

cessors in office to indemnify, free, and relieve the said Major Thomas Hamilton (the feuar) and his foreseids in all time coming."

It was maintained by the defenders that this obligation of relief only applied to public burdens imposed in virtue of laws existing at the date of the contract; and the Lord Ordinary (KINLOCH) gave effect to that contention.

The pursuer reclaimed.

CLARK and JOHN HUNTER for her.

YOUNG, GIFFORD, and ASHER for defenders.

The Court, after overruling an objection taken in the Outer-House to the pursuer's title, adhered to the principle of the Lord Ordinary's judgment, holding the same to be settled by the case of *Scott v. Edmond*, 12 D. 1077. The case was continued that parties might be heard on the application of this principle to the particular burdens referred to in the summons, and also as to the question whether the obligation included burdens payable by tenants and occupiers.

Parties having been heard on this point, the Court held that the pursuer, under the clause in the feu-contract founded on, was entitled to be relieved of poor-rates payable by her as proprietor, and also of cholera money, which was an additional assessment under the Poor-law Act; but they held that the clause did not apply to poor-rates or other burdens payable by tenants or occupiers, nor to constabulary assessments, assessments for general prisons, repairs on Inveresk Church, and statute-labour assessment. With regard to expenses, neither party was found entitled to expenses prior to the date of the Lord Ordinary's interlocutor, and the defenders were found entitled to expenses subsequent to that interlocutor.

Agents for Pursuer—Morton, Whitehead, and Greig, W.S.

Agents for Defenders—Paterson and Romanes, W.S.

Tuesday, February 25.

EARL OF GALLOWAY *v.* BIRREL AND
OTHERS.

Salmon-Fishings—Express Grant—Barony Title—Possession—General Clause of Fishings. Interim interdict granted in favour of a title setting forth possession for forty years upon an express grant of salmon-fishings, as against an allegation of possession upon a general clause.

This was a suspension and interdict brought by the Earl of Galloway against William Birrell, gamekeeper, Burnfoot, Annan; Thomas M'Gowan, fisherman, Wigtown; and John Graham, fisherman, Cumberland. The note had the following prayer:—"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondents, by themselves, or their servants, or other persons authorised by them, or any of them, from entering upon the complainer's lands and estates in the county of Wigtown, lying between the lands of Grange of Cree and the march of Crugleton inclusive, and the leechy ground or shores *ex adverso* thereof, or on any part or portion thereof; and particularly on the sands of the lands of Grange of Cree, Barsalloch, Burrowmoss, Kirklands, Jedderland, and Maidland, the sands now called Wigtown sands, and the sands of Baldoon, all parts of the said lands and estates, or on any one or more of

them; and from erecting stake nets, coop nets, half nets, or other fixed engines or machinery thereon, for the purpose of taking salmon, trout, or other fish, or for any other purpose whatever; and from fishing for salmon, trout, or any other kind of fish in the rivers Cree and Bladnoch, and bay of Wigtown, adjacent and opposite to the complainer's said lands and estates, and along which the same extend, and in the burns and streams in the said lands and estates communicating with the said rivers and bay; and from otherwise troubling, molesting, or interrupting the complainer in the peaceable possession and occupation of the same; or to do otherwise in the premises as to your Lordships shall seem proper."

The complainer relied upon immemorial possession upon titles giving him an express grant of salmon-fishings in the river Cree where it runs along the lands of the Grange of Cree and others in the parish of Penninghame; of salmon-fishings in the water of Bladnoch, in the barony of Baldoon; and of salmon-fishings in the water of Bladnoch, which runs through or adjoins his lands in that parish and of Innerwell.

