according to the judgment, showed malice and ill-will towards the student. I happened to be counsel in that case, and probably I may take a stronger and stiffer view against the judgment, as it was adverse to my side, than I might otherwise have done. But there is another feature in the case which appears upon the face of the report. The pursuer, a student, who was Dr Christison's assistant, was put into the witness-box for the defender, and in the examination in chief of the pursuer as evidence for the defender, counsel for the defender proposed to put the following question—"Did you take any part in the riot?" The pursuer's counsel objected, and the Judge disallowed the question, so that the young gentleman objected to answer the question, and said he would rather say nothing upon that subject. There was no issue of *veritas*, but if there is anything established in this class of cases at the present day it is that without any issue of *veritas* you may ask the party who is complained of about his own conduct in the matter, and take his own account of it, in mitigation of a claim of damages for the injury alleged to have been done to him. In my judgment the decision requires reconsideration. At all events I am not now, seventeen years afterwards, going back to apply it to a member of a town council making a speech in the town council upon the occasion of a legitimate motion. I hold that the statement was made by the defender in the course of his duty as a member of the town council in a speech, and that it was pertinent to the speech which in the discharge of his duty the defender made on that occasion, and that falsehood and malice have not been proved.

Lord Rutherfurd Clark—I confess that I have had great difficulty in drawing a distinction between the present case and the case of *Jex Blake*. With respect to the latter case I wish to say nothing against the judgment. As your Lordships are both of opinion that a distinction may be drawn between the cases, I am willing to accept the distinction, and to agree with your judgment.

Lord Justice-Clerk—I wish to make one observation in regard to the case of *Jex Blake* that I forgot, namely, that this case differs from it in this respect, that the individuality of the pursuer was a question in this case; it was not so in the case of *Jex Blake*. In regard to other matters I am not going back upon the ground Lord Young referred to, but I think that we are now applying the law as laid down in the previous cases.

The Court pronounced this interlocutor:—

"Find in fact that on the occasion libelled the defender used the language complained of by the pursuer; that he did so in the course of his duty as a member of a committee of the town council; and that it is not proved that he willingly spoke falsely, or that he was actuated by malice: Find in law that he was privileged in expressing himself as he did in respect that he was *versans in officio*: Therefore sustain the appeal, and recal the judgment of the Sheriff and Sheriff-Substitute appealed against: Assoilzie the defender from the conclusions of the action."

Counsel for the Appellant—Dickson—Hay. Agent—D. W. Paterson, S.S.C.

Counsel for the Respondent—Salvesen. Agents—Sturrock & Graham, W.S.

Friday, July 6.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

WARRAND AND OTHERS *v.* MACKINTOSH.

Fishings—Salmon Fishings—Competing Titles—Possession.

In an action of declarator of exclusive right of salmon fishing in a part of the river Ness, the pursuers founded upon a Crown title granted in 1591 to the town of Inverness, which conveyed the whole salmon and other fishings in the water of Ness between the stone of C and the sea, which included the fishings in dispute. The defender's title was a Crown charter in favour of the Earl of Moray granted in 1566, which conveyed half of the lands of H, with the salmon and other fishings "pertaining" to the same. The defender held the other half of the lands of H under a title from F, which made no mention of fishings. Under his title from Lord Moray the defender claimed a joint right of salmon fishing, along with the pursuers, in the Ness *ex adverso* of the half of the lands of H thereby conveyed. It was proved that the fishings *ex adverso* of the one-half of the lands of H held of Lord Moray by the defender were the fishings in dispute, and that the defender had possessed the fishings *ex adverso* of the whole lands of H, chiefly by rod fishing, but also by net and coble, for more than the prescriptive period. The pursuers had had possession of the fishings specified in their title by net and coble and by rod fishing from time immemorial.

Held (*rev.* Lord M'Laren—*diss.* Lord Rutherfurd Clark) that, in the absence of anything to the contrary, the fishings "pertaining" to the one-half of the lands of H held of Lord Moray by the defender were the fishings *ex adverso* of this one-half, that on the evidence the defender had had possession of these fishings, and had therefore a joint right along with the pursuers.

Observations on the effect of rod fishing in a question regarding the possession of salmon fishings.

This was an action at the instance of Mrs Catherine Munro Warrand of Bught, in the county of Inverness, widow of Duncan Grant of Bught, and wife of Colonel William Edmund Warrand, of the Royal Engineers, and her marriage-contract trustees, and the Provost, Magistrates, and Town Council of Inverness, against Angus Mackintosh of Holme, in the county of Inverness, and Charles Innes, solicitor, Inverness, for his interest, the conclusions of the summons being for declarator "that the pursuers and the defender Charles Innes have the sole and exclusive right of salmon fishing in the river Ness from both banks from the stone of Clachnahagaig to the mouth of the river where it joins the sea at low water, with the

exception of the fishing known as the Duke of Gordon's fishing, below the Castle Hill, and the fishing further down the river known as the Friars' fishing or Friars' Shot: And it ought and should be found and declared, by decree foresaid, that the defender the said Angus Mackintosh has no right or title to fish for salmon upon the said river within the bounds foresaid, and in particular, has no right or title to fish for salmon in that portion of the river which is immediately below the site of a cottage upon the east bank of the same, opposite or nearly opposite the point upon the west bank where the lands of Bught marched with the lands of Dunain prior to the construction of the Caledonian Canal: And the said defender ought and should be interdicted, prohibited, and discharged, by decree foresaid, from fishing for salmon, by himself or others with his authority, within the said bounds."

The pursuers averred that the town of Inverness was under its ancient charters vested in the whole salmon fishings in the river Ness between the stone of Clachnahagaig and the sea, with the exceptions mentioned in the conclusions of the summons. The original charter was lost, but a charter was produced, dated 1st January 1591, granted by James VI. in favour of the burgh of Inverness, which ratified former grants in favour of the community. The grant in that charter was in these terms—"Totamque et integram aquam de Ness, omnesque partes, ac utrumque latus ejusdem, inter lapidem vocat. Clachnachaggag et mare, cum omnibus piscationibus et piscariis, tam salmonum quam aliorum piscium." This charter was ratified by Parliament on 17th November 1641.

The right of fishing belonging to the town was exercised in early times by means of four cobles, and the fishing thus came to be known as the Four Cobles fishing. The Four Cobles fishing was thereafter feued off in cobles and fractional parts of cobles, the right of each feuar extending over the whole area of the town grant.

The pursuers Mrs Catherine Munro Warrand and her marriage-contract trustees were, at the date of the action, the proprietors vested in three and one-third cobles of the fishings. The Magistrates and Town Council of Inverness were proprietors vested in one-half coble. The remaining one-sixth coble belonged to the defender Mr Charles Innes.

The pursuers averred that they, "their predecessors and authors, have, in virtue of the said titles, along with the said Charles Innes and his authors in title, exercised peaceably and without interruption the sole and exclusive right of fishing for salmon the whole river from both banks between the stone of Clachnahagaig and the sea, except the Duke of Gordon's fishing and the Friars' fishing above-mentioned, from time immemorial, or at least for upwards of forty years;" and they averred that the defender Angus Mackintosh had of late years asserted a right of salmon fishing in a portion of the Ness "within the bounds of the said Four Cobles fishing below the stone of Clachnahagaig and *ex adverso* of lands belonging to him situated below the site of the cottage mentioned in the summons, and which cottage is opposite the former march between the estate of Dunain and Bught on the west side of the river."

Defences were lodged for the defender Angus Mackintosh. His title was founded on a charter of Queen Mary in favour of James, Earl of Moray, and spouse, dated 1st June 1566, by which there was conveyed "dimidietatem terrarum de Holme cum salmonu et aliis piscariis earundem in aqua de Nyss."

