Court is the sale," not the agreement. The writer of the proposal for sale declares that on acceptance within a specified time the offer "will be binding" upon him, but "the sale is made subject to the ratification of the Court." It was objected that the term "ratification" implies at least a power of rejection, and that the Court cannot properly be said to "ratify" when its action is merely formal. But the same objection might have been urged with even greater force if the word used had been "approved," and yet the Legislature itself speaks of the Court "approving" a sale under the Rutherfurd Act. I think that the word "ratification" simply means confirmation. It seems to me that that is the proper and ordinary signification of the word, and the sense in which it is used in the letter of the 19th of September 1888, and so used it has, I think, as was pointed out in the course of the argument, a real operation.

On the other hand, I do not think that the word "ratification" as used in the letter of the 19th of September is properly applicable to proceedings under the Act of 1882. I do not say that a pre-arranged sale may not be carried out under that Act with the consent and concurrence of the next heir of entail. But even then, strictly speaking, the Court would not be ratifying a sale under a subsisting agreement, though it might be sanctioning a sale on precisely the same terms. But if the next heir of entail refuses his consent and insists upon a sale by public auction the agreement is at an end—neither party is bound—the whole matter is at large.

Then it was said that there was an application on the part of the appellant which was still pending to have the entailed estate converted into entailed money, and that therefore the appellant must have been referring to those sections of the Act of 1882 under which that application was made. Very likely the appellant had some idea more or less indistinct of the powers of the Court under those sections. But it is impossible to suppose that at the time he made his offer to Mr Kennedy he had present to his mind the actual provisions of the statute, and that he contemplated the intervention of the next heir of entail. If he had that in contemplation—if by the expression "subject to the ratification of the Court" he really meant "subject to the consent of the next heir of entail," which is what the argument comes to—all I can say is that his offer was very misleading. But I acquit Sir Douglas Stewart of any intention to mislead, for I find by his letter of the 20th of October that he was surprised—and I have no doubt he was honestly surprised—to learn that in the proceedings which he then had distinctly in view the next heir of entail was entitled to appear and to prevent a sale by private bargain.

In the result, I am of opinion that the interlocutors appealed from are right, and that the appeal must be dismissed with costs.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants—Sir Horace Davy, Q.C. — D.-F. Balfour, Q.C. — Finlay, Q.C.—Dundas. Agents—Loch & Goodhart, for Dundas & Wilson, C.S.

Counsel for the Respondents—The Lord Advocate Robertson, Q.C.—Rigby, Q.C.—Graham Murray. Agents — Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

Monday, February 17.

(Before Lords Herschell, Watson, and Macnaghten.)

WARRAND AND OTHERS *v.* MACKINTOSH.

(*Ante*, vol. xxv., p. 626; and 15 R. 833.)

Fishings—Salmon Fishings — Competing Titles—Prescriptive Possession.

In an action by the burgh of Inverness and others for declarator of exclusive right of salmon fishing in a part of the river Ness from both banks from a stone C to the sea, the pursuers founded on a Crown title granted in 1591 to the town of Inverness, which conveyed the water of Ness and all partes and each bank with the whole salmon and other fishings, including the fishings in dispute. The defender was proprietor of the lands of Holme on the south bank, which lay partly above and partly below the said stone. His title was a Crown charter in favour of the Earl of Moray, granted in 1566, which conveyed half of the lands of Holme, with the salmon and other fishings "pertaining" to the same. The defender held the other half of the lands of Holme under a title from Fraser of Balnain, which made no mention of fishings. The disputed part of the fishings was below the said stone, and was opposite part of the lands held by the Earl of Moray; the upper part of the fishings was not in dispute, and lay partly opposite the Earl of Moray's feu and partly opposite Fraser's feu. Under his title from Lord Moray the defender claimed a joint right of salmon fishing along with the pursuers in the Ness *ex adverso* of Holme below the stone C. It was proved that from 1840 to 1843 the lower half of the Holme fishings and the town fishings were let to the same tenant; in 1843 the defender had been unsuccessful in an attempt to interdict the tenant of the town fishings from fishing on the Holme side of the river. It appeared from the evidence in the interdict that one of the witnesses deponed that the defender's predecessor had pointed out the stone C as the boundary of the witness's tenancy; since 1843 the defender had granted successive leases of the Holme fishings, and that the tenants had unchallenged fished salmon with net and coble down to 1853, and since then with rod and

line, to the lower boundary of Holme.

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

Held (*rev.* the judgment of the Court of Session) (1) that upon the titles alone the pursuers were entitled to prevail, for the fishings *ex adverso* the lands of Holme to which the defender had undisputed right amply satisfied the terms of the title in his favour, and there was no necessity for resorting to a construction of the grant which would conflict with the clear and unequivocal terms of the pursuers' title. (2) That there had been no use by the defender to displace the title of the pursuers.

