

Thursday, July 9.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

THE DUKE OF ARGYLL v. CAMPBELL
AND ANOTHER.

Salmon Fishing—Title—Grant of Barony cum salmonum piscationibus—River ex adverso of the Lands of the Barony—Adverse Possession for the Prescriptive Period upon Insufficient Title—Cruives.

The Duke of Argyll was proprietor of the barony of Lochow, bounded on the north by the river Awe, under, *inter alia*, a Crown charter of 1667, which by a clause of novodamus of new granted the barony *cum salmonum piscationibus*. The previous grant had only been *cum piscationibus*. Neither the Duke nor any of his predecessors ever exercised the right of salmon-fishing in the river. In 1673 the Duke's author confirmed the author of Campbell of Lochnell in the lands of Eachterachine within the barony of Lochow, reserving, however, his whole rights of fishing in the river of Awe. Lochnell also held the barony of Kilmarnaig lying within the lordship and barony of Lorne, but outside the barony of Lochow, by virtue of charter of erection dated 1603; he further held upon a separate title the lands of Ardeconnell situated within the barony of Lorne, at some distance from the river Awe, with the right of salmon-fishing in four pools of that river. In a Crown charter of confirmation of the barony of Kilmarnaig in favour of Lochnell's author in 1727 these lands and fishings said to include "cruives on the said water of Awe" appeared as part of the barony, and upon that title he was duly infeft. The right of fishing by cruives had never been exercised within living memory, but from 1847 onwards Lochnell and his predecessors exercised the right of salmon-fishing by rod and line in the river of Awe *ex adverso* of the lands of Eachterachine, and let such fishing.

In 1889 the Duke of Argyll brought an action against Campbell of Lochnell to have it declared that he had right to the salmon-fishing in the river of Awe *ex adverso* of the lands of Eachterachine except in the four pools above mentioned, with right to go upon these lands in the exercise of his right, and to have Lochnell interdicted from fishing for salmon in the water in question.

Held (rev. Lord Kyllachy—*diss.* Lord Young, who thought that the Duke had failed to establish his title to the fishings in dispute) that the pursuer was entitled to decree as he had a valid title to the fishings in question, and the defender had no sufficient title upon which to base his adverse possession.

Observations upon the effect of a

grant of a barony *cum salmonum piscationibus*, and upon a grant of cruives as a title upon which to prescribe a general right of salmon-fishing.

In August 1889 the Duke of Argyll brought an action of declarator against Archibald Argyll Lochnell Campbell, Esquire of Lochnell, in the county of Argyll, and Richard Watson, Esquire, banker, Oban, trustee under a trust-disposition executed by him dated 4th and recorded 10th September 1888, to have it found and declared that the pursuer had good and undoubted right to the whole fishings of salmon and other fish in the river or water of Awe . . . from the march between the lands of Eachterachine and others belonging to the defenders, and the lands of Fanans . . . to the north of the said river or water of Awe, and particularly to the whole fishings of salmon and other fish in the river or water of Awe *ex adverso* of the said lands of Eachterachine and others belonging to the defenders, and situated upon the south or left bank of the said river or water of Awe . . . saving and reserving to the defenders the following salmon-fishings of the river or water of Awe, viz., the salmon-draughts of Poulindouan and Polinstuck, and salmon-draught of Cruback, and salmon-draught of Sanluip or Sandloup, situated in the river or water of Awe, and mouth of the same . . . and that the pursuer was entitled to fish for salmon and other fish in the said river or water of Awe *ex adverso* of the said lands of Eachterachine and others . . . saving and excepting as aforesaid and that by every lawful mode of fishing . . . and that the pursuer was entitled, by himself or others authorised by him, to enter upon the defenders' said lands of Eachterachine and others . . . for the purpose of exercising his said right of fishing for salmon and other fish, and to use the same so far as necessary for the exercise of his said right by all lawful modes of fishing, and . . . that the defenders had no right of fishing for salmon and other fish in said river or water of Awe *ex adverso* of their said lands of Eachterachine and others, . . . saving and excepting as before mentioned. . . .

The pursuer was proprietor of the lands and barony of Lochow under and by virtue of Crown grants in favour of his predecessors and authors. The earliest charter of the said lands and barony was granted by King Robert the Bruce in 1315 in favour of Sir Colin Campbell, Knight of Lochow. Several charters of confirmation of the said lands and barony were granted by the Crown in favour of the pursuer's predecessors and authors prior to and in the course of the sixteenth century, and in particular a charter of confirmation of said lands and barony was granted by King James V. on 14th March 1540. That charter was a grant of "totas et integras terras et baronias subscriptas videlicet terras et baroniam de Lochow . . . cum cestrīs turribus . . . piscariis in aquis dulcibus et salsis."