This charter was ratified by Parliament on 5th June 1592. On 4th September 1706 the Earl of Moray granted a precept of *clare constat* in favour of John Mackintosh of Holme, in which the description was as follows:—"Toto et integro dimidio villæ et terrarum de Holme et in dimidio molendini de Holme astrictis multuris et sequelis ejusd. cum dimidio salmonum piscarium super aqua de Ness ad dict terras apertans."

The defender, founding upon this title, averred that the grant of salmon fishing to the town of Inverness in 1591 did not convey the fishings *ex adverso* of the lands of Holme which had been conveyed to the Earl of Moray in 1566. He further averred that he and his authors had always exercised the right of fishing *ex adverso* of their lands of Holme.

The question in the case was whether the defender had a joint right to fish along with the pursuers, the title of the latter, except in so far as they sought to have it declared to be exclusive, not being disputed.

The stretch of water which was in dispute in the action extended from the cottage mentioned in the summons down the river to the defender's march, and was proved in the case to be *ex adverso* of that half of the lands of Holme held by the defender of the Earl of Moray. The other half of the lands of Holme the defender held of Mr Fraser of Balnain. In an instrument of sasine in favour of John Mackintosh of Holme, dated 5th October and recorded 20th November 1706, following upon precept of *clare constat* in his favour by Hugh Campbell, Laird of Calder, dated 25th March 1700, this half of Holme was thus described:—"Toto et integro dimidio villæ et terrarum de Holme, et dimidio molendini earundem." There was no mention of fishings.

For the result of the evidence led in this action in regard to possession reference is made to the opinions of the Judges, *infra*.

The Lord Ordinary (M'Laren) on 10th January 1888 pronounced this interlocutor:—"Finds that on a sound construction of the title-deeds, and in conformity with the evidence as to past possession, the pursuers are entitled, as deriving right from the Magistrates of Inverness, to the salmon fishings concluded for, and therefore finds and declares, interdicts, prohibits, and discharges, in terms of the conclusions of the summons, and decerns: Finds the pursuers entitled to expenses, &c.

"*Opinion.*—The conclusion of the action is, that it should be found and declared that the pursuers and Mr Innes, who is called for his interest, have the sole and exclusive right of salmon fishing in the river Ness from both banks from the stone of Clachnahagaig to the mouth of the river where it joins the sea at low water, with the exception of two pools there described, and which are known to belong to other parties. The defender maintains that the fishing on the right bank of the Ness from the stone of Clachnahagaig to his march is his private property. The question of title is there-

fore limited to the fishing of a small part of the right bank of the river. Each party founds on a Crown title, and a considerable mass of documentary and parole evidence has been imported into the case. I have carefully considered the documentary evidence embraced in the joint print for the parties, including the proof taken before the Sheriff of Inverness-shire in a previous action, and while the weight of the evidence is in my opinion altogether favourable to the case of the pursuers, whose title is derived from the Magistrates of Inverness, I judge that the element of chief importance is that of title, which I shall accordingly proceed to consider.

"For the better understanding of the evidence it is necessary to keep in view that the right of fishing as derived by the magistrates from the Crown, whatever its extent may be, was at an early period divided into the fishing of 'four cobles.' This arrangement apparently suggests a practice of fishing by no more than four persons or parties at a time. But it is in evidence that the rights of the proprietors of the different cobles were split into smaller portions, and these fractional rights were understood to confer a privilege of rod fishing on the possessors. This circumstance does not really affect the merits of the present case. Apparently the whole of the shares into which the four cobles came to be divided have been acquired by the pursuers and Mr Innes, and their title is the title of the Magistrates of Inverness.

"The existing title of the magistrates to the burgh property is a charter granted by King James VI. in 1591. There is also a parliamentary ratification dated 17th November 1641, but there is nothing in this deed to distinguish it from ratifications of the ordinary class which were obtained apparently for the purpose of barring challenge at the instance of the Sovereign on extrinsic grounds. The charter conveys to the magistrates 'the water of Ness in its whole extent, and on either side thereof, betwixt the stone called Clachnahagaig and the sea, with all fishings and fishing stations of salmon, as well as other fish.'

"The title of the defender is founded on a charter of Queen Mary in favour of James, Earl of Moray, and spouse, dated 1st June 1566—twenty-five years earlier than the charter in favour of the magistrates. This charter conveys to Lord Moray 'one-half of the lands of Holme, with the salmon and other fishings of the same in the water of Ness.' These are the only words that appear to me to be material to the question.

"Now, in the absence of any competing title, I do not doubt that the charter in favour of Lord Moray would be a sufficient title to the defender to support his claim to the salmon fishings *ex adverso* of the entire river boundary of his estate. The fishings conveyed with the half of the lands of Holme are 'the fishings of 'the same on the water of Ness;' and in the absence of a competing right I should conceive this to be a perfectly good title to all fishings on the water of Ness which are situated in or adjacent to the property conveyed. But I am also of opinion that the grant of the salmon fishings is susceptible of a more limited interpretation. A grant of the fishings 'of the same,' that is, of the lands, means, in my judgment, fishings which have been possessed along with the lands, whatever these may be; and it is only in the absence of a competing right that the grant of fishings would receive an interpretation co-extensive with the boundary of the lands.

"The grant to the magistrates is expressed in a different way. It is not a general grant of fishings in the Ness pertaining to the burgh, but is a grant of fishings described by known land marks. In particular, the stone of Clachnahagaig, which is the upper terminus of the magistrates' right, was in existence until a comparatively recent period. It is spoken to by a considerable number of witnesses, and there is nothing in the evidence which suggests a doubt as to the identification of this landmark. It was a large stone in the stream nearly opposite Ness Cottage. The identity of the stone described by that name in the titles of course depends upon oral tradition, just like the identity of any other landmark, and it is not suggested by anyone that the stone mentioned in King James' charter was outside the boundary of the Holme estate, or was indeed any other than the stone spoken to by the witnesses.

"Comparing the grant to the magistrates with the grant to the proprietor of Holme, my opinion is that the right given to the magistrates by precise and defined bounding description must prevail over the undefined grant in favour of Holme where the two titles come into competition. It is urged against this view that the Holme title is the earlier in date, and to this the pursuers reply that the charter of the magistrates bears to be a confirmation of three previous charters going back to the time of King William, and which it is supposed were in identical terms. When the question is one of boundary, and especially of a river boundary which is liable to physical changes, I do not think that it can be assumed that the terms of the previous charters were identical with that under consideration. At the same time it is a circumstance in favour of the magistrates' charter that it bears to be a renewal grant, and that unquestionably the greater part of the salmon fishing confirmed to the magistrates by the charter of King James had been in their possession from very early times. I do not understand that this is disputed. It is therefore much more probable that in the matter of salmon fishing the charter of King James merely echoed the words of grant of previous charters than that it professed to take away by the device of a new bounding description part of the fishing right which had been previously given to Lord Moray. But I conceive that this result can be reached through the titles themselves without taking into account the probabilities of the case as regards previous possession. The grant to the magistrates includes both banks of the river from the stone of Clachnahagaig downwards, but there is a reasonable extent of river boundary above the stone of Clachnahagaig which the proprietors of Holme have enjoyed without dispute, and this fishing includes what all the witnesses agree in declaring to be the best fishing pool in the Ness. It appears to me therefore that there is no real contradiction between the two titles. The title of the magistrates ought to receive effect according to its boundaries, and sufficient effect is given to the conveyance of the fishings of Holme to Lord Moray by holding that conveyance to apply to so

much of the water as has admittedly been possessed by the proprietors of Holme without dispute.