This case is reported *ante*, vol. xxv., p. 626; and 15 R. 833.

The pursuers appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, this is an appeal against a judgment of the Second Division of the Court of Session, recalling an interlocutor of the Lord Ordinary in an action of declarator and interdict at the instance of the appellants against the respondent. The pursuers sought to have it declared that they and the defender Charles Innes had the sole and exclusive right of salmon fishing in the river Ness from both banks from the stone of Clachnahagaig to the mouth of the river, where it joins the sea at low water, with the exception of two fishings known as the Duke of Gordon's Fishing and the Friars' Fishing, and that the defender Mackintosh had no right to fish for salmon upon the river within the bounds aforesaid. The Lord Ordinary found that the pursuers were entitled, as deriving right from the Magistrates of Inverness, to the salmon fishings concluded for, and therefore found and declared in terms of the conclusion of the summons. In the Inner House the Lord Justice-Clerk and Lord Young (Lord Rutherfurd Clark dissenting), differing from the view taken by the Lord Ordinary, recalled the interlocutor, and assoilzied the defender. The appellants maintain that they, along with the defender Charles Innes, who has a small *pro indiviso* interest with them in the fishings, have the sole right of salmon fishing from both banks of the river within the waters in question. The title of the appellants and the defender Innes is derived from the burgh of Inverness. It is not disputed that if the burgh possessed the right for which the appellants contend, that right is now vested in them and the defender Innes, and their claim is well founded. The respondent does not assert any right to fish from the left bank of the river; his claim is limited to fishing from the right bank, where the river is *ex adverso* of lands which are undoubtedly his property. The Inner House have not sustained a claim on his part to the exclusive right to fish from the right bank, but have held that he is entitled to do so jointly with the appellants.

The appellants place their main reliance upon a charter of King James VI., dated 1st of January 1591. By this charter there was granted and confirmed to the burgh "Totamque et integram aquam de Ness, omnesque partes ac utrumque latus ejusdem, inter lapidem vocat Clachnahagaig et mare cum omnibus piscationibus et piscariis, tam salmonum quam aliorum piscium." It is not disputed, and indeed could not be, that this charter in terms covered the whole of the salmon fishings in question, and purposed to vest them in the burgh. But the respondent alleges that by a charter of Henry and Mary of earlier date, viz., 1st of June 1566 (which was a charter of confirmation on resignation), the fishing in question from the left bank of the river was, together with the lands of Holme, granted and confirmed to the Earl of Moray, a predecessor in title of the respondent. He asserts that there are thus competing titles of which his is the earlier in date; that the use must therefore be looked to; and that when the evidence on this point is properly weighed it establishes his case, and shows that his claim is well founded. The words of the charter upon which he relies are as follows:—"Dimidietatem terrarum de Holme cum salmonum et aliis piscariis earundem in aqua de Nys." The earliest instrument of title containing a description of the lands derived from the Earl of Moray is a precept of *clare constat* dated the 4th of September 1706, by the Earl of Moray, in favour of John Mackintosh, in which the lands and tenements held by him of the Earl are thus described—"Toto et integro dimidio villae et terrarum de Holme et in dimidio molendini de Holme astrictis multuris et sequilis ejusdem cum dimidio salmonum piscarium super aquæ de Ness ad dict terras apertans domibus edificiis," &c. It will be observed that he thus shows title to one-half only of the lands of Holme, but it is common ground that he is the owner of the whole of these lands. The other half is held under a different title of the Laird of Calder. In a precept of *clare constat* dated the 25th of March 1700, in favour of John Mackintosh, the lands are thus described:—"Toto et integro dimidio villae et terrarum de Holme et dimidio molendini earundem cum astrictis multuris ad dict terras partibus pendiculis domibus hortis aedificiis cæterisque suis pertinentiis quibuscunque solitis et consuetis," &c. There is in this instrument no mention of any fishery. The respondent relied on the evidence afforded by the description contained in certain marriage-contracts for the purpose of shewing that the part of the river the salmon fishing in which is in dispute was *ex adverso* that portion of the lands of Holme which he derived from the Earl of Moray, and not that portion which he held under the title of the Laird of Calder. And it is in this way that he seeks to establish that the titles to the fishings in question are competing titles.

