that fact required to be made in some distinct manner to the bank at the time. No such intimation was there made, and the gentleman's name remained on the register, and it was held that it had been properly put upon the list of contributories. Now, on the admitted facts of this case there is no doubt that no intimation was made on the part of the petitioner to the bank officials, for the first subdivision of the admissions distinctly bears that no formal intimation of the petitioner's resignation of the trusteeship was ever made to the City of Glasgow Bank, and the bank officials were never asked to make any change in the entry of the names of the trustees in the stock ledger or other books of the bank. In these circumstances, he is just in the same position as Mr Sinclair was, and I concur with your Lordship in thinking that the mere fact of the dividend having been paid to Miller alone cannot in the circumstances be held as equivalent to an authoritative intimation to the bank of the resignation.

Lord Shand—I am of the same opinion, and I think the determination of the case really depends upon a question of fact. I assume that if notice of the resignation of the office had been given by or on behalf of Mr Tochetti to the bank, with a view to his name being removed from the register, or with a view to a marking being put on the register of the fact of his resignation, that would have been effectual to relieve him of future responsibility with reference to the shares. But I think that, upon the state of the facts, as the parties have agreed upon them in the minute of admissions, we must hold that such notice was not given. It is expressly admitted that formal intimation was not given. I confess that it would have been more satisfactory to me, instead of the admission that is given on that matter, to have had such evidence now as your Lordship has pointed at by an examination of Mr Miller, who would have given such account as he could of how it happened that he came to draw the dividends alone, and that his receipt alone was accepted, and some evidence from the officials of the bank as to the way in which entries in the transfer register came to be made, and how this particular entry came to be made in the dividend register, for without some evidence of that kind it is impossible for the Court to know what weight is to be attributed to an entry in that book at all. It is a fact that seems to favour the petitioner's case that the marking in the dividend register occurred within a short time of his resigning his office, and if the inference to be drawn from the date at which that happened had been strengthened by some parole evidence of the kind I am pointing at, even though it might not be very much, it would have had considerable weight. But the petitioner has, I think, by his admission deprived the Court of the power of drawing any inference that notice was given, because it is expressly admitted that none was given. In that state of matters, I cannot draw the inference from the marking in the dividend register which the petitioner asks we should draw. Accordingly, I concur with your Lordship in thinking that although the case is a hard one, as many others are, the petitioner has failed to make out a case entitling him to have his name removed from the register.

The Court therefore refused the prayer of the petition, and found the liquidators entitled to expenses.

Counsel for Petitioners — M'Laren—Goudy. Agents—Dove & Lockhart, S.S.C.

Counsel for Liquidators—Kinnear—Balfour—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Friday, March 7.

SECOND DIVISION.

[Lord Curriehill,

LORD ADVOCATE *v.* LORD LOVAT.

Fishing—Salmon-Fishing—Barony Title—Possession—Rod Fishing.

L had a barony title to the lands on both sides of a river, dating from 1774, and also express grants of salmon-fishing of a much earlier date to certain parts of the river situated below the falls of K. He had from time immemorial exercised a full and exclusive right of fishing below these falls, *inter alia*, by means of close cruives, which caught almost all the salmon ascending the river. In consequence of the cruives and the falls, the fishing above the falls was, up to 1862, when close cruives were abolished, almost worthless. L had asserted his right above the falls for a prescriptive period (1) by protecting the river during the spawning season; (2) by exercising the right of fishing occasionally; (3) by taking his tenants bound to protect the water; (4) by preventing others from fishing. Since 1862 he had fished regularly above the falls. *Held*, in an action at the instance of the Crown, who claimed the fishings above the falls, that L was entitled to attribute his possession of the whole river to the barony title, and that under it the possession which had been had from the highest portion of the stream down to the sea had been one and continuous, and sufficient to maintain L's rights within the limits of the barony lands.

Observed (*per* Lord Justice-Clerk Moncreiff) that if a grant of salmon-fishings in a river of which the grantee has one or both sides, is extensive enough in its terms, it is sufficiently clothed with possession by the exercise of the right in any part of it.

Observed (*per* Lord Gifford) that where salmon-fishings are held on a barony-title *cum piscationibus*, possession of any part of the river is possession of the whole.

Observed (*per* Lord Justice-Clerk Moncreiff) that if letting the rod-fishing was more profitable than using net and coble, that possession was the strongest which produced the greatest amount of profit.

In this action the Lord Advocate, on behalf of the Crown, asked for declarator that the whole salmon-fishings in the rivers Affaric and Cannich and their tributaries, and in the river Glass (in which these waters combined), sometimes called the Beauly, down to the falls of Kilmorack, be-

longed to the Crown. The action was directed against Lord Lovat, The Chisholm, Mr Oswald of Aigas, and Sir Dudley Coutts Marjoribanks, of whom Lord Lovat alone entered appearance as a defender. He maintained that he had right to the salmon-fishings in question either (1) by express grant by the Crown, or (2) in virtue of his titles followed by possession. He, however, made no serious claim to the fishing in the rivers Affaric and Cannich, and it was in regard to what was called the Glass that the true litigation arose.

The course of the river was, as described in the Lord Ordinary's note, as follows:—"It rises in the western part of Inverness-shire, and by the time it reaches Guisachan it is a considerable stream, called the "Diag," or "Guisachan." A little above Fasnakyle the Diag is joined by the "Affaric River," and the united stream is thereafter known as the "Glass." A few miles further down it receives the "Cannich," or "Cannay," and after a course of several miles it receives the "Farrar," which, after flowing through Glenshathfarrar and past Struy, joins the main river near Erchless Castle. The river, still under the name of the "Glass," or the "Beauly," then passes Aigas, and by a temporary bifurcation forms the island known as "Eilan Aigas," below which it receives "Breachachy Burn," and after a rough rocky course of about a mile it falls over a cliff at Kilmorack, and thence meanders through comparatively level ground to the estuary known as the Beauly Firth. The Castle of Lovat is near the river where it begins to widen out into the estuary. The town of Beauly is about a mile higher up. The Falls of Kilmorack are about four miles above Beauly by road, but following the course of the river they are nearly double that distance. From the Falls to Breachachy Burn the distance is about a mile; Aigas is about two miles higher up; Erchless about three or four miles farther up; and from Erchless to Fasnakyle the distance is about eight or ten miles. The whole distance from Beauly to Fasnakyle is thus about twenty miles by road, and from Kilmorack to Fasnakyle about sixteen miles. The falls of Kilmorack are so high that unless in heavy floods salmon cannot reach the upper waters, and as for about six centuries cruives extended across the whole river below the falls, with hecks so close that no salmon could pass unless in time of very high floods, the salmon-fishing above the falls was practically valueless until after the legislation of 1862, by which close cruives were abolished and a regular weekly close time was made imperative."

During the course of the discussion before the Lord Ordinary, which followed upon a proof as to the extent and nature of the possession, a number of questions were raised in regard to the interpretation of ancient titles, the situation of certain places mentioned therein, &c., but the only point which it is necessary here to report is that upon which the case was ultimately decided, viz., the effect in the circumstances of the case of a barony title followed by possession, and what amount of possession was sufficient to constitute a right of salmon-fishing.

The various questions which arose and were discussed in the question of a direct grant were however shortly these:—

Lord Lovat produced a Crown title to his estates, dated 1774, uniting the whole into the barony of Lovat, one of the component parts being an earlier barony of Bewlie comprehending sundry lands, and containing an express grant of salmon-fishing *super aquam de Forne*, or Cairncross, *usque ad mare* lying within the barony of Bewlie. This barony of Bewlie had been granted in 1571 by charter from the priory of Bewlie to Fraser of Lovat. Under this Crown charter two questions arose—(1) as to the precise position of Cairncross, or as it was called in older titles "Carnecot," the Crown holding that it was situated below Kilmorack, and Lord Lovat that it was at a point far enough up the river to include all the fishing in dispute; and (2) as to the extent of the "Water of Forne," it being admitted on all hands that it applied to part of the river in question, the difference being as to whether it only applied to the part below the falls of Kilmorack, or to the whole river with its tributaries.

Titles were produced by the parties in support of their views, dating from the 12th century, the more important of which are examined in the opinion of the Lord Justice-Clerk (*infra*). It is sufficient here to state that in 1571 Fraser of Lovat possessed continuously the lands bounding the streams of the Diag, the Glass, and the Beauly on the south side, from Guisachan to the sea. On the north side he possessed an equally continuous boundary on these rivers, with the exception of a small portion belonging to The Chisholm.

Previously to this, in 1539, Fraser of Lovat had obtained a Crown charter, erecting into a new barony of Lovat several baronies then belonging to him, including among others lands which were above the falls of Kilmorack with their salmon-fishings. The charter of 1571 which was obtained from the priory of Bewlie, and which is referred to above, was repeated in the Crown charter of 1774.

The estates of the predecessor of the defender had been confiscated in 1746, prior to which time, although feus had been given off, no grant of salmon-fishing had been given along with them. They were restored in 1774 precisely as they had been forfeited, and erected into the barony of Lovat, under which title they had been subsequently held.

On behalf of the Crown it was maintained that Lord Lovat could point to no grant of salmon-fishings prior to 1571 above the falls of Kilmorack, and that therefore the Crown charter of 1774, which gave him nothing more than he had before the forfeiture, gave him no express grant; that though Lord Lovat had undoubtedly full and complete possession of the salmon-fishing below the falls for centuries, that possession was to be ascribed to the express grants which he there had, and not to the barony title, and that therefore such fishing was quite insufficient to create or imply a right of fishing above the falls; that therefore the only way in which Lord Lovat could establish a right above the falls was by proving that he had fished this portion of the river in an appropriate manner and for a prescriptive period, which the Crown maintained he had not.

Lord Lovat maintained that he had an express grant to the whole fishings of the river from Cairncross to the sea, which included all the fishings in dispute. If this were not so, he maintained that all his lands having been erected

into a barony, the river, which was within the lands, and its salmon-fishings, were a *unum quid*, and that therefore he, having admittedly exclusively possessed the fishings of the lower part of the river, was entitled to the fishings of the whole.

Besides, he further maintained that he had in point of fact possessed the fishings of the upper part of the river above Kilmorack to an extent sufficient to give him the right of salmon-fishings when the possession was founded on a barony title.

