view to another trial, the Sheriff-Substitute was right in refusing to insist on a further trial for the reason stated in his note.

LORD PRESIDENT—I entirely concur in and adopt the views of Lord Shand.

On the motion of the pursuers (appellants) for expenses, the defender asked that the costs of a conjunct probation which the pursuers had led in the Court below at the conclusion of the defenders' proof, and to which the defender had then objected as being unnecessary and incompetent, should be deducted from the expenses to which the pursuers were to be found entitled.

At advising—

LORD PRESIDENT—I am for disallowing the expenses of this conjunct probation, and I think it right to make it known that we shall do the same in other cases of the kind. Wherever an incompetent conjunct proof has been allowed, whether the fault be that of the Sheriff or of anyone else, we shall not allow the expenses of it.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I think it is a very bad and loose practice in some Sheriff Courts that after the pursuer of the issue, who ought in the first instance to lead full evidence, not only in support of the ground of his action but in anticipation of any ordinary defence, has closed his proof and the defender has led his evidence, the pursuer is thereafter allowed a second proof, for that is what it practically comes to. This practice ought to be checked, and I hope this decision as to expenses will aid in checking it. In this case the pursuers in the first instance very properly adduced evidence on the whole points in controversy, thus at once leading their proof-in-chief and the conjunct proof allowed to them in anticipation of the defence, of which they had full notice. But, again, after the defender had led evidence, the pursuer recalled certain witnesses and examined others practically on the leading points which had already been the subject of his original proof. This ought not to have been allowed. The result was to cause considerable additional expense, for witnesses had to be brought back a second time, and the defender had not an opportunity of expressly meeting that evidence. Of course I distinguish between conjunct proof and proof in replication, which may be properly had in reply or in regard to any incident or matter of which notice has not been given, or of which it may fairly be said proof in anticipation could not be expected.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff of date 2d December 1879: Find that the pursuers undertook to supply, and the defender undertook to purchase and pay £1115 for, a steam digging machine, in terms of the letters dated respectively 21st and 22d September 1876: Find that it was a condition of the said contract that the defender sheuld not be bound to accept and pay for the said machine if it should fall short of digging and filling into waggons 350 cubic yards of the clay or other soft substance within a day of ten hours, in a certain railway cutting which the defender was about to make, called the Carfin cutting, after it is fairly tried on a properly opened-up face: Find that it was impossible that the machine should have the stipulated fair trial unless the defender provided a properly opened-up face at the said Carfin cutting: Find that the defender failed to provide such properly opened-up face, notwithstanding repeated demands on the part of the pursuers, and thus prevented the machine from being tested in the manner provided by the contract: Find that the defender has failed to prove that the pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine: Therefore repel the defences, and decern against the defender to pay to the pursuers the sum of £1115, with the interest prayed for, in terms of the petition: Find the pursuers entitled to expenses in both Courts, but subject to deduction of the expense of the conjunct probation, which was incompetent, and ought not to have been admitted," &c.

Counsel for the Pursuers (Appellants)—Mackintosh—Murray. Agents—Finlay & Wilson, S.S.C.

Counsel for Defender (Respondent)—Johnstone—Asher—W. C. Smith. Agents—J. Smith Clark, S.S.C.

Tuesday, May 25.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MURRAY *v.* PEDDIE AND OTHERS (TRUSTEES OF ALLAN'S MORTIFICATION, STIRLING).

Property—Barony—Servitude—Real Right—Salmon-Fishing.

The Crown titles of the barony of T. contained a clause by which there was conveyed to the vassal the right and privilege of one tide's fishing of salmon yearly, whensoever he should make his option, within certain specified boundaries which were beyond the boundaries of the barony. The exercise of this right was uninterrupted from 1676. *Held* that the right was valid against the proprietor of certain salmon-fishings within the specified boundaries, whose titles contained no reference to the burden.

Question—Whether the right was of the nature of a servitude?

The following narrative in this case is taken from the opinion of the Lord Ordinary (CURRIEHILL):—"The pursuer Lieutenant-Colonel Murray is infeft upon Crown titles in the barony of Touchadam, including, *inter alia*, 'the lands of Polmaise, Saint Clare, . . . lying within the sheriffdom of Stirling, with the fishing of one boat upon the Water of Forth belonging thereto; as also with the right and privilege of one tide's fishing of salmon yearly whensoever the deceased William Murray of Touchadam, or his heirs of

taillie after specified, shall please to make their option, from the Abbeyford to the Pow of Alloa in the said Water of Forth and sheriffdom foresaid, of the whole boats and nets within the said bounds, with the farm shotts of two boats within the said bounds, conform to use and wont.'

"The defenders the managers of Allan's Mortification in Stirling are infeft in 'All and Whole the salmon-fishing and other fishing in that part of the river of Forth which belonged to the lands of West Grange, called the Longrack, and whole privileges belonging to that fishing.' These fishings are within the 'bounds' specified in the pursuer's titles above recited.

"Founding upon the said titles, and upon earlier titles similarly expressed, Colonel Murray's fishing tenant, James Greenhorn (with his landlord's consent), sometime ago raised against Joseph Bisset & Company, the tenants of the Longrack fishings belonging to Allan's Mortification, an action for payment of various sums of money as the respective values of one tide's fishing in each of the years 1876, 1877, and 1878. The action was sisted to enable Colonel Murray to raise an action of declarator of his right against the managers of Allan's Mortification; and an action of declarator having accordingly been raised at the instance of Colonel Murray and Mr Greenhorn against Allan's Mortification and Joseph Bisset & Company, the two actions were conjoined.

"In the declarator the pursuers ask to have it declared that in virtue of the titles and of the usage following thereon Colonel Murray 'has the right and privilege of one tide's fishing of salmon yearly, whensoever he shall please to make his option, from the Abbeyford to the Pow of Alloa in the Water of Forth and sheriffdom of Stirling, of the whole boats and nets within the said bounds, with the farm shotts of two boats within the said bounds, according to use and wont;' that the Longrack fishings are within these bounds; and 'that in virtue of the said right and privilege the pursuer the said John Murray, and the other pursuer as in his right, are entitled to claim and receive the whole fish caught within the bounds of the said Longrack fishings during such one tide in each year as may be selected by the pursuers, or in the event of the said fish being retained by the defenders, to claim and receive the value of the said whole fish so caught during said tide.' [This conclusion is not now insisted in so far as it relates to the 'farm shotts.'] There is an alternative conclusion for declarator (which, however, is not now insisted in by the pursuers) to the effect 'that in virtue of the said right and privilege the pursuers are entitled to the sole and exclusive right of fishing within the bounds of the said Longrack fishings for or during such one tide in each year as they may select, and also to the full and exclusive use of the whole boats and nets of the defenders for the purpose of the said fishing during the said tide.' There is also a declaratory conclusion that the defenders Bisset & Company are bound to pay to the pursuer Greenhorn the value of all fish caught by them in the years 1876, 1877, and 1878, during the tides selected by the said pursuer during the said years, and there is a petitory conclusion for payment of £60, or whatever other sum may be found to be the value of the said fish. The pursuers maintain that they are entitled to select the tide's fishing either before or after the fishing has actually taken place.

"The defenders resist both actions on various grounds, of which the most important are the following—(1) That the title of Colonel Murray confers no valid right to take the fish, or the value thereof, caught by the proprietor or tenants of Longrack fishings, or to use the nets and boats of these parties; (2) that in any view the privilege is personal to the proprietor of Polmaise, and is not communicable to tenants; (3) that the alleged right is of the nature of an innominate servitude, and is therefore invalid, and, separately, is not binding on the defenders as singular successors of the Earl of Mar, who, at the date of the original grant by him on which the pursuers found, was also the proprietor of the fishings now belonging to the defenders; (4) that the defenders have had free and uninterrupted possession of the fishings under their titles unburdened by the pursuer's alleged right; and (5) that in any event the measure of the right is the usage of more than the last forty years, which has been an annual payment of £1 as 'bailie-tide' for each boat employed in the defenders' fishings."