Now, it may be admitted that a grant

of lands with the fishings pertaining thereto does *prima facie* mean the fishings *ex adverso* of them. But this is only the *prima facie* and not the necessary construction; that is to say, it is the construction to be put upon the grant if there be nothing to lead to the conclusion that some other construction ought to be adopted. But I think that in the present case there are strong grounds for rejecting the *prima facie* interpretation if any other reasonable one be possible. It is not to be presumed that the Crown would grant the same subject-matter to different persons by conflicting dispositions. The grant to the burgh is unambiguous, and susceptible of but one interpretation; and there is, I think, of itself enough to show that the other title ought, if possible, to receive a construction which will make it applicable to some other subject. Indeed, it appears to me doubtful whether such titles as these can properly be termed competing titles, for each may have due effect given to it, doing no violence to its language, without any conflict resulting.

In the present case it is to my mind clear that the respondent has title to one-half only of the salmon fishings of the lands of Holme in the river Ness; and the evidence shows that he has long enjoyed, and still enjoys without question, the salmon fishings *ex adverso* one-half of the lands of Holme which border on the river. It is argued on his behalf that the Court is not justified in investigating his title to those fishings, which are not in dispute, or in inquiring by what right he enjoys them. I cannot concur in this view. The title under which he claims the fishings in dispute is a grant of one-half of the lands of Holme with one-half of the fishings pertaining to those lands; and in construing this grant I think we are clearly entitled to ask what were the lands of Holme and what salmon fishings have been enjoyed with them? And it appears to me that the fishings *ex adverso* the lands of Holme to which he has undisputed right amply satisfy the terms of the title, and that there is no necessity for resorting to a construction of the grant which would conflict with the clear and unequivocal terms of the grant to the burgh. It is urged on behalf of the respondent that it is improbable that the fishings opposite lands not comprised in the grants to and from the Earl of Moray would be included in such grants. I may observe that if the plan No. 236 of process could be relied on, the whole of the fishings, both those enjoyed without dispute and those which are now in controversy, are *ex adverso* of lands held under the Moray title; but there does not appear to be any satisfactory proof of this, and assuming it not to be so, the point does not in my opinion involve any difficulty. It is conceded that a fishery is *separatum tenementum*, which may be held, and is not unfrequently held, apart from the ownership of the adjacent land. This seems to me to be a sufficient answer to the suggested difficulty. Then it is contended that the true meaning of the grant of "one-half of" the salmon fishings belonging to the lands of Holme is, that it confers the right to that half of the river from bank to bank, which is next the lands of Holme. Without saying that such a construction would never be proper, I do not think it is the natural or legitimate one in the case of the grant we are dealing with, where the words are such as we find there, and immediately follow a grant of one-half of the lands of Holme, and where such a construction would conflict with another title.

I have arrived then, with the Lord Ordinary, at the conclusion that, if the titles alone be considered, without reference to the oral evidence relating to the fishings in dispute, the claim set up by the pursuers is established. And I find nothing in the oral evidence which militates against this conclusion. In the year 1843, the respondent, who was then a minor, filed a petition before the Sheriff of Inverness, alleging a right to the salmon fishing opposite the lands of Holme, and that the then respondent, Archibald Tait, had fished for salmon on the Holme side of the river, and drawn his nets on to these lands, and praying an interdict to prohibit Tait from encroaching on the petitioner's right of salmon fishing by fishing on the Holme side of the river. On this petition the Sheriff-Substitute granted an interim interdict. A considerable body of evidence was led for the respondent in these proceedings, but no evidence was led for the petitioner. How this came about does not to my mind very clearly appear. But I lay no stress upon the circumstance. It is sufficient to say that the interdict remained in force, and the matter lay dormant for several years, until under a process of wakening the interlocutor was in the year 1853 recalled. The circumstances under which this took place are not before your Lordships. The proceedings in the Sheriff Court are only of importance in two respects. The evidence there led was used by the appellants as evidence in the present suit, and the existence of the interdict renders the user proved between 1843 and 1852 of little or no importance. There is another circumstance which diminishes the importance of the evidence relating to the earlier part of the time covered by the evidence. It appears that cruives then existed in the lower reaches of the river, which were made so as to prevent all fish above seven or eight pounds in weight getting through them. And it would seem that it was only after floods that fishing with coble and net took place in the river where the fishings are in dispute. That the appellants' predecessors in title did fish there as far back as 1804 appears certain, and that they hauled the net in indiscriminately on both sides of the river. I need not dwell upon this, however, since it appears to have been conceded in the Inner House that the only question was whether the respondent Mackintosh had a concurrent right of fishing in these waters, and that he had such right is all that the majority of the Court have decided in his favour. On this point evidence of great importance was given by John Macnaughton, one of the witnesses examined in 1843. He took in 1816 a lease

