came operative by his succeeding to the Peerage the estate was no longer to be regarded as his property. He held it under the feudal title, but he held it merely because the title had been so made up, but made up with the quality to which I have alluded. And from that time forward the real property in the estate belonged to the party to whom it had devolved, and he only held the feudal title as trustee for the benefit of that party. That being so, I think it would follow that debts contracted by him subsequently to that date could not be made chargeable on the estate.

But perhaps that might not be conclusive of this question, if some of the views that have been stated in the Court below be sound, namely, that whether or not the estate was liable for the debts contracted after he became a peer, at all events, the demand of the trustee can be supported for the debts contracted previously to that event. I differ from that entirely. The demand of the trustee is a demand to have possession of the whole estate in order that it may be disposed of and distributed, and it is not a good ground for that demand that there exists a certain class of creditors who have a right in that estate and another class who have none. Take for instance this case—suppose that at a certain date a party applies to have an unrecorded entail recorded, and it is recorded accordingly—it was liable for debts contracted previously to that date, but it was not liable for the debts contracted after that date. Suppose, in that state of matters, the trustee had demanded the conveyance of the estate to the effect of paying the debts which had been contracted previously to the recording of the entail, it is quite clear that he could not have it. I am, therefore, very clearly of opinion that this condition or quality of the right which appeared on the face of the title was a sufficient obstacle to any demand such as we have here. It has been said that this was not truly a condition of the right. The expression "condition of the right" is used in various senses; and in certain views it is not similar to certain other conditions. If it was a quality of the right it was not a matter necessarily connected with the entail, but it was a quality of the right on the face of the title; and if I am right in holding that from the time that John Fleeming succeeded to the Peerage he held the estate as trustee, then it is clear that this was a trust, not latent, but a trust patent on the face of his right—a trust which every one becoming his creditor on the faith of his having a feudal investiture was bound to know, for there it stood open and patent.

Questions have been raised as to whether the doctrine of latent trusts does or does not apply in cases of feudal investiture. I do not think it necessary to solve that question here, because here the trust is patent on the face of the title of John Fleeming.

But then, another question has been raised here—a very large question—the one which has been particularly spoken to by my noble and learned friend on my right (Lord Westbury), as to the effect of the Statute of the 20th of George II. I regard that as a very important question, but it is one which has not been so fully argued before us as to entitle me to pronounce any opinion on it now, nor do I think it necessary for the present purpose, because I see enough in the trust created by the succession to the Peerage to put an end to this demand on the part of the trustee. But I think it quite right, if the case should take another form, as it may do by the demands of individual creditors to proceed against the estate, that that question should be perfectly open for the consideration of the Court which would have to deal with those demands, and, in that view, I think it is well that the question has been so stated by my noble and learned friend on my right as to put it in the view of all the parties when they proceed further against this estate that such a question does arise.

With the expression of these views, my Lords, I concur in the judgment proposed in this case.

Interlocutors complained of reversed, and case remitted to the Court of Session, with a declaration that the petition of the trustee ought to be dismissed with expenses, and that any expenses which have been paid ought to be repaid.

Agents for Appellant—Thomas Ranken, S.S.C., and Tatham & Procter, Lincolns Inn Fields, London.

Agents for Respondent—Scott, Moncrieff & Dalgety, W.S., and Connel & Hope, Westminster.

Tuesday, July 21.

STUART *v.* M'BARNET.

(*Ante*, iii, 39.)

Salmon-fishing—Title—Crown Charter—Prescription—Net and Coble—Rod and Line. State of titles on which *held* that a proprietor of lands on the bank of a river had right to salmon-fishing in the river in virtue of a charter from the Crown.

Question, as to the effect of fishing with rod and line in establishing a right of salmon-fishing.

This was question as to the right of salmon-fishing in the river Balgy, in Ross-shire, between Colonel M'Barnet, proprietor of the lands of Torridon, on the right bank of the river, and Sir John Stuart, proprietor of Balgy on the left bank.

Sir John Stuart claimed an exclusive right to the salmon fishings in the river, or otherwise a right to the fishing *ex adverso* of his own lands; and asked declarator that M'Barnet had no right to fish for salmon in the river in any way whatever.

The Court, on 23d Nov. 1866, pronounced an interlocutor finding, *inter alia*, that the pursuer had a right to the fishings from the left bank *ex adverso* of his own lands, but *quoad ultra* assoilzing the defender.

Stuart appealed.

Sir R. Palmer and Cotton, Q.C., for him.

Lord Advocate and Balfour for respondent.

At advising—

Lord Chancellor—My Lords, the question in this appeal is as to a right of salmon-fishing in a river in Ross-shire, in Scotland, called the Balgy. The appellant and the respondent are owners of lands upon opposite sides of the river. The lands of Balgy belonged to the appellant, and the lands of Torridon belonged to the respondent. An application for an interdict with reference to this fishing was made by Colonel M'Barnet to the Sheriff of the county. That interdict was advocated to the Court of Session. Thereupon an action of declarator was instituted in the Court of Session by the appellant Sir John Stuart. In that action an interlocutor was pronounced by the Lord Ordinary, which was appealed to the First Division of the Court of Session, and by that Court the interlocutor of the 23d of November 1866 was pronounced, which is now brought by way of appeal before your Lordships.

My Lords, that interlocutor consists of four introductory parts or propositions, and a conclusion or finding derived from those propositions. The first proposition is one upon which no serious argument has taken place—"That the question between the parties relates to the right of fishing for salmon in the water or river of Balgy or Balgay, which is a narrow stream adapted for being fished from either bank all the way across." I apprehend that in that respect the interlocutor is entirely correct, and that no variation can be made.

The second proposition is this:—"That from the year 1725 the predecessors and authors of the pursuer have, in virtue of titles flowing from the Crown, been infeft in the lands of Balgy or Balgay and others, now belonging to the pursuer, with fishings pertaining thereto; and that from time immemorial prior to 1845, they, in virtue of said titles, possessed and exercised the right of fishing for salmon by means of net and coble and other legal modes of fishing in the river or water of Balgy from the left bank thereof, in so far as the said river or water runs *ex adverso* of the pursuer's said lands of Balgy and others; and that in 1862 they conveyed to the pursuer the said lands, being part of the estate of Applecross, with all right of salmon-fishing in the river of Balgy or Balgay heretofore belonging to the estate of Applecross, on which conveyance the pursuer was infeft in April 1862."

My Lords, the appellant complains of the proposition thus stated, because it does not in his opinion go sufficiently far as maintaining his right; and, in opposition to this proposition, he claims to have affirmed the conclusion of the summons which contends for an exclusive right of fishing in the river Balgy at this place. The conclusion of the summons is in these words—"Therefore it ought and should be found and declared by decree of the Lords of our Council and Session that the pursuer has the only good and undoubted title to the lands of Balgy, in the county of Ross, with the salmon-fishings in the river or water of Balgy; and that he has the sole and exclusive right and privilege of fishing for salmon and fish of the salmon kind in the said river or water."