The pursuer was also proprietor of the

lands and barony of Lorne, which were acquired by his predecessors and authors in the fifteenth century, and were confirmed to them, *inter alia*, by another charter of confirmation by King James V., also dated 14th March 1540. In 1667 the whole lands and estates belonging to the family of Argyll, including the baronies of Lochow and Lorne, were of new erected into the earldom, lordship, and barony of Argyll in favour of Archibald, then Earl of Argyll, and in 1702 the same and other lands were erected into the dukedom of Argyll in favour of Archibald, then Earl of Argyll. The barony of Lochow is bounded, *inter alia*, by the river or water of Awe on the north or north-east, and the barony of Lorne is bounded, *inter alia*, by the said river on the south or south-west. The whole of said river is within the baronies of Lochow or Lorne.

The charter of 1667 was a grant by King Charles II., "nostro consanguineo et consiliario Archibaldo Comiti de Argyll," and contained the following clause of *novodamus*—"De novo damus concedimus disponimus ac pro nobis et successoribus nris, Regibus Principibus et Senescallis Scotie pro perpetuo confirmamus prefato Ar^{do} Comiti de Argyll ejusq. heredibus masculis quibuscunq. . . omnes et singulas Terras Dominia Baronias officia alioq. rextive et particulariter supra et subscripta, viz., omnes et singulas dictas terras et Baroniam de Lochow una cum advocacione, donacione et jure patronatus eccliarum parochialium et parochiarum S^{ti} Petri Deaconi de Lochow et Inschael rectoriarum et vicariarum earund. dict. tras de Ardskeodneis, Glenyra, Glenshera, et Letter dict. Burgum de Innerraray infra dict. Baroniam dict. terras et Baroniam de Glenurquhy, totas et integras dict. terras et dominium de Cowall cum dta. Forresta de Benmoir eidem pertinent. et spectan. cum oibus. et singulis manerierum locis molendinis silvis forrestis lie sheillings, grassinges piscationibus decimis advocacionibus donacionibus et juribus patronatum eccliarum beneficiorum, capellaniarum et altaragiorum domibus edificiis hortis toftis croftis partibus pendiculus et integris pertinen. earund. quibuscunq. dtas. tras et Baroniam de Over Cowall dict. tras de Straquhir extenden ad quadraginta unam mercatam et dimidium mercat. trarum antiqui extentus dtas. tras de Stratheichie, Glenmassen, Glenlean, Lochstrivan Scheid, Ardinslat Towart, Fleyming, Innerneill et Glack, Camisse et Achatachevane Dtas. tras. de Ardmernoche Lysage Darinagerochmoir Glenlair et Darinagerochbeg dict. terras et Baroniam de Otterinverane dtas. tras. de Glasserie et Ederlin supra et subscripta viz: dtas. terras de Menard Kilmichaelbeg . . . totas et integras tras. de Craignish et Melphoirt, cum castris turribus fortalicis manerierum locis domibus edificiis hortis pomariis molendinis tris molendinarius multuris silvis forrestis lie Banks parcis pratis insulis lacubus piscationibus salmonum aliorumq. piscium tenen. tenan. libere tenen. servitiis advocacionibus donacionibus et juribus patronatum ec-

cliarum parochialium et parochiarum de Kilmairtein et Kilmahew seu Inneraray Kilmorich Dysart Lochguoylshead Kilmelphort et Kilmorew rectoriarum et vicariarum earund. et onim aliarum eccliarum beneficiorum et capellaniarum annexis connexis dependen omibus aliis partibus pendiculis et pertinen trarum Baroniarum aliorumq. predict oia jacen infra dict vicet^{um} de Argyll. . . . Ac etiam totas et integras dictas terras Dominium et Baroniam de Lorne." . . . The pursuer was duly infest in said subjects.

In 1529 Archibald Campbell (the pursuer's author), feuar of the Earldom of Argyll and of the lordships of Campbell and Lorne, and Earl Colin his father, granted to Sir John Campbell of Calder and his heirs-male 11½ marks of Eachterachine . . . all of old extent, in the barony of Lochow, and in 1673 Archibald Earl of Argyll granted a charter of confirmation in favour of Sir Hugh Campbell of Calder, confirming the grant of "omnes et singulas terras subscriptas viz., undecem mercatas et dimidietatem mercat terrarum de Eichterachin . . . cum partibus pendiculis et pertinentibus earundem quibuscunq. jacen. in Baronia nostra de Lochow . . . Salva tamen et reservata nobis heredibus et successoribus nostris totali piscatura aquae de Aw cum pertinentibus."

The said lands were possessed for a long period by the Campbells of Calder, but were ultimately acquired from them by the Campbells of Lochnell, through whom they passed to the defender Lochnell, who held them of the pursuer as his superior.