of the Holme fishings for one year from Angus Mackintosh, a predecessor of the respondent, at a rent of £10, and according to his statement "when the deponent took the fishings Angus Mackintosh pointed out the march to him, that is, the march between the town's fishings and the Holme fishings. He told him that the place so pointed out was the march, and that he, Mr Mackintosh, could not give the deponent permission to go further down the river, and that the deponent could not fish further down unless he had permission from those who had the fishings below." The march the witness identified as the stone of Clachnahagaig on the north side of the river, nearly opposite the cottage and the fir trees on the south side. It was attempted to diminish the force of this evidence by the production of an entry of 23rd July 1816 in the books of Angus Mackintosh, whereby he acknowledged the receipt from Mr Macnaughton "for liberty to fish in part £5," the suggestion being that Macnaughton did not enjoy the whole of the Holme fishings, but I think it is obvious that the words "in part" meant merely that the £5 was in part payment, and not in full discharge, the agreed rent being £10. There is scarcely any evidence of fishing by the respondent or those claiming title under him in the disputed waters prior to the date of the interdict, except that Dr Nicol who resided at Holme Mills was seen fishing there. After the recal of the interdict, such fishing as there was appears to have been by rod and line; before that date a coble was occasionally used. I do not lay any stress upon the fact that the user was by rod and line only, because it appears to me to have been occasional only, and very limited in amount, and far from sufficient to show that the respondent or his predecessors have been in point of fact in possession of the fishings now claimed as to countervail or displace the title which the appellants establish under the charter to the burgh to all the salmon fishings on that part of the river Ness in respect of which the present controversy has arisen. I am not unmindful of the fact that the right to fish in the disputed waters was included in several leases of the Holme fishings, but the right thus granted not being exercised, or very rarely so, I cannot attach any importance to the mere granting of the leases. Upon the whole, I think that the appellants have made out their case, and that the interlocutor appealed from must be reversed, and the interlocutor of the Lord Ordinary restored. The respondent must pay the costs here and in the Court below.

LORD WATSON—My Lords, the respondent and his ancestors have for nearly three centuries been proprietors of the estate of Holme lying on the west side of the river Ness, which has a northerly course from Loch Ness to the sea. These lands commence at a point on the river side near to Ness Cottage, and thence extend up the river for about two miles to a point where they march with Lord Saltoun's property on the south. About midway between these two points there was in olden times a large stone visible on the west side of the river, which went by the name of Clachnahagaig. It stood at some distance from the water, and is now buried in the embankment of the Caledonian Canal. There is no question raised in this case with respect to the salmon fishings opposite to that portion of the estate which lies to the south of Clachnahagaig, but the appellants and the respondent each claim exclusive right to the salmon fishing *ex adverso* of the lands of Holme between Clachnahagaig and their southern boundary, the respondent claiming alternatively a right in common with the appellants.

The estate of Holme was acquired in two halves, the one from the Earl of Moray with salmon fishings, and the other—to which no right of fishing is attached—from the Laird of Calder, now of Balnain. The only Moray title now produced is a Crown charter in favour of Earl James and his spouse Agnes Keith, and the survivor of them, dated 1st June 1556, of the entire *comitatus* of Moray, containing amongst other subjects enumerated "dimidietatem terrarum de Holme, cum salmonum et aliis piscariis earundem in aqua de Nyss." In the year 1618 Angus Mackintosh, rector of Kingussie, was infeft in the entire estate "tam de Morravie comite quam de domino de Calder tenet." The earliest description of the Calder half of the estate occurs in a sasine of 1700, in favour of John Mackintosh of Holme, in these terms—"Toto et integro dimidio villae et terrarum de Holme et dimidio molendini earundem." The earliest description of the other half, after it came into the possession of the Mackintosh family, is to be found in a precept of *clare constat* by the then Earl of Moray, dated 4th September 1706, in favour of the same proprietor, which is in these terms—"Toto et integro dimidio villae et terrarum de Holme et in dimidio molendini de Holme astrictis multuris et sequelis ejusdem cum dimidio salmonum piscarium supra aqua de Ness ad dictas terras apertans." The appellants derive their title from the burgh of Inverness, whose earliest charter extant is from King James the Sixth, and bears date the 1st January 1591. It does not profess to make any new grant, but simply purports to ratify and confirm all estates, rights, and privileges already granted to the burgh by the predecessors of His Majesty, including "totamque et integram aquam de Ness omnesque partes, ac utrumque latus ejusdem, inter lapidem vocat Clachnahagaig et mare, cum omnibus piscationibus et piscariis, tam salmonum quam aliorium piscium." The charter confers right to fish with net and coble, and also to maintain and repair cruives according to use and wont. The burgh feued out its fishings, in half and quarter cobles, to the extent of all of four cobles; and in a question with the feuars the Court of Session decided in 1775 that the whole interest of the burgh in the salmon fishings between Clachnahagaig and the sea, including the privilege of cruive fishing, had been transmitted to its dis-