"The observations which I have made express my judgment on the point independently of the evidence, or as it would have been given if the parties had agreed that no light could be thrown upon the question by evidence of past possession. I cannot say that the evidence is very strong or conclusive in favour of the pursuers had evidence been necessary to sustain their claim. I shall, however, indicate briefly my view regarding it. Both parties are founding upon historical documents which have been traced out with much industry and research from local records. The most general result derivable from early documents is that from 1680 to 1769 the town of Inverness and the proprietors of Holme, whose title was derived from Lord Moray, were at variance regarding their boundaries, or it might be more correct to say regarding a tract of debateable land which lay adjacent to the site of the fishing now in dispute. This land appears to have been claimed by the magistrates under the name of the burgh moor. It was also claimed by the Mackintosh family by their estate title, and it appears from the burgh records that at various times portions of the moor had been enclosed by the proprietors of Holme and converted into arable land. Eventually the burgh acquiesced in the claim made by the Mackintoshes, and there can be no doubt that for a period much exceeding that of prescription the defender's family have been unquestioned proprietors of the land *ex adverso* of the disputed fishing. It was argued for the pursuers, founding upon the ancient plan and on the records here referred to, that the lands *ex adverso* of the fishings were originally the property of the burgh, and that while the magistrates had lost their right to the lands by negligence or acquiescence they had successfully maintained the possession of the adjacent fishings. This appeared to me at the time to be a somewhat hazardous argument for the pursuers. If the lands and the fishings do not necessarily or probably go together, then the argument comes to nothing. If I am to assume it as natural and probable that the lands and fishings were held together, I must take it as a fact that Mr Mackintosh is proprietor of the lands, and I cannot enter into the consideration of whether the possession was justly acquired or whether it was in reality an encroachment. The presumption of course is in favour of a just title, and that presumption will operate entirely in favour of the defender. But for the reasons stated I do not consider that it is necessary to assume that the lands and fishings were conterminous. The charter defines the fishings by proper descriptive words, and apparently is less explicit in regard to the boundaries of the burgh property. It seems to me that what is the subject of precise description does not stand in need of illustration from what is confessedly more or less doubtful and undefined.

"With respect to the parole evidence it is not necessary that I should analyse it in detail because its import is very evident. In an action of interdict instituted by the guardian of the present proprietor in 1843 the Sheriff allowed the respondent (the lessee under the magistrates' title) a proof of his averments, and to the petitioner (Mr Mackintosh) a conjunct probation. Under this order proof was adduced by the respondent. Its import is that for forty years prior to the action the possession of the magistrates, their disponees and tenants, had been co-extensive with the boundary in the charter of King James, and in particular that the magistrates' right of fishing had been exercised through tenants during the whole or a great part of that period by fishing from the shore, and drawing nets to the shore, on that part of Mr Mackintosh's estate which lies below the stone of Clachnahagaig. No proof was offered for Mr Mackintosh, and some years later the interim interdict which had been originally granted by the Sheriff was recalled. The defender offers an explanation intended to displace the inference which might be drawn, that he had no contrary proof to offer. His explanation is quite intelligible, and is offered I am sure in perfect good faith. But the effect remains that a strong case on the evidence was made by those deriving right through the magistrates, that this proof was not seriously shaken by cross-examination, and that no evidence to the contrary was adduced. Another period of forty years has since elapsed, and of course it is no longer possible to obtain further parole evidence applicable to the possession in the earlier part of the present century. So far as we have proof applicable to the period 1800-43, it must be taken that the possession was in conformity with the charter. This result in my opinion is not displaced by the evidence adduced in the present case.

"With respect to the evidence as to the possession subsequent to 1843, it is admitted by counsel on both sides that the state of possession is ambiguous. Neither party acquiesed in the claim of the other; and while I think that there has been more regular and effective possession by the proprietors or tenants of the Four Cobles fishing than by the defender, yet during this period the defender has sufficiently asserted his right to keep the question open for future consideration. The matter has now been raised for the first time in a form which will enable the question of righ tto be brought to a final decision, and so far as that depends on my judgment I give it in favour of the pursuers."

"Note—*20th Jan.* 1888.—In the argument addressed to me no question was raised as to the topographical position of the stone of Clachnahagaig, and I was under the impression that although the stone had disappeared the parties were agreed as to its true situation. It has since been pointed out that there is some discrepancy in the evidence regarding the situation of this landmark. The summons is not very well adapted to raise such a question, and the case is now beyond my control, because I have given decree in terms of the conclusions of the summons. It will be for the Inner House, either by themselves or by a remit to the Lord Ordinary, to settle the position of this landmark, assuming that the parties are unable to come to an agreement regarding it."

The defenders reclaimed, and argued—Upon the proof it was made out that the defender had had possession of the fishings in dispute along with the pursuers. The pursuers could not therefore obtain declarator of an exclusive right —*Mackenzie* v. *Davidson*, February 27, 1841,

3 D. 646. The charter to Lord Moray did not convey a *pro indiviso* right, but a several right to one-half of a certain subject—*Stuart* v. *M'Barnet*, March 30, 1867, 5 Macph. 753, and July 21, 1868, 6 Macph. 123.

The pursuers argued—The defender had admittedly possessed the fishings *ex adverso* of the upper half of the lands of Holme, which were of much greater value than those now in dispute, which he held of Fraser of Balnain, and now he claimed the fishings *ex adverso* of the other half which he held of Lord Moray. Therefore either he held his most valuable fishings on no title at all, or he was maintaining a right to the whole fishings on a title which only gave him right to one-half of the fishings. Fishings pertaining to lands did not necessarily mean fishings *ex adverso* of those lands—*Fraser* v. *Grant*, March 16, 1866, 4 Macph. 596; *Earl of Zetland* v. *Tennent's Trustees*, February 26, 1873, 11 Macph. 469—The boundaries in the pursuers' charter were definite, while there were no boundaries in the defender's title. The evidence as to possession was in the pursuers' favour.

At advising—

Lord Young—This is a case not at all devoid of interest or difficulty. The proceedings are very voluminous—I mean the parole and documentary evidence—and the case was very fully and satisfactorily, if I may presume to say so, argued. I cannot help feeling some regret that a case that has given rise to so much litigation is of such trifling pecuniary value. The fishings in question appear to be of very little value indeed. I think they have been let for some time at a rent of £10 per annum. Fishings of that value have given rise to this amount of litigation. And the controversy seems to have been going on, not between the same parties, but about the same fishings, and between one of the parties and another party who then had the right which the pursuers aver that they now have, since the year 1843 at least, and probably since before that time.

The question regards the fishings *ex adverso* of the lands of Holme in the river Ness below the site of the cottage mentioned in the conclusions of the summons. The first thing to consider of course is the title of the parties. They are in conflict about these fishings in the Ness *ex adverso* of the lands of Holme below that cottage, and about nothing else. As I say, the first question is, what are their respective titles? Now, I do not refer at all particularly to the title of the pursuers, because their title to fish in the river at the part of it in question is not disputed. Their title is not given to them, and they do not hold it, in connection with any lands. The leading pursuers, Mrs Warrand's trustees, hold the lands of Bught on the north side of the river, but the fishings are in no way attached to those lands, or the title to them connected with those lands. They derived their title from the town of Inverness, and the town of Inverness is represented here by the Provost and Magistrates of the burgh, and they—I mean the town—still hold, according to the averment in the case, and according to the assumption I am going to make, a part of the fishings in question.

