

CLARK and PATTISON in answer.

To-day the Court adhered to Lord Ormidale's interlocutor, but recalled Lord Mure's; and upon Paul's finding caution, passed the note to try the question. The majority of the Judges were of opinion that suspension was a competent remedy, assuming unconditional payment of the sum in the decree had been tendered and consigned on refusal. The question whether the tender under conditions here made was equivalent to an offer of a payment raised a nice and important question, on which they expressed no opinion, that being a question on the merits, to be determined on the passed note.

The LORD JUSTICE-CLERK said—We have first to decide whether the suspension is competent. Mr Thomson Paul's position is this: he is decerned against in a decree in which he is conjoined with another party. He has tendered payment of and consigned the whole amount in the decree; and he says that tender has been wrongly refused. I do not think the remedy of suspension is incompetent (Stair, 1, 18, 4). Consignation is equivalent to payment, and had payment been actually made, suspension would have been competent if the debt was not at once surrendered. There is no rule that the decret must be extracted. Take, for instance, the cases in which titles to land are tried in this way. Mr Paul was not premature, if he has done what is equivalent to payment. It was not unnecessary either. I express no opinion at present on the merits of the important question Whether Mr Henderson was bound to accept the offer and grant an assignation? But the note ought to be passed on caution.

Agent for Suspender—Party.

Agents for Respondent—J. & A. Peddie, W.S.

Friday, July 19.

BARSTOW (MALTMAN'S FACTOR) v. COOK.

Commission—Foreign Witnesses—Penuria Testium—Closed Record. Motion, in a case where the record was not closed, for a commission to examine witnesses abroad, refused, an order for proof after closing of the record being held to serve the same purpose.

This was a motion by one of the claimants in this multiplepounding for a commission to Nova Scotia, to take the evidence of three witnesses who reside there, the depositions to lie *in retentis*, and it came before the Court on report of Lord Barcaple, the Ordinary in the case. The motion is made in a process of multiplepounding and examination brought by Mr Barstow, judicial factor on the estate of the late William Maltman, purser in the East India Company's service. Maltman died at Elie, Fifehire, 3d March 1854, intestate and unmarried, leaving considerable property. Gavin Maltman, in Nova Scotia, a younger brother, was sole heir-at-law and next of kin, and was last heard of about 1849.

After very extensive searches and advertisements in the British American Colonies, it is believed and averred by some of the claimants that he was shipwrecked on the coast of New Brunswick, on the 30th October 1855.

The object of the commission was to examine those parties, with the view of founding on their evidence, as the only vestige to be obtained.

TRAYNER, for the claimants, maintained that he

was entitled to this commission, even although the record had not been closed on the ground of *penuria testium*, and he offered to pay all expenses, including a reasonable sum for the employment of an agent in Nova Scotia to take charge of the interests of his opponents.

The Court unanimously refused to grant the commission, on the ground that the claimant, when the record was closed, might get an order for proof, which would serve his purpose equally well as a commission now.

Agent for Pursuer—William Sime, S.S.C.

Agent for Claimant—Thomas M'Laren, S.S.C.

HOUSE OF LORDS.

Friday, June 7.

LORD ADVOCATE v. SINCLAIR.

(In Court of Session, 3 Macph., 981.)

Salmon—Fishing—Crown Charter—Prescription. Circumstances in which held, on construction of titles and proof of possession, that a proprietor of lands on the sea-shore was vested in the salmon-fishings *ex adverso* of his lands.