Now, my Lords, the titles of the appellant contain no mention of salmon-fishings. The titles mention the lands of Balgy with the fishings pertaining thereto, and, according to the well-established principle of Scotch law, the word "fishings" is an equivocal word, capable of having an explanation put upon it so as to include in its terms the fishing of salmon by an immemorial usage and practice of taking salmon in the place in question.

The Court of Session have found, and I think your Lordships will concur in that finding, that the evidence clearly instructs a user of salmon-fishing by the appellant and his authors, which enables us to put upon the word "fishings" a construction which would include salmon-fishing. But, my Lords, the result of that is simply this, that we are thus enabled in reading the titles of the appellant to read the word "fishings" whenever it occurs as if it were expressed "salmon-fishings," and the consequence would be, that his titles would show that he and his authors were infeft in the lands of Balgy or Balgay with the salmon-fishings pertaining thereto. But I apprehend that nothing can be clearer than that a title to lands with salmon-fishings pertaining thereto means, in the case of salmon-fishing in a river, not an exclusive right of fishing salmon in the whole of that river, and from both sides of that river, but a right of fishing salmon *ex adverso* of the lands specified bordering upon the river,—a right to be exercised in the usual way, treating the land at the side of the river as a point of departure for the purpose of practising the salmon-fishing.

I therefore think that the Court of Session have rightly applied the practice and usage which is proved by the evidence to the titles, and, so applying it, have rightly held that the appellant, being infefted of the lands of Balgy with the fishings pertaining thereto, has the right of salmon-fishing in the Balgy by all lawful modes, in as far as the river or water runs *ex adverso* of the pursuer's lands of Balgy—a right of fishing to be exercised from those lands, and not an exclusive right of salmon-fishing from both sides, or throughout the whole of the river.

My Lords, I pass next to the 4th proposition in the interlocutor, omitting for the present the third. The 4th proposition is one upon which no serious dispute has arisen in the argument.—"That the pursuer holds no right or title to fish for salmon in the said river or water from the right bank thereof in so far as the said river or water runs *ex adverso* of the said lands of Torridon, the property of the defender, or to enter on the said lands for the purpose of fishing in the said river or water therefrom, or to interrupt or prevent the defender by himself, his tenants, and others, from fishing with rod and line, or by other legal means, for salmon or other fishes from the right bank of the said river or water, in so far as the same runs *ex adverso* of the defender's said lands of Torridon."

"My Lords, upon that no question was raised in the present argument. It appears that at one stage of the litigation before the Sheriff some claim had been made to enter upon the lands of Torredon for the purpose of practising fishing from those lands; but that claim was not insisted upon in the action of declarator; and this is merely a proposition negativing that claim, inasmuch as it had at one time been raised.

My Lords, still keeping in reserve the third proposition, I pass to the ultimate finding. The Court of Session found "that the pursuer has right to salmon-fishings in the said river or water *ex adverso* of the said lands of Balgy or Balgay; and that he has good right and title to fish for salmon and other fish of the salmon kind in the said river or water from the left bank thereof, in so far as the said river or water runs *ex adverso* of his own lands, and that by net and coble, rod and line, and every other legal mode; and to that extent and effect decern and declare in terms of the second or alternative conclusion of the summons."

My Lords, the appellant makes no complaint of that finding, except that it does not go far enough. He complains that it does not affirm his exclusive right of fishing in the river, which I have already expressed an opinion upon. The finding, however, continues "*quoad ultra* assoilzie the defender from the whole conclusions of the summons." That is to say, assoilzie the defender, *inter alia*, from those conclusions of the summons which ought to restrain him from the practice of fishing from his own side.

My Lords, this latter part of the conclusion may now conveniently be taken in connection with the third proposition, which for the time I passed over, for the two together raise the claim in question

which has been the main question argued before your Lordships, namely, the respondent's right to fish in this river.

Now, how does the title of the respondent stand upon his own deeds and charters in the case? I think your Lordships will find that we may conveniently take, in the first place, the instrument of wadset which passed in the year 1668 from the then Lord Seaforth to Kenneth Mackenzie of Coull. The wadset is printed at page 131 of the joint appendix. That wadset bears to be made to secure a considerable sum of money advanced by this Kenneth Mackenzie to the then Lord Seaforth; and, in order to secure that sum of money, the wadset bears, that "the said noble Lord with consent aforesaid has sold annaillied wadset and disponied, and by the tenour hereof sells," &c., "to and in favour of the said Kenneth Mackenzie, his heirsmale and assignees whomsoever, heritably, under reversion always in manner underwritten, All and haill the davock lands of Torredon, comprehending" certain premises specifically mentioned, "together with the teynd, sheaves, parsonage and vicarage teyndes of the same included, and never to be separate therefrom during the non-redemption thereof," by virtue of the reversion after-mentioned, "and sicklyck the salmon-fishing of the water of Torredon and Lochanmeiskeith with the half of the salmon-fishing of the water of Balgay, and Lin thereof; and with all and sundry houses" &c., "together with all the right," &c; and the deed contains the usual reversion or power of redemption.

Now, my Lords, it is abundantly clear—indeed it could not have been controverted—that this wadset, taking it by itself, and putting aside for the moment the question of the title of Lord Seaforth to make it, upon the face of it it bears to carry one half of the salmon-fishing of this river and the lin of the river, in words as large as could be used for that purpose. It was not disputed that the wadset created a base fee, supposing that infeftment followed in the usual way. And if the present respondent could connect his title with this wadset, and if in turn the title of the wadsetter from the Crown to carry this salmon-fishing should be made clear, it was not disputed, and could not be disputed, that the titles of the respondent upon his own charters would be sufficient to carry the salmon-fishing.

Now, the first objection, my Lords, that was made to this wadset was with reference to the infeftment following it. As to that, your Lordships will observe that the watset itself, in the part to which I have referred, continues in these words—Lord Seaforth "binds and obliges himself and his heirs with all convenient diligence duly and sufficiently to infeft and seise by charter and sasine."

Then, my Lords, we have the precept of sasine at pages 63 and 64 of the joint appendix, by which precept the Lord Seaforth appoints in the usual way his bailies to go on the ground and to give heritable state, sasine, and possession (using the proper and apposite words) of "all the davock lands of Torredon, comprehending certain towns and lands specified, with all and sundry houses, buildings, yards, mills, multures, woods, fishings, loanings, grassings," and so forth, using every term commensurate with what occurs in the wadset itself. The only objection taken to that was, tha having used those general terms, a certain specification was afterwards made as to the mode and manner of delivering sasine "by deliverance of earth and stone of the said lands, clap of the said mill, and one handfull of corn with one penny money for the said teynds upon the ground thereof, as use is," and this is "in no ways" to be "left undone." It was said there was no appropriate emblem or symbol of delivery of sasine with reference to fishing; and that there ought to have been a symbol of delivery of sasine by net and coble.