The facts in regard to the possession of the fishings in the river in question were, briefly, as follows:—Below the falls Lord Lovat had from time immemorial had full and complete possession, exercising his right *inter alia* by means of cruives just below the falls of Kilmorack. These cruives stretched right across the whole river, and were narrower in their hecks or spars than was allowed by law until 1862—since then the hecks had been wider. From the position and closeness of these cruives they caught almost all the salmon that came up the river, hardly any fish getting past them; and the falls, which were very high and impassable to salmon except in a full flood, stopped mostly all the fish that escaped the cruives. Lord Lovat in fact reaped the whole crop of salmon of the river at this point. In regard to the possession above the falls, it was admitted that since 1862 Lord Lovat had regularly fished the river by net and coble once a year. The main question, therefore, was for the period prior to 1862. In regard to this period there was a certain amount of evidence—which, however, was not very satisfactory—speaking to occasional visits of Lord Lovat's people with net and coble to fish the upper waters, one or two witnesses stating that they went mostly every season. From 1845 the fishing had been in Lord Lovat's own hands; previous to that it had been let to various fishing tenants, and it was in regard to this latter period that the above evidence applied. During all the time that the fishing was in the possession of Lord Lovat himself, watchers were in the habit of being sent up to the upper stretches whenever the net-fishing on the lower part of the river was closed, and kept there until the spawning was over; they watched the whole river as far as salmon could go. During the open season Lord Lovat's gamekeepers had orders to prevent people fishing, which they did. The only person who was proved to have occasionally fished by rod and line was The Chisholm, which was explained by Lord Lovat in this way that his father, in whose time the fishing took place, did not believe that any right of fishing could be acquired by rod-fishing, and that therefore he was unwilling to hinder The Chisholm from fishing, he being a neighbour with whom he was on good terms, and whose land abutted upon the river.

There were also produced by Lord Lovat a number of leases of farms on the upper portion of the river extending from 1802 downwards, in which the tenants were taken bound not to take salmon themselves, and also to preserve the fishings and prevent others from taking salmon.

As already explained, prior to 1862 the fishing above the falls was comparatively worthless, almost all the fish being caught below, and besides, the river was not there, except in a few places, very well adapted for net and coble fishing. Since 1862 the upper part of the river had been fished regularly.

No evidence was brought by the Crown to the effect that the upper stretches of the river were watched by any one other than Lord Lovat, nor was there any evidence of any objection being made by the Crown or by any of the upper proprietors to his method of fishing prior to 1862.

The Lord Ordinary (CURRIEHILL) pronounced an interlocutor decerning against Lord Lovat in terms of the conclusions of the summons. His Lordship added a note, which so far as it related to the questions of the barony title and possession, was as follows—

"*Note.*—. . . . . But the question—and it is an important one—still remains, viz., whether the defender, either in virtue of his other titles alone, or of his titles and possession thereon, has the right to fish for salmon in the river above Kilmorack, and if so, how far that right extends? The defender's title is a barony title, but it contains no express grant of salmon-fishings, except in those parts of the river which have been already specified, all of which are below Kilmorack. It is now quite clearly settled that a barony title does not of itself constitute or confer a grant of salmon-fishings. Indeed, it has not much, if any, greater virtue than an ordinary Crown charter '*cum piscationibus*,' but it is a good title on which to prescribe a right of salmon-fishing by forty years' possession, although it does not contain any reference to fishings at all. Has, then, the defender in the present case had any such possession in virtue of his title? He maintains that he has had full possession, in respect—(1) That he has *de facto* from time immemorial regularly fished for salmon at all suitable times and at all practicable places, and by the proper means, from Guisachan to the sea; (2) That even should he fail to prove regular fishing on the whole river, such fishing was not required either to constitute or explain the grant, and that it is enough to prove (as the defender maintains he has done) that he and his predecessors have fished salmon from time immemorial in one or more parts of the barony, such exercise of fishing being (as he maintains) in law sufficient to establish and preserve a right over the whole river within the bounds of the barony; and (3) That in particular his fishing below the falls of Kilmorack has been of such a character as to establish and maintain his right over the whole river to its source, or at least to Guisachan. Now, before noticing these arguments in detail, it is necessary to recall the following facts:—(1) That until the Salmon Fisheries Act of 1862 came into operation the defender's cruives had for centuries prevented the passage of salmon into the upper waters above the falls of Kilmorack, except during close time or in unusually high floods, so that practically the fishing above the falls was unproductive; (2) That between the falls and Breackachy the river could not, owing to its rocky bed and rapid course, be fished at all, certainly not with net or coble; (3) That no fish could ascend any of the affluents of the main river to any material distance, because of falls above the respective points of junction. It is also necessary to explain the extent of the land bordering on the

river, now belonging or which formerly belonged to the defender or his predecessors, because he maintains that, in so far as lands lying on the river and formerly belonging to his ancestors have been acquired by other parties, the right of salmon-fishing has not been transferred, and remains with him as a *separatum tenementum* in virtue of his original titles.

Prior to 1571 the owners of the lands on both sides of the river from the sea to the source were only three in number. Hugh Lord Fraser of Lovat was, under various titles, proprietor of the whole lands on the south or right bank of the river, and he was also proprietor of the lands on the north or left bank from the Glass burn down to the lands of Breackachy, and of the lands of Kirkton of Kilmorack opposite the falls. The Chisholm was proprietor of the lands of Breackachy, extending along the left bank of the river for a short distance above the Breackachy burn, and of all the lands on the same side of the river above the Glass burn. The priory of Beauly were owners of all the lands upon the left bank from Breackachy to the Beauly Firth, except the lands of Kirkton of Kilmorack, which belonged to Lord Lovat. It has been already mentioned that the Lovat estates were then held by Hugh Lord Fraser of Lovat under the barony charter of 1539, and that in that barony were included not only certain lands *nominatim*, but several other baronies which had been previously erected, and among others the baronies of Ard Abirtarf, and Stratharrick and Erchless, and an older barony of Lovat. In 1571 he became proprietor of the whole of the lands which had belonged to the priory, so that The Chisholm and he were then the sole riparian proprietors upon the river. The particular lands adjoining the river and held by him under the barony charter of Lovat, including therein the older baronies above specified, are the following:—[*Names the different lands on both sides of the river*]. But one thing is certain, viz., that there is no express or implied grant of salmon-fishings as attached to any lands above the falls.

In the course of the seventeenth century Lord Lovat feued out to The Chisholm the lands of Easter and Wester Erchless, Comerkil or Comerkirkton, Wester Comer, and Buntaits and Mauld, on the right bank, and the superiority of these lands afterwards fell to the Crown. In the eighteenth century Lord Lovat's estates were forfeited, and were for a considerable time in the hands of the Commissioners of Forfeited Estates, but they were for the most part restored to the defender's ancestor, General Simon Fraser, in whose favour a charter of novodamus passed under the Great Seal on 19th April 1774. In that charter there were included *nominatim* the whole of the lands above enumerated, and many others, although in point of fact Erchless, Comar, Comarkyle, Buntait, and Mauld had all long before been given to The Chisholm. The whole of the restored lands had been previously erected in 1703, '*in unam liberam baroniam et dominium de Lovat*,' and in 1704 into a burgh of regality, and were now in 1774, along with '*terras de Kirktown de Kilmorack cum lie Craig et piscatione ejusdem vocat lie Ess de Kilmorack*,' of new erected into 'the barony of Lovat and burgh of Bewly.' Since that time the lands of Guisachan have been sold to Sir Dudley Coutts Majoribanks, and the lands of Aigas to Mr John Gordon Oswald, and the superiorities of these lands belong now to third parties, so that Lord Lovat is not proprietor of nearly so much land fronting the river as his ancestors were in 1571. He is proprietor of both banks up to the Breackachy burn, of the south bank from that burn to Easter Mains, and again *ex adverso* of the Easter and Wester Croichails, and he is proprietor of Struy on the left bank from the Glass burn down to opposite Mauld.

"Now, as I have already explained, the only express grants of salmon-fishings in any of Lord Lovat's titles is in connection with lands below the falls of Kilmorack, and the question is, whether these lands and the lands above the falls having been all united into one barony, a right of salmon-fishing over those parts of the barony in connection with which there are no express grants has been established by the possession which the defender has proved? Now, it is clearly proved and not disputed that in virtue of their titles Lord Lovat and his predecessors have for centuries had the full and exclusive possession of the whole salmon-fishings below the falls. But I think, as the fishing for salmon below the falls of Kilmorack was practised either in virtue of express grants of salmon-fishings or of '*piscationes*,' in connection with particular lands on that part of the river, such practice is quite insufficient either to create or imply a right of salmon-fishing in the river above the falls. The question therefore as to the right of Lord Lovat to fish for salmon above the falls must depend solely upon the question of fact, viz., whether he has to any, and if so to what, extent fished for salmon above the falls in the appropriate manner and during the prescriptive period? The evidence shows very clearly that for the last fourteen or fifteen years Lord Lovat and his father have been in use to send their men with net and coble to fish for salmon from the Croichails down to near Breackachy one day in each year just at the close of the statutory period for net fishing, and that during these years the tenants of their shootings of Eilan-Aigas and Eskadale have had rod-fishing for salmon included in their leases, and have paid rent therefor, and have been in use to fish for salmon with the rod. These leases have not been produced, but the fact of the rod-fishing having been so let and exercised was not disputed by the Crown. But for a period of seventeen or eighteen years previous, that is, from 1845 to 1862, there is not only no proof of salmon-fishing of any kind having been carried on above the falls, but Lord Lovat and his factor Mr Peter admitted that no such fishing had taken place, owing, as they explained, to the existence of the close cruives below the falls, and to the height of the falls themselves, whereby salmon were prevented from ascending the river above the falls in sufficient numbers to make the fishing of the upper waters commercially profitable. Still it is the fact, and a most important one, that during that period salmon did ascend to the upper waters, and might have been caught there if the attempt had been made. The river from Breackachy burn, up at all events to Fasnakyle on The Chisholm's ground, abounds in pools well adapted for salmon-fishing. As, however, none was practised from 1845 to 1862, it is obvious that in order to establish by prescription a right to fish for salmon in these upper

waters the defender must prove forty years' continuous and uninterrupted practice of salmon-fishing for forty years before 1845.

"In my opinion he has failed to establish any such possession. The salmon-fishings of the Beauly appear to have been let by the defender and his predecessors to a succession of tenants (professional salmon-fishers) from the middle of last century down to 1845, when the defender's father took them into his own hands. Several of these leases have been produced, but there is nothing in them to show the limits of the fishings so let, although it is obvious from their terms that the fishing was chiefly carried on in the part of the river below the Falls of Kilmorack. It is true that in one or two leases of lands bordering on the river, some of them in the early part of the present century, Lord Lovat and his father bound their agricultural tenants to prevent all persons from fishing for salmon, particularly in close time, *ex adverso* of their farms, and reserved right to themselves to have access to the river, and to draw their nets there if and when required. And if the defender had been able to show by satisfactory evidence that it was the regular practice of the tenants of the salmon-fishings or of the proprietors to fish the pools of the upper waters with net and coble regularly every year, even although only once a-year, I should perhaps have been inclined to hold that, considering the limited number of fish in these waters, there had been sufficient possession to establish a prescriptive right. All that the defender has proved, however, is that the persons who were tenants of the salmon-fisheries upwards of forty years ago occasionally drew their nets in the upper waters, sending through the night a boat and boat's crew up to some point which no one can now specify, and who, in the morning and forenoon of the following day, drew the pools here and there down to Eilan-Aigas.