This was an appeal against a judgment of the First Division of the Court of Session. In 1846 the Lord Advocate and the Commissioners of Her Majesty's Woods and Forests brought an action against James Sinclair, Esq. of Forss, proprietor of the lands of Holburnhead and others, lying on the sea-shore in the parish of Thurso and county of Caithness, concluding for decree (1) that the salmon-fishings in the bay of Scrabster belong exclusively to the hereditary revenues of the Crown in Scotland, so far as the said salmon-fishings have not been expressly granted to subjects or vassals by charters or otherwise; (2) that the defender "has no right or title to fish for salmon *ex adverso* of the lands of Holburnhead, or in any part of the bay of Scrabster, or the sea coast adjoining, by means of stake-nets or bag-nets, or by net and coble, or in any other manner of way; or at least, in case it should be found that the defender and his predecessors have acquired a right to salmon-fishings *ex adverso* of their lands by exercising the same for forty years under a proper title, for declarator that the defender is only entitled to exercise the said right of salmon-fishing in the manner and to the extent possessed by him and his predecessors during the said period of forty years, and that he has no right or title to extend his fishings into the bay beyond the boundaries within which he and his predecessors formerly fished." The action made no progress until 1860, when the record was closed on revised condescendence and answers. The defender then pleaded (1) the pursuers are not entitled to insist in this action, as they are not vested with a right to salmon-fishings in the bay of Scrabster, and in particular to those *ex adverso* of the defender's lands, either *jure coronæ*, or by a singular title clothed with possession; (2) the Crown having divested itself of the right of salmon-fishing *ex adverso* of the defender's lands by grants to vassals, the pursuers cannot now insist, *jure coronæ*, to prohibit said fishings by the defender; (3) the defender having right by his titles to the lands of Holburnhead and others, which were a portion of the barony of Scrabster, with fishings, is entitled

to the salmon-fishings *ex adverso* of these lands; (4) at all events, the defender's title to said lands, either as part of a barony or with fishings, followed by the prescriptive exercise and possession of said right *ex adverso* of his said lands, by himself and his authors, constitutes a legal and valid title and right to the salmon-fishing in question. The Lord Ordinary (MACKENZIE) sustained the claim of the Crown. The defender reclaimed. The case was, after argument, sisted to enable the defender to prove the tenor of a disposition, dated in 1700, upon which he founded. After farther argument, and a proof as to the possession of the salmon-fishings relied on by the defender, the Court, on 21st June 1805, reversed the judgment of the Lord Ordinary, and assolized the defender.

The pursuers appealed.

LORD ADVOCATE (GORDON), ATTORNEY-GENERAL (ROLT), ANDERSON, Q.C., and T. IVORY, for appellants.

Sir ROUNDELL PALMER, Q.C., and YOUNG for respondent.

LORD CHANCELLOR—My Lords, this is an appeal from interlocutors of the First Division of the Court of Session, pronounced in an action brought by the Lord Advocate on behalf of the Commissioners of Her Majesty's Woods, Forests, Land Revenue, Works, and Buildings, against the respondent.

This action was one of declarator by which it was sought to have it found and declared "that the salmon-fishings in the bay of Scrabster form part of the hereditary revenues of the Crown in Scotland, and that the defender has no right or title to fish for salmon *ex adverso* of the lands of Holburnhead, or in any part of the bay of Scrabster, or the sea coast adjoining, by means of stake-nets or bag-nets, or by net and coble, or in any other manner of way."

In this contest with the Crown the *onus* of proof lies entirely upon the defender. According to the familiar law in Scotland, salmon-fishings are *inter regalia* and *prima facie* Crown property, and a subject can only establish his right to them against the Crown by clear proof of title in himself. The defender, in this case, proved the exercise of the right of salmon-fishing in the bay of Scrabster, and *ex adverso* of the lands of Holburnhead, for a period beyond the memory of man; and he and his predecessors have therefore had a possession of more than forty years as a foundation for a title by prescription. But this in itself is insufficient, unless the defender can, in the words of the statute respecting prescription of heritable rights (statute 1617, cap. 12), "show and produce a charter granted to him or his predecessors by their superiors and authors preceding the entry of the forty years' possession, with the instrument of sasine following thereupon."