My Lords, I think it would be convenient to take, together with what I have read upon this point, a recital as to sasine in the charter of renunciation and discharge in the year 1754. That charter, at page 7 of the small Additional Appendix, after reciting the wadset and renunciation, continues thus:—"Conform whereunto, and charter following thereupon, the said Kenneth Mackenzie was," on such a day, "duly and lawfully infeft and seised in the lands, fishings, teinds, and others above mentioned, as the instrument of sasine given to him thereof, under the sign and subscription of" so and so "notary-public, duly registered, at length purports."

Now, I own it appears to me that if after a mortgage you find an undertaking in the most general terms to deliver sasine in most appropriate way —if you find a precept of sasine giving the most simple power to the bailies to deliver sasine of all the premises mentioned in the wadset specifying them, and you find afterwards a recital coming from the author of the wadset, or those who follow him in title, stating that proper livery of sasine had been made—if after all that your Lordships were, in consequence merely of an insufficient specification in the preceipt of sasine of the various modes in which sasine was to be delivered, of the different subjects matter of the deed, to hold at this distance of time that there was an infirmity or imperfection in the title on that score, the consequences would, as it seems to me, be most serious; and certainly your Lordships would require clear and distinct authority before you would arrive at a conclusion that would involve such a consequence. My Lords, certainly no authority to that effect was cited, and I think, in the absence of authority, it would be a most dangerous principle to listen to an argument of that kind.

Then, my Lords, the wadset having, as I have said, created a base fee, there is no controversy that this base fee created by the wadset was transmitted to the respondent in an unbroken series of charters. I need not detain your Lordships by going through those charters, because upon that part of the case no controversy arose.

The equity of redemption, as we term it, as I have already said, was renounced by Lord Fortrose in the year 1754, the renunciation being set out in that part of the appendix to which I have already referred. Before this year 1754, it is true that Lord Seaforth, the ancestor of Lord Fortrose, had been attainted, and the forfeiture of his estates had intervened in the year 1715; but I apprehend that it is perfectly clear that that attainder and forfeiture would in no way affect the title of a person claiming under the wadset. The law upon this point appears to be very clear and free from ambiguity. It is stated in Stair in this way—"By the Act of Parliament (The Scotch Act of Parliament) July 27, 1664, forfeiture was declared to be without prejudice to all persons not accessory to the crime of the superior, of their rights of property in any lands, wadsets or others, holden by them of the

forfeited persons, or of the payment of their just debts, or relief of their cautionaries out of the forfeited estates, which was rescinded (that is, which Act of Parliament of 1644 was rescinded) by the General Act (Rescissory, *Parl.*) 1661, cap. 15; but that Act (that is the Act of 1661) is now revived by the Act of Parliament of 1690, cap. 33 of King William and Queen Mary, as to posterior forfeitures. Therefore the law applying to forfeitures at the time when the attainder of Lord Seaforth took place, stood upon the former Act, the Act of 1644, which saved expressly from the consequences of forfeiture the right of any person holding a wadset.

Now, my Lords, that being the case, having this base fee created in 1668, and traced down without any break in the chain to the present respondent, it only remains to consider what was the title of Lord Seaforth in 1668 to make the wadset which I have referred to, including the salmon-fishing. As to that, it appears by a special retour made in the year 1584, and printed at page 77 of the appendix to the respondent's case, that the jurors convened to consider the title of Donald M'Angus M'Alaster, found that Margaret of the Isles, the grandmother of this Donald M'Angus M'Alaster, had died seised as of fee (using the ordinary term) of all and several the lands after-mentioned, including "*dimidietate terrarum de Torredon et piscariis ejusdem*," meaning, I apprehend clearly, one-half of the land of Torredon and one-half of the fisheries of Torredon (whatever that might be); that the said Donald M'Angus M'Alaster was the lawful heir of Margaret of the Isles; that he had attained the age of twenty-one years; that the said half of the lands of Torredon and other places, *cum piscariis earundem*, were of a certain value, which is here mentioned; and that all this half of the lands and fisheries, with the appurtenances, were held *in capite* of the King and his successors by ward and by relief; and that all those premises had been seised into the hands of the King, and had remained in the hands of the King, and in the hands of his mother, the Queen of Scotland, for the space of forty years and two months, which had elapsed by reason of ward and non-entry after the decease of Margaret of the Isles, (the grandmother) that is to say, that they had been in the hands of the Crown from the year 1544 until the year 1584, when this inquisition was made.

Now, my Lords, the terms here used are the lands of Torridon "*cum piscariis ejusdem.*" I should not think myself that any serious argument could be based upon the term "*piscariis*" as distinguished from the term used in other charters "*piscationibus.*" Some argument certainly turned upon that point, but I think it would be very unsafe in the state of the authorities that were referred to, to hold that "*piscariis*" is in any sense a larger word than "*piscationibus*," so as to dispense with the ordinary proof of user which is necessary in order to give to "*piscationibus*" the power and force of carrying a fishing for salmon.

Then, following this retour in 1584, we have next another retour in the case of a person called Duncan Bayne of Fairley, dated 23d July 1624. Considerable argument took place as to whether this next retour, to which I am about to refer, concerned the same half of the lands of Torredon and the fishery which was the subject of the retour of Margaret of the Isles of 1584, or whether it related to the other moiety. I apprehend, my Lords, that whether it was the same or whether it was a different moiety can make very little difference as regards the conclusion ultimately to be arrived at in this case. I will state presently why it appears to me to be the other moiety which is mentioned in the second retour. But, even if it should be the same moiety, your Lordships will observe that the consequence would be, that if we find in that second retour salmon-fishing mentioned in a way which would lead to the presumption of a grant from the Crown, and that the second retour relates to the same half as the first, you would get, with regard to that one-half, the right of salmon-fishing to the tenant in common with the Crown; and for the purpose of affirming the title of the respondent in this litigation, the right on his part to be tenant in common with the Crown of one quarter (that is to say, half of half the salmon-fishing) would be perfectly sufficient.

But to come to the second retour—it bears to have taken place on the 23d of July 1624, and to have resulted from an inquisition made in the usual way. The jurors say that the late Alexander Bayne, the grandfather of Duncan, who had been married to Lady Agnes Fraser, had died seised as in fee of the whole half of the lands of Torredon, or Torvirthan as it is here called, "*et piscaria salmonum ejusdem tam in aquis salsis quam dulcibus et quarta parte piscariæ salmonum de Balgy cum earundem annexis*," &c. There is therefore here mention as it were of two different fisheries, the lands of Torredon and the salmon-fisheries of the same, and also the fourth part of the fishery of the salmon of Balgy. And then, further on, after stating that Duncan Bayne was the heir-male of Alexander Bayne and Agnes Fraser his wife, the jurors proceed to say that the said lands of Torredon with the fisheries of the same, and the other pertinents, as well those mentioned generally as those mentioned specially above, were held *in capite* of the King and his successors, in fee and in heritage in perpetuity, and with the usual services for the same, and that they had been seised into the hands of the Crown for the space of twenty-four years from the death of Alexander Bayne the grandfather of Duncan, who died in the year 1600, and that the lands had been so seised into the hands of the Crown by reason of the non-entry through the default of Duncan Bayne up to the day of that inquisition.