The Lord Ordinary pronounced this interlocutor—"Having considered the conjoined actions, in the declarator finds, declares, and decerns that the pursuer John Murray, in virtue of his titles and possession had under the same, has the right and privilege of one tide's fishing of salmon yearly, whenever he shall please to make his option, in the Longrack fishings, in the Water of Forth, of the whole boats and nets used by the defenders in said fishings, according to use and wont; and that in virtue of said right and privilege the pursuer the said John Murray, and the other pursuer James Greenhorn as in his right, are entitled to claim and receive the whole fish caught within the bounds of the said Longrack fishings during such one tide in each year as may be selected by the pursuers, such selection being always made before the fishing of such tide is begun, or in the event of the said fish being retained by the defenders or others, the tenants or occupiers of the said fishings to claim and receive the value of the said whole fish so caught during said tide: Finds, declares, and decerns that the defenders Joseph Bisset & Company are bound to make payment to the pursuer the said James Greenhorn of the value of all the fish caught by them in the years 1876, 1877, and 1878, during the tides selected by the said James Greenhorn during the said years, and decerns: In the conjoined actions finds that the value of said fish, at the rate of £2 sterling for each of two boats used by the said last-mentioned defenders in the said tides during each of said years, amounts to the sum of £24 sterling: Decerns and ordains the said Joseph Bisset & Company to pay to the said James Greenhorn the said sum of £24 sterling, with interest at the rate of £5 per centum per annum from the 13th day of November 1878 until paid: *Quoad ultra* assoilzies the whole defenders from the conclusions of both actions, and decerns.

"*Note.*—[*After the narrative quoted above*]—These defences render it necessary, in the first place, to ascertain from Colonel Murray's titles the true construction of the grant upon which the pursuers found; in the second place, to ex-

plain these titles where they are obscure or ambiguous by the usage which may have followed; and, in the third place, to determine whether, in virtue of these titles and of the subsequent usage, the pursuers are entitled to succeed in their present claim to any, and if so to what, extent.

"In 1635 the Earl of Mar appears to have been proprietor of the whole of the salmon-fishings in the river Forth from Stirling to Alloa, except a limited right of salmon-fishing by means of only one boat, attached to the lands of Polmaise, on the south side of the river, then belonging to Sir William Murray of Touchadam, a predecessor of the pursuer Colonel Murray. In addition to that right Sir William Murray and his predecessors appear to have been in use to enjoy one day's fishing annually over the whole of the Earl of Mar's water within the bounds mentioned. The earliest written title extant or produced in reference to this matter is a document entitled 'Letters of Approbation,' dated 22d June 1635, granted by the Earl of Mar to Sir William Murray in the following terms, viz. :—'Be it kend till all men be thir pnt. lres., We, Johnne Erle of Mar, Lord Erskyne and Gareoche, &c : Forsameikill as Sr. Williame Murray of Touchadame, knicht, and his predecessors, hes bene in peicabill possessioun and vse be thaimselfis and yair servandis, in yair names and at yair directioun, be vertew of yair richtis off ane dayis salmond-fisching yeirlie quhan he sould pleis to mak chois yairof, off the haill cobillis and nettis vpon the Watter of Forthe betwix the Brig of Stirling and the Pow of Alloway, and for the respect and favour we carie to the said Sr. Williame Murray, nawayis intending to prejudge him of yat privilege he and his predecessoris hes bene in vse and had heirtofoir, we, be thir p'nts, ar content and maist willinglie consentis that the said Sr. Williame Murray bruik and injoy the said libertie of fisching within the foirsaid boundis as he and his predicessoris hes bene in vse and custome, conforme to thair said richtis and possessioun, qlk we sall not quarrell nor impugne, and thairfoir willis and requyris the tennentis an dfischeris vpoun the said Watter, within the landis and boundis foirsaid, to reddilie ansr. and obey the said S. Williame Murray and his foirsaids with yair haill cobbillis and nettis for the said fisching quhan they sal be requyrit be him yairto, conforme to vse and wount; and consentis thir p'nts be reg'rat in the Buikis of Counsall and Sessioun ad futuram rei memoriam.'

"Sir William Murray was succeeded by John Murray, who was proprietor of Polmaise, in 1659, and who in 1676 resigned the same in the hands of the Crown *in favorem* of his eldest son John Murray jun., who obtained a Crown charter on 23d June 1676 in favour of himself and the heirs therein mentioned, of, *inter alia*, 'Totas et integras terras de Polmais Sinclare nunc vocat Johnstoune cum do'ibus edificiis hortis pomariis p'tibus pendiculis et pertinen. hujusmodi quibuscunq. jacen. infra vicecomitat. n'rum de Stirling predict. cum piscaria vnius cymbae supra dict. Aquam de Forth ad easdem pertinen. ac etiam cum jure et privilegii vnius estus lie an tyde salmonum piscariarum annuat. quando placebit dict. Joanni Murray juniori ac suis predict. electionem earundem facere a lie frae the Abayfoord to ye Pow of Alloway in dict. aqua et vicecomitat. n'ro prescript. integrarum cymbarum lie cobles et retum lie nets infra predict. bondas ejusdem et cum lie the ferme shots duarum cymbarum illi et suis predict. infra easdem bondas supraspec'at secundum vsum et consuet.' By that Crown charter the whole subjects therein contained, including the right and privilege foresaid, were erected into the barony of Touchadam. It has been followed by a complete feudal progress of titles—the last being a Crown writ of *clare constat* in favour of the pursuer Colonel Murray, dated. the 1st and recorded in the Register of Sasines the 2d September 1862, the subjects in question being therein described in the terms quoted at the beginning of this note.

"It will be observed that the terms of the Crown charter of 1876 and subsequent titles differ in some material respects from those of the Earl of Mar's letter of approbation in 1635. In the first place, the 'jus et privilegium' which in the 'letter' is said to be 'a day's fishing,' is in the Crown titles only 'one tide's fishing.' In the second place, in the 'letter' the Earl of Mar requires the tenants and fishers in the river (*i.e.* his own tenants and fishers) to attend and assist with their nets and cobles. There is no such direction in the Crown titles. And, in the third place, the privilege is, by the charters, declared to include the 'farm shotts'—*i.e.*, the first shots —of two boats, which are not alluded to in the letters, and which, as already explained, are not now claimed by the pursuers.

"Now, if the claims of the pursuers had depended solely upon the 'letters of approbation,' and if the terms of that document were to be construed apart from all proof of usage, I should have been inclined to hold (1) that the right or privilege of fishing thereby recognised was a privilege limited to the lifetime of Sir William Murray, though it might be exercised by him through his tenants or others having his authority; (2) that in exercising the privilege he was entitled to select any day which he might choose during the fishing season—to demand the attendance and assistance of the Earl of Mar's whole tenants and fishers within the specified bounds, with their nets and boats—and to carry off the whole produce of the day's fishing; but (3) that the privilege was one which the Earl would not have been bound to renew to Sir William Murray's successors.

"The numerous references, however, in the 'letters' to usage as fixing the measure and the mode of exercising the privilege, render it impossible to fix any satisfactory meaning upon the terms of the document without inquiring into that usage. Now, we have an important piece of evidence on that point in a decree of the Court of the lordship and barony of Alloa, dated the 14th July 1659, in an action at the instance of John Murray of Touchadam against John Millar and others, 'anent his tide fishing.' Millar was the tenant or fisher of the West Grange fishings (of which Longrack formed a part), and he was sued for fifty shillings Scots 'as the pryce of two salmond and two grilses detained be him aff the fishes taken be ym. in that tyd dew to the said Johne Murray for his salmond coble in the Water of Forth, this instant year of God 1659 year, conform to his right thereof.' Millar compeared personally and confessed that he had detained the fish, admitted his liability for the value, and was decerned to pay the amount, with expenses.