"But the evidence shows that this was not a regular practice, but only an occasional act, and that nothing of the kind took place during the tenancy of Wilson (1831 to 1845), and there is only hearsay evidence that it took place during Berry's tenancy, and between 1824 and 1831, The regular annual practice therefore, for fishing these upper waters did not begin until 1862. The defender founded very strongly upon the fact that he had incontestibly proved that for more than forty years he and his predecessors had been in use regularly to watch the river from Fasnakyle to Breackachy burn by means of water bailiffs in their service. But I regard that circumstance as being in the present case neither conclusive nor important. The watchmen were employed only during "close time," and for the protection of the breeding and spent fish. Now, whether Lord Lovat had right to fish above the falls or not, he was clearly before 1862 the person who was mainly interested in protecting the breeding fish, because by means of his cruives below the falls he virtually enjoyed the whole profitable fishing on the river. The Chisholm and other riparian proprietors, although they had no legal right to salmon-fishings, seem to have, in point of fact, fished a good deal with rod, and they therefore have no interest, but quite the reverse, to interfere with Lord Lovat protecting the river against illegal fishing in close time, and against poaching generally, even although for these purposes the watchers might occasionally enter upon their lands.

"On the whole matter, therefore, on this branch of the case, I am of opinion that the defender Lord Lovat has failed to establish sufficient possession of salmon-fishing in the river above the Falls of Kilmorack to give him a prescriptive right to fish there in virtue of his barony title, and as the salmon-fishing which he has undoubtedly possessed from time immemorial below the falls has been in virtue of grants limited in their expression to the river *ex adverso* of lands situated below the falls, possession of the fishing in those parts of the river cannot be held as equivalent to possession of the salmon-fishing in the river *ex adverso* of other parts of the barony. In the case of the *Lord Advocate* v. *Sir John Cathcart*, 9 Macph. 744, where the barony was erected '*cum piscationibus*,' and consisted of detached portions of land, of which two were intersected or bounded by rivers and the third was bounded by the sea, it was held that immemorial possession of salmon-fishings in the river did not entitle the baron to fish for salmon in the sea, because he could not establish more than about thirty-five years' continuous possession of the sea fishing. In the present case the circumstances are no doubt different, as the defender's lands extend continuously along the river for sixteen or eighteen miles, except at that part about three or four miles in length where the lands of Erchless intervene. Still I think, that as no regular fishing has been proved to have taken place above the falls, and as the fishing below the falls has all been exercised in virtue of special grants expressed in the titles as pertaining to certain specified lands all situated below the falls, and is therefore not to be ascribed to the general grant of barony, I cannot see any good ground for holding possession below the falls as equivalent to possession above the falls. In saying this I do not mean to express or indicate any opinion to the effect that where a right to fish salmon depends upon a barony title followed by possession, it is necessary that the party pleading prescription should prove that he has regularly fished in the proper manner every pool and stream in the river in which a salmon might be expected to be caught. It would be enough, in my opinion, were it proved that he substantially fished over the whole of the river within his bounds in the appropriate manner, and regularly and continuously from year to year throughout the prescriptive period. I would be slow to hold that if he fished certain pools regularly and others occasionally, or not at all, he had failed to establish a right to fish in the whole. But when the proof shows that although proprietor of lands stretching for sixteen to eighteen miles along a river, the defender has systematically confined his fishing to the lower reaches of the river, only a few miles in extent, I think it must be held that he has neither in fact nor in law had any possession of the fishing in the upper water, especially in a case like the present, where the continuity of his property on the bank of the river is interrupted for a considerable distance by the lands of other owners. In short, the maxim '*tantum præscriptum quantum possessum*' applies to the present case, and the defender can claim no right of salmon-fishing above the falls

because he has failed to prove that he has possessed any.

"I need hardly say that the foregoing observations upon the proof apply not only to the salmon-fishings *ex adverso* of the defender's own lands, but also to the right of fishing which he claims *ex adverso* of the lands of the other defenders. The proof of possession fails equally with regard to all. Indeed, there is really no proof at all satisfactory to my mind of any possession whatever of salmon-fishings *ex adverso* of the lands of any of the other defenders.

"It is therefore unnecessary to consider the question whether Lord Lovat, although he has ceased to be owner of the lands now belonging to these defenders, has retained the salmon-fishing thereof as a *separatum tenementum*. I can well see that difficult questions might have arisen in a different state of the facts, but happily it is unnecessary to consider such questions, and thereby add to the length of this note, which is already too long.

"The result of the whole matter is that in my opinion the Crown is entitled to decree of declarator, with expenses as concluded for."

The defender Lord Lovat reclaimed and argued—(1) If Lord Lovat, having the barony title applicable to the whole lands on each side of the river, had had in a reasonable sense possession of the fishing of the river for a prescriptive period, he was now entitled to the right of salmon-fishing. (2) Lord Lovat having had the whole lands erected into a barony, that constituted by way of title the river and its fishings a *unum quid*, and he as baron was entitled to possess in such place or places as suited him, and the possession of any part of the fishings of the barony was equivalent to possession of the whole, it being a continuous stretch. On this point the case of the *Lord Advocate* v. *Cathcart*, May 19, 1871, 9 Macph. 744, was not an authority to the contrary, for there the stretch of water was not continuous, being river and sea three miles off. Possession was sufficient to give right to the whole fishings of a parcel of lands bound up into a barony, even with no express grant; and surely, therefore, the grant of fishings in the titles to certain of the lands would not take away this right; and this was the ground that the Lord Ordinary must have gone upon. In regard to the question of double title, it was submitted (1) that the express grants would not sustain the possession Lord Lovat had had; and (2) that the express grant was merged in the barony title, and even if not, Lord Lovat was entitled to attribute the possession to whatever title was most favourable to himself. Even if Lord Lovat had had no possession above the falls, he still had full possession of the fishing, for he exercised it to the best advantage to himself, no one interfering with him. But he had possessed above the falls in respect of occasional fishing by net and coble, by rod fishing both by himself and by his tenants, by preserving the fishing and allowing no one to exercise the right, and by the insertion in the leases of the farms bordering on the river of a reservation of the right and an obligation on the tenants to protect it. This amount of exercise might not be sufficient to create a right, but it was quite sufficient in Lord Lovat's circumstances to preserve it.

Authorities—*Lord Advocate* v. *Cathcart*, quoted *supra*; *Lord Advocate* v. *M'Culloch*, Oct. 20, 1874, 2 R. 27; *Baird* v. *Fortune*, April 25, 1861, 4 Macq. 127, 33 S. J. 437.

Argued for respondent—If there were pre-existing grants of fishing with possession, followed by a barony title, the possession must be ascribed to the prior grant, unless the right was enlarged by the barony title. The Crown was entitled to ask, How did your possession begin? Lord Lovat no doubt had express grants to the fishing below the falls, but this was not sufficient to prescribe a right of fishing above the falls. A barony title in a question of salmon-fishing was no better than a grant *cum piscationibus*, at all events where there was a continuous stretch of water as here. Under it, therefore, in order to prescribe a right to the whole stretch of fishings, the whole must be possessed as in a case where the title was *cum piscationibus*. It was submitted that that was not the case here, for there was no proof of adequate possession above the falls. To prescribe a right of fishing, the possession must be of an open, systematical, continuous, exclusive, and public kind, and there was nothing of that sort here.

Authorities—*M'Donald* v. *Lord Advocate*, April 16, 1875, 2 R. H.L. 49; *Lord Advocate* v. *M'Culloch*, quoted *supra*; *Milne's Trustees* v. *Lord Advocate*, July 19, 1873 (decided Jan. 7 and 10, 1869), 11 Macph. 966; *Lord Advocate* v. *Hunt*, H.L., 1 L.R. S.A. 85; *Chisholm* v. *Fraser*, M. App., Salmon Fishing, No. 1; *Duke of Richmond* v. *E. of Seafield*, Feb. 16, 1870, 8 Macph. 530 (p. 541); Stair, ii. 1, 27.

At advising—

Lord Justice-Clerk—This important cause has undergone a very long and anxious discussion before us from the bar, and the Lord Ordinary has bestowed upon it an unusual amount of attention and research.

The action is one at the instance of the Lord Advocate, on the part of the Crown, and the circumstances under which the demand with which the summons concludes is made are unusual and interesting. We have before us an inquiry which extends back nearly 700 years, and embraces a large number of ancient titles, on which many conflicting conclusions and much speculation has been expended. Many of the questions which have thus been raised and argued with great force and ingenuity appear to me to be at this distance of time insoluble, and, as far as they are concerned, while I shall state generally the impression made on my mind by the attentive perusal of the documents referred to, I must not be understood as forming any certain conclusions upon them, as the view which I take of this case rests upon broader and simpler grounds. The general aspect which the case presents, divested of its historical character and its details, is simply this—(1) that Lord Lovat and his predecessors and authors have during the whole period in question, that is, from the year 1206 downwards, exercised the right of salmon-fishing to some extent, at all events, within the boundaries in question, and it appears that they not only have fished within these bounds, but that their right has been deliberately and repeatedly asserted; (2) that no conflicting or adverse right has been alleged or pretended by

any other proprietor; and (3) that whatever the Crown rights may be, the Crown authorities have never during the whole of that long period interposed to prevent or interfere with the right which is claimed by the defender.

Putting aside the question of title or the details of possession, this is not a favourable case on the part of the pursuer. If I am right in so describing the broad features of the past possession, the presumptions will be very strong indeed in favour of those rights having been exercised on a legal title, and many acts which might be indifferent or inconclusive if they were alleged in support of a shorter period of possession, may come to have great weight when applied to the interests which have been enjoyed for so long a period of time.

It may, no doubt, be that the possession of part of the right, at all events, may be imperfect, or that possession may have taken place on a title not sufficient to support it. These are the matters into which we have to inquire, but the general features of the case are those which I have now described.

It is quite true, and my opinion proceeds on that footing that, if the Crown, in whom the salmon-fishings of the whole territory are vested, is entitled to require the landowner or the Crown vassal to show his right, the presumption is that all fishings to which the vassal can show no right belong to the Crown, and therefore Lord Lovat is put to prove his right. Still further, while it is unquestionably true that if the Crown have granted out the fishings in a particular locality to a vassal, it will not be sufficient to allege in a challenge by the Crown against a subvassal or assignee or disponee of the original vassal that the right has not been communicated to him. But in the present case no question on that head can arise. I think the plea which was sustained in the case of *M'Culloch* is only applicable when the original grant is still in operation. Looking to the antiquity of the writs which are before us in this case, I should have hesitated to say that if Lord Lovat could not trace his right through these ancient grants, so as to vest them in himself, we could, in a matter so ancient and obscure, come to the conclusion that the Crown was at this moment divested of its right merely because there were traces four or five hundred years ago of the right having been vested in a subject. In those days of forfeitures, and when conveyancing had not acquired the precision which it has possessed for several centuries, grants might be given and recalled, although not a trace remained of the re-investiture of the Crown; and some presumptions which would be strong in recent transactions might not be available, at least to the same effect, when dealing with transactions so remote.