Another party—Mr Innes—holds a third part. These fishings were held in what are called "cobles"—I suppose the right being measured by the number of cobles which the holders, who were more or less numerous, were entitled to use. The fishing here was called the Four Cobles fishing, and it is explained that the leading pursuers, Warrand's trustees, are the proprietors of three and a-third of these cobles. For the purpose of making this division more satisfactory I have taken the cobles in sixths. Three and a-third will make three and two-sixths; the town of Inverness is proprietor of three-sixths of a coble, and Mr Charles Innes, who is called as a defender here, is the proprietor of the remaining sixth. I repeat that their title to these fishings is not in dispute, except in so far as they allege it to be and ask us to declare it to be exclusive. The defender does formally in one of the pleas dispute their right, but it is only in a plea-in-law, and it was quite formally conceded in the debate before us from the outset that the defender did not dispute the pursuer's title to fish in the part of the river in question, but only maintained his own right, and disputed their right to interdict him. The question therefore is, whether the pursuers are entitled to have their right declared to be exclusive, and so to interdict and prohibit the defender from fishing within the specified bounds—that is, *ex adverso* of his lands below the cottage, the site of which I have referred to.

Now, what is the title of the defender? He is admittedly proprietor of the lands of Holme. That part of the lands of Holme *ex adverso* of a portion of which are the fishings in dispute he holds by a title proceeding from and indeed holds under a superior, the Earl of Moray. That part of the lands of Holme which is described in his title as proceeding from the Earl of Moray is a half of the lands of Holme. The other portion he holds under Mr Fraser of Balnain. It is explained by the pursuer in the first article of the condescendence "that the lands of Holme are held of different superiors and under separate titles, viz., one-half under the Earl of Moray, and one-half under Mr Fraser of Balnain." There is an explanation added, to which I shall refer immediately, the point to which I call attention now being merely that the defender is proprietor of the whole lands of Holme—a half of the lands so described being derived from and held under the Earl of Moray, and the other half being derived from and held under Fraser of Balnain.

Now, the Earl of Moray, before he granted the lands, the one-half to the pursuer—or the predecessor of the pursuers, I should say—held them under a Crown charter, in which they are described as "dimidiatatem terrarum de Holme cum salmonu et aliis piscariis earundem in aqua de Nyss." That is all in the charter that need be attended to. That is a charter of one-half of the lands of Holme, with the salmon and other fishings thereof in the water of Ness. I may notice here—and I may take it in connection with the explanation of the pursuers in the first statement—that the title to the other half is derived in this way. I read from what is called a description of the half of Holme held by the Laird of Cawdor, now of Balnain—that is, from a sasine in favour of John Mackintosh of Holm, dated in 1706, following upon a precept of *clare constat* in his favour by William Campbell, Laird of Cawdor, in

1700, and it says—"Toto et integro dimidio villæ et terrarum de Holme, et dimidio molendini, earundem," and so on. There is nothing about the fishings. It is just half of the lands of Holme, I think, quite accurately translated.

Now, where these halves are situated does not appear from the title. It must be matter of evidence, and we have it as matter of evidence in this case. I take it really from the evidence of Mr Innes, to which I am not going to refer particularly, and it has this result. Upon the plan—the plan on which the numbers are, and to which Mr Innes refers in his evidence—the lands coloured green, and marked No. 4, are the one-half of the lands held of the Earl of Moray, and derived and held from him. The other half—the half held of Balnain—are No. 6.

Now, what are the fishings of the lands of Holme? We cannot discover that from the title of course; they must be ascertained otherwise. I read the description in the Crown charter, which is in Latin, "fishings of the lands," salmon and other fishings of the lands. The title is to one-half of the land, and what is conveyed is—"Dimidiatatem terrarum de Holme cum salmonu et aliis piscariis earundem in aqua de Nyss." In the sasine which we were referred to as the first sasine which was produced the description is—"Toto et integro dimidio villæ et terrarum de Holme et in dimidio molendini de Holme astrictis multuris et sequelis ejusd. cum dimidio salmonum piscarium super aqua de Ness ad dictas terras apertans"—that is, pertaining to those lands. What is the meaning of the fishings here given, the fishings of the lands of Holme, or the one-half of the fishings pertaining to the said lands? If you are to construe a grant of the fishings pertaining to certain lands bordering on the river, I suppose that *prima facie*, and in the absence of anything satisfactory to the contrary, the grant would be taken to signify the fishings in the river *ex adverso* of the lands pertaining to them—reaching to them, touching them. It might be shown otherwise. The word "pertaining" might be taken in another sense on satisfactory evidence to that effect. It might be shown by evidence that the fishings which were attached to certain lands in a title were not *ex adverso* of those lands at all, but were elsewhere; for salmon fishings, being a royal privilege or franchise—*inter regalia*—may be alienated by the Crown without reference to any lands, or with reference to any lands whatever. But in the absence of anything satisfactory to the contrary a conveyance of fishings in a river appertaining to lands through which the river flows, would clearly in my opinion be taken to mean the fishings in the river *ex adverso* of the lands. And so with respect to the half, if you take the grant to be of the half of the fishings pertaining to those lands, *prima facie* and in the absence of anything to the contrary, it would be one-half of the fishings in the river *ex adverso* of those lands. Taking the fishings *ex adverso* as a whole, one-half of the fishings is thus conveyed. That does not even *prima facie*, certainly not necessarily, signify that the fishings are to be divided into two by measurement along the banks, the one-half of the measurement being the one-half, and the other half of the measurement being the other half. You ascertain as best you can what are the fishings appertaining to the lands in the absence of anything to the contrary, that being in my opinion the fishings *ex adverso* of the lands. In the case of the conveyance of the half, the fishings are divided into two, and the half only is conveyed. I am merely considering the matter of title at this moment. It is in my opinion clear, taking the conveyance of the Earl of Moray, and the sasine which we have in favour of the defender's predecessor upon that title, that his right under it was and now is to one-half of the lands of Holme—of the whole lands that is—to be ascertained in the usual way, because there is no description in the title of one-half of the whole lands of Holme, and one-half of the whole fishings pertaining to the whole lands. That is my opinion of the title; he has a title to one-half of the whole lands, and one-half of the whole fishings thereto pertaining. It is not a title to one-half of the whole lands, and one-half of the whole fishings appertaining to that half. There is no mention of fishings pertaining to one-half or another half, and the pursuers say upon record that there are no fishings appertaining to the other half which the defender holds of Balnain. That is the case stated on record, probably without much thinking of the matter, or what consequences it might lead to—that the defender has no fishings pertaining to the half of the lands which he holds of Balnain, but has only fishings pertaining to the half held of the Earl of Moray.

Having made it thus clear what the title is according to my view, I proceed to consider the evidence. Let me—in order that there may be no dubiety about it—repeat the conclusion at which I arrive as to the state of the defender's title. I think he has a title to one-half of the lands of Holme held under Lord Moray, and I think he has a title to another half or the other half—for there can only be two halves—of the lands of Holme held under Balnain. With respect to the fishing, I think he has under the Crown grant to Lord Moray—regularly and properly transmitted to him—a title to one-half of the whole fishings pertaining to the whole lands of Holme. There is no grant of fishings in the title held under Balnain, and his title to fishings, so far as we see, stands upon the Crown grant to the Earl of Moray properly transmitted to him, of one-half of the fishings pertaining to the whole lands of Holme.

Now, I just point out here that in this case—except as matter of history and as throwing light upon what requires light—we have no concern with the fishings *ex adverso* of the lands held under Balnain. The pursuers lay no claim to these or to fish in the river *ex adverso* of the lands of Holme held under Balnain. How, upon a question between the parties interested in those fishings and having conflicting interests, the title might be held to stand in regard to possession or otherwise I cannot tell. But for the purposes of this case I take it that the defender has a Crown grant to one-half of the fishings *ex adverso* of the whole lands of Holme.