ponees in feu. Of these fishings three cobles and two-thirds of a coble are now vested in the appellants, who are the pursuers of this action. The remaining third is held by Mr Innes, who was cited by them for his interest, but has taken no part in the litigation. The appellants have a title flowing from the Crown, which describes the precise limits of the grant. Its boundary on the south is a line drawn across the river at the stone of Clachnahagaig, and on the north is the sea; and between those *termini* their right of fishing extends to both sides, and every part of the water of the Ness, and must by necessity include the fishings in dispute. The respondent relied upon the fact that within these limits there are two fishings—the Duke of Gordon's and the Friar's Shot—which did not belong to the burgh in 1591, and are still held as separate tenements. That fact, he argued, was in itself sufficient to show that the terms of the charter of 1591 cannot raise a presumption that the disputed fishings were not at its date owned and possessed by Lord Moray or his disponee; but assuming the contention to be well founded, it does not go far to advance the respondent's case. It is clear that the burgh charter would have carried both the Duke of Gordon's fishing and the Friar's Shot if their owners had not been able to instruct a preferable title. The right which the charter gives to the appellants cannot be lost by their non-user, although it may be ousted in whole or in part, either by an express grant earlier in date or by a title of any date which, though not express, is capable of being construed—and has been construed—by possession following upon it for the requisite period. The appellants' title must therefore prevail, unless the respondent can establish that he has an earlier right which expressly includes the Holme fishings from Clachnahagaig to Ness Cottage, or otherwise that his title is not only capable of being applied, but has been applied, to these fishings by actual possession.

The Moray charter of 1566, which is twenty-five years older than the burgh charter, proceeded on a resignation of the *comitatus* by Earl James for new infeftment in favour of himself and spouse jointly with survivorship. No sasine upon either charter has been produced, and so long as they continued to be personal writs they could not in any legal sense give rise to competing rights of salmon fishing. But the parties to this appeal argued on the footing that both grants were feudalised shortly after their respective dates, and I shall therefore deal with the case upon that assumption. Both charters being writs by progress, it must necessarily be held that the Moray grant of salmon fishings is the earlier of the two. The question remains whether the charter of 1566, either expressly or by necessary implication, includes the fishings in question, so as to make it not only *prior tempore* but *potior jure* in competition with the charter of 1591. A royal grant of salmon fishings, described by precise and definite limits, constitutes a bounding charter, and the grantee cannot by usage extend his right beyond these limits. When a grant is of lands bordering on a non-tidal river like the Ness, it carries the river bed *usque ad medium filum aquæ*. If the lands be conveyed "with the salmon fishings of the same," the grant will presumably carry the fishings up to that middle line. But it is not a definite boundary, and just because it is not so, the grantee may show that his right extends from his own bank beyond the *medium filum*, as was held in *Earl of Zetland* v. *Tennent's Trustees*, 11 Sess. Cas. (3rd series) 469. In like manner the grantee's right may be limited by possession under a charter in similar terms to the proprietor of the opposite *ripa*. In this case there is no reliable evidence to show in what shape the lands of Holme were owned and possessed by the Earl of Moray and the Laird of Calder during the 16th century. The descriptions in the earlier titles do not suggest that each of them was in possession of a divided half, either of the "Villa de Holme" or of the Mill. The respondent states his belief that "the portion held from Lord Moray includes the whole river frontage," and his agent Mr Charles Innes gives evidence to the same effect, but his testimony is conjectural, and that of Mr Innes is founded upon descriptions occurring in writs by progress, the earliest of which bears date a hundred and thirty years later than the first sasine in favour of the family of Mackintosh. Assuming, however, that the whole riparian land of Holme was held and posesssed in shrievalty by the Earl of Moray, that circumstance does not, in my opinion, materially affect the merits of the present question. It might have been of some consequence if the respondent's title had been to the salmon fishings "attached to" or "*ex adverso* of" a several half of the lands belonging to Lord Moray. Even in that case it might not have been conclusive in his favour. But Lord Moray's title is to one-half of an integer comprising the whole fishing attached to the entire estate of Holme; and the respondent's own titles deduced from the charter of 1566 give him in the first place one-half of the lands of Holme, and in the second place one-half of the fishing upon the water of Ness pertaining to the lands of Holme.