My Lords, I observe upon that, in the first place, that there is in the earlier part of this retour a clear mention of the fourth part of the salmon-fishery of Balgy, that is to say, the half of one-half; that there is in the first part a mention, as I have said, of the salmon-fishery of Torredon, and that in the latter part of the retour it seems to be assumed that the whole of the fishings mentioned in the earlier part were the special description of fishings which might be described under the general term of the fisheries of Torredon, and under that term they are described in a later part of the retour.

That retour having been made by the jury, which retour of course would not in any way compromise the Crown if it stood alone, we have next—what is much more important—an instrument of sasine in favour of Duncan Bayne, following upon it in the year 1626. That instrument of sasine followed a writ issued out of the Court of Chancery in Scotland, and the writ is set forth at the bottom of page 81. The instrument recites that a certain person, who is named, acting as the attorney of Duncan Bayne, had come forward holding in his hand this writ out of Chancery, and describing that Duncan Bayne was the grandson of Alexander Bayne and Agnes

Fraser, and that he was in that right entitled to a whole half of the lands of Torredon and the salmon-fishings of the same, as well in salt water as in fresh, and to a fourth part of the salmon-fishing of Balgy. Then the writ is set forth thus—"Charles, by the Grace of God," and so on—"Inasmuch as by an inquisition in consequence of a mandate from the Sovereign, it had been made known;" and then the finding of the jury, which I have already referred to is recited, stating among other things that the salmon-fisheries were held of the King *in capite;* and then an order is made out by the Crown in these terms—"We order and command you that to the aforesaid Duncan or to his certain attorney, the bearer of these presents, you give seisin of all the half of the said lands of Torredon and of the salmon-fisheries of the same, as well in salt water as in fresh, and of the said fourth part of the salmon-fishing of Balgy, with the pertinents of the same." And following that writ from the Crown, the livery is made according to the tenor of the writ.

Now, my Lords, I apprehend that a better Crown charter than this could not possibly be found. It so happened that the reason why the Crown intervened was because there had been resumption of possession into the hands of the Crown during the want of entry of this Duncan Bayne—but that leads to the Crown recognising the right of Duncan Bayne, and ordering sasine to be given back to him of the fourth part of the salmon-fishery.

Then, my Lords, following that, there is the sasine in favour of the Lord Seaforth at the time, who, immediately after Duncan Bayne had been restored to his property, appears to have purchased it from him. In point of fact, the sasine of Duncan Bayne appears to have been made in order to enable him to make a title to Lord Seaforth. The sasine of Lord Seaforth is recorded on the 24th May 1626, and in his case the general description which I have already referred to is given—the whole of the half of the lands of Torredon "*cum salmonum piscariis in aquis salsis quam in aquis dulcibus*," stating, however, that this had been purchased from Duncan Bayne subsequently to the retour which I have referred to, showing that the same subject matter was carried to Lord Seaforth which was returned into the hands of Duncan Bayne.

My Lords, I pass over the two feu-charters to the Parson of Sleat, because they resulted in a resignation by the Parson of Sleat to the Earl of Seaforth. The Earl of Seaforth thus got back again whatever those charters had given to the parson of Sleat.

We have next an instrument of sasine of George the next Earl of Seaforth, in the year 1633, and then, finally, we have the wadset by Kenneth Mackenzie who succeeded George Lord Seaforth.

My Lords, I apprehend that your Lordships will be of opinion that there is thus derived a clear title from the Crown, certainly to one quarter of the salmon-fishery of Balgy; but I myself am prepared to go even further than that, because I own it seems to me to be perfectly clear that the two retours which I have mentioned deal with the two separate quarters of the salmon-fishery. and represent really the title of the two heirs-portioners claiming under the Lord of Lochalsh,—the two heirs-portioners who between them shared the lands of Torredon and one-half of the salmon-fishery, according to the admission of the appellant in the condescendence printed at page 12 of the smaller of the printed books before your Lordships. In that condescendence the respondent stated the retours which I have read to your Lordships, and then called upon the appellant to answer his statement with regard to that allegation of title. Thereupon, in answer to the articles where those retours were printed, the appellant stated that "the alleged deeds are referred to for their terms, *quoad ultra* denied with this explanation, that in or about the year 1518, on the death of Donald Lord of Lochalsh, all the lands of Applecross and Lochcarron, including the lands of Torredon, (which then were a mere pertinent to the Castle of Stome in Lochcarron) descended to his two sisters as heirs-portioners, each of whom was then entitled to one undivided half of the said lands; that Margaret, one of the daughters, was grandmother of Donald M'Angus M'Allister of Glengarrie, who in her right is said, in 1584, to have been possessed of one half of the lands of Torredon; that the other half thereof, as well as of all the other lands of Applecross and Lochcarron, were acquired through the other co-heiress by Colin Earl of Seaforth about the year 1600, or before.

My Lords, I think upon this admission, taken in connection with the charters to which I have referred, it is abundantly clear that the two heiresses of the Lord of Lochalsh were Margaret of the Isles and Agnes Fraser, and then, inasmuch as we have the clear construction put upon the title of Agnes Fraser as being one-half by the writ from the Crown to which I have referred, the same construction must obviously be put upon the title of the other portioner, because the two portioners held exactly under the same title.

My Lords, I have thus traced the title, at the risk of wearying your Lordships, because it seemed to me right to explain the grounds upon which I should base the motion I am about to make. Having thus traced the title, it is quite unnecessary to consider, though it was the subject of much argument at the bar, the true view and the effect of such acts of salmon-fishing as have taken place in the course of the last fifty years from the lands of Torredon, in the River Balgy. My Lords, I own that if the respondent had not been able to trace back the title from the wadset to the Crown, but he had stood simply upon the base property title commencing with the wadset, together with the acts of ownership which he has been able to show, and the exercise of the right of fishing in the river Balgy on his part, and on the part of his predecessors, I myself should have been of opinion that the title had not been made out in such a way as would enable your Lordships to say that under the Scotch Prescription Act the fishings in the river had been brooked by the respondent in such a way and for such a length of time as would give the respondent the advantage upon his base title with reference to it which the Act of Prescription intended to give.

My Lords, it appears to me to be also entirely unnecessary to consider whether in strictness the appellant has the right to challenge the title of the respondent, and whether, if the respondent had shown nothing more than what was termed in the argument a *prima facie* title, the appellant could have required the title to be further examined. I have assumed, and I think it much safer to assume, that the appellant has that right, and I own that, if I were to express an opinion upon it, it seems to me that reason and common sense require that a person in the position of the appellant with reference to a salmon-fishing of this kind, should have the

right of challenging a claim to fish from the opposite side of the river. I have however assumed that in favour of the appellant, and, assuming that, I have certainly come to the conclusion that upon the titles themselves the right of the respondent to the salmon-fishing is made out. It becomes therefore unnecessary to consider what has been the usage and practice, because, if the right exists upon charter, it certainly could not be lost *a non utendo*.