That title, however, might be lost *non utendo*, and it might be acquired by some other party—that is to say, it might be lost to the one party by the negative prescription and acquired by another party by the positive prescription. I assume that to be quite possible. I am only speaking of the title before proceeding—as I shall immediately do—to consider the evidence of possession.

What then appears to have been the possession? I think it appears quite satisfactory to my mind that the lairds of Holme have during all the time to which the evidence extends asserted a right to fish *ex adverso* of the whole lands of Holme, and that under the title to one-half of the fishings pertaining to these lands, and which I must take—for the reasons I have stated if there be nothing satisfactory and conclusive to the contrary—to mean the fishings *ex adverso* of the whole lands. In regard to the other half of the fishings pertaining to the lands of Holme we have seen no title to any half except that which the pursuer has. I suppose, however, that there is another half, and that half might be alienated by the Crown in any way and under any name. At all events it has not been alienated under the name of the half of the fishings pertaining to the lands of Holme. We have not the means of inquiring into that. I see there is a suggestion—and I think it is not without plausibility—in the course of the proceedings in 1843 before the Sheriff at the instance of Holme against a Mr Tait, who was a hairdresser and fishing-tackle dealer in Inverness. I suppose he had as lessee a right to the fishings which are now in the pursuers. Those proceedings were instituted in 1843 against him to stop him from fishing *ex adverso* of the lands of Holme, and particularly to stop him from fishing from the Holme lands at all. Well, there was this suggestion by his law agent Mr Duncan M'Lennan—"On their own showing"—that is, on the showing of Holme—"they have only one-half of the fishings attached to the lands of Holme, and there is nothing set forth in the petition inconsistent with the assumption that the other half belongs to the respondent as the tenant of the lower heritors." The proprietor of Holme is the proprietor of one-half, and he is not maintaining an exclusive right, at least so far as the portion of water which alone is here in dispute is concerned. Whether or not he has an exclusive right further up, and if so, what that exclusive right to fish further up is to be attributed to, we are not now in a position to inquire, for we have not the parties in that question here. But what has been his possession? I repeat that he has from as far back as memory can reach or evidence can go, by himself or his predecessors asserted a right to fish *ex adverso* of the whole lands, and he has fished *ex adverso* of the whole lands. I cannot find any evidence here that he or his predecessors were ever stopped. Certainly they were never effectually stopped, and I do not find them challenged in fishing *ex adverso* of the whole lands. It so happened that the upper fishings were very much more valuable than the lower. If you take a stretch of a river extending along an estate the probability is that the fishings at one point will be very much more valuable than the fishings at another part; and it so happens here that the fishings *ex adverso* of the lands held of Balnain are infinitely more valuable—for they let for hundreds of pounds—than the fishings in question *ex adverso* of the lands held of the Earl of Moray which let for only £10—I think a single £10 at this moment. But they were all possessed latterly—and for a quarter of a century at least—indeed for a good deal more, they have been exclusively possessed by rod fishing. I shall have a word to say about rod fishing by-and-by in questions in regard to salmon fishings. But in the meantime let me say that these fishings were let, and let for large rents, for more than a quarter of a century for rod fishing to, for instance, Mr Dennison, for upwards of twenty years, who paid £300 a-year for them. He was a fastidious fisher, and fished only the best water. But we have abundant evidence in my opinion—and for myself I should not think it necessary to go beyond the evidence of Mr Mackintosh himself and Mr Innes—that continuously these fishings were possessed as far down as the lands extended, although chiefly by rod fishing. There was never much coble fishing—latterly, I think, there was none at all except at the very end of the season when there was a sort of gala-day. At the same time there was a little coble fishing, and coble fishing down to the very end of the property. There is the evidence of Alexander Fraser and of Mr Mackintosh himself. They speak to a good deal of net fishing below as well as above. Alexander Fraser says—"I remember Mr Weeks, an Englishman, having the Holme fishings. He fished with the net. I was one of his crew. He liked us to fish for an hour or two at night. I have seen him net the river down to Ness Cottage. He could not net Redbraes, because there were stakes in it, but I have seen him net below that. I remember when the Ness Club was in existence. I fished the river with them one night with the net on the Holme side, beginning at the Saltoun March and going down to Kessock Ferry at the mouth of the river." There was some trespass in that if it was not done by permission, although it probably was done by permission. Then he goes on—"Donald Nichol was present. I was not regularly employed by the Club—perhaps an hour to-night and two hours to-morrow night, and so on." "*Cross.*—When we netted the lower water we dragged the boat back; we did not use a cart. Mr Weeks was not the last who netted the disputed water. I think Tait netted it after that."

"There is some ambiguity" is the expression which the Lord Ordinary uses about the possession. He proceeds on the footing that both parties have had possession, but that there is obscurity in the evidence as to the facts of possession. There seems to have been an interchange of courtesies and civilities—each party giving rights to the other. Even the public were tolerated, and tolerated with boats to a considerable extent. There is therefore some confusion in the matter of possession, but I should have no hesitation in pronouncing as my verdict on the evidence that there has been continuous uninterrupted possession by the lairds of Holme of the salmon fishings in the river Ness—that is to say, that they have continuously and uninterruptedly fished salmon in the river Ness along the whole course of the river *ex adverso* of their lands.

An argument was stated to us that no possession was to be looked to or was of any legal value except possession by net and coble. I desire to say distinctly that I am not of that opinion—not at all of that opinion. I quite assent to the proposition that we have authority, which I shall not go back upon,

which goes this length, that a general grant of fishings shall not be converted or explained into a grant of salmon fishings by mere fishing with the rod. We have no case here to consider about explaining a general grant of fishing to mean a grant of salmon fishing. That is not the kind of case before us at all. Where there is a general grant of fishing it has been held, and I repeat that I shall not be disposed to question the decisions, or the grounds on which they stand, or to go back upon them, that that shall not be explained into a grant of salmon fishings by saying that the grantee fished or that his successors fished with the rod. That is not *positivi juris*, but a conclusion reached upon rational and intelligible grounds, or, to speak in the singular, upon a rational and intelligible ground, the ground being that fishing by net and coble was at the date of those decisions regarded as the only serious mode of salmon fishing. They would have opened their eyes and lifted their brows with some amazement if they had heard of £200 or £300 a-year being paid for fishing by rod in the river *ex adverso* of the lands held of Balnain, but a great deal has occurred in modern times, and now the most profitable use which can be made of salmon fishings in many places is to abolish the fishing by net and coble altogether, and to hire out the fishings to tenants for rod fishing only. Although no such question arises before us, I am not at all prepared to say that I should not hold a general grant of fishing to be explained by possession into a grant of salmon fishing by such commercial and profitable use of it—letting it out for rod fishing at those great rents to which I have referred—as could be had of it. What I say at present, however, is that the decisions about explaining a general grant into a special grant of salmon fishing proceed upon a rational and intelligible ground, and not upon a rule *positivi juris* that there must be net and coble fishing. Net and coble fishing may go out of existence altogether, and another mode of fishing quite foreign to net and coble, although perhaps a more profitable use of the salmon fishing, may come into existence, and to say that then a grant of fishing cannot possibly be explained into a grant of salmon fishing at all would in my opinion be extravagant. As I have already said, however, we have no case of that kind here. We are only considering whether what is *prima facie* and on the face of it a good title to salmon fishing in a particular part of the river will be lost by a party holding the title *non utendo*, so that his title shall cease because he has only fished for salmon with the rod. I could not assent to such a proposition for a moment. It would come to this, that if a man who had, as here, an admitted and indisputable grant of salmon fishings *ex adverso* of his land, chose to make the most profitable use of his fishing by means of rod fishing he might lose the subject of the grant, while another proprietor on the opposite side of the river with a similar grant applicable to his side, might acquire the whole of it because he had simply fished his part of the stream by net and coble. The man who lets his fishings for rod fishing may make hundreds, or it may be thousands, a year. It seems that rents have gone that length. They may do that continuously now. Now, to say that he who has thus never ceased to utilise his fishings in the best way is liable to lose his right of salmon fishing *non utendo* on the mere ground that he did not fish with net and coble, would in my opinion be extravagant.