In my opinion the salmon fishings of or pertaining to the lands of Holme must *prima facie* be taken to be the fishings *ex adverso* of these lands from bank to mid-channel along the whole length of their river boundary, and the evidence shows that no part of the river to the west of its *medium filum* is included in the Holme fishings. The respondent has right to a half of these fishings and no more. That is the construction put upon his titles by all the Judges of the Court below. Lord Young, who with the Lord Justice-Clerk (Lord Moncreiff) formed the majority of the Second Division, says—"With respect to the fishing, I think he has, under the Crown grant to Lord Moray, regularly and properly transmitted to him a title to one-half of the whole fishings pertaining to the whole lands of Holme. There is no grant of fishings in the title held under

Balnain, and his title to fishings, so far as we see, stands upon the Crown grant of the Earl of Moray, properly transmitted to him, of one-half of the fishings pertaining to the whole lands of Holme,"—15 Sess. Cas. (4th series) 844. Now, half of the salmon fishings *ex adverso* of lands on one side of a river may mean one or other of two things, either a *pro indiviso* right to a moiety of the fishings all along their frontage (for in such a case I can hardly conceive the possibility of longitudinal division), or the whole fishing along such part of the frontage as will, having regard to the suitability of the water for fishing purposes, fairly represent a moiety. Neither the charter of 1566 nor the subsequent titles define which of these things is meant; and it is obvious that a moiety of the Holme fishings in either sense would satisfy the description which they give of the respondent's right. It appears to me that the indefinite right of the respondent, though earlier in date, cannot prevail over the express right of the appellants, so long as it is not shown that the former either did not or could not apply to a half in severalty. But it is an undisputed fact that the fishings to the south of Clachnahagaig and outside the limits of the appellant's grant are in extent of frontage and intrinsic value fully equivalent to a moiety of the whole fishings of Holme, and it is also a fact, established by the evidence and not disputed, that the respondent and his predecessors have from time immemorial had the exclusive possession of the entire salmon fishings of Holme between Clachnahagaig and their southern boundary. Both parties led proof for the purpose of instructing their counter averments of exclusive possession of the fishings in dispute. The Lord Ordinary (M'Laren) thought the proof was not conclusive in favour of either of them, and he found and declared that the appellants have the exclusive right by virtue of their title derived from the burgh charter of 1591. His Lordship does indicate an opinion that the "greater part" of the salmon fishing confirmed by that charter must have been in the possession of the burgh from very early times, but the real ground of his judgment appears to me to be expressed in these words—"The grant to the Magistrates includes both banks of the river from Clachnahagaig downwards; but there is a reasonable extent of river boundary above the stone of Clachnahagaig which the proprietors of Holme have enjoyed without dispute, and this fishing includes what all the witnesses agree in declaring to be the best pool on the Ness. It appears to me, therefore, that there is no contradiction between the two titles. The title of the Magistrates ought to receive effect according to its boundaries, and sufficient effect is given to the conveyance of the fishings of Holme to Lord Moray, by holding that conveyance to apply to so much of the water as has admittedly been possessed by the proprietors of Holme without dispute"—15 Sess. Cas. (4th series) 839. The Second Division recalled the judgment of the Lord Ordinary and assoilzied the respondent. The majority were of opinion that the evidence showed joint possession by the parties under their respective titles of the Holme fishings below Clachnahagaig, and consequently that no effect could be given to the conclusions of the action which are framed on the footing of the appellants having the exclusive right. Lord Rutherfurd Clark differed, being of opinion that the appellant had not proved possession of the lower fishings, and that the exclusive possession of the upper fishings had by himself and his predecessors was sufficient to identify them with the subject of grant in Lord Moray's charter. The practical effect of the judgment of the Second Division is to leave the respondent in possession of three-fourths, whereas his titles only give him a-half of the salmon fishings of Holme.

It appears to me that such a result can only be reached in one or other of these two ways, either by holding that his title to a moiety has been enlarged by prescriptive possession, or that his title, as construed by user, embraces half only of these fishings along their whole frontage, and that he is consequently, in the exclusive possession of part of the upper fishings without any title. The respondent does not allege that he or his ancestors were ever vested with a right to fishings of Holme other than that which they derived from Lord Moray, and it is in my opinion an idle suggestion that their acts of possession in the upper waters were intended to be, and were in fact partly with and partly without title. I agree with Lord Rutherfurd Clark in thinking that their exclusive possession of the fishings above Clachnahagaig can only be attributed to their title from Lord Moray, and that it is sufficient to identify these fishings with the half pertaining to the lands of Holme described in the charter of 1566 and subsequent writs. Entertaining these views I think it admits of serious question, whether the respondent's titles afford a legal basis for acquiring by prescriptive usage part of the fishings below Clachnahagaig in addition to the half which he has got above. But I do not find it necessary to decide the point, because on the assumption that the respondent's title is capable of being so extended the evidence of possession adduced by him does not appear to me to be sufficient for that purpose.

