road intended to have been made through the lands of Bowling-green and Redhall, conform to feu-charter granted by Thomas Field of Bowling-green and Redhall in his favour, dated the 29th June, and recorded in the Register of Sasines the 2d day of July 1864; that the said Thomas Bernard having agreed to renounce and give up said right of servitude in favour of the said Thomas Field, in order to him disponing the ground to be converted into said road to me free and disencumbered thereof, on condition of my granting these presents, and the said Thomas Field having disponed and made over the property