It was said by the Lord Advocate that there is no authority that the Crown can be divested of its right by a title from a subject, followed by forty years' possession; but the statute is express, that after persons have possessed for forty years continually following and ensuing their infefment, they shall "never be troubled, pursued, nor inquieted in the heritable right and property of their lands and heritages by His Majesty, or others their superiors and authors." It is said by Erskine (3, 7, 4), "as prescription cuts off all grounds of preference which, if insisted on before the expiration of the forty years, would have excluded the prescriber, a charter, though granted a *non domino*

by one who himself had a right, is a good title of prescription, so that if the title be a fair, genuine writing, and proper for the transmission of property, the possessor is, after the years of prescription, secure by the statute, which admits no ground of challenge except falsehood, the length of time standing in the place of all other requisites." The words of the statute make the passage as applicable to the Crown as to a subject. In considering the question whether the defender has shown a sufficient title with which his possession of salmon-fishing can be connected, it must be borne in mind that it is not necessary for him to show a charter containing a grant of salmon-fishings *eo nomine*.

If this grant is of "fishings" generally, followed by forty years' possession of salmon-fishing, the word will be construed to have that meaning. But he must show a grant either of "salmon-fishings," or of "fishings" generally, followed by the exercise of the right of salmon-fishings; for, being *inter regalia* and a separate tenement, it will not pass under the word "pertinents."

It must be expressly conveyed in the manner above mentioned, not only in the grant from the Crown, but also in a conveyance from the Crown's grantee in the dispositive clause of the grant or conveyance.

Some early charters were referred to in the course of the respondent's argument in favour of the Earls of Caithness and Sutherland, and a tack by the Earl of Caithness in 1657, "of the salmon-fishing upon the waters of Thurso, from the head of Lochmore to Holburnhead on the sea." The object of producing these instruments was to show that the Crown had parted with the salmon-fishing *ex adverso* of the respondent's lands to a subject, so as to make them transferable by words which would not be sufficient for the purpose in a Crown charter. In the charter of *novodamus* to the Earl of Sutherland in 1601, "*piscariis*" is mentioned amongst the pertinents; and it was argued that it therefore became afterwards a competent expression for salmon-fishings in subsequent deeds, and that the Crown charter of 1606 having created a barony of Scrabster with fishings annexed, when the charter of confirmation and *novodamus*, in 1683, from the Bishop of Caithness in favour of John Shilthomas and Margaret his spouse, contained the words, "*a vertice lie Bancks usque ad littus maris cum omnibus et singulis earund. pendiculis annexis connexis ac justis suis p'tinentibus quibuscunque jacen. in baronia n'ra de Scrabuster,*" the words "*pendiculis annexis et connexis,*" with possession, would carry the salmon-fishing. But there is no apparent connection between the titles of the Earls of Sutherland and Caithness and that of Shilthomas; and it does not clearly appear that the earlier charters relate to the salmon-fishings in question: and, even if they do, I cannot think that they give any such effect to the word "pertinent" as is contended for. It is quite true that in the charter of *novodamus* of 1601 the word "*piscariis*" is found amongst the general words descriptive of the pertinents: but it cannot refer to salmon-fishings, because they are in terms one of the subjects of the grant. It was most likely intended to apply to "white fishings," which may be transferred as a pertinent. And I find no authority (but the contrary) for saying that salmon-fishing can, under any circumstances, pass from the Crown, or from a subject by the word "pertinents." I think that all his arguments derived from the earlier charters must be laid aside, and that the prescriptive title of the respondent

cannot be drawn from a higher source than the disposition in the year 1700 by John Sinclair of Dunbeath in favour of John Sinclair of Brims. By that disposition, upon which sasine in 1763 proceeded, the lands of Howbornehead, Outerquoy, and Sandequoy, with anchorage of the road of Scrabster, were conveyed, and there is in the dispositive clause an express grant of fishings. It is not denied that the proprietors of these lands, the respondent's predecessors, exercised the right of salmon-fishing for forty years after this deed. Even if John Sinclair of Dunbeath had no title to salmon-fishing *ex adverso* his lands at the time of this disposition, yet forty years' possession of salmon-fishing afterwards by the donee and his successors not only gave an interpretation to the word fishings, but made the title unquestionable under the prescriptive statute of 1617.

The respondent, therefore, is enabled to found his defence to the claim of the Crown upon this title, unless it was subsequently displaced.