On the other hand, if it should be found that throughout the long period embraced in this inquiry the fishings which the Crown now endeavour to vindicate have always, under one title or another, been exercised by a subject, and all the more if the rights of these Crown grantees have descended to the present defender, this will form a very strong element, not so much on the question of title, as on the question of possession.

With these general remarks I shall address myself to some of the difficult and obscure questions which have been raised in the course of the discussion, not intending, as I have already said, to express any absolute conclusion on the earlier part of the history, but merely to indicate the impression which I have on some of the more important of these controversies, and the bearing which I think they possess on the case which we have to decide.

The first thing of which it is necessary to have a clear conception and statement is the nature of the locality which is in dispute, and the precise contention raised by the pursuer in his summons.

It is conceded by the summons that below the falls of Kilmorack Lord Lovat's title to the fishings in the stream which is now called the Beauly is incontestible, but it is said that above these falls he has no title and has had no possession of the right which is the subject of this action. This stream, the Beauly, is fed by three or four important tributaries, which are named the Farrar, the Glass, the Affaric, and the Diag. The territory which is in dispute measures from 17 to 20 miles from the sea, not counting the windings of the river; and the part of the course of these streams which is important for the purpose of this advising commences at a point up stream where the Affaric joins the Diag at the south-western extremity of the territory in question. These two streams run into the Glass, and the Glass again, and the Farrar, which are both considerable streams, join at Erchless Castle, about 8 miles above the Beauly Firth, and about 6 miles from the falls of Kilmorack. Such are the streams or watercourses to the fishings in which the present action relates.

It is necessary also to consider what the interests are, or may have been, of Lord Lovat and his predecessors in the lands *ex adverso* of these streams, and I shall shortly enumerate these lands as they stood in the year 1571—a date which is of importance in the present inquiry. At that time the possessor of Lovat possessed the lands of Guisachan, on the south bank of the Diag, before its junction with the Affaric; the lands of Wester Comar, lying along the Glass; then following down the stream, the lands of Croichail and Mauld, lying on the south-east bank, until its junction with the Farrar; thence, following still the southern bank, the lands of Mains, Eskadale, Fenellan, Kiltarlity. All these lands are above the falls of Kilmorack.

Below them were the lands of Beaufort, and Downie, and Dumballoch, and Lovat, which bring this territory down to the Beauly Firth. In that way Lord Lovat had a continuous stretch of lands on the south side bounded by the Beauly and its tributaries the Glass and the Diag, extending for the whole distance which I have now described.

On the north side, beginning at the Beauly Firth, he had the lands of Beauly, of Kilmorack, of Breackachy, of Aigas, and Erchless, all of which were bounded by the Beauly as their southern boundary; and he had also the lands of Struy, which lay between the Farrar and the Glass. He possessed also a tract of country in Strathfarrar to the north-west of the other lands which I have mentioned.

It thus appears that the Lovat of that day possessed continuously the lands bounded by the streams of the Diag, the Glass, and the Beauly on the southern side from Guisachan to the sea; and on the north side he possessed an equally continuous river boundary, with the exception of a small possession which at that time belonged to The Chisholm. The Chisholm also had the lands

on both sides of the river Affaric, and it does not appear that Lord Lovat at any time possessed either side of that stream. So much for the lands through which the streams in question run.

A second question has been raised as to the name of the river in which these salmon-fishings are to be found. I do not go into the antiquarian research which has been brought to bear upon this subject, but I have come to a very clear conclusion that the old name of the Beauly was the Forne, and that this expressed in old days what the Beauly expresses now—the general stream or watershed of that district of country. Generally speaking, when the name of a river is used in its generic sense, it is the name which it bears when it falls into the sea, and although its tributaries may, as they always do, bear different denominations in the locality, yet where the name is used in the generic sense it signifies the main stream with its tributaries. My impression was that the defender was successful in his attempt to trace the boundaries of Robert the Bruce's charter, which professed to give the limits of the earldom of Moray; and there are many other indications to be found scattered up and down the documents which the research of the parties has brought together that there was no other name for the general outlet of the streams of that district but the Forne. It was conceded at the debate, and I think rightly conceded, that the ancient Forne was the modern Beauly; and indeed we know from the time when the monks arrived at the Beau Lieu when it was that the change of name occurred. That the Beauly became the generic name for the main stream in those localities is illustrated by the fact that in 1669, c. 114, an Act was passed regulating the close time of a variety of rivers in the north, including the Spey, the Don, the Deveron, the Findhorn, Ness, Ithan, and Beauly. There can be little doubt, I think, that the close time on the Beauly was a close time for all its tributaries.

Still further, in regard to the titles to the lands which I have mentioned, many of them are in detail exceedingly perplexing—the more so as they commence at a period when, as I have said, our conveyancing had not assumed the scientific form which it afterwards acquired. But the general conclusions which I have formed are these. There can be little doubt that the whole of this territory belonged to the family of Bisset at the commencement of the period in question, viz., the beginning of the thirteenth century. We have not the titles under which Bisset held his lands, but it will be found from one of the compositions between him and the Bishop of Moray that he had unquestionably had a Crown grant of these lands both above and below the falls. That he was Crown vassal in them is shown by the first of these compositions, which refers directly to the sum which he was bound to pay to the Crown for his holding, and also expresses that he held some of them at least in feu. That he had the right of fishing may also be inferred, not indeed in the way of direct proof of title, but with some bearing and relevancy on the question of possession from the earliest of these compositions, in which Bisset agrees with the Bishop that the tenth of the sum which he was bound to account for to the Crown for the fishings of the lands there mentioned, embracing the greater part of those in dispute, should be equally divided between the two parishes of Conway and Dumballoch, the patronage of which was the subject of this agreement. Conway was in the upper, Dumballoch in the lower section of the river.

It is not difficult, as I think, to trace the after fortunes of these lands. They seem to me to have fared as follows:—John Bisset, in 1230 or thereabouts, gave off to the monks of Beauly a very considerable proportion of these lands upon the north side of the river Beauly, along with the fishings below the falls of Kilmorack, and probably, as I think, some of the fishings above. Bisset left three heirs-portioners. One was married to David Graham, a second to William Fenton, and a third apparently to a person of the name of Haliburton, all of whom were men of consideration in their day. Simon Fraser of Lovat married the widow of David Graham. A descendant of his in the next century married a sister of the Fenton of that day, acquiring by that marriage the lands of Eskadale and one of the Cromars, and the descendant of Haliburton in the following century conveyed his lands to Fraser of Lovat. It seems to me important to note these things, because after studying these somewhat perplexing documents I feel quite satisfied that it was in this or some similar way that all these lands came to be, as they unquestionably were, vested in the person of Fraser of Lovat.

The Bishop of Moray plays some part in the progress of titles, but I am disposed to think that he never had anything at the most but a right of superiority of the lands now in question. He was the Crown's assignee to a certain portion of the Crown rents or duties in this diocese of Moray, and of these lands among the rest; and although it appears that from time to time homage was done to him by the proprietors of the lands in question, I have no reason to think that the *dominium utile* of these lands themselves ever came into the hands of the Bishop, or that they descended to or were acquired by Fraser of Lovat from the Bishop, or otherwise than directly through and from the family of Bisset.

A great deal of argument has been expended upon the terms and details of the different titles connected with these lands. I mean only to refer at present to two before I come to the charter of 1571. The first is a Crown charter of resignation in favour of James Haliburton of Gask erecting certain lands into a barony to be called the barony of Erchless, dated on the 13th May 1512. Now, that charter, which I think the Lord Ordinary has not sufficiently adverted to, unites into the barony of Erchless lands below the falls and lands above the falls—as for instance Fenellan, which is partly above and partly below; the lands of Crew, which are above; the lands of the two Erchless, which lie entirely above; the lands of Struy, wester and easter; Croichail, wester and easter; and Comar—all of which lie above the falls. This brings us up close to the junction of the Affaric and the Glass, and all those lands are erected into a barony *cum molendinis le zaris piscationibus croftis*, and so on. And when we come to the tenendas clause, it concludes thus as regards the whole lands—"Nunc unitas, annexatas, et incorporatas in una libera baronia—cum molendinis piscationibus lie yaris, &c.

These lands therefore, embracing many of the lands in dispute (Erchless, Struy, Comar, Croichail, Fenellan, Crew, all above the falls), are united into a

barony *cum piscationibus le zaris.* The terms of the tenendas clause, whatever may be said of the prior part of the disposition, are quite general and universal, and on the principles which we took occasion to lay down in the case of *M'Culloch* we are here entitled to infer from the generality of the tenendas that these lands were erected into a barony with fishings called zaris, and that, in my humble opinion, is nothing more or less than a grant of salmon-fishings extending throughout the whole course of the stream which I have already described. This barony of Erchless was in 1528 conveyed by Haliburton to Hugh Fraser of Lovat, who in 1539 obtained a charter erecting the lands of Lovat into a barony which are said to embrace the "baronias de Lovet, Strahaurick, Ard, Abirtarf, Hereicles *alias* Straglass, cum multaris piscationibus super aquis de Forne et aveche et omnibus aliis piscationibus." So that when the barony of Lovat was erected it embraced the barony of Erchless. It directly gave the fishings on the water of Forne, but it necessarily embraced also that right of salmon-fishing in regard to the upper waters which I have shown to be conferred by the erection of Erchless into a barony *cum piscationibus lie yaris.* Thus, under the title to Erchless and the title to Lovat, Lovat had in 1539 acquired the salmon-fishings of the whole of this river Forne and its tributaries within the limits in question, excepting those which had been given over to the monks of Beauly by Bisset in 1230. These Lovat acquired by a charter from the monks in 1571—a charter which has been a subject of very great discussion, dispute, and difficulty in the course of the present investigation.

If I am right in the deduction which I draw from the titles to Erchless and Lovat, the questions which have arisen upon this title from the monks are of less importance than at first sight they appeared to be, because I think it very clear that as regards the lands of Lovat, and apart altogether from the grant from the monks, there was a title of salmon-fishing in the upper waters as well as the lower, and that on a direct grant, and one not requiring to be fortified by possession. On the title granted by the monks, I am of opinion that it could be satisfactorily read as granting the salmon-fishings from the point where, by the contention of the defender, that much disputed place described in the grant as Carnecot is to be found. It seems to me that the barony of Erchless included a large proportion of these fishings. On the other hand, I cannot read the grant of the monks as in any respect a bounding charter, because no one can fix the limit of the fishings from Carnecot to the sea until it be established where Carnecot is, of which there is, in my opinion, no sufficient evidence. I am also of opinion that it came out quite clearly by the last title which was referred to by the Dean of Faculty and produced by Mr Balfour, that the reading of the words "*de* Kilmorack" is not "the fishings of Kilmorack" or "fishings from Kilmorack to the sea," but that the words "*de* Kilmorack" really signify the title of Lord Lovat himself, precisely as the words were translated in by far the most authoritative version of them—the ratification in Parliament which took place ten years afterwards. This last title of 1575 has the words "*domini de Lovat et Kilmorack,*" and seems to put that controversy beyond dispute. This being so, the grant of the monks remains quite general—viz., the fishings on the water of Forne, anywhere and everywhere, among the other fishings of Lord Lovat, as far as they had power to grant it; and although it is not necessary to proceed on this ground in the view that I take of this case, still, even though the grant had proceeded *a non domino*, it might have been a good title of possession.