I therefore would propose to your Lordships to affirm the whole of the interlocutors appealed against except that third proposition contained in them, which I think, according to the view I have submitted to your Lordships, if you adopted it, will require some alteration. In point of fact, that third proposition in the interlocutor proceeds not so much upon the titles of the respondent as upon the exercise by the respondent of the right or usage of salmon-fishing. I propose that, in place of that, it should be rested entirely upon the titles of the respondent. The third proposition in the interlocutors altered as I propose, would run thus:—"That from the year 1668 the defender and his predecessors and authors have, in virtue of titles also flowing from the Crown, stood infeft in the lands of Torredon and others, with, *inter alia* 'the half of the salmon-fishing of the waters of Balgy and linn thereof,' conform to the wadset of 1668 and the other writs produced, and which are referred to in the statement of facts on his behalf." And making this alteration, which is a substantial one, in the interlocutor, I should humbly advise your Lordships that no costs of the appeal should be given to either side.

Lord Cranworth—My Lords, having come to a very clear conclusion that the respondent has made out a good title, I have not thought it necessary to go minutely into the question how far the appellant is entitled or would have been entitled to complain of the acts of the respondent if that title had not been made out. I will proceed at once to state (which I shall do very shortly after the full statement of the case we have heard from my noble and learned friend) the grounds on which I think that the title of the respondent to one-half of the salmon-fisheries of the Balgy is completely made out. It is certainly satisfactorily made out that George, Earl of Seaforth, had power to grant those fishings in 1668. On the 4th of November 1668, Kenneth, the then Earl of Seaforth, wadsetted to Kenneth Mackenzie, "*inter alia*, the davoch lands of Torredon, including Annatt, Devrinifoiran, Corrwicknoble, and Algine, and the salmon-fishing of the water of Torredon," with the half of the salmon-fishing of the water of Balgy. In 1672 these lands and fishings were transferred by the same description to Simon Mackenzie, who was duly infeft thereon, the holding being a base holding under the Earl of Seaforth.

No further deeds are forthcoming until the 30th of June 1741, when, under a precept of *clare constat* by the then Lord Fortrose, sasine was delivered of the same lands and salmon-fishings, by the same description precisely, to John Mackenzie of Torredon. John Mackenzie disponed to Kenneth Mackenzie, on the 20th of June 1767, and he was duly infeft in the following month of November. Kenneth Mackenzie disponed to John Mackenzie on the 27th of May 1797, and he was duly infeft on the 15th of September then next. James Alexander Stewart Mackenzie became a purchaser of the whole at a judicial sale on the 17th of July 1826, upon which he obtained sasine on the 15th of September then next. The respondent derives title under this James Alexander Stewart Mackenzie.

It is perhaps unnecessary to go into this detail, for really it can hardly be said to be a matter of dispute; but I felt it would be more satisfactory to myself to watch every step in the title, and I have therefore gone through it in the manner I have now briefly described.

In all these various dispositions and instruments the salmon-fishings of the Torredon, and one-half of the salmon-fishings of the Balgy, are expressly named. The title is thus traced for exactly 200 years—the date of the wadsett being 1668. But as this has been all along a base holding, the titles do not necessarily show a right to salmon-fishing as against the Crown. The question therefore is, whether we can see that when Kenneth, Earl of Seaforth, included in his wadsett the half of the salmon-fishing of the water of Balgy and the linn thereof, he had himself a title to those fishings against the Crown. I think it is made out with reasonable clearness that he had.

In the first place, it appears from a special retour dated the 23d of July 1624, that Duncan Bayne was on that day served heir in special of, amongst other things, one-half of the lands of Torredon, and the salmon-fishery thereof, and one-fourth of the salmon-fishery of Balgy, as being the heir-male of his grandfather and grandmother, Alexander and Agnes Bayne; and it was found that all the lands and fisheries included in the retour were held of the King *in capite*, and that the whole had been in the hands of the Crown since the death of Alexander Bayne in 1600, by reason of non-entry.

It is impossible to doubt from this that Agnes Duncan was one of two copartners who had succeeded to the lands and salmon-fishery of Torredon, and to one-half of the salmon-fishery of Balgy; and, with the knowledge we have of the nature of the waters of the Balgy, and that it was bounded on one side only by the lands of Torredon, I cannot doubt that by "one-half of the salmon-fishing of the Balgy" must have been meant the right to fish from one side only, *i.e.*, from the Torredon bank.

Duncan Bayne, on the 2d of May 1626, was duly infeft in the property included in the retour, comprehending by name the half of the salmon-fishery of Torredon and the fourth part of the salmon-fishery of Balgy. This made him a tenant *in capite* of the Crown of, *inter alia*, the salmon-fishings of the Torredon and most of the salmon-fishings of the Balgy.

Contemporaneously, or almost contemporaneously, with this infeftment, Duncan Bayne sold or disposed this property to Colin Earl of Seaforth, who was duly infeft therein on 22d May 1626. The fishery of Balgy is not mentioned in this infeftment, but I think it impossible to doubt that it was not mentioned by name only, because it was supposed, and reasonably supposed, that it was included in and formed part of the Torredon fisheries. It differed from the other Torredon fisheries only in this, that it could be fished only from one side of the river, as the lands did not extend to the other side; but it is impossible to believe that there could be any intention on the part, either of Duncan Bayne or of the Crown, after parting with the lands of Torredon and all the valuable fisheries thereof, to retain that which in all probability was considered at that time a matter of such very small value as not to be worth a separate mention. Add to which, it is not less worthy of observation, as

was pointed out in the argument, that whereas in the retour of Duncan Bayne and his infeftment therein, the fishery of Torredon and the fishery of Balgy are both referred to in the singular number; yet when the Earl of Seaforth made up his title by infeftment from the Crown, though there is no express mention of Balgy, yet the fisheries of Torredon are referred to in the plural, which might have been intended, if indeed that was necessary to include the fishery *ex adverso* of the Balgy.

Colin Earl of Seaforth granted to Kenneth M'Kenzie, Parson of Sleat, a subinfeudation of what he had purchased from Duncan Bayne, who was only infeft in the half of the lands of Torredon, with the salmon-fisheries, *cum piscationibus salmonum.*

So much as to one-half of the superiority of the lands of Torredon with its fisheries, including, as I think necessarily, one-half of the right of fishing *ex adverso* the Balgy river. The title to the other half is less clear, but I think it is sufficiently made out.