In 1702 Sinclair of Brims granted a wadset of the lands and fishings to James Sinclair. The wadset continued to exist until the year 1761, when it was redeemed by Sinclair of Forss, who had in the previous year purchased the reversion of the lands. This reversion was originally granted by John Sinclair to his son James on the 20th March 1712. The disposition, after reciting the wadset, disposed to James Sinclair and his heirs-male "All and hail the ground right, property, and reversion of all and sundry the town and lands of Hoapburnhead, Utersque, and Sandequay, with the parsonage, teinds, and pertinents of the foresaid lands, parts, pendicles, and universal pertinents, as is contained and particularly express in the foresaid contract of wadset above narrated, and more particularly as is at length contained in the original rights and progressive securities conceived in favour of me, my authors and predecessors of, upon, and concerning the samen lands."

It was argued on behalf of the Crown that this deed contained no express grant of the fishings; that they were not included in the words "parts, pendicles, and universal pertinents;" and that a clause of conveyance must contain a description of the property in itself and not by reference; and, therefore, that though the deed of 1700 contained a grant of the fishings, they were dropped out of the titles in the conveyance of 1712.

I cannot adopt this argument. I agree that the word "pertinents" would not be sufficient to pass the fishings to the donee, but, as it was clearly the intention of John Sinclair to convey to his son the reversion of everything which was contained in the wadset, I cannot understand upon what principle it can be contended that, as between the parties to the disposition, the reference to what was "contained and particularly express in the contract of wadset," was not effectual to pass all the subjects, including the fishings, which are particularly expressed. The disposition by James Sinclair in favour of Robert Sinclair in 1728 contains no express reference to the contents of the wadset like that in the deed of 1712; but it recites the wadset and the disposition of the reversion in that deed, and is a conveyance of that reversion, and consequently of all that it included. But in the disposition of the reversion from George Sinclair to James Sinclair by the deed of 27th March 1760, "fishings" are expressly mentioned. And on the renunciation of the wadset in the following year, 1761, in favour of James Sinclair, the purchaser of the reversion,

the fishings are again expressly mentioned and renounced. I therefore think that it may be properly said that all the titles from 1700 down to 1760 contained fishings in the dispositive clauses.

But then it is contended on the part of the Crown that, supposing a base title to the fishings to be thus established in 1761, the owner of the fishings under this title returned the subjects which he held, including the fishings, into the hands of the Crown, and took back a grant from which the fishings were excluded.

In considering the question it is necessary to bear in mind that this charter proceeded upon a resignation *in favorem*, the object of which was to convert the base title of James Sinclair into a public title. The presumption therefore is, that whatever was resigned to the Crown for this purpose would be re-granted. It is certainly true that in the dispositive clause of the charter there is no mention of fishings; but I see no reason on that account to adopt the strong expressions of the Lord Advocate, that the Crown struck out the word "fishings," and refused to grant them. The fishings were either intended to be resigned into the hands of the Crown for the purpose of being re-granted, or they were not. If they were, why should not the same words by which they were resigned be sufficient for their re-grant? And if they were not included in the resignation, then the respondent may fall back on his base title, founded upon the deed of 1700, and the subsequent possession of salmon-fishing *ex adverso* his lands. The word "*piscationibus*" is found in the Crown charter, but it is in the *tenendas* clause. Now I quite agree that this clause will not have the effect of conveying any right not conveyed by the dispositive clause; but I do not see why, if a question arises as to what was re-granted upon the construction of the charter as a whole, any clause may not be resorted to in aid of this construction, and the *tenendas* clause amongst the rest. The word "*piscationibus*" thus found in the *tenendas* clause renders the charter in some degree ambiguous; and if so, and we are called upon at the distance of 100 years to construe it, I presume that the rule of evidence which prevails in England would be applicable for the same purpose of construction in Scotland. That rule is, that ancient instruments of every description may, in the event of their containing ambiguous language, be interpreted by what is called contemporaneous and continuous usage under them—that is, by evidence of the mode by which property dealt with by them has been held and enjoyed. Now, from the terms of the charter of 1761, by which the vassal is supposed to have resigned the fishing, and not to have obtained a re-grant of it, he continued to exercise his right of salmon-fishing as before, and the same has been enjoyed by his successors down to the respondent himself; and the respondent's right to the salmon-fishing *ex adverso* of his lands was acknowledged on the part of the Crown in the disposition and procuratory of resignation *ad remanentiam* of the 16th January 1839, by which, in consideration of a sum of £700 paid to him by the Commissioners of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, on behalf of Her Majesty, the respondent sold and disposed to and on behalf of Her Majesty, "All and whole the lands of Sandquay, with the whole houses thereon, the sea-shore adjoining the same, and the fishings thereof."