It is not necessary that we should decide to what extent possession on this grant of the fishings below the falls of Kilmorack would amount to possession of the fishings above the falls of Kilmorack if there had been no other title, for that is by no means the condition on which this question proceeds. At the same time, I cannot doubt that a grant of fishings in a river of which the grantee has one or both sides is sufficiently clothed with possession by the exercise of the right in any part of it. I think, further, that it has been too much assumed in this argument from the bar and in the note of the Lord Ordinary that the falls of Kilmorack constitute an actual boundary or division of the river. I know of no instance in which a river has one name above falls which occur in its course and another name below. That there was a practical division into profitable fishings below the falls, and very doubtful and precarious fishings above, was the necessary condition which the falls created. That this condition was intensified by the cruives which Lord Lovat placed and maintained below the falls is quite certain, but if he had a right to the salmon-fishing it can in no way derogate from this right that he uses his catholic privilege from source to mouth by placing his fishings where they were likely to be most profitable.

It has been said that these cruives were illegal because they were not constructed in terms of the Acts of Parliament in regard to the hecks or hatches, and reference was made to some observations in the case of the *Duke of Richmond* v. *Earl of Seafield* bearing upon that question. But the mode of fishing was not illegal, although the Act of Parliament was not followed as regarded the details. For myself I had some sympathy with the view that the very fact of these cruives creating so great an obstruction to the passage of the fish was the strongest assertion of Lord Lovat's right against the Crown, or anyone in the Crown's right, which could have been made. He stopped the passage of the fish without objection, because there was no one above him who had an interest to object. The Chisholm did attempt to object about the beginning of this century, and he was found to have no title to do so. But I was not a little amused to find that during the period when these lands were in the hands of the Crown, in consequence of the forfeiture of Lord Lovat, the Crown gave a lease of the fishings of the then General Fraser of Lovat, and in the lease the tenant was taken specially and anxiously bound to maintain these cruives as they then existed; from which I conclude that while the Crown occupied the fishings there was no change in the state of possession. But on the whole of this matter, I should be very slow indeed, on any such ground as this, to overlook possession which has lasted for five or six centuries.

So stood matters then in 1571. Since that date the estate of Lovat has been considerably diminished by sales and subfeus; but it was

assumed in the argument, and I presume is the fact, that no grants of salmon-fishings accompanied these subfeus and sales; and therefore at the time of the forfeiture in 1746 the rights of Lord Lovat were precisely as they were in 1571. In 1774 the lands were restored to General Simon Fraser for a payment of £20,000 and in consideration of great services rendered. They were restored precisely as they had been forfeited, and the Crown grant bears that expressly both in the narrative and in the course of its provisions. The baronies of Lovat and Beauly were erected into a barony of Lovat, and all the possession which has taken place since then has been under that barony title.

It was contended that although Lord Lovat had thus a barony title embracing the whole of the lands *ex adverso* of the streams in question, and although a barony title with possession is sufficient to clothe the right with the privilege of salmon-fishing, yet it is not necessary to attribute that possession, not to the barony title, but to the specific grants from the monks. I know of no authority which could justify any such contention. The passage referred to in Lord Stair will not support it. It may be quite true that if Lord Lovat had a separate and specific title under his former rights to salmon-fishings in any particular portion of the river, he might have maintained that right on his previous title, although there might be doubts as to his possession; but that can never prevent him from attributing his possession to the nobler title—the supereminent title of barony; nor do I know of any instance in which such a plea has been given effect to, or has been maintained. The barony title absorbs the older titles. It embraces and strengthens them, and gives to the possession commenced on the lower title the increased effect of the higher. And therefore the solution which I am inclined to come to of these difficult questions rests in the main—indeed I may say entirely—on the possession which Lord Lovat has held since 1774 under his barony title; and if he has shown by reasonable evidence that he has asserted his right to the salmon-fishings throughout the whole course of these streams by all reasonable means for the prescriptive period, the barony title is amply sufficient to protect and legalise that possession.

As I understand my brother Lord Ormidale proposes to enter at a little length into the question of possession, I shall content myself with saying that with this barony title in his hand I think Lord Lovat was quite entitled to use the lower fishings as the main source of his profit, and to content himself with protecting the upper fishings in so far as it was necessary or for his interest to do so. They were, as I think, all on the same stream. They were part of the barony. He was not bound to use them in any way excepting that which was most profitable. He did use them as he thought most profitable, by simply leasing them for rod-fishing, and protecting them as spawning ground. I will not say that if these fishings had been in a detached or separate stream the possession of the fishings in the Forne would under the barony title have been possession of the fishings in a separate river; but we are dealing here with one continuous stream and its tributaries, and I think my remarks may be fairly extended to such a case, and that it rests with the grantee, if he truly have a barony title which will fortify his possession, to distribute that possession in the way that he thinks most beneficial for himself.

Now, here I think it has been proved (*first*) that Lord Lovat has asserted his right by protecting the water throughout the whole period; (*second*) that for a period extending over forty years he has from time to time, no doubt at rare intervals, exercised his right of salmon-fishing in the upper waters; there were but few salmon which could escape the cruives and the falls, but notwithstanding that the salmon-fishing has been exercised; (*third*) he took his tenants bound to protect the water above; and (*fourth*) he excluded everyone else from fishing or attempting to fish, and that without challenge, except in the single instance of the lawsuit with The Chisholm, in which he entirely prevailed. Latterly the amount of possession has been much greater, and although it no doubt has been held as law that rod-fishing will not by itself be sufficient possession to set up a right of salmon-fishing, excepting where fishing by net and coble is impracticable, modern usages I think have modified that principle, and I should be inclined to say that if letting the rod-fishing was more profitable than using net and coble, that possession is the strongest which produces the greatest amount of profit. It is not necessary, however, in the present case to go upon that ground, seeing that it appears to me that while the possession below the falls is complete, the possession above the falls was an accessory or incident to that right, and quite sufficient to maintain the right of Lord Lovat under the undoubted title which he possesses. Therefore my conclusion on the whole matter is, that if I were to draw an inference of fact and of law from the older titles, I could not assert that the Crown had made out their right. On the contrary, I am inclined to think that Lord Lovat, before his charter of 1774, had a right of salmon-fishing in these upper waters, and that his right was not limited by the falls of Kilmorack, and that the Crown was divested of that right. But the ground on which I will put this judgment is, that under the barony title the possession which has been had from the highest portion of these streams down to the sea has been one and continuous, and quite sufficient to maintain the right for the future as far as the barony lands on either side extend, but no further.

Lord Ormidale—This action, which is at the instance of the Lord Advocate as representing the Crown, is directed against Lord Lovat, Mr Chisholm of Chisholm, Mr Gordon of Aigas, and Sir Dudley Coutts Marjoribanks, as defenders; and it concludes for declarator to the effect that "the whole salmon-fishings in the rivers Affaric and Cannich and their tributary rivers, streams, and lochs, and in the river Glass (part of which is sometimes erroneously called the Beauly), down to the falls known as the falls of Kilmorack, with its tributary rivers, streams, and lochs in the parishes of Kilmorack and Kiltarlity and county of Inverness," belong to her Majesty *jure coronæ*, and that the defenders, and none of them, have right to fish or take fish of the salmon kind in said rivers, streams, or lochs, "or any of them, in any manner of way."

The defenders, excepting Lord Lovat, have allowed decree to pass against them. But Lord

Lovat resists the action, and maintains that it is ill-founded as against him. The Lord Ordinary, whose judgment is characterised by great research, learning, and ability, has, after a proof, by the interlocutor under review decerned against Lord Lovat in terms of the conclusions of the summons. The Court has now to determine whether his Lordship has decided rightly or not.

The case is undoubtedly attended with considerable difficulty, not so much as regards the principles of law involved as the facts, which in several important particulars, in consequence of the lapse of time and loss of evidence, it has been found impossible satisfactorily to clear up. It cannot now, for example, be ascertained with anything like certainty what was the precise course and identity with any existing stream of the river "Forne," which is referred to in many of the more ancient writs and titles in process. The Lord Ordinary says that the river anciently known as "Acqua de Forne" has at different times, and with reference to different portions of it, been called and known as "Avon na Manach," or "The Monks' River," the "Glass," or "Avon Glash," or "Water of Strath Glass." The Lord Ordinary also says that the river is, in a map two centuries old, named the "Farray," but that for a very long time that part of the river has received no other name than "The Beauly," and that "for upwards of a century the name of Beauly seems to have been ascending the river which now bears that name as far up as Erchless, if not further up." For myself, I am disposed to think that, having regard to the whole proof, including the parole evidence as well as the written, it may be taken as sufficiently established that the river anciently called the "Forne" is the existing stream know as the Beauly, from the sea as far up as Fasnakyle, where the Diag and Affaric run into it; and assuming this to be so, it will be found to be a very important circumstance in considering the case under and in connection with Lord Lovat's barony title obtained from the Crown in 1774.

Before, however, taking up that part of the case, I may remark that although a great deal of elaborate argument was addressed to the Court from both sides of the bar as to the bearing and effect of the more ancient titles prior to the barony grant of 1774, I am not prepared to say that they would of themselves have been sufficient to enable me to form a judgment on the main question to be determined. The case could not, indeed, according to any view I can take of it, be determined upon the ancient titles alone without invoking the aid of surmise and conjecture to an extent which is scarcely admissible. But whether a satisfactory conclusion may not be arrived at on a consideration of the barony title of 1774, and the other barony titles therein referred to, taken in connection with the parole evidence in the case, is another matter.

By the Crown title of 1774, being a charter of novodamus, the whole Lovat estates were erected or re-erected into the barony of Lovat; and it contains an express grant of salmon-fishings "supra aquam de Forne a Cairncross usque ad mare cum lie cruives et omnibus aliis proficuis ad eosdem pertinen. jacen. infra dict. Baroniam de Bewlie et vicecomitatum de Inverness." Now, although it is a disputed point, and one which I cannot venture to think has been satisfactorily cleared up, where "Cairncross" is situated, it is at least clear, looking to the clause or passage I have just quoted from the barony title—(1) that it contains a grant of the whole salmon-fishing in the river from Cairncross, wherever that may be, to the sea, and not a grant merely of fishings applicable to or attached to some particular lands only; and (2) that the salmon-fishings "supra de Forne" must be held to mean, especially having regard to the immemorial possession afterwards referred to, the fishing in that stream from bank to bank, and not merely in the half of it on the right side where the Lovat lands were chiefly situated. But where Cairncross is, whether above or below the cruives, is not stated in the barony title. That it was at the particular place on the Diag contended for by the defender I am not prepared to affirm—the titles affording no conclusive evidence on the subject. But neither can I hold that the pursuer is right in his contention that Cairncross must be taken as having been situated at or about the falls of Kilmorack, there being nothing whatever, so far as I can see, to support that view, or even to make it likely or probable.