The evidence as to possession goes back to the year 1804, the older portion of it consisting of the depositions of witnesses examined in a process of interdict brought before the Sheriff Court of Inverness-shire in 1843 by the respondent, then a minor, with the consent of his curatrix, against the tenant of the fishings within the burgh grant. These fishings were principally worked by means of cruives situated below the north march of the Holme estate until 1824 or 1825, when they were removed. So long as these fixed engines were maintained they intercepted all the larger fish, no salmon above seven or eight pounds weight being able to pass

them except during spates. Between 1804 and 1820 the cruive fishers were in the habit, either after a flood or when the river was very low, of fishing both sides of it with hang-nets up to Clachnahagaig, and there is no evidence of any fishing by the proprietors of Holme or anyone in their right. Counsel for the respondent argued that hang-nets as described by the witnesses are forbidden by the old Scottish statutes, and probably that is so, but the use of a destructive and illegal method of fishing, whilst it cannot avail those who practise it for the purpose of establishing a presumptive right, may nevertheless go a long way to negative the possibility of legal possession by anyone else. There is also the uncontradicted testimony of one witness to the effect that about the year 1817 he took a lease of the Holme salmon fishings for one year from the proprietor Angus Mackintosh, who then stated that he could not give his tenant right to fish below Clachnahagaig. The evidence applicable to the period between 1820 and 1840, or about that date, is of a neutral character. During that period the tenants of the Holme fishings were also lessees of the whole or a *pro indiviso* share of the burgh fishings, and it is impossible to discover to which of their leases such possession as they had of the fishings in the disputed water was attributable. It appears from the evidence on both sides that the disputed water is very inferior to the waters both above and below it, and to whichever right it belonged was not likely to be much fished either with net or rod. That circumstance justifies the observation made by the respondent's counsel that in any question of user the amount of possession expected or required cannot be the same as if these disputed fishings had been of relatively greater value. After the system of double tenancy came to an end disputes arose with regard to the Holme fishings below Clachnahagaig, which resulted in the petition for interdict already referred to. The Sheriff-Substitute on 3rd March 1843 made an order for service upon the defender, and at the same time granted an interim and *ex parte* interdict against his fishing or drawing his nets upon the Holme side of the river. A record was made up and closed, and on the 26th March 1843 the Sheriff-Substitute allowed the defender a proof of his averments, and to the petitioners a conjunct probation. A proof was led by the defender, the petitioners being represented by their agent. No proof was adduced by the petitioners, and the process fell asleep, but was resuscitated by a summons of wakening at the defenders' instance in 1852. It is admitted that in the year 1853 the interim interdict was recalled, the parties to this case stating in the course of the proof before the Lord Ordinary that they "were not agreed as to the terms, if any, upon which it was recalled." The respondent in his evidence gives an explanation of the circumstances which prevented him from attending to his interests in that litigation. The only relevant fact deducible from the course of these proceedings is that the respondent obtained an interim interdict in 1843, which was recalled in 1853, from which it necessarily follows that he cannot found upon his possession whilst the interdict stood as evidencing the right which he now asserts. This part of the case is accordingly narrowed to the state of possession in the interval between 1853 and the month of March 1887, when the present action was brought—a period which considerably exceeds the time now required for prescriptive possession.

In the Inner House there was much discussion as to the value of possession by angling only. Lord Rutherfurd Clark (15 Sess. Cas. (4th series) p. 852) expressed his opinion "that when salmon fishings can be fished by net and coble, mere angling cannot establish a prescriptive right, and in support of that proposition his Lordship referred to *Richmond* v. *Seafield*, 8 Sess. Cas. (3rd series) p. 530. The Lord Justice-Clerk held that if a Crown grantee of the salmon fishings found it more profitable to fish with the rod, that would be as good possession as if he had fished with net and coble, but his Lordship suggested a doubt whether angling for salmon will suffice to enlarge a right *cum piscationibus* into a right of salmon fishing. Lord Young indicates that in his opinion a general grant of fishings may be explained into a grant of salmon fishing by such commercial and profitable use as can be had of it, as, for instance, by letting it out for rod fishing at a large rent. I think the law is too broadly stated by Lord Rutherfurd Clark, if a very strong qualification be not implied in the words "mere angling." In *Stewart* v. *Macbarnet*, L.R., 1 S. and D. 390, Lord Westbury expressed his opinion that although it is true in the law of Scotland, as an affirmative proposition, that an ambiguous grant of *piscatores* alone may be interpreted into a *jus piscandi salmonum* by evidence of user of net and coble, yet he did not apprehend the law of Scotland to warrant the negative proposition that no evidence whatever except user by net and coble would be sufficient to establish it. That statement of the law was made *obiter*, but Lord Colonsay took occasion to express his concurrence (L.R., 1 S. and D. 391). I have no doubt that the noble Lords referred to fishing with the rod, but I do not think they meant to suggest that any kind or amount of rod fishing would be sufficient. If a proprietor holding a grant *cum piscationibus* by preventing intrusion upon his water was enabled to let it at a rent of £100 a-year for angling merely, instead of letting it to net and coble fishers for £50, I should certainly be of opinion that he was in as full and effectual possession of the right of salmon fishing as if he or his tenant had fished with net and coble. Moreover, I see no reason for holding that the doctrine ought to be confined to the case where a proprietor lets his fishings. But I do not think that occasional angling will be sufficient, or that the use of the rod will be of any avail, when it is practised in competition with net and coble fishing. The latter is by far the more destructive method, and besides