It was said on the part of the Crown that although this purchase from the respondent was an

admission of his right to the fishings *ex adverso* of the lands of Sandequay, it could not be carried farther, and that it did not follow that he was entitled to the fishings beyond these particular lands. But the respondent's claim to the fishings is precisely the same throughout the whole extent of his lands, and when his right depending upon this common title is admitted in one part, it is scarcely possible to resist the application of the admission to the rest.

I think that the respondent successfully established his defence to the claim of the Crown to the right to fish for salmon *ex adverso* his land, and that the interlocutor appealed from ought to be affirmed.

LORD CRANWORTH—My Lords, I will, in the first place, very shortly state the nature of the title on which the argument of the respondent is founded.

By the Bishop's Charter of Adjudication of 25th March 1687 William Sinclair of Dunbeath obtained the lands of Howburnhead to him and his heirs, to be holden of the bishop. Under the word "Howburnhead" I include all the lands to which the writs and documents before us relate. The grant did not in the dispositive part mention fishings, but it contained the usual precept of seisin, and we may presume that seisin regularly passed, though there is no instrument of seisin in proof.

The bishop's superiority was transferred to the Crown shortly after the date of this charter, when Episcopacy was abolished in Scotland. William Sinclair of Dunbeath died seized, and his eldest son, John Sinclair, was duly retoured his heir.

In 1700 this John sold and disposed to John Sinclair of Brims and his heirs the lands of Howburnhead with (*inter alia*) the fishings; and the deed contained a procuratory of resignation and precept of seisin. On that precept John of Brims was duly infeft in the fishings as well as the lands in April 1703.

John of Brims made a wadset of these lands and fishings in 1702, but I do not feel called on to say more as to this wadset, except that it included the fishings by name, and passed through various persons till it was finally discharged in 1781.

In 1712 John Sinclair of Brims sold and conveyed the reversion to his third son, James, and his heirs, of all which had been conveyed by the wadset; and this certainly included the fishings, though they are not mentioned by name, for the reversion was the reversion of all contained in the wadset. The deed contained a procuratory of resignation and a precept of seisin.

James in 1728 sold and disposed the reversion, which would include the fishings, to Robert Sinclair and his heirs.

Robert died, and his son James, in 1760, sold and disposed the reversion, expressly including fishings, to James Sinclair of Forss, with procuratory of resignation and precept of seisin; and, in the following year (4th March 1761), James Sinclair of Forss obtained a charter of resignation and confirmation from the Crown. The grant does not in the dispositive part mention fishings, but only "*totas et integras terras de Howburnhead, etc.; cum (inter alia) pendiculis et pertinentiis earundem;*" and in the *habendas* the words are added, "*cum (inter alia) piscationibus.*"

It is admitted that the present respondent has succeeded to all the rights which passed under that charter to James Sinclair of Forss. And the question therefore is, what those rights were. The respondent claims in two distinct rights. He says

that James Sinclair of Forss acquired under the charter of 1761 the fishings as well as the lands. But if that is not so, then he relies on a base title to the fishings acquired under the disposition by John, son of William of Dunbeath, to John of Brims, in 1700.

It is clearly established in proof that the respondent and his predecessors have enjoyed the fishings in controversy (which are salmon-fishings) for a period greatly exceeding 100 years before the present action was brought; in fact, as far back as living memory or tradition can go. This is sufficient to entitle him to salmon-fishings if he has any *habile* title on which the enjoyment can rest; for the word "fishings" may be construed to mean salmon-fishings if, under a title to fishings, salmon have always been taken.