In this state of matters, it appears to me that the evidence of possession which has been had under the titles, and particularly that of 1774, must be appealed to in order to see whether Cairncross, wherever its exact site was, must have been sufficiently far up as to cover the right of fishing which has been exercised by Lord Lovat and his predecessors. In any other view, the barony title might be rendered altogether inept and abortive as regards the salmon-fishing thereby expressly conveyed, or at least as regards a considerable portion of it; and this, as I understood the pursuer's argument, was what he contended for. I need scarcely remark, however, that such a result is not to be arrived at if the possession and enjoyment of the salmon-fishings which has been had under the barony title ever since its date in 1774, now upwards of a century ago, is such as to lead to a different and more reasonable conclusion.

In considering, then, the matter of possession, it is of importance that it should be borne in mind —*First*, that no dispute has been raised as to the right of the defenders to the salmon-fishings below the falls of Kilmorack, but that on the contrary, this has been throughout the discussion acknowledged by the pursuer; *secondly*, that the defender Lord Lovat's barony lands still occupy nearly the whole right or east bank of the river from the sea up to Fasnakyle, about where the Diag and the Affaric join the main stream and anciently extended further up; and *thirdly*, that since the date of the barony title or longer the river from that point has been known as the Beauly, the same name that it bears at and below the falls. Nothing, therefore, could be more natural or likely than that Lord Lovat's right of fishing should extend up to the head of the river, the more especially considering that in place of any other proprietor claiming to have such a right the only parties who have lands in the neighbourhood of the river whom the pursuer has thought it advisable to call as defenders have allowed decree to pass against them. It must also be kept in view, in considering the proof of possession, that a barony title, even where it contains no express grant of salmon-fishings, or of fishings

at all, is a good and sufficient title to prescribe a right to salmon-fishings. If therefore, it could, contrary I think to all probability and reasonable inference, be supposed that the express grant of the salmon-fishings in question is not to be taken on a fair construction of the title itself, as extending upwards from the sea as far at least as the main stream goes, prescriptive possession under the title would be enough so to extend them. The proof of possession of the salmon-fishings on the part of the Lovat family and his predecessors comes therefore to be of great importance in the case.

The Lord Ordinary, although otherwise and generally adverse to the defender, seems to acknowledge that since 1862 there has been an exercise by the defender of salmon-fishing in the river above the falls of a sufficient character. But he goes on to say that from 1845 to 1862 there is no sufficient evidence of the requisite possession. In this, however, I must, with all due deference to the Lord Ordinary, differ from him, for it appears to me that the proof discloses in an unmistakeable manner that the right of fishing was exercised on the part of Lord Lovat during the seventeen years intervening betwixt 1845 and 1862, just as it had been previously for time immemorial.

In support of this view, there has, besides a large body of parole evidence, been produced a number of leases by the defender and his predecessors to tenants (professional salmon-fishers), extending from the beginning of the century to 1845, when the defender's father took the fishings into his own hands. This certainly looks very like what is necessary to constitute prescriptive possession, and I fail to see that the observation of the Lord Ordinary, that there is nothing to show the limits of the fishing referred to in the leases, is either correct in point of fact or relevant in point of law. It would rather appear to me that possession by such leases as these referred to, as well above as below the falls, is enough to embrace the whole river up to the junction with it of the Diag and the Affaric, regard being had to the undeniable fact that it is to that extent one continuous stream.

But it is right that the proof of possession of the fishings by the Lovat family should be examined with more minuteness, in order that its bearing and effect may be duly appreciated. And in doing so I shall deal with the parole evidence first, and then the leases.

Mr Peter, who was factor for many years on the Lovat estates, and who appears to know the localities as well as anyone could, speaks first to the practice there has been since 1862 of letting to sportsmen the rod-fishing below the lower fall at rents varying between £30 and £60 for the season; and he explains that the sportsmen who so had the rod-fishing regularly fished from Breachachy burn, which is above the falls, to the lower falls, and caught salmon. Mr Peter also makes the important statement that "since he entered Lord Lovat's employment," which appears to have been in 1852, he has "caused the waters to be regularly watched. I have paid," he says, "the wages of the watchers regularly every year for doing that duty all the time. No other body watched any part of the river. Neither the Crown nor anyone else interfered with the watchers who performed the duty of watching. The watchers were never impeded or interrupted in any way. I am now shown a statement of payments to water-bailiffs on the river Beauly from season 1845 to season 1877. It has been correctly made up from the factor's books and the vouchers. Since 1845 the salmon-fishings have been in Lord Lovat's own hands. The waters have been fished since that time under my charge. Before 1845 the fishings were let to tenants. I understand that these tenants employed and paid watchers, who watched the upper reaches as well as the lower, as Lord Lovat has done since. The watching which I have described took place about the middle of September to the end of the year. During the open season Lord Lovat's keepers had instructions to see that no one fished in the upper reaches of the river. I gave these instructions to the keepers, and they have been given all the time I have been in the employment of his Lordship." Mr Peter also speaks to the written leases, which will be afterwards more particularly referred to. And he mentions what, in certain views of the case, is not unimportant, that "the most of the water above the falls of Kilmorack is not very good fishing for net and coble." And he also explains that the portion of the river called the Glass "applied to a division of the Beauly river — Beauly was the general name." And again he says—"I have understood that when we speak of the Beauly it comprehends the Glass." And when asked "Do you know of any more ancient name than the name Glass for the part of the river which goes by that name?" he answers, "None except Forne." And then being asked "Does the Forne include the Glass?" he answers, "I understand it does." According to this evidence the Beauly is a continuous river or stream from the sea up to the head of the Glass, which, it will be seen from the maps in process, is not far from the confluence of the Affaric and the Diag with the main stream, and close to a place called Fasnakyle.

The next witness, Hugh M'Rae, corroborates Mr Peter in regard to Lord Lovat's possession of the fishings; but he can only speak personally and directly to the last 23 years during which he has been manager of his Lordship's Beauly fishings. He says, however—and this is very important—that "there was a man of the name of Allan Fraser who watched before I was watching, and who has been over twenty years at it, but only during the close time, and a man at Eskadale watched before the close time came on." And he afterwards adds that "Lord Lovat's people watched the river immediately below Fasnakyle," which, as is shown on the maps, is the name of a place close to the junction of the Diag and the Affaric with the Beauly. Allan Fraser, the witness, also says he watched down to the junction of the Cannich with the Affaric, and from there down to Croichail.

The witness John Mackenzie, who is upwards of 70 years old, likewise gives some important evidence, especially in reference to the last 40 years, when he was himself employed in the fishing. From what he says it may be fairly collected that there was regularly, for at least 40 years previous to his examination, net and coble fishing to some extent above as well as below the falls.

Christopher Macdonnell, who is upwards of 80

years old, and had obviously a good opportunity of knowing all about the fishings, says that in his early days he always heard that they belonged to Lord Lovat—that his Lordship watched the river, that he remembered hearing of Simon Lord Lovat apprehending a priest's clerk or servant at Fasnakyle "for fishing for salmon."

Allan Fraser, who has been in Lord Lovat's service as a fisherman for twenty-nine years, besides stating that the river was watched up as far as Fasnakyle and further, speaks to using net and coble "up as far as Cannich," which is not far from Fasnakyle. Helen Mackenzie, who is upwards of 60 years old, speaks to watching having gone on as far up as Fasnakyle, and says that she understood the fishing on the whole river to belong to Lord Lovat. Margaret Fraser or Mackenzie also states that her deceased husband, to whom she was married twenty-eight years ago, watched the river for Lord Lovat as far up as Fasnakyle, ever since her marriage till his death, and that she cannot tell how long he had watched previously.

Alexander Fraser, who is upwards of 70 years of age, gives evidence of more than ordinary importance, inasmuch as he speaks to the twenty years immediately preceding 1845, and to there having been to some extent during that time net and coble fishing above as well as below the falls. James Fraser gives evidence to the same effect. Hugh M'Gilvray, who says he is 70 or 71 years of age, and was a water-bailiff for Lord Lovat for five years forty years ago, watched the river between the Glass Burn and Easter Main; and he states that other two men, John Mackenzie and Kenneth Chisholm, who are both dead, watched from the Glass Burn up to Fasnakyle. He further says that he stopped all the people he met fishing, and that no one else watched the river except Lord Lovat. Theodore Chisholm, who was one of Lord Lovat's watchers for about forty years, says he has seen Lord Lovat's people fishing with net and coble below Struy in the close time. William Fraser, an old man, who it appears was born at Cannich, and had lived there the most of his life, speaks to Lord Lovat's people fifty years ago watching and also fishing the river in some of its upper reaches. And Hugh Cameron speaks to Lord Lovat's watchmen taking charge of the river up to Fasnakyle.

Such being the import of the proof of possession of the fishings in question by the Lovat family, I cannot resist the conviction that it is sufficient to entitle the Court, independently altogether of the more ancient writs and titles, to hold it to be sufficiently established that the defender and his predecessors have for time immemorial exercised the exclusive right to the salmon-fishings in the river referred to in the pursuer's summons "as the Glass, sometimes called the Beauly," from Fasnakyle, at or near the junction of the Affaric and Diag, down to the falls of Kilmorack. It may be true that the fishing above the falls was not of a very substantial or remunerative description, but such as it was, there can be no reasonable doubt, I think on the proof, that it has been exercised and possessed for time immemorial by the defender Lord Lovat and his predecessors by net and coble as well as by rod and line. It has been frequently observed from the bench in salmon-fishing cases that the quality as well as the mode of possession necessary to satisfy the requirements of a prescriptive right depend upon circumstances. Accordingly, where the fishing is meagre, and the mode of exercising it necessarily limited, the requisite possession may, although correspondingly small, be sufficient. Where there is little to fish there is little to possess. Nor can I think it of any consequence that in the present instance the limited number of salmon in the upper portion of the river may have been in some measure caused by the alleged illegality of the cruives used by the defender and his predecessors below the falls prior to 1862.

That might be a reason for preventing effect being given to possession founded upon such an illegal mode of taking salmon; but the defender does not require to found upon the cruives at all in the establishment of his right of fishing salmon in the river either above or below the falls. No question has ever been raised, either by the Crown or by any other party, as to the illegality of the cruives while they existed, and it is about seventeen years since they were entirely done away with. I cannot, therefore, see how or why any effect can now be given to the pursuer's objection, founded upon the alleged illegality of the cruives, to the defender's right, if it be otherwise established, as I think it has been. Besides, there is a manifest difference between fishing by a mode which is wholly illegal, and fishing by a mode which is perfectly legal, as cruive-fishing was in the present instance prior to 1862, and an irregularity merely in the way it was exercised.