Duncan Bayne, it will be remembered, became entitled to his half of the lands and fisheries of Torredon, as heir of his grandfather Alexander and his grandmother Agnes. Alexander survived Agnes, and died in the year 1600. In the year 1584, being sixteen years before the death of Alexander, one Donald M'Angus M'Alaster was served heir in special to a lady, described as Margaret of the Isles, his grandmother, who had died forty years previously. The retour comprised the moiety of, among other things, the lands of Torredon and its fisheries. The inference seems to me almost irresistible that this Margaret of the Isles was the co-heir with Agnes Bayne of the property to which Duncan Bayne succeeded in 1600. And if that be so, though there is no special mention of Balgy in the retour of 1854, and though the fisheries are not expressly described as salmon-fishings, yet it is impossible to doubt that as one copartner certainly succeeded to salmon-fishings, including those *ex adverso* of the Balgy, therefore the word "*piscariis*" in the retour of 1584 must have been intended to include the same.

In explaining deeds of so very remote a date it would be very unreasonable not to make inferences which deeds nearly contemporaneous fairly suggest. Assuming, then, that it is fairly shewn that M'Alaster was served in 1584 as heir in special to the moiety of the lands and fishings, the other moiety of which became vested in Colin Earl of Seaforth in 1626, it is next to be remarked that, on the 12th of March 1633, this same Colin Earl of Seaforth granted by way of subinfeudation to Kenneth M'Kenzie, Parson of Sleat, to whom in 1626 he had granted one moiety of the lands and fisheries of Torredon, the other moiety thereof, in which he was duly infeft. How Colin Earl of Seaforth had acquired his other moiety does not appear. But that he had acquired it by some lawful means in the forty-nine years which elapsed between 1584 and 1633 may fairly be presumed. He died almost immediately after this last grant, and was succeeded by his brother George, afterwards Earl of Seaforth. He duly obtained infeftment from the Crown of all the extensive possessions of the Seaforth family. The descriptions are not exactly the same as in the prior instruments, but they were obviously meant to include all of which Colin had died seised; and they include by name the lands of Torredon with the fishings, which, for the reasons I have stated, I think certainly comprehend the salmon-fishings *ex adverso* of the Balgy. A few years afterwards, namely on the 1st July 1641, Kenneth M'Kenzie, Parson of Sleat, who had obtained the two feus from Colin Earl of Seaforth resigned the entirety, including the lands of Torredon with the salmon-fishing thereof, into the hands of Earl George, his superior, *ad perpetuam remanentiam*, so that Earl George acquired the *plenum dominium* of what I think must be taken to include the salmon-fishing *ex adverso* of the Balgy. The same Earl George granted the wadset in 1668. That wadset, and all the deeds which followed it, included by express words the salmon-fishing in the Balgy, and seems to me, therefore, to show a complete title in the defender.

This being so, it is unnecessary to consider whether anything short of a complete title might have afforded a sufficient ground of defence to the pursuer's action. That question does not arise in a case where the defender has shown a perfect title from the Crown. But it is proper to add that, even if it can be suggested that the title of the moiety of the fisheries derived from Margaret of the Isles has not been fully made out, that is unimportant; for if it is clear, as it is clear, that the defender has a perfect title to the half of the salmon-fishings derived from Duncan Bayne (including the right of fishing from the Torredon side of the Balgy) that is a perfect title against the pursuer—for if there be a good right of salmon-fishing in the Balgy belonging to the respondent and to the Crown, or to the respondent and some grantee of the Crown as tenant in common, the pursuer cannot complain that the respondent has exercised a right which he enjoys in common with some other person. I advert to this, though I entertain no doubt that the respondent has shown a title to the whole. That being so, it is unnecessary for me to say more than that I entirely concur in the judgment proposed by my noble and learned friend on the Woolsack.

Lord Chelmsford—My Lords, the appellant appeals from an interlocutor of the First Division of the Court of Session, which finds that he holds no right or title to fish for salmon from the right bank of the river or water of Balgy, in so far as the river or water runs *ex adverso* of the lands of Torredon, or to enter into those lands for the purpose of fishing in the said river or water therefrom, or to interrupt or prevent the defender (the respondent) from fishing with rod and line, or by other legal means for salmon, &c., from the right bank of the said river or water, in so far as the same runs *ex adverso* of the defender's lands of Torredon. But the interlocutor finds that the appellant has right to salmon-fishings in the said river or water *ex adverso* of the lands of Balgy, and has good right or title to fish for salmon from the left bank thereof, in so far as the said river or water runs *ex adverso* of his own lands, and, *quoad ultra*, assoilzies the defender from the whole conclusions of the summons.

The appellant contends that the interlocutor is erroneous, as the Court ought to have found, in the terms of the summons of declarator, that he has the sole and exclusive right and privilege of fishing for salmon on the river or water of Balgy, and that the defender has no right of salmon-fishings in the said water or river, and that the defender ought to have been interdicted from fishing in the water or river for salmon, and from troubling and interrupting the appellant in the peaceable possession and exercise of his right of salmon-fishing.

The *onus* of proof rests entirely upon the appellant. He must prove that he is entitled to the exclusive right of fishing in the Balgy. If he fail in this, it is extremely doubtful whether it is open to him to question the title of the respondent.

The lands on both sides of the Balgy formerly belonged to the Earls of Seaforth, and were held by them together with certain fishings which appear to have been connected with the lands. The possessions of William Earl of Seaforth were forfeited to the Crown by his attainder on account of his taking part in the Rebellion of 1715. The appellant's title begins with a Crown charter in 1725, when the forfeited possessions of the Earl of Seaforth were in the hands of the Crown. This charter, which is the origin of the appellant's title or proof, contains, amongst other general words, the word "*piscationibus.*" Looking to the mode in which this word is introduced into the charter, it cannot, in my opinion, be construed to grant a more extensive right of fishing than one *ex adverso* of the lands granted. But the use and exercise following upon this general grant of "fishings" enables the appellant to read it as a grant of salmon-fishing,

From the peculiar character of the river of the Balgy, it can only be effectually fished for salmon from both sides by fishing all the way across. Whatever, therefore, may be the nature of the appellant's right, whether an exclusive one over the whole river, or to be confined to salmon-fishing *ex adverso* of and from his own lands, the actual enjoyment of the right at the moment of its exercise will be necessarily the same.

But the appellant endeavours to give a double effect to his proof of the exercise of the right of fishing—1st, as establishing that the charter of 1725 was a grant of salmon-fishing; and 2d, that it was a grant of salmon-fishing on and from both sides of the river.

Now, the right actually enjoyed enables the appellant to read the general term "fishings" in the Crown grant as meaning salmon-fishings; but it cannot enlarge the limits of the grant if it be confined to a right of fishing *ex adverso* of the lands to which it is annexed. Suppose that the appellant and his predecessors might have fished the river effectually by confining themselves to fishing from their own side *ad medium filum*, then fishing beyond the limit for any length of time would not have enabled them to acquire a right to fish over the whole river unless they could show a *habile* title to which the use and exercise could be ascribed. But (as I have already observed) in the charter upon which the appellant founds his title, the fishings are included in the general words which follow the description of the lands granted, and cannot be taken to have given any other rights of fishing than are annexed to the lands. No amount of user therefore could enlarge this right *ex adverso* of the lands into an exclusive right of fishing over the whole river.