The respondents, on the other hand, deduced their title from the town of Wigtown, in respect of certain old charters in favour of the burgh, upon which, although they contain no express grant of salmon-fishing, it is said that immemorial possession has taken place. The respondents connect themselves more particularly with this title by means of the following statements:—"On the 18th of December 1867, the Town Council of Wigtown advertised that their fishings in the bay "of Wigtown will be let for one year, by public roup, within the Court-house of Wigtown, on 2d January next. The articles of let may be seen in the town-clerk's office." The complainer and his agents were fully aware of this, as appears from the complainer's agents' letter, dated 26th December 1867, to the provost of Wigtown, quoted in article 9th of the complainer's statement; but though the complainer, by that letter, threatened declarator and interdict, he presented no interdict against the provost, magistrates, and council, but contented himself with bringing his action of declarator, 28th December, and with causing the foresaid letter of his said agents to be read by another agent at the roup. He had ample time and opportunity to present a suspension and interdict either in this Court or to the Sheriff of Wigtown; but the provost and council, as they believed his threat to that effect would be followed up, lodged a caveat in the Bill Chamber; and they would have been heard against any application of interdict. He made none, though so easily in his power; but put in this suspension and interdict, a fortnight after the let, against the tenants *alone*; and, though the Bill Chamber clerks believed the suspension was affected by the caveat, the complainer's agents objected to any notice being sent to the town council's agent under the caveat, and interim interdict was thus obtained against the tacksman in a matter which is the landlord's interest, and, as respects the right and property, exclusively so. At the roup, on the 2d of January 1868, the fishings were let by the town council, referring to their said titles and decree of declarator, in four lots, conform to articles of roup, as previously advertised publicly, signed by the provost for himself and the magistrates. These lots comprehended:—Lot I, commencing on the south point of the farm of Grange, and running along

the Cree to its junction with the Bladnoch, and from the mid-stream of the Cree westward in the bay. Lot II, commencing with the junction of the Cree and Bladnoch, and running along the north side of Bladnoch. Lot 3, commencing at their junction, and on the south of the Bladnoch, and running westward on the south of the Bladnoch. Lot IV, commencing on the south of the last mentioned lot from the mid-stream of Cree, and on the south of Bladnoch. All as more fully described in the articles of roup, and sketch or plan there referred to. The other fishings contained in the decree of declarator were not let, but retained by the town council. Lot first was taken by the respondent Birrell at the rent of £72; lots second and third by the respondent Thomas M'Gowan at rents of £36 and £52; and lot 4th by the respondent John Graham, at a rent of £10. All these salmon fishings so let and retained, lie in the bay of Wigtown, and are quite independent of all rights, either of the complainer himself, or his ancestors. Their rights, whatever that may be, are to fishings in the rivers lying inland, and at a distance from the bay. The magistrates and town council by themselves, and the burghesses of Wigtown, have been in the immemorial possession of all the fishings so let and retained. The respondents are prevented from preparing and placing their nets by the complainer's present proceedings, and are suffering serious damage in consequence, for which they beg leave to reserve their action against him.

The Lord Ordinary (MURE) pronounced the following interlocutor and note:—

"*Edinburgh, 4th February 1868.*—The Lord Ordinary, having heard parties' procurators, and considered the note of suspension, answers, and productions: Passes the note, and continues the interim interdict on caution; and in the meantime ordains the complainer to keep an authentic account of the number and weight of the fish caught by him, or by his tenants, within the limits of the fishing ground claimed by the respondents under their lease." "DAVID MURE."

"*Note.*—The discussion before the Lord Ordinary was confined to the question whether the interim interdict should be recalled, as no objection was made to the note being passed; and, upon considering the titles and proceedings, he has come to be of opinion that the circumstances of the case require that the interdict should be continued in the meantime, subject to the conditions which he has attached to it for the protection of the respondents, should it eventually be found that they have acquired a valid lease to any portion of the salmon-fishings in question.

"*Ex facie* of the titles produced by the complainer as set out in article 1st of the note of suspension, he appears to be infeft in an express grant, 1st, of salmon-fishings in the river Cree, where it runs along the lands of the Grange of Cree, and others, in the parish of Penninghame; 2d, of salmon-fishings in the water of Bladnoch, used and wont in the barony of Baldoon, in the parish of Kirkinner; and, 3d, of the salmon-fishing in the said water of Bladnoch, in the parish of Wigtown, where it runs through, or adjoins, certain of his lands in that parish—one portion of which lands is described as bounded on the east by the sea or water of Bladnoch. And although these titles do not contain any express grant of salmon-fishings in the lands 'of Innerwell and Crooks,' and parts of 'the same,' it appeared from the minute of set, founded on at

the discussion before the Lord Ordinary, that, since the year 1843, the salmon-fishings of Innerwell in the bay of Wigtown had been let by the complainer, under that descriptive name, and as extending along the 'shore of Baldoon towards the point of Crooks, but not approaching within one thousand yards of any part of the river Bladnoch above its junction with the Cree.' And it also appeared, from other documents which were founded on, that the complainer had for some time been in use to let his fishings in the water of Bladnoch and river Cree, although it was alleged that this was for the purpose of rod fishing only.