But if I am right that there is a *prima facie* good title to salmon fishing *ex adverso* of these lands, the question is, whether the possession has been such that it has been lost to this party and acquired by another. Now, even if his fishing had been confined to the rod, which I think it was not, I do not think that consequence would have followed. That is the view in which the case presents itself to my mind. I think there is a good title to begin with. I think that title has throughout and without interruption been acted upon. There is no ground for maintaining that there has been any abandonment of the right. Therefore I think there is no ground upon which we can cut out the defender by declaring the pursuers' right to be exclusive, and so interdict him at their instance from fishing there. I think that would be unjust. I think he properly failed in interdicting Mr Tait in 1843. Of course, in saying that, I assume that the same title in Tait's authors was exhibited which the pursuers are exhibiting here. I think it is a good title. The defenders themselves think it is a good title, and never contended for a moment before us to the contrary effect. There was therefore a proper failure of the attempt to stop Tait in 1843. I think there is an equally good title and equally available possession put before us here, and just as those who in 1843 were in the defender's place failed to turn out Tait and stop him from fishing, so I am for giving no countenance to the pursuers' attempt now to interdict the party before us.

I have only a word to say on the view on which the Lord Ordinary proceeded. I think he proceeds on the assumption that both parties have had possession, and have been continuously in possession. He thinks the evidence explains the defender's title, so that the salmon fishings under it are *ex adverso* of the lands held under Balnain and not *ex adverso* of those acquired from and held under the Earl of Moray. I do not assent to that view. I have stated already that *prima facie* in my opinion, and in the absence of anything satisfactory to the contrary, the fishings pertaining to the lands must be taken to be the fishings *ex adverso* of those lands. I am taking the case where the lands are on the river bank, and I think there is nothing here satisfactory, I myself happen to think there is nothing even plausible to the contrary; for the view is this, that when the Crown granted the lands in the lower part of the river as one-half of the lands of Holme with the fishings pertaining thereto, the meaning of that was that these were the fishings *ex adverso* of the other half of the lands situated up the river, and which were not the subject of the grant at all. I mean the lands were not the subject of the grant at all. So that the Laird of Holme is in this position, that he has the undisputed possession and an indisputable right to the fishings *ex adverso* of the lands which he has, without any grant of fishings at all, but no right to the fishings *ex adverso* of the lands which he has with that grant. That is a little paradoxical, and I do not assent to it. But it is sufficient to

say that in my opinion, for the reasons which I have endeavoured to explain—I am afraid only at too great length—the pursuers must fail here. I should sustain the defences in so far as they do not proceed upon a denial of the pursuers' right and assoilzie them from the conclusions of the action. We do not need to declare the pursuers' right to fish. We only need to negative their exclusive right which they ask us to declare, and upon declaring which they ask us to interdict. We cannot define the respective rights of the parties to use the banks on the one side or on the other. We can only proceed on the view in which this action is presented.

Lord Rutherfurd Clark—By Crown charter dated 1st January 1591 King James VI conveyed to the town of Inverness, *inter alia*—"Totam et integram aquam de Ness, omnesque partes, ac utrumque latus ejusdem, inter lapidem vocat. Clachnachaggag et mare, cum omnibus piscationibus et piscariis, tam salmonum quam aliorum piscium." The pursuers, along with Mr Charles Innes, are now in right of this grant. It is not disputed that infeftment followed in favour of the burgh, and that the title of the pursuers and Mr Innes has been properly deduced. For the sake of simplicity I shall speak of these fishings as if the pursuers were the sole proprietors. That Mr Innes holds a part is not in any way material.

The legal meaning of such a grant is not doubtful. It conveys the whole salmon fishings within the specified limits with a right to fish on both sides of the river. So far there is no controversy.

It appears, however, that by a Crown charter dated 1st June 1566 Henry and Mary conveyed to the Earl of Moray "dimidietatem terrarum de Holme cum salmonum et aliis piscariis earundem in aqua de Nyss." No infeftment following on this charter has been produced. But there is a "ratification to the Erll of Moray of his infeftment" granted by Parliament on 5th June 1592, by which is ratified the charter of 1st June 1566, and the precept of sasine following thereon. We do not, however, see whether the infeftment contained the half of the lands of Holme and the fishings thereof which are mentioned in the charter.

The lands of Holme came into the present family by two different titles—one-half from the Earl of Moray, the other half from the Laird of Calder. The former half still continues to be held of Lord Moray. The other is now held by Mr Fraser of Balnain. On 4th September 1706 the Earl of Moray granted a precept of *clare* in favour of John Mackintosh of Holme, the description in which is "toto et integro dimidio villæ et terrarum de Holme . . . cum dimidio salmonum piscarium super aqua de Ness ad dictas terras apertans." This right is continued in the successors of the grantee till the present time. With the other half of the lands of Holme flowing from the Laird of Calder no right of salmon fishings is conveyed.

The titles standing thus, the pursuers seek declarator that they are the proprietors of the whole salmon fishings in their grant, with two exceptions, which I shall notice hereafter. On the other hand, the defender claims the salmon fishings *ex adverso* of his lands of Holme within the limits of the pursuers' grant, although at the discussion he admitted that he could only maintain that he had a joint right along with the pursuers.

The first point to consider is, whether there is any competing title. The defender maintains that his title is preferable to that of the pursuers in respect that it is of an earlier date. If this point is to be made, the infeftment of the Earl of Moray should have been produced, because there can be no competing title without competing infeftments. But I am willing to take the case on the footing that the infeftment of the Earl was conform to his charter, and to examine the title on that footing.

When salmon fishings are given out along with lands the meaning of the grant is that the grantee has a right to fish *ex adverso* of his lands, and from his lands. Such a grant may support a larger or different possession. But on the face of the title it means no more than what I have stated.

The charter in favour of Lord Moray would thus import a right to the fishings *ex adverso* of that half of the lands of Holme which belonged to him. The title in the person of the defender is more limited, though perhaps more accurate in its expression. For he holds only one-half of the salmon fishings of the lands of Holme. Under that title he can never have more than one-half of these fishings, nor in my opinion would the title support a prescriptive right to the whole. But judging by the title alone, I should be disposed to hold that the fishings were the fishings *ex adverso* of that part of the lands held of Lord Moray. So far therefore there is a competing title. For it seems that the lands held of Lord Moray form the lower portion of the lands of Holme, and in so far as the pursuers claim the fishings *ex adverso* of these there appears to be another title, and it may be a prior title, in the person of the defender.

But questions of this kind which relate to grants of so ancient a date can never be satisfactorily decided by reference to the title alone. We must see what has been possessed under the title. Nor must we forget that salmon fishings are not a part and pertinent of lands. They are a *separatum tenementum*, and though the construction of a title may be as I have stated, possession may show that the situation of the fishings is elsewhere. When salmon fishings are given out by a Crown grant, the possession which has followed upon it is, I think, decisive as to the locality of the fishings.