Now in considering the validity of the claim of the respondent resting on the Crown title, I would observe, in the first place, that the evidence of enjoyment must be taken as proving that his predecessors in title exercised the right of fishing for salmon as far back as the year 1700, and so, that the fishings mentioned in the disposition to John of Brims and the seisin had therein in 1703, were salmon-fishings. Though under the terms of the disposition of 1700 John of Brims might have obtained a charter to hold of the Crown, yet he did not take that course; he was content to hold by a blench holding under John, the son of William of Dunbeath. He obtained no grant or charter from the Crown. If, however, John of Brims, and those who from time to time were successively in the seisin by virtue of this base tenure from 1700 to 1760, exercised uninterruptedly the right of salmon-fishing, I take it to be certain that at that latter date they had acquired under the Statute of 1611 a prescriptive title to it, as well against the Crown as against all other persons.

I have already stated, as the clear result of the evidence, that they did so exercise this right. The consequence is, that in 1761 the Crown had no power to disturb James Sinclair, the person then in enjoyment of the right, though he did not hold directly as a vassal of the Crown as his immediate superior.

It appears that this James Sinclair who was in possession in 1761, as well of the fishings as of the land, by clear progress of title from John of Brims, the donee in 1700, was minded to become an immediate vassal of the Crown, and accordingly he procured a charter of resignation and confirmation, dated the 23d of February 1761, whereby the Crown granted to him and his heirs the lands of Howburnhead, to be holden by the said James Sinclair and his heirs immediately of the Crown, with the pertinents (enumerating them), and expressly including fishings in the *tenendas* clause, though it had not been mentioned in the dispositive clause.

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 farther that the word "pertinents" cannot, *prima facie*, be taken to include fishings. But in construing Crown charters, as well as all other written instruments, common sense suggests that we must look to the whole context of the instrument before we can say with certainty what is the true meaning of any particular clause in it; and, acting on that principle, I have come to the conclusion that salmon-fishing must be held to have been granted

by the Crown charter of 1761, and in those which have followed. I will state shortly the grounds on which this opinion is founded.

In the first place, fishings were, in terms, included in the disposition by John of Dunbeath to John of Brims in 1700, and in the seisin following on that disputed in 1703.

Fishings were expressly included in the wadset of 1702, and though in the subsequent dispositions of 1712 and 1728, under which George Sinclair of Geise became subject to the wadset entitled in 1760, fishings were not mentioned in express terms, yet they were implied, because the dispositive clause in both these deeds was clearly meant to embrace everything which had been included in the wadset. George Sinclair of Geise having thus become entitled to the fishings, as well as to the land, sold and disposed both land and fishings to James of Forss, by the disposition of the 27th of March 1760.

At that time, therefore, James of Forss had acquired an absolute title to the salmon fishings against the Crown and against all the world, under the statute of 1617; for the parole evidence must be taken to show immemorial enjoyment; and there was clearly a good title to fishings under all the dispositions from the year 1700, though not by holding under the Crown.

In this state of things, James of Forss expedite the Crown charter of 1761; and the question is, whether the Crown thereby granted the fishings to which James of Forss had undoubtedly acquired a good title by a base holding under the heirs of John of Dunbeath?

I cannot doubt that the fishings must be treated as included in the grant. It is true that fishings are not specifically mentioned in the dispositive clause of the charter; but after granting the land with its pertinents, the charter, by the *quæquidem* clause, connects the subject matter of the grant with that which was formerly held by John Sinclair of Brims; and in a subsequent clause it expressly ratifies and confirms the disposition by John of Dunbeath in 1700 in favour of John of Brims; which ratification and confirmation it is there declared should have the same force as if the disposition of 1700 and the instrument of seisin following thereon had been therein engrossed verbatim, and as if the confirmation had been made in the lifetime of John of Dunbeath and John of Brims. In that disposition and instrument of seisin fishings are expressly included. It was thus made plain, on the face of the charter of 1761, not only that James Sinclair, upon whose resignation the new grant was made, was thus entitled to the fishings as well as to the land, but further, that the Crown ratified and confirmed that right. When, therefore, the Crown accepted from James Sinclair the resignation of that which had formerly been held by John of Brims, in order that a new grant might be made to him, and when the Crown made a new grant accordingly, describing the subject matters of the grant as the lands of Howburnhead, &c., with the pendicles and pertinents, it must have been understood that those words would sufficiently describe what had been surrendered—*i. e.*, all which had been formerly holden by John Sinclair of Brims; and it appeared on the face of the grant that this included the fishings. Thus explained, the charter would correctly include, as it did, fishings in the tenendas clause; for though not expressly mentioned, they were, as I have endeavoured to explain, looking to the whole

of the charter, impliedly included in the new grant.