the mere slaughter of the fish it seriously interferes with an angler's sport. That appears to me to have been all that was decided in *Richmond* v. *Seafield* (8 Session Cases, 3rd Series, 530), where the facts were that A, a riparian owner, under a charter of barony *cum piscationibus*, fished from his own bank of the Spey with the rod, whilst B, holding a Crown grant of the salmon fishings upon the river Spey, according to use and wont, fished from A's bank with net and coble; and it was held that B had, and A had not, been in possession of the fishings *ex adverso* of the lands of the latter.

The respondent has no occasion to found upon his possession for the purpose of converting a general grant of fishing into a right to fish for salmon. He relies upon possession as construing his title and evidencing the particular salmon fishings to which it applies. For that purpose I think that proof of user by rod and line, if regular and effective, and not disturbed by others fishing with net and coble, will be sufficient, and it therefore becomes necessary to consider the nature and extent of the possession had by him since 1853. The Holme Fishings were let by the respondent from 1853 till 1862 to Mr Wicks, from 1863 till 1867 to Mr Reeves, and from 1868 till 1879 inclusive to Mr Denison. In all these cases the leases granted by the respondent expressly included the disputed fishings as well as those above Clachnahagaig. When a lease is an ancient document there is a presumption, more or less strong, that possession followed upon it; but the terms of a modern lease cannot prove the fact of possession, although possession by the tenant being otherwise proved, they will show the title under which it was enjoyed. Mr Wicks regularly fished the upper pool of Holme, but the only evidence of his fishing in the disputed water is that of two witnesses, one of whom says that he "has seen" Mr Wicks fishing there, but how often, and whether with net or rod, he does not say, and the other depones in terms equally vague—"I have seen him net the river down to Ness Cottage." After Mr Wicks left, the fishing tenants only used rod and line. During Mr Reeves' lease one witness says that he saw him fishing below Clachnahagaig. Mr Denison's lease began in 1867, and neither he nor anyone in his right fished below Clachnahagaig. In 1878 and in 1879 the respondent, seeing that Mr Denison did not care about fishing in the lower water, gave Mr Innes, his agent, leave to fish there, and on the expiry of Mr Denison's lease Mr Innes became tenant of these lower fishings, and continued to be so until this action was brought. Mr Innes does not appear to have fished much, but he gave permission to others, who angled in his right. These facts might have been of importance had it not been for the fact that ever since 1878 Mr Innes has been the owner of a share of the Bught right to the extent at first of one-sixth and afterwards of two-sixths of a coble. Mr Innes, it is true, depones that he always gave his licensees distinctly to understand that their permission was to exercise the right derived by him from the respondent. In these circumstances I am of opinion that neither his own angling, nor that of the licensees, to whom Mr Innes made such an intimation, can be regarded as legal possession of the disputed salmon fishings by the respondent. The appellants could not be expected to challenge either their co-owner or persons known to be fishing with his leave. It therefore appears that there has been no net fishing in the disputed water since the expiry of Mr Wicks' lease, or, in other words, for five-and-twenty years before this action was raised; and the evidence does not suggest that Mr Wicks used the net on many occasions. During the next five years it is proved that Mr Reeves, the tenant, was seen "fishing," by which I understand that he was angling, but whether he fished every year, or with anything approaching to regularity, does not appear. Then for the ten years from 1868 to 1877, both inclusive, there is no evidence of possession; and from 1878 till the date of the action there is nothing proved beyond occasional angling for salmon by Mr Innes, and these persons to whom he gave permission, which cannot in my opinion be regarded as a legal assertion of the respondent's right to the fishing, either exclusively or in common with others. For these reasons I am of opinion that the judgments appealed from ought to be reversed, and that the appellants ought to have decree in terms of their summons, and that a remit ought to be made to the Court of Session to fix the precise boundary of the fishings at Clachnahagaig, before final decree is pronounced.

LORD MACNAGHTEN—My Lords, I have had the advantage of reading the two opinions which have just been delivered, and agreeing as I do with your Lordships, both as to the construction of the documents and as to the result of the evidence, I do not desire to add anything. I concur in the motion.

Their Lordships reversed the interlocutor appealed from, and restored that of the Lord Ordinary with directions as to the boundary.

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