"The title founded on by the respondents on the other hand, which is that of the town of Wigtown, does not contain any express grant of salmon-fishing. But it is alleged that, in virtue of that title, the magistrates and council of the burgh have, for time immemorial, possessed and enjoyed the exclusive right of salmon and other fishings in the whole bay of Wigtown, from and along, *inter alia*, the lands of Grange of Cree, Barsalloch, and Borrowmoss, which lands appear to be all included within the titles of the complainer; and also along the whole of Borrowmoss, Wigtown, and Baldoon sands, southwards to the Irish Sea.

"In this state of the respondents' averments, the Lord Ordinary does not think he would be warranted in throwing out of view, in dealing with the question of interim possession, *First*, the fact, strongly relied on by the complainer, that, in the action at the instance of the *Magistrates of Wigtown v. M'Clement*, January 15, 1834, in regard to a right to levy customs beyond the territory of the burgh, it is distinctly averred, on the part of the pursuers, in the closed record, that, in so far as the pursuers know, the 'town of Wigtown never had any right of salmon-fishing in the water of Cree;' and, *Second*, the somewhat peculiar nature of the possession which the town is alleged to have had of the salmon-fishings in question, which was not that of letting them to tenants, for it is not alleged that they were ever let on lease till January last, or that of employing men to fish them for the benefit of the town, but simply that of allowing the inhabitants of the burgh of Wigtown to fish in the bay in proximity to the streams of Cree and Bladnoch.

"Having regard, in these circumstances, to the state of the respective titles and to the terms of the respondents' lease, it appears to the Lord Ordinary that the interim interdict cannot be recalled without the risk of exposing the complainer and his tenants to serious interference in the exercise of a right of salmon-fishings which they appear to have enjoyed for a considerable period. Because, under the lease founded on, Lot I. is described as including fishings on the 'Grange of Cree,' but these seem to be the subject of express grant in favour of the complainer. Lots II. and III. are so described as to extend to fishings in the water of Bladnoch, where it runs along the farm of Maitland, to which also the complainer has an express grant; while Lot IV. appears to be so described as to comprehend fishings along the sands of Baldoon, to a point situated a very considerable distance to the south of that, up to which the Innerwell fishings are shown by the lease to have extended since the year 1843.

"The Lord Ordinary has therefore felt that the only safe way of regulating the interim possession, will be by continuing the interim interdict, but only on full caution, which is offered by the complainer, and under an injunction to keep an ac-

count of the fish taken within the limits covered by the lease of the respondents. If the respondents succeed in establishing the validity of their lease, they will, in this way, be re-embursed for any loss they may ultimately sustain. And although they may be subjected to some present inconvenience, it is to be borne in mind that they took the lease in the knowledge of the protest which was made on the part of the complainer, and which, it is admitted, was read by his agent in presence of the parties assembled at the time when the fishings were let."

"D. M."

The respondents reclaimed.

YOUNG and GIFFORD for them.

FRASER and JOHN MARSHALL in answer.

At advising—

LORD JUSTICE-CLERK—The present note of suspension was presented with a view to obtain interdict against three parties, who, in virtue of a lease from the Magistrates of Wigtown, were about to commence fishing at certain stations in the Bay of Wigtown. The prayer of the note of suspension is—[*Reads*].

The note has been passed to try the question, and in the meantime the parties have been interdicted by the Lord Ordinary from doing the acts complained of, who has granted interim interdict as craved on caution, and on condition that a note is kept of the fish taken at the fishings. The prayer of the note is so framed as to embrace cases of mere trespass, and interdict is craved not only against the catching of salmon, but fish other than salmon. There is no statement of facts which can justify an interdict against the parties except against fishing for salmon. In order to warrant such an application, it must be set forth that the act complained of has been done or threatened. There is no such averment as to trespass on the grounds of the complainer, or as to any fishing for trout or other fishes than salmon. Moreover, the Court cannot assume such a right in the applicant as would entitle him to prevent the respondents from going over the sands of the Heechy grounds, and other grounds which may form part of the sea-shore; and it would require very grave consideration before the respondents, viewing them simply as members of the public, could be interdicted against fishing for white fish in this bay. As at present advised, I am of opinion that they have that right. It is clear, therefore, that an interim interdict has been asked and granted to an effect and purpose beyond what the noble complainer has, under the circumstances, a right to obtain. To that effect the interlocutor must be altered.