These proceedings show that the privilege had been continued in favour of Sir William Murray's successors—that it was recognised in Lord Mar's own Barony Court as a subsisting privilege—and that it was exercised by Mr Murray selecting a tide and claiming from the tenants and fishers the whole of the fish caught during that tide, or their value, and not by himself fishing the river either with or without the assistance of Lord Mar's tenants and fishers.

"These facts throw some light upon the terms of the Crown charter of 1676, which, as I have explained, was expede upon a resignation by this John Murray in favour of his son John Murray junior. The words in that charter by which the right and privilege of a tide's fishing are conferred, renewed, or recognised, are as follows, viz:—'Cum jure et privilegio estus lie an tyde salmonum piscariarum annuat. . . . integrarum cymbarum lie cobles et retum lie nets infra predict bondas . . . secundum vsum et consuet.' These words, when read in the light of the decree of 1659, would indicate that the right or privilege, whatever it may have been originally, had come to be regarded as a right to demand one tide's salmon-fishing (*i.e.*, the produce of one tide's fishing) of all the boats and nets within the specified bounds, and such appears to have been the practice during more than a century after the year 1676.

"The estates of the Earl of Mar were forfeited in 1715, and were sold by the Commissioners of Forfeited Estates in 1724 to James Erskine of Grange, who conveyed one-half thereof in 1725 to David Erskine of Dun, and a Crown title was expede in favour of these two persons. Thereafter various portions of the estates were sold by James and David Erskine to purchasers, and, *inter alia*, the lands of Easter Grange of Cambuskenneth (called also Black Grange), and the salmon-fishings thereof, were sold to or acquired by Scott of Scotstarvit, and the lands of West Grange and fishing were acquired by David Toshack and spouse. The fishings of West Grange, which include Longrack, were in 1779 acquired from Toshack's successors by the defenders 'Allan's Mortification,' whose title was completed by charter of confirmation in 1785, granted by John Francis Erskine, Esq. of Mar.

"Various questions in relation to the 'bailie-tide' occurred during the eighteenth century between these purchasers or their fishing tenants and the predecessor of the pursuers. One of these arose in an action raised in 1763 by Scott of Scotstarvit against William Murray of Touchadam and Polmaise, who by his Crown titles had (as has been already mentioned) a right of salmon-fishing with one boat in connection with Polmaise, which is on the south side of the river, immediately opposite Scott's lands of Easter (or Black) Grange. The action was one of declarator by Scott and his son, as proprietors of the Black Grange salmon-fishings, to ascertain their right in said fishings alleged to have been encroached on by the proprietors of Polmaise. Proof was led, and many printed pleadings were lodged on both sides, and prints of these documents were at the close of the proof in the present action tendered by the pursuers as evidence for them, but were rejected as inadmissible. It is, however, competent to refer to the final decree of this Court in the action referred to, not as evidence, but by way of precedent. The final interlocutor, which is dated 9th August 1763, and is signed by the Lord President (Dundas), is as follows:—'Upon report of Lord Edgefield, and having advised the state of the process, testimonies of the witnesses adduced, writs produced, together with the informations and additional informations given *in hinc inde*, the Lords find the pursuers have right to the salmond and other fishing on that part of the river Forth adjacent to their lands of Easter *alias* Black Grange of Cambuskenneth, and to fish the same with boats, nets, and every other lawfull way, and to draw their nets on either side of the said river as most convenient: Find that William Murray, defender, has right to fish on the said river opposite to the said lands of Easter *alias* Black Grange of Cambuskenneth with one boat only, and to draw his nets on his own side; and likeways that he has right to exact one tide's fishing yearly when he, the defender, shall chuse the same, and that of all the fishers' boats and nets employed by the pursuers or their tenants in the said fishing, in name of bailie's tide; but find that the defender has no right or title to the farm's shott or first shott of the above-mentioned one boat's fishing upon the said river, and decern and declare accordingly.' The importance of that decree as an authority in the present case consists in this, that the Court, after full inquiry and proof of usage, found that the proprietors of Polmaise had under their titles a good right to exact the 'bailie-tide' out of the Black Grange fishings, which are within the specified bounds, and immediately adjoin the Longrack fishings. If, therefore, the present pursuers can establish a usage of exacting 'bailie-tide' out of the Longrack fishings, the decree of 1763 is undoubtedly an authority in support of their claim to have their right to such exaction judicially declared and enforced.

"In support of their averments as to usage the pursuers found upon, *inter alia*, certain proceedings in the Sheriff Court of Stirling in 1785 and 1788, at the instance of their predecessor Sir William Murray against various fishers in several parts of the river, and among others against 'James M'Bea at Craigmill, who is sued for payment of £1 sterling as the bailie-tide of two boats fished by him on Longrack, demanded in August then last . . . which boats are liable to the petitioner in virtue of his rights for the foresaid bailie-tide, but of which they refuse payment or delivery of the fish.' The proceedings in the action were protracted, and in the course of them the Master of Allan's Mortification was cited as a defender for his interest, and appeared and resisted the action. The decree in *Scott of Scotstarvit's* action was produced and founded on, and the right of the proprietor of Polmaise to exact a 'bailie-tide,' though questioned, was in the end recognised. The defenders, indeed, seem to have at last recognised the right to his 'tide,' and to have been willing that he should have either the fish caught or the value thereof, if duly demanded. What was really in dispute between the parties was the time and mode of making the demand. The pursuer maintained that he was not bound to select his tide until the close of the season, and that he was then entitled to claim the value of the largest catch which had been taken, while the defenders maintained that the selection should be made during the season and before the tide's fishing was commenced, and that nothing could be claimed by the pursuer un-

less so demanded. After much procedure, in the course of which the Sheriff-Substitute held that Sir William Murray was bound to make his selection and demand either before or immediately after the fishing of the tide, the fact of the demand having been made was referred to the oath of M'Bea, who deponed negative, and the result was that on 8th February 1788 the Sheriff-Substitute found that 'it is incumbent on the pursuer or his tacksman to make a demand upon those liable for their bailie-tides yearly within the legal fishing season, and that the defender M'Bea having deponed that no such demand was made upon him is not now liable.' The pleadings show very plainly that prior to 1788 the pursuer's predecessors were in use to exact a bailie-tide, and that the demand was generally made for the value of the fish.

"It does not appear that subsequent to that time, and until recently, there had been any question between the parties interested as to whether the demand should be made before or after the fishing of the tide. I think that the Sheriff-Substitute was wrong in holding that the pursuer had the option of selecting his tide either at the beginning or at the end of the fishing. He was, in my opinion, bound to demand his tide 'before the nets were wet.' Any other construction, indeed, of the pursuer's right would be entirely inconsistent with the terms of the grant in the 'Letters of Approbation,' on which he founds his claim, because, as I have already pointed out, the terms of that document clearly imply that the grantee was, on the day selected by him, to go or send his servants to the river, and then call upon the Earl of Mar's tenants and fishers to assist him with their boats and nets. Such a right could clearly not be exercised unless at the beginning of the day's fishing. And there is nothing in the later titles to indicate that they must in that respect be construed differently from the 'Letters.' But, as I have said, the question did not after 1788 assume any practical importance, because, as the proof shows, there has been, since an early period in the present century, a uniform practice of commuting the tide's fishing into an annual money payment. The proprietors of Polmaise and their fishing tenants have been in use to exact from the fishers, not only of Longrack but of the river generally between Stirling and Alloa, an annual payment in lieu of 'bailie-tide,' and such payment has been uniformly made, though doubtless not without grumbling.