So much for the defender's right of fishing considered in reference to his barony title of 1774, and the possession he has had under that title. But I am not to be understood as disregarding the observations made by your Lordship on the earlier titles, some of which are referred to in that of 1774. On the contrary, I consider these observations of great importance as fortifying the conclusions I had otherwise come to, and I accordingly generally adopt without repeating them.

I am therefore of opinion that the interlocutor of the Lord Ordinary reclaimed against ought to be altered, and the defender assoilzied from the conclusions of the pursuer's summons in so far as they affect him.

Lord Gifford—This case in its historical details is exceedingly complicated and difficult. The title-deeds and charters founded on go back six or seven centuries, and embrace a charter by William the Lion in 1171, and a Bull by Pope Gregory 9th in 1231. There are old documents, compositions, and homages, the exact meaning and effect of which it is now not very easy precisely to ascertain, and I cannot say that I am able to construct with any confidence a connected history either of the lands and baronies in question, or of the salmon-fishings which were connected therewith. The Lord Ordinary, in the very careful, learned, and elaborate note which he has annexed to his judgment, has, I think, with perfect correctness given a general review of the old titles so far as they relate to the salmon-fishings on the river anciently called the Forne, and although I differ as to the inferences, or as to some of the inferences, to be drawn from these titles, and although I have come to a different conclusion from that reached by the Lord Ordinary, I assume the

accuracy of the narrative of titles which the Lord Ordinary has given.

It is not necessary, therefore, to enter upon the details of the titles further than to see how far Lord Lovat is possessed of titles which are habile and competent to vest in him a right of salmon-fishing either over the whole river of Forne, or in any portion thereof, and to determine whether and how far this right or title to salmon-fishing is bounded or limited by its terms. The remaining inquiry will be how far Lord Lovat and his ancestors or authors have possessed and enjoyed the salmon-fishings, and whether there has been any contrary possession, or anything tending to restrain or to limit the right.

In truth, in all questions regarding rights of salmon-fishing there are ultimately only these two questions, namely—*First*, What is the title upon which the claimant of the salmon-fishings rests his right? and *second*, What is the possession which has followed thereon? In all such questions there must be, first, a written title flowing mediately or immediately from the Crown; and second, if the title is not conclusive by itself, it may be explained and interpreted by the possession which followed thereon; and however complicated the present case may be, all the questions which arise under it may all be referred to one or other of these two categories—first, Lord Lovat's title; and second, the possession had thereon by him and his authors.

After very full consideration I have ultimately come to concur in the result reached by your Lordships, and after the full explanations given by your Lordships, in all of which I agree, I shall confine myself to very few observations. I think that Lord Lovat, the defender in this action, has sufficiently instructed a right of salmon-fishing in the river Forne from the sea as far up the river as the old barony of Lovat extended, or at least as far as the river Forne extended within the old barony of Lovat. I think it is sufficiently instructed that the river Forne is the same as the river presently known as the river of Beauly and the river of Glass, and that Lord Lovat's right of salmon-fishing extends from the sea upwards to above the junction of the river Glass with the river Affaric, or rather as far up the Diag as the old barony of Lovat went, and I therefore concur in the judgment proposed by your Lordship.

There is no dispute regarding the salmon-fishings on the river Beauly situated below the falls of Kilmorack. Admittedly these belong absolutely and exclusively to the defender Lord Lovat, and accordingly they are not embraced in the conclusions of the present action. The whole salmon-fishings below Kilmorack are conceded to be the defender's property, and in his full possession and enjoyment. The present action only seeks to have it declared that the salmon-fishings above the falls of Kilmorack belong to the Crown. The conclusion of the action is that it should be found and declared, "by decree of the Lords of our Council and Session, that the whole salmon-fishings in the rivers Affaric and Cannich, and their tributary rivers, streams, and lochs, and in the river Glass (part of which is sometimes erroneously called the Beauly), down to the falls known as the falls of Kilmorack, with its tributary rivers, streams, and lochs, in the parishes of Kilmorack and Kiltarlity, and county of Inverness, belong to us *jure coronae.*" Even as to this conclusion, however, I think there is practically no dispute as to the salmon-fishings, if any, "in the rivers Affaric and Cannich, and in their tributary rivers, streams, and lochs." Lord Lovat does not claim the salmon-fishings either in the Affaric or in the Cannich, or in any of their tributaries or lochs. It is only as to the salmon-fishings in the river Beauly or Glass that there is really any room for dispute. In point of fact, it appears that salmon run very short distances up the rivers Cannich and Affaric, and as these rivers along their whole course till they join with the Glass never were within the old barony of Lovat, or within any of the old baronies incorporated therewith, I think Lord Lovat was quite right to make no claim to the salmon-fishings of the Affaric and Cannich. The sole controversy, therefore, relates to what may be called the main salmon stream—to what was of old called the Water of Forne, or to what is now known as the river Beauly, including the upper part thereof in Strath Glass, and which is known as the river Glass.

Now, what is the title in virtue of which the defender claims right to the salmon-fishing in the continuous stream called the Beauly and the Glass? The title, of course, must come either directly or indirectly from the Crown, for the right of salmon-fishing was *inter regalia.* It is here I think that the Lord Ordinary has failed to give full effect to the various titles founded on by the defender. No doubt his Lordship narrates several of these titles, but I think he attaches too exclusive importance to the title which Lord Hugh Fraser of Lovat got in 1571 from the prior and the monks of Beauly. No doubt that is an important title, but it is only one of a great variety of titles to fishings and to salmon-fishings which were held by the Lords Fraser of Lovat. It is in this title that the description appears which has figured so largely in the discussion and proof, in which the salmon-fishings conveyed are described as extending from "lie Carnecott *usque ad mare*," and this description has led to the elaborate inquiry as to where the place or point called "Carnecott" really was. To this question I may afterwards advert, but what I want to point out at present is, that this grant of salmon-fishing from Carnecott to the sea is only one out of many grants of fishings and of salmon-fishings, all of which united in the Lovat family, and on all of which the defender now rightly and reasonably founds. The monks' grant of the barony of Beauly, and of the salmon-fishings belonging thereto, was made to Hugh Fraser Lord Lovat in 1571, but before that grant Lord Lovat had large possessions upon the river Forne. Indeed, the Lord Lovat of that day had the whole old barony of Lovat which was erected in 1539, while the barony of Beauly was only acquired in 1571. In most, if not in all, of Lord Lovat's older titles applicable to the barony of Lovat and to the various estates of which it consisted, fishings or salmon-fishings are expressly mentioned, and this appears sufficiently from the very terms of the monks' grant itself, for the charter of 1571 not only expressly conveys to Lord Lovat "our salmon-fishing in and upon the water of Forne extending from lie Carnecott to the sea," but it conveys other salmon-fishings "in any other part

of the said river among (inter) the salmon-fishings of the said noble Lord Fraser of Lovat." It was simply a grant of additional salmon-fishings to Lord Lovat, who at the time of the grant was already possessed of other salmon-fishings upon the same stream both above and below the falls; and I cannot help thinking that this undoubted fact deprives the inquiry as to the local position of Carnecott of a great part of the importance which it would otherwise have possessed. If Lord Lovat's only title to salmon-fishings was the bounding title from Carnecott to the sea, nobody can doubt the importance of fixing where Carnecott was; but if the fishings from Carnecott to the sea are only one set of fishings among many others to which Lord Lovat has titles, it is of less importance to fix where Carnecott is if the other titles will support a possession extending as far as the ancient barony of Lovat. I am aware of the controversy regarding the true translation or meaning of the other words which follow the reference to the other fishings of Lord Lovat, but I may say at once I am disposed to accept as the preferable translation, and as expressing the real substance of the grant, that given in the Parliamentary ratification of the charter of 1571, granted by James Sixth, with advice and consent of Parliament in 1584. The translation is not literal, but I think it contains the true meaning of the passages.

But there is abundance of other title to salmon-fishing, or to fishings which by possession may be interpreted as salmon-fishing, and upon which Lord Lovat is entitled to rely. I am not going to detail them, but I may refer as a single and as a sufficient example to the charter of resignation in favour of Haliburton of Gask, erecting a variety of lands and subjects into the barony of Erchless. Now, the barony of Erchless is one of the lesser baronies which afterwards came to be united and incorporated with the barony of Lovat, and Lord Lovat is entitled to found upon the Erchless title as part of the barony title of Lovat. The barony of Lovat was erected in 1539, and the charter of that year expressly incorporates seven or eight smaller baronies into one, to be called the barony of Lovat. Now one of the smaller baronies so incorporated is that of Hereicles, that is Erchless, and it is noteworthy that it is expressed in the charter by another name "*alias* Straglass," indicating, I think, that it extended at least some way into Strathglass. Now, in the charter erecting the barony of Erchless alone there are special grants of fishings attached to a variety of lands, and that these are salmon-fishings is sufficiently shown by their being granted with yairs, a grant of yairs being at that time a privileged mode of taking salmon. In like manner, in various other titles, which ultimately merged in the old barony of Lovat, general grants of fishings are made, and all of these came to be vested in the Lovat family, and united into one barony by the charter of 26th March 1539.

Now, without going farther into these old titles, I cannot doubt that in 1539, when the barony of Lovat was originally erected, the then Lord Fraser of Lovat had an ample and sufficient title to prescribe a right of salmon-fishing up the river Forne—that is the continuous river Beauly and Glass—at least as far up as the barony extended. I put the case no higher than this, but I think it might be pleaded considerably higher. I think it might be pleaded as an express title of salmon-fishing limited only by the bounds of the barony, for although in general the words used are only *cum piscationibus* or *piscariis* without the addition of the word *salmonum*, still when taken in connection with grants of yairs, I think the words can only be read as having reference to salmon-fishing alone. It is enough for the case, however, that they afford a good title to found a prescriptive right.