Turning then to the possession which has followed on the grant of the pursuers, I find that the pursuers have possessed for time immemorial the fishings from the Clachnahagaig stone to the sea, and that they have drawn their nets on both sides of the river. So entirely does the defender admit this to be the state of possession, that he does not now claim an exclusive right to the fishings *ex adverso* of the lands of Holme, in so far as these fishings are below the Clachnahagaig stone, but only a joint right along with the defenders. The claim of the pursuers being so far admitted, it only remains to inquire whether the defender has established the joint right for which he contends.

The first question which I put is this—What are the Holme fishings? I do not find it to be

suggested that these fishings are situated elsewhere than *ex adverso* of the lands of Holme. It is not said that any other fishings have been possessed as such, and in the absence of such possession as will show that they are in another locality, I take it to be clear that the words "the salmon fishings of the lands of Holme" must receive their ordinary legal interpretation, and that they mean nothing else and no more than the fishings *ex adverso* of that estate.

Of these fishings the defender is infeft in one-half. What has been his possession under that title?

The lands of Holme lie above and below the Clachnahagaig stone. In so far as they are above that stone, the defender and his predecessors have possessed the salmon fishings *ex adverso* of these lands. It would appear, as I have said, that the lower portion of the lands is held under the title flowing from Lord Moray, and the higher under the title flowing from the Laird of Calder. But as salmon fishings are a *separatum tenementum*, and not a part and pertinent of lands, I hold that the possession which the defender and his predecessors have had has identified the fishings which were granted to them by Lord Moray. The defender has no other title to these fishings than his charter from Lord Moray, and I think that it is sufficient. Nor would it benefit the defender to have any doubt thrown on that right in order to his success in the present action. For the fishings which he has possessed are very valuable, and comprise in extent fully one-half of the fishings of Holme, while the fishings below the Clachnahagaig stone, though the subject of this action, are worth very little.

But the defender says that he has also possessed jointly with the pursuers the fishings opposite that portion of Holme below the stone, so that according to his contention he has possessed the whole salmon fishings opposite Holme—the upper portion exclusively, the lower portion jointly with the pursuers. In his defences he claims the whole fishings opposite Holme, and subject to the joint right which he now concedes to the pursuers his present claim goes as far. For if the joint right of the pursuers be allowed, such a right is an excision from the whole fishings of Holme, and not from one-half of these fishings. The claim of the defender is therefore in my opinion not supported by his title, unless it were to be held, contrary to his interests, and contrary to what I take to be the fair legal inference, that the upper fishings, which he has undoubtedly possessed, are not within it.

I may, however, put that question aside, for I do not think that it is proved that he has possessed the lower fishings.

In 1843 the defender raised a process of interdict against Tait, the tacksman of the fishings of the town of Inverness, to have him interdicted from fishing from the lands of Holme so far as below Clachnahagaig stone. He obtained interim interdict. We have before us the proof which was led for the respondent. The petitioner did not adduce any. It seems to me that that proof shows very conclusively that the town of Inverness had the exclusive possession of the whole fishings contained in the grant of 1591, and that the defender did not possess any part of the fishings which he now claims. It is unnecessary for me to examine it, for it is all one way. Both fishings were sometimes held by one tenant. But the boundaries of each were well known, and are very precisely described. For instance, the witness Macnaughton, who was tenant for a year of the Holme fishings under the grandfather of the defender, tells us that when he took the fishings his landlord pointed out the march between the Holme fishings and the town's fishings. The march was opposite the Clachnahagaig stone. When the fishings were in different hands I think that it is proved that this march was observed. The defender has in this action led evidence as to the state of possession prior to 1843. But the evidence adduced by the pursuers in the process of interdict is much more reliable. I think that the defender has failed to show that his predecessors possessed the fishings in question. There may have been occasional fishing on their part, but to my mind there was no possession in any reasonable sense of the word.

There can, I think, be but one inference from the proof as applicable to this period. I hold that prior to 1843 the town of Inverness had immemorial possession of the fishings within their grant. Such possession was not necessary to establish their right to these fishings except as against a competing title. But if, as the possession has I think shown, the fishings conveyed by Lord Moray to the predecessors of the defender are the upper fishings of the lands of Holme, there is no competing title, because the title of the defender is satisfied by what was possessed under it, and because he could not claim under that title the whole fishings of Holme. But as the town had possessed the fishings which were granted to them it seems to be completely established that they were at the date I have mentioned the exclusive proprietors of these fishings.

If this be so, the defender can only maintain that he has acquired the joint right which he now claims by subsequent possession. Salmon fishings may undoubtedly be acquired in this way, and so be lost by a former owner. There are examples in our books. But the title must be sufficient and the possession must be very clear. I do not think the defender's title is sufficient, and I am of opinion that the necessary possession has not been proved.

The most favourable way of stating the case for the defender is that he has possessed the fishings for twenty years prior to the raising of this action, which is the shorter prescriptive period introduced by the recent statute in place of the period of forty years. The time between 1843 and 1853 may be thrown out of view, for the process of interdict, though not actively proceeded with, was still in existence, and was not taken out of Court till 1853. While the case was *sub judice*, the action of either party is not material. But even if it were, I do not think that the defender has proved possession in any satisfactory way during that period, and whatever possession he had was due to the interim interdict which he had improperly obtained in 1843, and which was not recalled till 1853.

As to the alleged possession since that time we are not in doubt. The defender himself says —"Since 1853 the fishings have been used entirely as rod fishings." He adds—"During that time they were almost continually let." His tenants were Mr Weeks, Mr Reeve, Mr Denni-

son, and latterly, as regards the lower fishings, Mr Innes. The first two gentlemen held the fishings from 1853 till 1867—Mr Dennison from 1867 till 1879—and Mr Innes from that year to the present date, though it would appear that he was allowed to fish in the lower fishings a year or two earlier. It appears from the evidence that Mr Reeve and Mr Weeks only occasionally angled in the lower water, and that Mr Dennison never fished there at all. Mr Innes fished, it may be said, regularly, but it is important to notice that for a considerable part of his tenancy he was a part proprietor of the fishings which had belonged to the town, and had thus a right to angle independently of his lease from the defender. It is said that Mr Weeks occasionally netted the lower water. At the best this netting was only occasional. But as it appears that he netted from the Holme fishings to the sea, his acts prove nothing. For it is clear that he either fished by tolerance or that he held other rights than those which he derived from the defender.

In my opinion such possession as the defender has proved cannot prescribe a right to salmon fishings. It has only been occasional, and certainly not continuous. For twelve years from 1867 till 1879 there was no possession at all. It is of no consequence that the fishings were let—possession must follow on the lease. For possession is the only mode of asserting a right, and the only means by which a right can be prescribed.

A possession so uncertain, occasional, and ambiguous cannot in my opinion deprive the pursuers of the right which they hold under their charter. Further, it was by rod only, and I hold it to be settled in this Court that where salmon fishings can be fished by net and coble, mere angling cannot establish a prescriptive right—*Richmond*, 8 Macph. 530. The principle on which this rule depends is not difficult to discover. It is nothing more than this—that when a right is claimed by prescriptive possession complete possession must be asserted and proved, and that acts which fall short of complete possession will be ascribed to tolerance, and will not be regarded as the assertion of a right on the one hand, nor as the recognition of a right on the other.

I said in an early part of my opinion that there are fishings within the limits of their grant which the pursuers do not claim. The origin of these exceptions has not been well explained. The defender argued from their existence that there was reason to suppose that the fishings of Holme might be also excepted. I do not pursue the argument. At the best it rests on a mere presumption, and the considerations on which I found my judgment are in my opinion quite sufficient to displace it.