"Until about forty years ago the payment was usually 10s. sterling per boat, but for the last forty years it has been increased to £1 sterling per boat, that being, until within the last twenty or thirty years, a fair estimate of the value of one tide's fishing of one boat, taking the average of the whole season. The amount of payment, however, appears to have been made (at all events until within the last twelve or fifteen years) matter of special arrangement at the beginning of a season, or at the beginning of a tack between the Polmaise fishing tenants and the parties liable in the burden. Thus the witness George Stevenson, who was tenant of Longrack in 1837 and 1838, says—'I know about the bailie-tide. It was exacted from me in respect of the Longcrack fishings. (Q) How did you arrange as to the payment of the bailie-tide during the two years you had Longrack?—(A) I do not know exactly. There was just a private agreement to take so much in respect of the bailie-tide. There would be £1 paid for each boat, but I never saw a statement of the account. I never heard the sum that was paid—it was just slumped in with the other expenses. (Q) How much was paid when you were tenant of Longrack?—(A) I cannot say; it would be 10s. at least, perhaps £1. I have heard it was 10s. in the old times, but it came to be £1. (Q) Was it just a matter of bargain each year at the beginning of the season?—(A) Entirely that—just a private arrangement with the tacksman of the Little Hole fishing.' To the like effect is the testimony of other witnesses. 'Little Hole,' it should be explained, is the name of the pursuer's fishing attached to Polmaise.

"I think, therefore, that it may be held proved that there has never been any absolute fixed sum exigible or payable in respect of this bailie-tide, but that from time immemorial, and indeed for a period of two centuries and a-half, there has been a usage on the part of the proprietors of Polmaise to exact, and on the part of the proprietors of the other fishings on the Forth and their tenants to hand over or pay, either the actual produce of a tide's fishing or a sum of money yearly in lieu thereof, as 'bailie-tide,' and that the amount of commutation has been in use to be settled by private arrangement from time to time as an approximation of the actual value of the fish, the result being that it has increased from 10s. sterling per boat to £1. In these circumstances, if the pursuer Colonel Murray has a valid right to exact the 'bailie-tide' at all, he is entitled to demand either the produce of the tide's fishing or its actual value, but he must make his selection and demand his 'tide' before the fishing of that tide is begun.

"The question, however, still remains, whether notwithstanding the terms of the pursuer's titles and the proven usage, the right is one which he is legally entitled to enforce against the defenders to the effect of demanding from them either the produce of the selected tide's fishing or the value thereof? The defenders, as I have already said, maintain that as they are singular successors of Lord Mar, and as their titles contain no reference to the burden, they are, notwithstanding the long usage, under no obligation to continue to submit to the exaction. The case of *Scott of Scotstarvit* is undoubtedly an authority. But as that judgment may perhaps not be conclusive of the question, it is desirable to ascertain clearly the true nature of the right claimed by the pursuers. One view insisted in by the pursuers is that the right is of the nature of an annual duty or prestation or casualty effeiring to the heritable office of Bailie of the Forth, and that the pursuer being expressly infeft in the prestation, and having been in use to exact the same, he and his tenants are now entitled to continue the exaction. In support of this argument the pursuers refer to a number of cases, such as *M'Lay*, M. 10,887, *The Earl of Moray*, M. 10,903, and various other cases reported in the Dictionary under the word 'Prescription.' But the argument, in my opinion, utterly fails. In all the cases referred to the casualties were attached to an existing heritable office, and were possessed by the actual holders of the office. But in the present case there is nothing of the kind. The pursuer Colonel Murray is not Bailie of the Forth, and, so far as the proof shows, there never

was any such officer. The cases, therefore, which are referred to have no bearing on the case.

"Neither can the right be said to be a right of property. No doubt the right of salmon-fishing is a *separatum tenementum*, which admits of being enjoyed apart from the possession of land, and which may be indefinitely subdivided—a good instance of which is to be found in the pursuer's own title, for while Lord Mar and his successors were proprietors of almost the whole fishings on both sides of the Forth from Stirling to Alloa, the pursuer is proprietor only of the fishings opposite to his lands of Polmaise, in so far as the right is to be enjoyed by means of one boat drawing the nets only on his own side. But the right and privilege of the 'tide's fishing' now claimed is something quite different. The grant, as interpreted by the usage, does not give to the pursuers any right of property—it confers upon him no active right which he can exercise either himself or through others. He is not entitled to dip a net of his own in the water; all that he is entitled to is to name one tide in each year, and to demand the produce of that tide, or its value, from the fishers of Longrack.

"The right, therefore, appears to me to be of the nature of an innominate servitude, not necessarily binding on singular successors of the original granter, but capable of being made binding upon them by prescriptive usage such as is proved to have existed in the present case. The defenders have been proprietors of the Longrack fishings for one hundred years, and during all that time they and their tenants have knowingly and uninterruptedly submitted to the exaction. The burden more nearly resembles the servitude of thirlage than any other burden known to the law. In thirlage questions the payment by a landowner of dry multures during the prescriptive period, although he has taken none of his corn to the mill, implies an acknowledgment on his part that his lands are subject to the servitude. And so in the present case I think that the defenders, by their long continued and uninterrupted submission to the pursuer's exactions, have virtually acknowledged that the grant has imposed upon them a burden from which they cannot now escape. In short, the burden, although it might not have been binding on them as singular successors, if challenged at the time when they acquired the subjects in 1779, is one which they cannot now effectually repudiate.

"The result, therefore, of the whole matter is that the pursuers are entitled generally to prevail in the action, but the decree of declarator which they ask must be qualified by a finding that they must make their selection of the bailie-tide in anticipation of the fishing, and not after it is finished. It is said, no doubt, that if they take that course the defenders will find ways and means of evading their right—that they will fish the waters carelessly or negligently, and will rather allow fish to pass the nets than take the trouble of catching them for the pursuers. On this point I shall merely say that if any such course shall be adopted by the defenders *in mala fide*, I cannot doubt that the law will be found strong enough to prevent such infraction of the pursuer's right. But I would suggest that the judicious course for all parties to follow is to commute, by an annual or periodical arrangement, the value of the fishing for a money payment.

"As to the actual value of the tide's fishing during the years 1876, 1877, and 1878, for which the pursuer claims £60—*i.e.*, at the rate of £5 a boat each year—there does not appear to me to be any satisfactory evidence. The defenders, however, aver in the record that £1 per boat is far below the true value of the tide's fishing, and on the whole I think that £2 per boat may be taken to be the fair value of the fishing during the years libelled. Decree will therefore be given for the sum of £24, which is about the sum sued for in the original action."

The defenders reclaimed.

Authorities—*M'Lay* v. *Skelmerlie*, July 10, 1673, M. 10,887; *Gardner* v. *Earl of Aboyne*, Nov. 27, 1734, M. 14,517; *Aboyne* v. *Farquharson*, Nov. 16, 1814, F.C.; *Aboyne* v. *Innes*, July 10, 1819, 6 Paton's App. 444; *Magistrates of Edinburgh* v. *Scott*, June 10, 1836, 14 S. 922; *Harris* v. *Magistrates of Dundee*, May 29, 1863, 1 Macph. 833; *Mactaggart* v. *Macdouall*, March 6, 1867, 5 Macph. 534; *Patrick* v. *Napier*, March 28, 1867, 5 Macph. 603; Erskine Inst., ii. 9, 23, and iii. 7, 8; Bell's Prin., secs. 992 and 1016.

At advising—

Lord President—The existing title of the pursuer of this action is a Crown writ of *clare constat*, which bears date 1st September 1862, and was recorded in the Register of Sasines on the 2d day of the same month. By virtue of this Crown writ the pursuer is feudally invested in the barony of Touchadam, embracing among other subjects "All and whole the lands of Polmaise Saint Clare, now called Johnstone, with houses, &c., ... lying within the sheriffdom of Stirling, with the fishing of one boat upon the Water of Forth belonging thereto; as also with the right and privilege of one tide's fishing of salmon yearly, whensoever the deceased William Murray of Touchadam, or his heirs of taillie after specified, shall please to make their option, from the Abbeyford to the Pow of Alloa in the said Water of Forth and sheriffdom foresaid, of the whole boats and nets within the said bounds, with the farm shotts of two boats within the said bounds, conform to use and wont." Now, by virtue of that title and of the previous titles to the same barony, and of the possession which is said to have been had under these titles, the pursuer seeks declarator, in the first place, precisely in the terms of this feudal investiture which I have just read, and then he further seeks declarator that Longrack fishings, belonging to and tenanted by the defenders respectively, are within the said bounds, and that the pursuer's said right and privilege extends over the said Longrack fishings, and that in virtue of the said right and privilege he is "entitled to claim and receive the whole fish caught within the bounds of the said Longrack fishings during such one tide in each year as may be selected by the pursuer, or in the event of the said fish being retained by the defenders, to claim and receive the value of the said whole fish so caught during said tide." There are other alternative conclusions to this summons, which it is unnecessary to read, because the conclusions to which I have now referred are those which have been given effect to by the judgment of the Lord Ordinary.