It is true that it is now not possible in all cases, or in many cases, to identify the precise position or extent of the various lands, or even of the various baronies included in these old charters, but all difficulty on this ground is really avoided or removed by the fact that the whole lands, and the whole subordinate baronies, were really united in 1539 into one great barony of Lovat, and we can tell perfectly what the extent and limits of that great barony was—at least we can determine it beyond reasonable dispute—and for the purposes of the present action it will be sufficient to refer to one of the plans which have been laid before us in the present case. I take the plan D, which shows in yellow what the Lovat family had in 1571, including what they got in that year from the monks of Beauly. Now this plan shows, and its substantial accuracy is not impugned, that in 1571, and after the monks' grant of that year, the Lovat family were proprietors of the whole land on both sides of the river Beauly, and the river Glass from Beauly firth to the southern limit of Struie Forest, excepting only a very small portion of the north bank. Proceeding up the stream, or southward, the Lovat family held the whole land on the south side of the stream upwards to the river Diag, and considerably beyond its junction with the river Affaric; so that at this date, 1571, when the Lovat family got from the monks the lands and fishings of Beauly, they had really two independent possessions held on distinct titles. Thus they had all those accumulated lands and fishings which were merged into the barony of Lovat in 1539, and these they held under the barony title of "Lovat" of 1539, and then they had the separate barony of Beauly, and a special grant of salmon-fishings therewith. Now I think one of the points on which the Lord Ordinary has been misled is that he treated the grant of salmon-fishings on which Lord Lovat has relied as simply extending from Carnecott to the sea. If this had been so, it would have been almost an essential point to find out where Carnecott was, and if it could not be found out, there would be difficulty in arriving at any definite conclusion. For I agree with both your Lordships in thinking that it is not proved where Carnecott really was. I cannot rely upon the evidence which has been adduced by Lord Lovat to fix it in that neck of land where the old vitrified fort is. That is not a natural place for a fishing boundary to be, and the derivation of the word "Coit" seems to point to quite a different kind of thing—for "Coit" seems to be the Gaelic word for boat or ferry, and has no reference to a cross or some other Christian symbol which has been put up in a particular spot. Therefore the state of the title is that we have a great many grants from the Crown and other parties merged into the barony of Lovat in the beginning of the 16th century,

and we have also the grant from the monks of their fishings in 1571; but of these two sets of titles by far the most important are the old barony titles embraced in the Lovat barony of 1539, for I apprehend that the monks having only the land on the north side of the river there might have been a question as to whether they could give a grant of the fishings on both sides of the river, or only on that bank of the river opposite their barony. But Lord Lovat, before he got that right to the Beauly fishings, had then the whole south side of the river, and I think that explains why his fishings were interspersed among those of the monks, as explained in the Beauly charter. Now so stood matters, and if the question had arisen, I think Lord Lovat would have been entitled to vindicate the very same right which he now claims, and which we are now recognising, upon the face of the titles to the barony of 1539 and the Beauly grant of 1571.

After that it appears that a good many large pieces of land were alienated by the Lovat family. We have not before us the terms on which this was done or the deeds by which these alienations were made; but it is not said that they gave away any of the salmon-fishings which they got by previous grants. I do not know how far it would have been competent for the Crown to found upon that, because the Crown does not say that any of the fishings were ever given back to them. But be that as it may, I think we are entitled to take it that either Lord Lovat or his disponees or heirs held all the salmon-fishings which they held in 1571, when they got the Beauly fishings from the monks. Then the only other title that I need mention is a new incorporation both of Beauly and of the old Lovat barony into one by the charter of novodamus in 1774. That was the charter granted to Lord Lovat by the Crown after the attainder in 1746; and it gives back to Lord Lovat everything which his ancestors had before the attainder; and it also, in the form of the new barony, gives more than any charter that had ever been granted before, because it included the barony of Beauly as well as the old barony of Lovat. And now the question is, what possession has followed upon that habile title? I do not want to go deeply into the question, but there is the utmost presumption from these successive barony titles that the whole salmon-fishings of the river Forne were given. Plainly they contained a great many salmon-fishings. If the Crown really intended to retain part of the salmon-fishings, and to give out others, it is very strange that there is no reservation of salmon-fishings, and no specification of what is to be reserved. A barony title, as we all know, is a very favourable title to a party claiming salmon-fishings. I think Lord Stair states that a mere barony title was held to include salmon-fishings in the grant; and although it now only gives a title to prescribe salmon-fishings, still it is a very serious title for the Crown to grant if it contains salmon-fishings which are erected into one complete and entire subject; and I think the general rule of possession upon a barony title applies with peculiar force here—that possession of a part is equivalent to possession of the whole. I do not think it can be said that it was necessary for the grantee under these barony titles to fish every pool and every portion of that long river, to the extent of 17 or 18 miles. I think possession of any part of the river—I have put that pretty strongly, but I think that is the fair conclusion—possession of any part of the river is possession of the whole, for it is all held under a barony title *cum piscationibus*—at all events possession of the river practically in the mode in which it can best be possessed by a party entitled to the whole salmon-fishings thereof. I quite admit that in one sense in certain circumstances possession of a part of the barony will not always be equivalent to the possession of other parts. If there had been two rivers in the barony I would not say—I think it could not be said—that possession of the barony was equivalent to a right of salmon-fishing upon each distinct river. And so in the case of a river, salmon-fishing in the river was not held, even with a barony title, to be possession of sea-fishings 3 miles away and in no way connected therewith. But we have no such case here; this is one continuous river from source to sea. The interposition of the falls of Kilmorack on the river does not make the least difference; it does not spoil the continuity of the stream. Now, in the special circumstances of the locality, which your Lordship has fully described, and which are essential to be described, the falls make this river, in the character of its salmon-fishings, different so far as below and so far as above the falls; and I do not think anybody can contend that possession of salmon-fishings should be exactly the same in character on the one side and on the other. Practically, the fishings below the falls, which belonged partly to the monks and partly to Lord Lovat, are the most valuable part of the fishings, and they will be far more productive probably than the fishings above the falls. But this view is intensified when you look at the circumstances under which the fishings were really possessed. Not only were there falls which made it difficult for salmon to ascend except in floods, but there were immediately below the falls two sets, I think, of salmon cruives, and these were very deadly to the salmon, and very few comparatively got up; and the case becomes still stronger when we see that, besides using cruives, which was quite within his right, the Lord Lovat of these times seems to have narrowed the yairs and the cruives or meshes of the net to an extent greater than the law allowed. It is said that this was illegal, and so it was; but its illegality does not make it the less an important element in showing what the possession was. Practically the result was that Lord Lovat by means of these cruives, with the additional assistance of the illegal meshes, could take all the salmon he wanted below the falls instead of going up above them; —as expressed in argument, he took his crop of salmon at that point, but the crop he took there was that of the whole river. That, whether legal or not, is perfect possession of the whole river; and if there had been anybody above who had right to the salmon, it is impossible to imagine that they would have remained passive and would not have objected to that mode of dealing with the salmon in this river. It is a valuable salmon stream, and if it belonged to different proprietors, upper and lower heritors, or even to the Crown, I think it may be said that they never interfered in the least with the entire possession which Lord Lovat and his ancestors had of the whole salmon upon it. I have come without difficulty to the conclusion that there is here a possession and

title sufficient to give Lord Lovat the salmon-fishings in this stream. But under his title I think Lord Lovat cannot claim the salmon-fishings beyond the limits of his barony. It would require something very express in his title to give him a right to fishings locally situated, it may be, in another man's barony, or at all events in another man's lands, and, separately, I do not think there is sufficient proof of possession outside the defender's barony.

The Court therefore recalled the Lord Ordinary's interlocutor, and decerned in terms of the conclusions of the summons with respect to the rivers Affaric and Cannich. *Quoad ultra* they assoilzied the defender.

Counsel for Pursuer (Respondent)—Dean of Faculty (Fraser)—T. Ivory—Pearson. Agent—Donald Beith, W.S.

Counsel for Defender (Reclaimer)—Balfour—Mackintosh — Guthrie. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

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*Friday, March 7.**

FIRST DIVISION.

[Lord Adam, Bill Chamber.

LANDALE AND ANOTHER *v.* GOODALL AND OTHERS.

Arbitration—Extent of Reference—Where Arbiter appointed in "Matters relating to Copartnership."

Where a contract of copartnership between five persons provided that—"In all matters relating to the copartnership, whether during its subsistence or at and after its dissolution, and also in all matters relating to the meaning of these presents, where any question or dispute or difference of opinion shall arise between the partners, or between any of them, and the representatives of a deceasing bankrupt or insolvent partner, and which is not otherwise herein specially provided for, every such question, dispute, or difference shall be and is hereby referred to," &c.—*held* that this clause conferred upon the arbiter the jurisdiction of a court of law only, and that a dispute in which a majority of the partners desired to appoint a new manager (an office provided for in the contract) did not fall within the reference, as it was a matter relating to the internal arrangements of the business, and was not a question which would have been within the jurisdiction of a court of law had there been no reference.

The complainers, Mrs Goodall and others, in this suspension and interdict were the majority of the partners of the Denend Coal Company, and the respondents were Andrew Landale and Alexander Thomson, the remaining members of the company, together with Robert Frew, mining engineer, Glasgow, who was nominated arbiter in the contract of copartnership.

The company was a private partnership consisting of five members, who were all related to one another either directly or through marriage. The fifth article of the contract of copartnery was as follows—"Each of the said parties shall do his or her utmost endeavour to promote the interest of the foresaid joint trade, and for the more efficient conduct of said trade or business the partners shall appoint from time to time some qualified person, either of their own number or a stranger, to take the management thereof, to whom they shall allow from the concern suitable remuneration for his trouble, and who shall, if required, be obliged to find security." &c. The eleventh article was as follows—"In all matters relating to the copartnership, whether during its subsistence or at and after its dissolution, and also in all matters relating to the meaning of these presents, where any question or dispute or difference of opinion shall arise between the partners or between any of them and the representatives of a deceasing bankrupt or insolvent partner, and which is not otherwise herein specially provided for, every such question, dispute, or difference shall be and is hereby referred to Robert Frew, mining engineer, Glasgow, whom failing," &c.

A dispute arose with reference to the appointment of the manager, the three partners who formed the majority being desirous that the old manager should be superseded in favour of a near relative of their own. The two remaining partners resisted this, and took the matter before Mr Frew, the arbiter. The majority declined his jurisdiction, but Mr Frew decided that the matter was one falling within the reference. This note of suspension and interdict was then presented.

The complainers pleaded, *inter alia*—"(1) The appointment of a manager being a matter of ordinary administration, regarding which the partners cannot be held to have delegated their powers, and, *separatim*, being provided for in the contract, the same does not fall within the arbitration clause. (3) Upon a sound construction of the arbitration clause in the contract of copartnery, the question of the powers of a majority of the partners to appoint a manager is not a matter referred to the arbiter; and being therefore *ultra fines compromissi*, he has no jurisdiction, and should be interdicted from dealing with the question in any way."

The respondents pleaded, *inter alia*—"(2) A dispute having arisen between the parties to the contract of copartnery, in matters relating to the meaning of the said contract and to the copartnership, the clause of reference has come into operation, and the reference to Mr Frew should be allowed to proceed."

The Lord Ordinary on the Bills (Adam) passed the note and granted interim interdict without caution.

The respondents reclaimed, and argued—This was a dispute arising between the partners, and therefore was within the arbitration clause. To hold otherwise would be to deprive the clause of most of its meaning.

The complainers argued—This was a matter affecting the internal management of the business—it was not a dispute between the partners in the sense of the arbitration clause. To hold that it was would be to make the arbiter the sole manager of the concern—*Lauder* v. *Wingate*, March 9, 1852, 14 D. 633.

At advising—

Lord President—This reclaiming note really raises the whole question between the parties so far as this suspension and interdict is concerned, because if we affirm the Lord Ordinary's interlocutor there is an end of the interference of the

* Decided January 28, 1879.