This is probably a matter of no great importance, and the contest between the parties does not lie there. The material question is, whether the respondents should be interdicted from fishing salmon within the limits described in the note pending the litigation, or should be permitted in the meanwhile, on conditions, to exercise the right apparently conveyed to them in their lease by the magistrates of Wigtown. This is a question in this, as in all similar cases, of great importance to the parties, and has been argued with an anxiety commensurate to its importance.

The Earl of Galloway, the complainer, sets out his titles to salmon-fishings, and to fishings, under which he has, fished through his tenants, for salmon during forty years in this locality. He has a barony title with fishings. He has an express right to the salmon-fishings of the river Bladnoch.

He has a right to the salmon-fishings nigh to and opposite to the Grange of Cree expressly; he has right to the fishings of Barshalloch, of Baldoon, and Innerwell, and he has had access to his alleged possession of salmon-fishings for forty years under these titles, having let them to tenants, and received rents from them.

So far as the salmon-fishings are given expressly, the title of Lord Galloway is complete. So far as relates to the Innerwell fishing, in support of the case of possession of salmon-fishing, there is a lease produced for five years from Martinmas 1838, averred to have been followed by tacit relocation, and setting forth a previous occupancy by a former tenant, by which there is let "the fishery of Innerwell, in the bay of Wigtown, with the whole houses and pertinents thereto belonging, as presently occupied by the heirs of James Young deceased, the boundary of said fishery extending along the shore of Baldoon towards the point of Crook, but not approaching within one thousand yards of any part of the river Bladnoch above its junction with the Cree; and southwards from Innerwell, the said fishery not to be interfered with by bag-net, or any other kind of fishing, belonging to the said Earl, as far as Port M'Gean; and that for the space of five years from Martinmas first, which shall be the term of entry under this agreement."

In so far as regards the lower portion of the Cree, we have a lease of five years from February 1840 in favour of a tenant of the Earl of Galloway in the Cree, from the large jetty, followed by a lease in 1866 of these fishings, described as in the occupancy of James Irvine, the tenant of 1840. They are described as opposite to the lands of Cree, which is, strictly speaking, inaccurate, but which, with reference to the previous occupancy of James Irvine, must be held as extending so far as Irvine's fishings extended; and, in any view, must be held as in possession of a tenant of the Earl of Galloway up to 1866.

When regard is had to the map, it is plain that the Innerwell fishings extended from a point beyond the sands of Wigtown along the beach so far as the tenants were permitted to fish, until their fishing came so near to the Bladnoch as to interfere with the Bladnoch fishings. As to the fishings of that river, I hold that they must be considered as extending till its junction with the Cree; although the channel is covered by the sea at and before high water, the river has a distinct course within banks until it comes to the Cree. According to the view taken by the House of Lords in the case of *Straiton*, and followed by the Court of Session in the case of *Brodie*, parties having a river fishing may fish in the stream so long as its channel is distinguishable, and is not covered by the sea.

There thus appears to be *prima facie* evidence of possession on the part of the Earl of Galloway, under an adequate title, along the line of the rivers Cree and Bladnoch, and on the sands opposite to Baldoon and Barshalloch. The lands adjacent to the sea, along the shore, belong to him, and he has a right, though that is of slender importance in a question of fishings, to embank what is called *sleechy ground* opposite to portions of them.

Opposed to this, we have a title set up by the magistrates, and an alleged possession under it. The title is contained in a charter. There is there given to the magistrates [*Quotes*]. There is no express grant of salmon-fishings anywhere, and the grant of fishings conferred are fishings of the lands of Burrowmeos, Culquhork, Broadfield,

Clachary, Creveny, and Philipland, *piscaria* or *piscatione dictarum terrarum*. Where Culquhork is we are not informed. Philipland is the property of the magistrates, but it is an inland property. The other lands have been acquired at a long distant period by the Earl of Galloway from a person of the name of M'Donald, to whom they were sold by the town. The fishings are not shown to have been reserved from the conveyance, and where lands with their fishings are granted, it would require to be clear that when the lands were given the fishings were retained. The titles of the complainer contain Kirvenny, Clauchrie, Broadfield, Burrowmoss, and Milns of Bladnoch, with the fishings of the water of Bladnoch, and hail pertinents thereof, which renders it in the highest degree improbable that any rights of fishing were retained. If not, the magistrates would seem to have no title whereupon a right to salmon-fishing could be prescribed. It is certain that they have not succeeded in pointing to any such title as yet.