Now, when we come to look into the origin of this right, I think it is unnecessary to go beyond

the charter of 1676, because that is the earliest existing Crown writ embracing the right in question, and it does embrace that right in very precise terms; and without troubling your Lordships with the precise words of that Latin charter, it is enough to say that the existing investiture of Mr Murray, the Crown writ of 1862, very faithfully translates the words of the charter of 1676. Whether the *jus et privilegium* of one tide's fishing was made the subject of Crown grant at an earlier period we have not the means of knowing. Probably it was, because this charter of 1676 is a charter by progress—a charter of resignation by one Murray of Touchadam in favour of his son. But there being no earlier Crown grants in existence embracing this right and privilege, it is in vain to speculate upon the question whether the right had been granted by the Crown to Murray of Touchadam or his predecessors as a distinct right of fishing before the fishings in this part of the Forth had been made the subject of grant to anybody else, or whether this right and privilege had been granted contemporaneously with the grant of the fishings generally. There is, however, an earlier writ, which, although it is not at all of the same authority or value to the pursuer as the Crown charter of 1676, is nevertheless of some value in the present question, as showing that a right—a true right—of the same description had been possessed by Murray of Touchadam at a still earlier period. I refer to what has been called the "letters of approbation" granted by the Earl of Mar in 1635. It might very well be contended, had that been relied upon as the pursuer's title, that the privilege there given is a privilege personal to Murray of Touchadam, and it might be even doubted whether it descended to his successors, and still more whether it would be binding upon anybody but the Earl of Mar and his descendants, and therefore I attach no importance to this document as constituting any part of the pursuer's title, but I think it is of some value as showing, from the statements which it contains, that the possession and use of this privilege had been held by the Murrays of Touchadam for a considerable period by virtue of their writs—that is, under their title; and thus that the right has been held under title from a very early period, and finds its place as part of the Crown grant contained in the charter of resignation of 1676.

Now, this right has not by any means lain dormant. It has not only been exercised—of which I shall speak by-and-bye—but it has also been asserted at various times. We have, in the first place, a proceeding in Lord Mar's Barony Court in 1659, which is perhaps the least important of the judicial proceedings connected with this right, but still it may be maintained in passing that the right was then given effect to by a decree of Lord's Mar's Barony Court against the fishers in this part of the Forth in 1659. But there occurs in the year 1763 a proceeding of a much more important character, which if it had been directed against the present defenders would have formed *res judicata* in this process. It was not directed against them or their predecessors, but against certain other proprietors of fishings within the bounds contained in the Crown charter of 1676—that is, between the Abbeyford and the Pow of Alloa. It was a declarator at the instance of Scott of Scotstarvit against William Murray of Touchadam, and we have the final judgment of the Court pronounced on the 9th August 1763, in which, upon report of Lord Edgefield, the Lords find that the pursuer, who is Scott of Scotstarvit, and Lieut.-Colonel John Scott, son of the pursuer, who seems to have had an interest in the same estate, "have right to the salmond and other fishing on that part of the river Forth adjacent to their lands of Easter *alias* Black Grange of Cambuskenneth, and to fish the same with boats, nets, and every other lawful way, and to draw their nets on either side of the said river as most convenient: Find that William Murray, defender, has right to fish on the said river opposite to the said lands of Easter *alias* Black Grange of Cambuskenneth, with one boat only, and to draw his nets on his own side; and likeways that he has right to exact one tide's fishing yearly when he the defender shall choose the same, and that of all the fishers' boats and nets employed by the pursuers or their tenants in the said fishing in the name of bailie's tide; but find that the defender has no right to the farm's shott, or first shott, of the above-mentioned one boat's fishing upon the said river, and decern and declare accordingly." Now, this assertion of the right—this judicial declaration of the right—is, I think, very precise and complete. It is defined here to be a right to exact one tide's fishing yearly when the defender shall choose, and that of all the fishers' boats and nets employed by the pursuers or their tenants in the said fishing. It appears to me that this judicial declaration of rights is quite in accordance with the conclusion of the summons which I have read to your Lordships, and, as I said before, if the interlocutor of the Court in 1763 had been pronounced in a question between the predecessors of the present parties it would have been *res judicata*, in my opinion, in this question; but being pronounced in a cause with another proprietor of fishings within the bounds of the pursuer's right, it cannot be said to be more than a precedent, but it is certainly a very important precedent, and one which we cannot but treat with great respect, because it is subscribed by the Lord President (Dundas), and we know that such judges as Kames, Grant of Preston Grange, and others, several of them very distinguished, were members of the Court at that period.

But the matter does not end here, for there are judicial proceedings which follow. It appears that in the year 1786 Sir William Murray, then of Touchadam, brought an action before the Sheriff of Stirling against the fishers of Scott of Scotstarvit, for the purpose of regulating the exercise of the right, and he contended in that proceeding that he was entitled to the selection of a tide's fishing at any time he thought proper, and was not bound to make it before the fishing commenced, but was entitled to wait until he would know for a certainty which was the best tide's fishing of the season. The fishers, on the other hand, contended that although they were not prepared to dispute the pursuer's right to a tide's fishing, they could not agree to the proposed mode of taking it, because it appeared he was only entitled to the right of fishing for one tide yearly, and not to demand the produce of any particular tide's fishing that he thought proper during the year's fishing. He must make choice

before the nets were wet, and run his chance of the produce. Now, this proceeding in the Sheriff Court was directed not only against Scott of Scotstarvit's fishers, but also against the fishers of the predecessors of the present defenders, and although as regards them the proceeding was ultimately unsuccessful, it was not so before the Sheriff had pronounced a very important deliverance. On the 3d November 1786 the Sheriff found "that the pursuer has a right to a bailie-tide in the river Forth from the Pow at Cambuskenneth to the Pow of Alloa, and he is entitled to make his selection of said tide either before the fishing is begun or immediately after it is finished," and thereupon he proceeds to admit the libel to the pursuer's probation and allows a conjunct proof. Now, under this interlocutor the pursuer Sir William Murray referred the matter of fact to the oath of the fishers of the defenders' predecessors, whether he had made choice of his tide in terms of the finding of this interlocutor, and the oath was negative of the reference, and so the fishers of the predecessors of the defenders were successful in that Sheriff-Court proceeding. It was otherwise with the fishers of Scott of Scotstarvit. A decree went out against them, and that decree they brought under review of this Court by suspension. The suspension came before Lord Stonefield, and on 30th July 1788 he pronounced an interlocutor repelling the reasons of suspension and finding the letters orderly proceeded; so that he in effect affirmed the interlocutors of the Sheriff, and amongst others that one which finds that the pursuer is entitled to his election of a bailie-tide either before the fishing is begun or immediately after it is finished. There was a representation given in against this judgment, and in the meantime Sir William Murray brought an action of declarator concluding "that it ought and should be found and declared that the pursuer, his heirs and successors, have good and undoubted right to exact one tide's fishing of salmon yearly in the river of Forth of all the boats, nets, or cobles employed thereon, from the ford of Cambuskenneth to the Pow of Alloa, by the said defenders or their tenants or others, in name of bailie-tide, and that at any time when the pursuer shall make choice thereof, either before the tide's fishing commences, during its continuance, or after it is completed, and which shall be at the sole expense of the proprietors of said boats, nets, or cobles." This action was joined to the suspension, and in the joint process the Lord Ordinary pronounced an interlocutor, dated 16th December 1788, in which he adhered to the Sheriff's judgment, and decerns and declares in terms of the summons of declarator brought by Sir William Murray. Now, all this information is to be obtained in the Session-papers, which are found in the Arniston collection, in reference to this case, and it does not appear that after that interlocutor the case proceeded any further. There was no judgment of the Inner House in that case.