For these reasons I think that the judgment of the Lord Ordinary should be affirmed.

Lord Justice Clerk—This is a perplexing case in any view, and after the opinions your Lordships have delivered it of course assumes a very important and difficult character, but I agree in the result at which Lord Young has arrived, and substantially upon the grounds which he has fully explained. I shall only add a few sentences to indicate where I think the real difference of opinion lies, and the grounds upon which the case ought to be decided.

The town of Inverness and the proprietor of the lands of Holme are the proprietors of lands on the banks of the river Ness. They both have grants of great antiquity of salmon fishings in that water, the lands of Holme being above and the town of Inverness below. The grant in favour of Holme goes back as far as three hundred years. It was a grant by Queen Mary and her husband Darnley in 1566. I do not think there is much doubt as to the terms of the grant or the right which it conveyed. That is the earliest grant which we have before us in the case. It substantially gives one-half of the lands of Holme and the fishings thereof. We have no sasine upon that grant, but it was ratified in Parliament in 1594. We have no sasine on it for one hundred and fifty years, but in 1706 we have a precept of *clare constat* in which the description runs in this way, "half of the lands of Holme and half of the fishings." I cannot for one moment imagine that that can be construed to mean anything else than the lands intended to be conveyed by the original grant. Therefore I apprehend that the title is quite sufficient, provided it is established by the subsequent possession. The Lord Ordinary says that the title of the burgh of Inverness should prevail, or have more favour in this inquiry, because there are physical limits pointed out as the boundary of the right. There is a stone with a long Celtic name referred to in the title which is said to be the other boundary of the town's right, but unfortunately for that view there are other boundaries in the right. It is said they are to have the right from that stone to the sea. It is quite certain that they have not the fishings from that stone to the sea. There are the Duke of Gordon's fishings, and the Friar's Shot between them and the sea. I do not think they are so much dependent upon the subsequent possession as the lands of Holme are, and in truth, dealing as we are with titles of that antiquity, and in a matter where possession is a necessary part of the right of the person asserting a title, I imagine that the real truth of the case must be found in inquiring into the subject which has been possessed.

Now, in 1843 the Laird of Holme brought an action of interdict before the Sheriff to have it found that he had exclusive possession of this part of the water *ex adverso* of the lands of Holme. A circumstance occurred which prevented the present defender from going on with that process of interdict, but the respondent went on in his absence, and we have a body of evidence led at that time for the purpose of rebutting the averments made by the petitioner. That process, however, came to nothing. The evidence is there. It is good as far as it goes, but it is evidence which was led without a contradictor. We have only one side of the case and not the other, and although I am far from saying that the evidence is not admissible in this inquiry, I think it can only be taken in the view of the observations which I have made.

From 1851 or 1852 until now matters have remained much as they were. They have, however, always been in dispute. It is plain from the evidence taken in the 1843 inquiry that there was always a difference between the town and Holme in regard to this matter. It was never

admitted on the one side or the other who had a right, and now that the question is fairly raised at last we have to determine what the limits of both these parties upon this water were.

It seems to be assumed that the evidence in 1843 proved exclusive possession on the part of the town. I am very clearly of the opposite opinion. I think the evidence in 1843 proved that there was not exclusive possession and that there could not be. I think so upon one very simple ground. That ground is, that for a great many years, for twenty years prior to that time, the fishings had been in the same hands, I mean that the same man was tacksman of the town of Inverness, and of the fishings belonging to the defender, and the fishings were held together and worked together. This made it quite impossible that the possession under such a state of matters could become exclusive. The evidence is quite distinct that while Mr Stevenson, who for certainly three quarters of the time held the fishings of Holme and the fishings of the town, worked the fishings, they did not observe any marches whatever. That is proved by Mr Hutchison. He says that "Mr Stevenson still continued the tenant of the Holme fishings. That the crews below sometimes went up to the said march to fish. That Mr Stevenson got the whole fishings afterwards, and the deponent gave himself no trouble thereafter about marches." The same thing is repeated by the witness Mackenzie, who is sixty years of age, and he says that "when Stevenson got the Holme Pool he fished the river as it suited his purpose, having had the whole of it from the lower march of Lady Saltoun's fishings." There are many other passages of the same description. The real state of of the matter is, that Mr Stevenson got the town fishings in 1820 and the Holme fishings in 1821, and until 1830 he substantially held and worked them all together. He got into difficulties in 1830, and there was a year or two when Mr Stevenson had no concern with the fishings at all, but in 1833 he apparently came back, and the same thing took place until 1838 or 1839. So that it is quite clear that on the evidence in the inquiry of 1843 there could not by possibility have been established an exclusive right on the part of the town. That being the state of the matter, it is admitted that the evidence in this action does not establish an exclusive right on the part of the town. It is ambiguous, and the Lord Ordinary admits that it is so. He holds mainly that a particular limit—the limit of the town's right—is established by the original grant. But I think that was all subject to possession. On the grounds I have stated I think there has been no exclusive possession proved in favour of the town of Inverness. I do not think it necessary to go further than that.

I may say in regard to the matter of rod fishing that I do not think it is doubtful in the slightest degree that if you have a Crown grant of salmon fishings, and find it more profitable to fish with the rod than with a coble, that is as good a possession as if you found it more profitable to fish the other way. But the difficulty that was suggested was this, that where there is no grant of salmon fishings the mere use of angling will not be held sufficient to change a right "cum piscationibus," or to enlarge it into a right of salmon fishings. But that doctrine could only apply where there was no grant of salmon fishings.

After the full consideration your Lordships have given to the case, I do not think it is necessary to say more. Your Lordships alter the interlocutor and assoilzie the defender.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender with expenses.

Counsel for the Pursuers and Respondents—D.-F. Mackintosh—C. N. Johnston. Agents—Skene, Edwards, & Bilton, W.S.

Counsel for the Defender and Reclaimer—Darling — Low. Agents — Murray, Beith, & Murray, W.S.

Thursday, July 12.

SECOND DIVISION.

[Sheriff of Stirling.

DAWSON *v.* THORBURN.

Bankruptcy—Act 1621, *cap.* 18—*Conjunct and Confident*—"*Just, true, and necessary cause.*"

A daughter who had obtained from her father a disposition of household furniture, sought to interdict one of his creditors who had poinded the furniture from proceeding to sell. The defender pleaded that the disposition was challengeable under the Act 1621, cap 18, as it had been granted by an insolvent in favour of his daughter without a just price having been paid. A proof having been allowed, the pursuer deponed that she had lived with her father for fifteen years, and for that time had acted as his servant; that she had never got any wages, and had got the disposition of the furniture in lieu of wages. There was no evidence to corroborate her statement.

Held that the pursuer had failed to prove that the disposition had been granted for a just, true, and necessary cause, and that the application for interdict should therefore be *dismissed.*

This petition was presented in the Sheriff Court at Stirling by Mary Ann Dawson, daughter of and residing with William Dawson at Sunnyside House, Bridge of Allan, to have Thomas Thorburn interdicted from selling the furniture and effects in Sunnyside House which he had poinded.

The facts out of which the case arose, as stated by the Sheriff in his note, were these:—The pursuer's father William Dawson was proprietor of a house at Bridge of Allan, on which he had borrowed £975—£850 (in two different sums) from the trustees of a Mr Baird and £125 from the defender. Baird's trustees held dispositions in security; the defender had an *ex facie* absolute disposition qualified by a back-letter. The interest on their bonds having fallen into arrear Baird's trustees in February 1886 initiated proceedings for realising their securities, and on 10th June 1886 obtained decree of poinding of