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 haill 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 or 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 averment 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:—