Now, looking to the whole of these proceedings, and to the title with which they are concerned, it certainly would be a very strong thing for this Court now to hold that there exists any objection of legal incompetency against the right which is claimed by the pursuer. We have had a very able argument to the effect that no such right as this can exist in the law of Scotland, because it is a right of the nature of a servitude, and it does not answer to the conditions of any of the servitudes known in the law. It is not predial servitude, and it is said it cannot be a servitude because the law of Scotland knows no servitude except predial servitudes, except the servitude of liferent, if that right can be so classed. Now, if it was necessary in order to define the pursuer's right to find that this *jus et privilegium* was a servitude in the proper sense of the term, I should certainly have very great difficulty in adhering to the interlocutor of the Lord Ordinary. But I do not think that it is a servitude. The law laid down in the cases of *Patrick* v. *Napier* and *Mactaggart* v. *Macdouall* precludes me from saying that this is a predial servitude. But although that be so, I am not, I must say, pressed with any difficulty in sustaining this as a good heritable right. It is the subject of a Crown grant as part and parcel of a barony, or, it may be, as an appanage of a barony, and it has been duly feudalised for centuries, and in these circumstances, even apart from the judgment of the Court in the case of *Scott of Scotstarvit*, I should not have the least difficulty in saying that this is a good real right, competently feudalised and transmitted from one generation to another by a complete series of Crown titles.

It is said that we must attend also to the usage in order to see whether the right can be sustained to the extent which is maintained by the proprietor, and I should say that it is absolutely necessary to attend to the usage to see whether this right has been kept up, and whether its exercise is in accordance with the claim now made by the pursuer. But I am not disposed to say because the right has been exercised in different ways or for a time compounded or commuted for payment of a sum of money, that that at all interferes with the nature of the right itself. It is just one of those rights which it is extremely convenient to parties to commute for payment of a sum of money, and I think it would be in the highest degree inexpedient by any judgment of ours to deter any person from commuting such rights into money payment by tying them down either to the period of commutation, to the money payment, or above all to a perpetual commutation—to a fixed money payment. I think there is no authority for that. A party may very well say—"I see what is the state of this fishing. For the last ten years it has been yielding very little, and in these hard times if I were asking you to deliver me the produce of a tide's fishing I do not think I should make very much by it, and therefore I am quite willing to take a small sum of money instead." But is that to be a perpetual commutation? I cannot say I see any law for that, and especially as we see the payment of commutation in this case has not been always the same. At one time it was ten shillings a boat, and at another time it was £1. I do not see why the amount might not be reasonably expected to change in the way of increase or decrease, looking to the prosperity of the fishing for the time. We see now that since the charge of £1 per boat was thought to be a fair commutation, the rents of these fishings have enormously risen, and it would be an injustice to say that the pursuer should be satisfied with £1 when the rents of the fishings have increased so much and the produce

will be very much greater than at the time he was willing to receive £1. In short, I think that in one way or other this right has been kept up by possession and use, and that the possession and use are of various kinds is not to my mind any objection to the assertion of the right now in order to claim, according to the conclusion of the summons, the produce or the value of the produce of one's tide's fishing to which the pursuer is entitled.

I therefore agree with the Lord Ordinary in the main part of his judgment. But he has found that the selection of the tide's fishing must be made before the fishing of such tide is begun, and I cannot agree with the Lord Ordinary on that point. I think it is quite an unreasonable restriction. It would rather appear that the pursuer's predecessors at one time contended that they were entitled to select their tide at the end of the season, and to take the best tide's fishing of the season as their choice. On the other hand, it was contended by the defender's predecessors, and is contended by themselves now, that the choice must always be made by Murray of Touchadam before the particular tide's fishing begin—that is to say, Murray of Touchadam is to go down to the river and say, "Now, I will take the produce of this next tide's fishing." I do not think either of these views is reasonable. In the first place, I think it is inconsistent with the terms of the Crown grant to say that the pursuer is entitled to wait till the end of the season and select the very best tide's fishing that has occurred during the whole season. But, on the other hand, it must be obvious that if bound to select the produce of a tide's fishing which is yet to come off, great difficulty would be experienced in getting that fishing conducted by the defenders' fishermen in such a way as to produce fair results. One can easily see that if that rule were laid down, the pursuer's right might be evaded altogether, or almost altogether. But I can see no unreasonableness in what was decided by the Sheriff of Stirling in *Scott of Scotstarvit's* case, and affirmed by Lord Stonefield's interlocutor—that the pursuer shall be entitled, immediately after the conclusion of one tide's fishing, and seeing what the produce is, to say, "I will take that fishing as my selection;" and that accordingly I think ought to be affirmed as the true mode of exercising this right. Subject to that exception, I entirely agree with the Lord Ordinary.

Lord Deas—The defenders, the office-bearers of Allan's Mortification, are the proprietors of the salmon-fishings known as the Longrack fishings in the tidal river of Forth, and the other defenders are their tenants. These fishings are part of the fishings which formerly belonged to the Earl of Mar, who it is not disputed was in 1635 proprietor of the whole salmon-fishings on the Forth from Stirling to Alloa, except a right of fishing by one boat attached to the lands of Polmaise, on the south of the river, belonging to the pursuer Colonel Murray's predecessor, and now to Colonel Murray himself. It is not disputed that the pursuer has under his Crown titles to the barony of Touchadam, which includes the lands of Polmaise, a valid right to the said fishing by one boat, but the pursuer claims further, as conferred upon him and his predecessors by the same titles, what is therein described as the right and privilege of one tide's fishing of salmon yearly, whensoever he or they please to make their option, from the Abbeyford to the Pow of Alloa, in the Forth, of the whole boats and nets within the said bounds, conform to use and wont. The Longrack fishings are admittedly situated within these bounds, and the dispute between the parties is, in the first place, as to the nature and validity of the right and privilege, and, in the second place, as to how and to what effect it falls now to be exercised.

It is conceded that under Crown titles by progress from a very early period the Earl of Mar had right to the salmon-fishings from Stirling to Alloa, whatever may have been the exceptions or burdens attaching to that right; but no original Crown charter in favour of the Earl is extant, nor has any date been assigned to it, further than that it appears to have been earlier than the date of the registered letters of approbation of 22d June 1635, of which an extract is in process.

In like manner it is conceded that the pursuer's Crown titles by progress to the barony of Touchadam from an early date, viz., 23d June 1676, bear to confer upon his predecessors and himself, besides the right to fish by one boat, the right and privilege to one tide's fishing of salmon yearly within bounds which comprehend the Longrack fishings. But no original Crown charter conferring these rights is extant, nor can the pursuer, any more than the defenders, assign a date to their original Crown title further than that it may be presumed from the terms of the letters of approbation of 1635 to have been also prior to the date of these letters.

The titles of both parties have, however, been immemorially possessed upon, and in that state of matters the presumption, I think, is that they had flowed from the Crown simultaneously or of the same date. No other supposition can indeed consistently be made. The grant to the pursuer's predecessors is of the nature of a burden on the grant of the salmon-fishings to the defenders' predecessors. This being so, it cannot be supposed, on the one hand, that the Crown made a grant of the burden before making the grant upon which it was to be a burden; nor, upon the other hand, can it be supposed that the Crown attempted to create a burden over the salmon-fishings after being divested of these fishings by a grant free from any burden. The presumption therefore seems now to be either that the two grants were simultaneous, or that the grant of the salmon-fishings had contained a reserved power to create the burden. In either view no preference in respect of priority can be assigned to the title of the one party over the title of the other.