But the appellant contends that, even if his right of salmon-fishing is to be confined to a right *ex adverso* his own lands, yet, as the right cannot be effectually exercised and enjoyed without fishing all the way across to the opposite bank, the respondent cannot interfere with the exercise of the appellant's fishing unless he can show a title from the Crown to salmon-fishing from his own (the Torredon) side of the river, which the appellant insists that the respondent is unable to do.

The evidence shows that the river cannot be conveniently fished with net and coble from the respondent's side, and that there are not more than two occasions upon which this description of fishing has taken place from this side, but that the river has been continually fished from the respondent's side with rod and line.

The argument for the appellant assumes that the respondent's title commenced in the year 1734, when the forfeited possessions of the Earl of Seaforth were sold by the Barons of the Exchequer. In the Crown charter of resignation and *novodamus* following upon the sale, which includes the lands of Torredon, the words "*piscationibus tam in aquis dulcibus quam salsis*" are contained, which the appellant contends will not of themselves carry salmon-fishings. And cases were cited to show that a grant *cum piscationibus* cannot be established as a salmon-fishing without the use of net and coble. The conclusion drawn from this proposition was, that the respondent's fishing having been entirely with rod and line (the instances of the employment of net and coble being rather experiment than use) he had acquired no right of salmon-fishing which could circumscribe or interfere with the appellant's enjoyment of his right over the whole river.

The argument, that the only mode of interpreting a grant of fishings to mean salmon-fishings is by the exercise of the right with net and coble, was contested by the Lord Advocate, who mentioned the case of line fishing as an instance to the contrary. And he observed, that if the argument is correct where there is a grant of lands with fishings, and no other practical mode of salmon-fishing than by rod and line, although there had been an exclusive enjoyment of this mode of fishings, for a century, the general term "fishings" could never be converted into the particular one "salmon-fishings." This is true, but it does not therefore follow that the right to salmon-fishing without an express grant can be acquired by any other mode of fishing than the peculiar one by net and coble. I do not find, however, that it has ever been expressly decided that the only mode of explaining a general clause *cum piscationibus* into a right to salmon-fishings is by the exercise of that description of fishing by net and coble. I am not prepared to say that if fishing for salmon by rod and line has been systematically and uninterruptedly practised in a river where it is the only practicable mode by which such fishing can be carried on, it may not be sufficient to establish a right to salmon-fishings under a general grant of "fishings."

But, assuming that the respondent's right to salmon-fishing is questionable, is it competent to the appellant to question it, and to call upon the respondent to prove his title? It must be borne in mind that the appellant has no right to fish from the Torredon side of the river. Any person therefore fishing from that side is not trespassing upon the appellant's property, although he may be disturbing him in the full enjoyment of his power of effectually fishing the river. Whether, if a stranger without any authority from the respondent were to fish from the Torredon bank, he might, upon being shown to be a mere trespasser, be called to account by the appellant, I will not undertake to decide; but I am inclined to think that it would not be competent to the appellant to demand of any person so fishing by what authority he was acting, much less where the respondent himself is fishing from his own bank of the river to call upon him to show

his title. If the respondent cannot found himself upon a grant of salmon-fishing from the Crown, then the Crown has never parted with the right of fishing from the Torredon side of the river, and the acts of the respondent may be an invasion of the Crown's rights, which may be prevented by the Crown but cannot be challenged by the appellant.

The question of the right of the appellant to put the respondent to proof of a title from the Crown was so strongly insisted upon, and argued so fully on both sides, that I have not felt justified in passing it by without some observation. Any decision upon it, however, is, in my view of this case, wholly unnecessary, because, assuming that the obligation of proving a right to salmon-fishing from the Torredon side of the Balgy was imposed upon the respondent, I am of opinion that he has fully satisfied it.

From the earliest information upon the subject it appears that in the 16th century the lands of Torredon and fishings of the same were held immediately of the Crown by two heirs-portioners in moities. In the title of one of the heirs-portioners the lands of Torredon and fishings of the same are mentioned generally, but in the title of the other heir-portioner there is express mention of the fourth part of the salmon-fishery of Balgy. From this I think it may fairly be inferred that the general term "fishings" in the title of the first heir-portioner included the fourth part of the salmon-fishery of the Balgy, making together the half of the salmon-fishing in the water of Balgy in question in this case. Both these halves of the lands of Torredon, with the salmon-fishings, were acquired by Colin Earl of Seaforth in the year 1626. By feu charters, dated respectively 27th May 1626 and 11th February 1633, the Earl of Seaforth feued the two halves of the lands of Torredon to Kenneth Mackenzie, Parson of Sleat. In the first of the charters the words by which the fishings are mentioned are, "*Cum piscationibus salmonum tam in aquis salsis quam dulcibus,*" and in the latter "*cum piscariis tam in aquis salsis quam dulcibus.*" In 1641 the Parson of Sleat resigned in favour of George Earl of Seaforth all that had been feued to him by the description of "All and haill the toune and davoch lands of Tarritone, with the salmon-fishing thereof." Now, that the salmon-fishing in the feu charters to the Parson of Sleat, and consequently, in his instrument of resignation, included the half of the salmon-fishing of the water of Balgy, appears from the contract of wadset afterwards made, on the 4th November 1668, by which Kenneth Earl of Seaforth sold and disponed to Kenneth Mackenzie of Coull, and his heirs-male and assigns whatever, all and haill the davoch lands of Torredon, "with the half of the salmon-fishing of the water of Balgy and Linn thereof." After this wadset the Earls of Seaforth possessed only the superiority in the salmon-fishings in the Balgy, and this superiority, together with his other possessions, was forfeited to the Crown by the attainder of William Earl of Seaforth in 1715.

Upon the sale of the forfeited estates by the Barons of the Exchequer, a Crown charter of resignation and *novodamus*, dated 12th February 1734, was issued in favour of John Nairn, which was followed by a Crown charter in favour of Lord Fortrose, dated 12th February 1741. Both these instruments, after the description of the lands of Torredon and other lands, contain the words "*cum suis pertinent. Piscationibus tam in aquis dulcibus quam salsis.*" A question was made whether these words applied to the half of the salmon-fishing of the waters of the Balgy and Linn; but it seems to me that no reasonable doubt can be entertained upon the subject. The description is exactly the same as that contained in the feu charters from the Earl of Seaforth to the Parson of Sleat, which I have shewn by the wadset of 1668 must have included these fishings. That the superiority in the fishings was considered to be excluded in the Crown charters in favour of Nairn and of Lord Fortrose also appears to be clear from the fact that immediately after the charter in favour of Lord Fortrose by a precept of *clare constat* in favour of John Mackenzie of Torredon, granted by Lord Fortrose as superior of the lands of Torredon and the other forfeited lands of William Earl of Seaforth, it was required that John Mackenzie should be infeft, amongst other things, of the "salmon-fishing of the half of the water of Balgy and Linn thereof" to be held of Lord Fortrose "in feu farm for payment of the ancient feu-duty."