The magistrates have never received one farthing of rent from these salmon-fishings. They never let them. They have produced no evidence of their ever having granted a written authority or license to fish to any one. The lease under which the respondents were proceeding to fish is dated only in January last, and was granted against the remonstrances of the Earl of Galloway. They are for the first time attempting to let them. The nature of the possession alleged is embodied in the fourth statement of facts, and is as follows—"The said provost, magistrates, and council, and their predecessors in office, have had, and have now, the sole and exclusive possession of the salmon and other fishings in the said bay of Wigtown; but were in use to allow the inhabitants of the burgh of Wigtown generally to fish in said bay with draught-nets, stake-nets, and others, which nets those using them were in the habit of shifting from place to place along said Wigtown or Burrowmoss sands and Baldoon sands in proximity to the streams of the Cree and Bladenoch; but such allowance, or toleration to fish, was determinable at any time by the said provost, magistrates, and council, who, as representing the burgesses and community, are, in virtue of said charter, acts, and others, in right of the whole fishings, in the same way as they are of the whole lands contained in said charter and others, both for the common good and behoof of the burgh."

They have the sole possession *now*, but they have *allowed* or *tolerated* the inhabitants to fish in proximity to the rivers Cree and Bladnoch. In the charter of confirmation of 1842, these very parties confirm to the Earl of Galloway, all and whole [*Quotes*]. How strange if their toleration or allowing inhabitants of their burgh to fish for salmon in the proximity of the river, should defeat the very right which they have thus confirmed! But how loose an avowment of possession.—In fact it is not possession under a title at all. If they have had a special grant of salmon-fishings, one could understand it, but that use, said to be simply tolerated, by persons not deriving any authority for them, nor paying any consideration to them, but who chance to be inhabitants of their burgh, should be set up as a *modus acquirendi dominii*, is novel.

I confess that I see as yet no title produced by the magistrates, and no relevant allegation as to possession. And on that ground, and seeing that the respondents are attempting to innovate upon an

actual state of possession, *prima facie* proved, I think that the interdict should be continued.

Caution has been found, and a note has been undertaken to be kept. No reclaiming note has been lodged by the complainer as to these conditions. The latter remedy is certainly very applicable. It may be that the fishings will not be carried on at the places mentioned; but as I would have granted the interim interdict without that condition, it does not appear to me that there is any importance attached to the question.

The other judges concurred.

Agents for Complainer—Russell & Nicolson, C.S.

Agent for Respondents—R. M'William, S.S.C.

Tuesday, February 25.

ROMANS v. NORTH BRITISH RAILWAY CO.

(*Ante*, p. 142).

New Trial—Excess of Damages. In an action of reparation for personal injury, new trial, on the ground that the damages were excessive, *refused*.

This was an action of damages for personal injury, brought by Mr Romans, gas-engineer in Edinburgh, against the North British Railway Company. The case was tried at the last sittings, and resulted in a verdict for the pursuer with £1250 damages.

The defenders now moved for a rule upon the pursuer to show cause why the verdict should not be set aside on the ground of excess of damages; and the rule having been granted, counsel were heard last week, and the case was to-day advised.

Their Lordships refused to set aside the verdict, holding that the amount awarded was not so outrageous or extravagant as to imply improper motives, or passions, or prejudice on the part of the jury. It was only in such cases that the Court would interfere with an award of damages, at least where the elements of the damage consisted, as here, of *solatium* for past and prospective personal suffering, as well as compensation for past and prospective pecuniary loss.

Counsel for the Pursuer—Dean of Faculty and Alexander Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for the Defenders—Young and Gifford. Agents—Dalmahoy, Wood, & Cowan, W.S.

Wednesday, February 26.

FIRST DIVISION.

KERR v. KERR AND OTHERS.

Entail—Prohibition against Altering Succession—Irritant and Resolutive Clauses. A prohibition in a deed of entail against altering the order of succession not being fenced by irritant and resolutive clauses, *held* that the deed of entail was invalid.

This was an action of declarator at the instance of William Scott Kerr, of Chatto, against Robert Scott Kerr, and others, asking declarator that the deed of entail of the lands of Over Chatto and others in the county of Roxburgh, dated May 1759, was invalid and ineffectual, and that the pursuer was entitled to hold the lands in fee simple.

The deed contained certain prohibitory, irritant, and resolutive clauses in the following terms:—