Assuming, then, as we must do, that the original charter by the Crown in favour of the pursuer's predecessor was in similar terms with the subsequent charters by progress, the result is that the one party has a grant of a barony in the county of Stirling adjoining the river Forth, with parts, pendicles, and pertinents thereof, with the fishing of one boat upon the Water of Forth belonging thereto; as also, with the right and privilege of one tide's fishing of salmon yearly, whensoever he or his heirs (who are now heirs of tailzie) shall please to make their option, from the Abbeyford to the Pow of Alloa, of the whole boats and nets within the said bounds.

Now, I know nothing to prevent the Crown, in

connection with and as a pertinent of a barony, from granting any feudal or heritable right or privilege to one party not inconsistent with rights already vested in another party, and not unlawful in itself as contrary to public polity or otherwise. If followed by infeftment and prescriptive possession, as has been the case here, such a grant in all its parts is plainly within the protection of the statute 1617, cap. 12, which enacts that whoever shall have possessed his lands, annual-rents, or other heritages in virtue of infeftments for the space therein mentioned, shall not be troubled or disquieted by His Majesty or any other pretending right to the same. As Mr Erskine explains (iii. 7, 3)—"Under the word heritages are included wadsets, fishings, and all other subjects or rights that can be called heritable; and all privileges annexed to heritable subjects, *fundo annexo*, as patronages, fairs, or markets, &c.; and all servitudes or other real burdens affecting lands belonging to our neighbours."

No reason has been suggested why the right or privilege here annexed to the pursuer's barony, and affecting the heritable estate, namely, the salmon-fishing belonging to the defenders, should not be legal and effectual equally with the privilege of presenting to a benefice or of holding fairs or markets, which Mr Erskine expressly extends to "other real burdens" affecting lands—meaning, of course, affecting heritable estates, whether lands or fishings, belonging to one's neighbours.

It is a mistake to say that a right to casualties or perquisites can only exist in connection with public offices such as that of a Sheriff, &c. The difference in regard to casualties attached to such offices is, that usage alone is sufficient, as Mr Erskine states (iii. 7, 6), to constitute the right without any special clause in the charter or grant, as was found in the cases cited by him, but that does not touch the question as to casualties or perquisites which are made the subject of special clauses or of special grant.

Nor could the prescriptive exercise of the right in the present case, and the previous judicial proceedings in which the right or privilege has been enforced, be laid out of view if there were any doubt, which there is not, of the legality of the grant, in its nature and origin, in a question with the defenders and their authors, who have so long submitted to it.

I am not disposed to peril the legality of the grant on its being a servitude. I think, whether made simultaneously with the grant of the salmon-fishings or by virtue of a reserved power in that grant, it is to be regarded as an inherent condition of the right to the fishings conferred on the authors of the defenders and handed down to the defenders themselves. It is not a real right in the sense which we had lately occasion to discuss between *The Marquis of Queensbery's Executors* v. *The Duke of Hamilton*, of being a security for debt, and consequently enforceable only by adjudication or poinding of the ground. It is part and pertinent of a right not only real but feudal, but that does not prevent it from being enforceable in a personal action.

It is true the right or privilege does not appear *ex facie* of the defenders' titles. If it had so appeared, the possession which has followed would not have been necessary to prevent its being lost. But the right having been exercised immemorially and prescriptively, it is perfectly clear that it remains in force equally against the defenders as singular successors as it did against their predecessors and authors.

I should not have been prepared to have taken the same view if the right of the pursuers had depended upon Lord Mar's letter of approbation of 23d June 1635. That letter is extremely valuable as evidence of the grant to the pursuer's predecessors having been acted upon, and of the possession having been quite understood to be by virtue of their rights—that is, of the titles. But it is not a document capable of being feudalised, and I do not see how it could have been enforceable against singular successors. The title which is so enforceable must be held, I think, to be the feudal title which flowed from the Crown, but of the validity of that title to confer a right so enforceable I have no doubt whatever.

Lord Mure—I concur in the result at which your Lordship and Lord Deas have arrived, and also in the views of the Lord Ordinary.

The main argument which was addressed against the Lord Ordinary's interlocutor was founded upon the "Letters of Approbation," which were maintained merely to confer a privilege personal to the Murray of Touchadam of that day, and if the case had stood upon these letters alone it would have been difficult to meet the force of that argument. But it appears to me that all difficulties in regard to the nature of the right are removed by the terms of the titles upon which the pursuer's property is held, and particularly the terms of the charter of 1676, the description in which is continued in these titles down to the present day. The "Letters of Approbation" describe Murray of Touchadam as having by virtue of his rights a day's salmon-fishing yearly whenever he chose to make choice thereof in that particular part of the Forth between the Abbeyford and the Pow of Alloa, and admittedly the fishings belonging to the defenders lie within these bounds. In the titles, however, the privilege is not conferred on the Murray of Touchadam of the day, but is the usual terms of charter, and includes his successors, just as much as in the case of the estate of Touchadam itself; and then the expression used is not precisely a day's salmon-fishing, but one tide's fishing within the particular boundary.

It has been questioned whether this right so conferred is a servitude. It is certainly not one of the known servitudes in the law of Scotland, but it comes very near some of those servitudes. I should have to go over more precisely the list of these servitudes with the view of showing the difference between this species of grant and a servitude, but in the view I take of the case it is not necessary to go into that question. I believe your Lordships are all agreed that the terms of the charter confer a heritable right. It is called a mere privilege, but that does not affect the question, because very much the same argument as to what a privilege actually was was raised in the case of *Aboyne* v. *Innes*, in which a mere privilege of foresting was held to be a heritable right, which Mr Innes could not only exercise himself but hand over to others. Therefore, upon that ground, I am of opinion with your Lordships that this is a heritable right which can be enforced as against the defenders, and there is no doubt that it has been enforced against parties in the same situation

as the defenders are by the earlier decisions of this Court, so that if there was any difficulty under the terms of the charter itself, it would be removed by these decisions. I should have had great difficulty in saying that the right could not now be enforced, because there is an express decision to the effect that a Murray of Polmaise has the right to exact one tide's fishing yearly. That having been so decided first in 1763, and afterwards in 1789, goes far to show that rights of this description are rights that can be recognised and enforced by the law of this country. As to the mode in which this right is to be enforced, I agree with your Lordships that the Lord Ordinary is right with one exception, and that is in respect to the tide which is to be claimed as the bailie-tide. I think the Lord Ordinary's view in that respect is not well-founded, and the alteration which your Lordship proposes to make is the proper way in which this Court should authorise the pursuer to enforce his right.

Lord Shand—This case raises two points for decision—first, as to the validity of the right claimed by the pursuer to one tide's fishing yearly within certain bounds of the river, and second, as to the mode of exercising that right. On the question of right it appears to me that we have a direct decision of this Court in 1763, in the case of *Scott of Scotstarvit*, and I see no reason for thinking that that decision ought not to be followed. In that case Scott, being in the position of the defenders in this case, sought to have it found and declared that his fishings were free from any right such as the pursuer here claims. The Court had then to consider the question of the validity of the right, and the validity of the right was affirmed, although, as we see from the Session-papers, the right was not mentioned as a burden in Scott's titles and those of his ancestors, but was in the titles of the Murrays of Polmaise, and had been the subject of immemorial usage. The first answer, therefore, to the case which has been presented by the reclaimers is, that the question has already been settled by a decision of this Court. The only suggestion of a difference now that came from the bar was that apparently in more recent times, instead of a usage of the delivery of fish at the end of a particular tide, there has been a commutation of the claim for fish at the beginning of every season. But this is a usage which recognises the right as much as the delivery of the fish would have done. I therefore take it that the previous decision, if it does not amount to *res judicata*, is yet a direct authority binding upon the Court in this question.