The grounds on which I have formed this opinion leave untouched the doctrine that the word "pertinents" does not, *vi termini*, include fishings; and also the rule of law, that subjects not included in the dispositive clause do not pass merely because they are mentioned in the tenendas clause. But 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.

I do not think it necessary to say anything as to the subsequent charters and instruments. It is clear that they must be taken to include whatever was granted by the charter of 1761.

My opinion, therefore, is clearly that the respondent has a good title under the Crown charters. But I also concur in the argument that, even if that were not so, still he has a good title under the base holding created in 1700. If the resignation for new infetment in 1761 included the fishings, then, as I have already explained, the Crown must be taken to have re-granted them. If the resignation did not extend to the fishings, then James Sinclair of Forss, and those deriving title under him, have all along been holding by the base tenure created in 1700.

In any view of the case, the claim of the Crown is unfounded.

LORD COLONSAY—My Lords, when this case was before the Court below I fully stated my opinion in regard to it, and as the parties are in possession of these views, I do not think it necessary to enter much into the case now, as I have not heard anything that leads me to alter the opinion I then expressed. But there are some elementary matters which have been dwelt on in the argument, to which I will shortly advert. In the first place, it is perfectly clear, as matter of law, that salmon-fishings are *inter regalia*. It is also perfectly clear that they are of that class of *regalia* which the Crown may give away. It is equally clear that a grant of "fishings" is not a grant of salmon-fishing; and it is clear, also, that a grant of "fishings," if followed by possession, may be converted into a grant of salmon-fishing, or may be explained as being a grant of salmon-fishing; but it is also clear that it requires possession for a length of time in order to do that. I hold it also to be a clear proposition, that by positive prescription the rights of parties are protected against the challenge of the Crown. All these things are equally clear. Now, on the face of the documents and evidence we have here, there are some things which, I think, are plain. In the first place, I think it is beyond the possibility of reasonable question, that the defender in this case, and his predecessors, have been in actual possession and enjoyment of these salmon-fishings beyond the memory of man. I think another fact appears clear, that at a very early period, in 1606, the Crown had granted away the right of salmon-fishings to the family of Caithness, and that the family of Caithness were in possession of these salmon-fishings for a length of time, because there is a tack granted by them more than fifty years after the date of that prior grant. Now, at this distance of time, it is difficult to see what more clear evidence of possession there could be than the exercise of the right of property which is involved in granting tacks of the property; and that very tack is not the first, but is one of a succession of tacks which were granted by the owner

of the fishings at that time. That fact is of importance in this case in this respect, that we are not to look at the case as one in which the Crown is to be assumed never to have made a grant of the fishings. Throughout the case it has been argued very much on the part of the Crown, as if that were the stand point from which it was to be regarded; but that is clearly a mistaken view of the case. When we find that the Crown parted with the right of fishings at an early period, and we find no evidence whatever of its being re-conveyed or re-assumed by the Crown (unless it is in 1761), the assumption that they are to be held as never having been given out of the Crown is excluded from the case; and the main foundation for the argument on the part of the Crown is most materially shaken by that state of facts.

Then again, we see that for a long period, from 1700 downwards, there has been a title on which prescriptive right could have been sustained on the part of this gentleman and his predecessors. I do not think it necessary to go through the intervening titles, some of which indicate the presence of the right of salmon fishing directly, and some more indirectly. But we have in 1700, a long way back, a clear conveyance of a right of fishing, which could be converted into a right of salmon fishing; and we have immemorial possession under that right.