In the subsequent progress of titles down to the respondent there is always a disposition of the salmon-fishing of the Balgy by the same description, thus showing a regular deduction of the title from the Crown downwards to the respondent.

It was argued for the respondent that if he failed to deduce a title to the fishings from the Crown he might stand upon the deed of 7th February 1754, by which Lord Fortrose renounced and discharged the right of reversion in the wadset of 1668. This renunciation and discharge having been followed by forty years' possession, it was contended that it constituted a good title to the salmon-fishings in question. In support of this view the case of the *Lord Advocate* v. *Sinclair* was cited, which decided that a charter, though granted *a non domino*, was a good foundation for a title by prescription. It seems to me unnecessary to consider the case in this point of view. The deed of renunciation hereby rendered the interest under the wadset absolute instead of being redeemable. The wadset itself, even if the title under it were not traceable from the Crown, would be a much better foundation upon which to rest a title *a non domino* than the renunciation of the right of redemption by the subsequent deed. And I am not prepared to say that as the wadset contained an express grant of salmon-fishing that the mode of fishing by rod and line would not have given a title by prescription. But it clearly appears that the title of the respondent to the salmon-fishing in half the water of the Balgy may be traced upwards to the Crown, and that he need not, therefore, have recourse to any base title. It is unnecessary to add that the respondent having in his titles an express mention of salmon-fishings, the consideration of the mode in which he has exercised his right of fishing, or whether he has exercised it at all, becomes perfectly immaterial. He does not require any evidence of the nature of the right where the grant is express, and his title once created by an express grant is not lost by *non user*.

I think, therefore, that with the alteration proposed by my noble and learned friend on the Woolsack, the interlocutors appealed from ought to be affirmed.

Lord Westbury—My Lords, after the opinions which have been delivered it is unnecessary that I should enter at length into the consideration of

this question; but for the satisfaction of the parties I may be permitted to say that I have examined the titles produced by the respondent with very anxious care; and I am decidedly of opinion that he has proved a title derived from the Crown, certainly to one-fourth part, and I think presumably to one-half part of the salmon-fishings of the Balgy. With regard to the evidence of enjoyment, with such a grant as that no evidence is needed; but I may be permitted to say, that although it is true in the law of Scotland, as an affirmative proposition, that an ambiguous grant of *piscationes* alone may certainly be interpreted into a *jus piscandi salmones* by evidence of user by net and coble, yet I do not apprehend the law of Scotland to warrant this negative proposition, that no evidence whatever except user by net and coble would be sufficient to establish it. That, however, is a mere *obiter dictum*, not necessary for the determination of this case. The case here rests, I think, clearly upon a title derived from the Crown of the one-quarter part of the *jus piscandi salmones* in the river Balgy. But it is impossible to deny that, if you come to that conclusion with regard to the right of one of the two heirs-portioners, that very proposition appears of necessity to involve the same conclusion with regard to the other.

I entirely concur, therefore, in the proposition of my noble and learned friend on the Woolsack—that the title under the Crown grant, not a title by enjoyment and immemorial possession, but the title under the Crown grant, should be made the foundation of the respondent's right; and I entirely concur with him, that having substituted that for the declaration made by the Court below, in so far altering the interlocutor, this appeal must be dismissed, but I think it ought to be dismissed without costs.

Lord Colonsay—My Lords, after the very clear and elaborate deduction of title which was given by my noble and learned friend on the Woolsack, it would be improper for me to detain your Lordships by any recapitulation of it. It has been stated more briefly by my two noble and learned friends opposite, and I also have arrived at the conclusion, that the title of the respondent may be traced up to the Crown. That being so, it is unnecessary to go farther in order to show that he has a right to one-half of the salmon-fishings, and that he is entitled to resist successfully the demand of the appellant to an exclusive right of the fishing of the river. The right of the appellant himself to one-half of the fishings is, I think, clear. His right of fishing is clearly proved by his use to have been a right of salmon-fishing. I had no doubt of that from the commencement of the case. The right of the respondent, tracing his title up to the Crown, I also thought had been established; but I am glad to find that my opinion, as it formerly stood on that matter, has had much more confidence given to it since I have had an opportunity of seeing in print the older titles on which it rests. When I had to consider the case formerly those documents were not printed. Observations were made upon them, and they were looked at in manuscript, but it was possible that some parts of them might have escaped notice, or that they might not have been so properly interpreted as they should have been; but on looking at them as they are now before us, I think they fully make out the right of at least one of the co-heirs, and I would say of both.

Some other points have been noticed, as to which I would rather avoid expressing my opinion; because I do not think they are necessary to this case. One of those matters is as to the right that the appellant would have had to challenge the right of the respondent if he had himself not contended for an exclusive right of fishing. I think there are points connected with that question which have not been fully developed: and, as it is not necessary for this case, I would rather avoid expressing any opinion upon it.

There is another point on which some of my noble and learned friends have expressed an opinion in which I entirely concur, namely, that it is not necessary in all cases, with a view either to convert a right of fishing into a right of salmon-fishing, or to establish a right of salmon-fishing as against the Crown, that there should be an exercise of the right of fishing by net and coble. That proposition, I think, is not established in our law, and I would wish not to be understood as saying anything which might imply it, but rather the contrary. My Lords, with these observations, I entirely concur in the judgment which has been expressed.

Lord Advocate—My Lords, there is a second appeal which has to be disposed of.

Lord Colonsay—That interlocutor has to be affirmed.

Lord Advocate—Yes, with costs I presume. We got costs in the Court below.

Lord Chancellor—The motion I submitted to your Lordships was founded upon this among other things, that the conclusion of the interlocutor which related to the claim raised in the interdict was a proper conclusion. I shall move your Lordships that the interlocutor of interdict be affirmed, and the appeal dismissed without costs.

Lord Chelmsford—There may be a question whether the appeal ought to be dismissed without costs. I had some doubt whether the former appeal ought to have been dismissed without costs.

Lord Chancellor—My Lords, I think upon every occasion in dealing with the question of costs, which in many appeals, and perhaps in this appeal, is the most substantial part of the case, very great care should be taken that we should act upon a uniform principle. The principle upon which I proposed to your Lordships, in the first instance, not to give costs in this appeal to either side, was this—I looked upon the litigation as a whole. It was necessary to bring up here the whole of the litigation. We have altered the finding of the Court below in one very material respect, because in place of basing the right of the respondent upon usage, we have based it upon his titles. I thought that, under these circumstances, the respondent certainly could not ask that the appeal should be dismissed with costs, and that the more just conclusion to arrive at was to hold that there should be no costs given to either side. I think that, although in point of form there has been a separate appeal upon the question of interdict, in substance the litigation is to be looked upon as a whole, and the observations I made apply to both the appeals.

Interlocutors affirmed with an alteration, and appeals dismissed.

Agents for Appellant—James Steuart, W.S., and Alexander Dobie, London.

Agents for Respondents—W. H. and W. J Sands, W.S, and John Graham, London.