But even if we had not had the authority of that case, I agree with your Lordships that the decision of the Lord Ordinary ought to be affirmed. I think it is unnecessary in coming to this conclusion to determine whether this right could be sustained as being of the nature of the servitude. The Lord Ordinary is obviously of opinion that although the right is not one of the ordinary and recognised servitudes known to our law, yet it is of such a nature as may be sustained as an innominate servitude. I confess I am not prepared to differ from this view. If it were necessary to decide the question, it appears to me that there are analogies to this right even among the known servitudes. But I do not think it necessary to express a final opinion on this point, because I agree with the view of your Lordships, that whether this right can be characterised as a servitude or not it is a heritable right which can be feudalised and enforced. It was not disputed that if the right had been expressly mentioned, not only in the titles of the pursuer, but in those of the defenders, there could have been no answer to the claim here made. It would have been conclusive of the existence of the burden. But I think that a principle which applies to servitudes comes in here with a force which is unanswerable by the defender. Although the right is not mentioned in the defender's titles, it has been the subject of immemorial usage, and this, I think, gives it complete validity as against the defenders. It is in the same way and on the same principle that similar possession gives validity to a right of servitude although the servitude may not be mentioned in the defenders' titles. I am therefore of opinion that this right is legal in its nature, and is binding on the defenders.

In regard to the way in which the right is to be exercised, it is to be observed that this has also been the subject of previous litigation and discussion. The Lord Ordinary unfortunately does not seem to have had the light that we have on this part of the case, because the decision of the Sheriff, which was affirmed by Lord Stonefield, and which must therefore be assumed to be the decision of the Lord Ordinary in that case, was not known to the parties, and was not brought under his Lordship's notice. It appears to me that the decision which Lord Stonefield affirmed expresses what ought to be the rule in regard to the exercise of this right. He finds that the pursuer is entitled to make his election of the tide either before the fishing has begun or immediately after it is finished. The demand now made that the pursuer should be held entitled to wait till the end of the season, and then claim the best tide, is clearly untenable, as a moment's consideration will show. The right is a right to fish, not to the payment of money, and it is impossible to say that the person in possession of this right shall be entitled to choose the best tide after the fishing season has come to an end, for that would be to convert his right of fishing into a claim for a money payment, as the fish themselves must have been consumed long before. Therefore the pursuer's demand is clearly out of the question. On the other hand, if the pursuer in the exercise of his right is to be called upon to name his tide before the fishing begins, then the right might become altogether illusory. No fish at all might be taken, or the right might be evaded either by a careless or by an intentionally unfair mode of fishing. Therefore it appears to me that the view which the Court took in the former case really does justice between the parties and ought to receive effect.

I have only further to notice, what your Lordships have not mentioned, that parties have explained that they had not specially drawn the attention of the Lord Ordinary to the 5th article of the condescendence and the answer thereto. The Lord Ordinary seems in consequence to have felt that he was shut up in the absence of precise data to making some estimate of what the value of the tide's fishing for these three years was, but in the condescendence it is said that the pursuer specially demanded the fish taken on a particular

day of each year, and we have it stated what were the number, weight, and value of the fish caught on these occasions, so that we have the materials for fixing the sums due to the pursuer, and I presume our course is to substitute these sums for those for which the Lord Ordinary has given decree.

The Court recalled the finding of the Lord Ordinary, to the effect that the pursuer must select his tide before the fishing is begun, and in place thereof found that such selection may be made by the pursuer either before the fishing of such tide is begun or immediately after it is finished, and decerned for payment of £27, 14s. 7½d. in place of the sum of £24 in the Lord Ordinary's interlocutor; *quoad ultra* adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuers (Respondents) — Mackintosh—Darling. Agents—Russell & Nicolson, C.S.

Counsel for Defenders (Reclaimers)—Kinnear —Mackay. Agents—Frasers, Stodart, & Mackenzie, W.S.

Wednesday, May 26.

SECOND DIVISION.

[Sheriff of Midlothian and Haddington.

HUTTONS *v.* DEMPSTER AND OTHERS.

Bankruptcy—Trust-Deed for Behoof of Creditors —Sequestration—Estate Attachable by Trustee.

The right of a trustee under a private trust-deed for behoof of creditors to receive payment of sums earned by him in carrying out the granter's contracts is not superseded by the right of a trustee under a subsequent sequestration—the trustee under the sequestration taking the estate *tantum et tale* as it stood in the bankrupt.

On 18th October 1878 William Tough, builder in Edinburgh, having become insolvent, granted a trust-deed for behoof of his creditors in favour of the appellant Mr Thomson, a chartered accountant in Edinburgh. At the time this deed was granted Tough had a current contract with John and James Hutton, Slateford, for the mason work of tenements which they were building at Slateford. Mr Thomson took up this contract, and the work was concluded by Tough under his supervision. Messrs Hutton paid to Tough, and after the date of the trust-deed to Thomson, as his trustee, the instalments of the price at the dates agreed upon in the contract. Besides the original contract price, certain extra work to the amount of £180, 3s. 8½d. was ordered by Messrs Hutton in consequence of a change in the plans, and Mr Thomson rendered to them an account for the execution of this extra work, having paid the accounts incurred to the different tradesmen therefor as the work proceeded. On 14th June 1879 Tough was sequestrated under the Bankrupt Statutes, and Hugh Miller, C.A. in Edinburgh, was thereafter confirmed trustee on his estate.

The appellant Dempster, a painter in Edinburgh, had been employed by Mr Thomson to execute certain work on some houses in Edinburgh which had been built by Tough, and he held a decree obtained in the Debts Recovery Court for the sum of £26, 10s. 8d., being the balance of his account after deducting payments by Mr Thomson. Dempster after obtaining this decree used arrestments to that amount in the hands of Messrs Hutton, as debtors to Thomson. Mr Thomson and Mr Miller both claimed from Messrs Hutton the sum due for extra work as above narrated. Messrs Hutton thereupon raised this action of multiplepoinding.

Mr Thomson claimed the whole fund *in medio*, and pleaded — "(1) The work libelled having been carried on and completed by the claimant as trustee and as contractor in room and place of the bankrupt, with the funds of the claimant, he is entitled to be ranked and preferred in terms of his claim."

Mr Miller, as trustee in bankruptcy, also claimed the whole fund, and pleaded—"(1) The claimant, as trustee for the creditors, is entitled to be preferred to the sums *in medio* in terms of his claim, subject to such claims of preference as may be instructed in the ranking in the sequestration proceedings."

On 3d March 1880 the Sheriff-Substitute (HALLARD) issued this interlocutor—[*After narrating the facts*] . . . "Finds, in these circumstances as above set forth, that the trust constituted in the person of the claimant Thomson, being separated by an interval of more than seven months from the subsequent sequestration of the truster, is protected against the retrospective operation thereof: Therefore ranks and prefers the said claimant Dempster *primo loco* over the fund *in medio:* Ranks and prefers the claimant Thomson *secundo loco* over said fund, but subject always to any liability to account which the claimant Miller, as trustee foresaid, may instruct against him: Repels the claim of the claimant Miller, but reserving his right to call the claimant Thomson to account as aforesaid, and decerns." He added this note:—

"*Note.*—It was contended by the counsel for the trustee in bankruptcy that a sequestration supersedes a prior private trust, whatever may be the interval between them. Perhaps, as a question of general jurisprudence, it would be better that the law were so. Meantime, the Sheriff-Substitute does not understand the law so to be. Separated from the bankruptcy by such an interval as here occurs, the private trust, it is thought, must be dealt with as subsisting, but subject, of course, to such liabilities in accounting as the trustee in bankruptcy may instruct."

Miller appealed to the Sheriff, who on 23d March recalled the interlocutor of his Substitute, and preferred Miller to the whole fund *in medio*, adding this note:—

"*Note.*—The rights of the other claimants could not be disposed of under this record as it stands, for there are statements made which the trustee in the sequestration has not had an opportunity of meeting. But the case is decided as above on a very plain ground. The fund *in medio* belongs or relates to the estate of the bankrupt; and the management of that estate, and of all claims on it or against it, falls to the