I think that the argument for the Crown consisted very much of criticisms on the rights and titles of the defender, as if everything was to be presumed against him, and everything in favour of this right having still rested in the Crown, and never having been given out. As, for instance, when the right of wadset was given, and when it came to be redeemed, it is said that the reversion did not expressly mention "fishings." But the right of wadset did give the fishings. That right of wadset is, in the first place, a clear proof of the exercise of the right of property in the party who granted the wadset; and then, when the creditor who had obtained possession (which in this case was of the nature of what is called a proper wadset), renounced the right in respect of having obtained satisfaction of his debt from his debtor, and the debtor came to redeem his right, the natural and reasonable construction of the grant of the reversion is, that it replaced the debtor in possession of all that which he had previously given to the creditor.

Then, again, when we come to the civil charter of 1761, which is the only point at which it can be said that the Crown had re-acquired the right of fishing, what is that but a charter by progress, in which the party is completing or making up his own title? It is not a resignation by him for the purpose of making over his right to the Crown, but a resignation by him with the view of getting a new right in his own favour.

Now the question has been raised, whether the word "pertinents" in that title can be held or construed to comprehend the salmon-fishing? It is clear that in ordinary cases it may not be so held. It will require that it should be stated. But the position of this title was peculiar. The description had been, in various steps of it, by reference to former titles; and when this party came to the Crown in order to get a renewal of his title, then it was the duty of those who were acting for the Crown to look at the right that was in him at the time, and to see what was the character of it, and what it was that was to be renewed. And the

reasonable presumption is, that whatever was thus surrendered to the Crown for the purpose of being re-granted to the vassal, was re-granted to the vassal. It has been said that there is no mention of fishings in the dispositive or conveying clause of this charter, but that it occurs only in the *tenendas*, and we had the remark made (clearly sound in law) that the *tenendas* is not a conveying clause, and that it is generally not enough by itself. That certainly is a doctrine which hardly required much authority, but we were referred to very high authority on that subject, and among others to a most recent authority, I mean the late Professor Menzies, whose Lectures on Conveyancing are of the highest value, in which he lays down that doctrine as he found it in all the institutional writers. But it does not follow from that, that the mention of "fishings" in the *tenendas* is of no use in any case whatever if the fishings are not mentioned in various parts of the deed. On the contrary, in that very dissertation, Professor Menzies lays down this "at the same time, while the *tenendas* cannot transmit a right, it may in some cases raise a presumption in favour of the grantee so as to entitle him to establish a right by evidence of possession; but it is certain that without such possession no right is conferred" (Menzies, 1st ed., p. 529). Now, that is the very position in which we are in reference to this case. I therefore hold that the transaction of 1761 is to be regarded as one which replaced the vassal in the right which he previously had in these fishings. But if it were otherwise, it cannot be set aside by placing an inconsistent construction on the surrender of the vassal by holding that those expressions which cover his surrender are not equally competent to cover his replacement. If there was no replacement, I think it is clear that there was no surrender. At all events, I think he had the option, and he has now the right, of ascribing his possession to that title which he may regard as most secure. And therefore, whether the Crown insist that the rights were then surrendered or not, I think, in either view of the case, that the vassal has defended his right successfully against the challenge that is made on the part of the Crown.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Agents for Appellant—A. Murray, W.S., and Horace Watson, Westminister.

Agents for Respondent—G. L. Sinclair, W.S., and Grahame & Wardlaw, Westminister.

Thursday July 11.

GILLESPIE v. YOUNG AND OTHERS.

(In Court of Session, 4 Macph., 715.)

Reparation—Patent—Consequential Damage. Action of damages by a proprietor of a mineral estate against a patentee, on the ground that the patentee having a patent for a certain limited purpose falsely and maliciously asserted that the patent included the mineral of the pursuers' estate, dismissed on the ground that the summons disclosed no relevant ground of action.—(Aff. C.S.)

This was an action of damages raised by Mrs Gillespie, heiress of entail in possession of the lands of Torbanehill, and by her husband, against James Young, E. W. Binney & Company, and E. Meldrum & Company, and partners, manufac-