The latest charter of the said lands was a precept of *clare constat* dated 12th November 1855, which contained also various other lands both in Lochow and Lorne, and which was granted by the pursuer to the late Duncan Campbell, Esq. of Lochnell, the immediate predecessor of the said defender. In that precept the said lands of Eachterachine and others were described, and the above reservation of fishing was inserted. The title of the defender to the said subjects was completed by decree of special service as heir-male of tailzie and provision in special of the said Duncan Campbell dated 30th September and recorded 23rd October 1882.

The pursuer averred that the said lands of Eachterachine were situated in the parish of Inishail (now united with Glenorchy), and comprehended the whole of the defender's lands in that parish by whatever names these might now be known. That they were bounded on the west partly by the water Nant, which at that point divided the barony of Lochow from the barony of Lorne as well as the parish of Inishail from the parish of Muckairn and partly by Loch Etive, on the north and north-east by the river or water of Awe, along the south or left bank of which they extended from its mouth to the march with the lands of Fanans. Also that saving and excepting certain net fishings at and about the mouth of the river Awe (subsequently referred to), the whole fishings in the river and water of Awe *ex adverso* of the defender's said

lands belonged to the pursuer, being the fishings reserved as above.

The defenders admitted that they were proprietors of lands called Eachterachine, but denied the accuracy of the pursuer's description of these lands and the pursuer's claims to the fishing.

The pursuer or his author had never exercised the right of salmon-fishing now claimed.

Some time after the date of the original grant in 1529 of the lands of Eachterachine and others, to Sir John Campbell of Calder, he obtained from the Bishop of the Isles a grant of the lands of Muckairn on the south side of Loch Etive in the lordship and barony of Lorne, which formed nearly the whole parish of that name. Those lands of Muckairn, along with those of Ardhattan, were erected into the barony of Muckairn or Kilmaraonig by charter under the great seal in favour of the said Sir John Campbell of Calder, dated 1st April 1603. That charter did not contain any lands of Ardchonnell or Ardchonnell-Callen or any salmon draughts in the river Awe or mouth of the same.

Before that date, however, the Priory of Ardhattan on the north side of Loch Etive in the lordship and barony of Lorne along with certain lands called Ardchonnell or Ardchonnell-Callen, not situated on or near the banks of the river Awe, possessed right to certain net fishings in that river. These lands and fishings passed to the Campbells of Calder, and were introduced into the defenders' titles by an instrument of sasine of 1640 in the following terms, which proceeded upon a charter granted by John Campbell younger of Calder, in favour of his eldest son Colin—"All and whole the lands and barony of Kilmacronage, comprehending . . . 'et totas et integras illas septem mercatas terrarum de decem libratas terrarum atque extentus de Ardchonneillis communiter nuncupat Ardchonnell Calen cum pertinen per Archibaldum Campbell de Dounstafneis nunc de me in feudifirma immediate tentas Unacum piscatione salmonum aque de Aw, viz., tractatione salmonum de Pollindounane et tractatione salmonum de Crubak et cum tractatione salmonum de Sanlwipe jacen in aqua et in ore dicte aque de Aw, cum singulis earundem pertinentiis omnes jacentes in dominio de Lorne et infra vicecomitatum de Argyle.'" The lands of Ardchonnell were held upon a separate *reddendo* from those of Muckairn and Ardhattan.

On 26th July 1727 the defenders' author Sir Duncan Campbell of Lochnell received a charter from the Great Seal reciting the charter of 1603 and confirming the grants then made. It disposed, *inter alia*, the following—"Totas et Integras Terras Baronium, Balivatum et Regalitem de Kilmachronag alias vocat Muckairn, comprehendem particulares terras, molendina, silvas, piscationes aliaq. subscript. vizt. Totas et Integras Villam et terras de Lyild, extenden ad quinque denariatas terrarum Villam et terras de Kilmachronag extenden ad quindecim denariatas terrarum—[Here

follows enumeration of various other penny lands]. Omnes jacen infra dominium de Lorn et vice-comitatum de Argyll. . . . aquae de Awe vizt. tractus (lie) draughts salmonum de Polindownan et Polinstuck, et tractus (lie) draughts salmonum de Cruback, et tractus (lie) draughts salmonum de Sanluip jacen in aqua et ore ejusdem cum omnibus earundem privilegiis et pertinen, atq^e lie cruives super dictam aquam de Awe, omnes extenden ut praeferuntur et jacen in Baronia de Ardhattan Dominio de Lorn et Vice-comitatu antedict. Una etiam cum officiis et privilegiis liberae regalitatis justiciariae et balivatus omnium praedict. terrarum et terrarum de Muckairn aliorumque terrarum particulariter supra-mentionat cum molendinis piscationibus, insulis et omnibus earundem pertinen jacen infra omnes bondas hujusmodi." That was the first mention of cruives in the titles. In these subjects the defenders were duly infeft, and they averred that the salmon-fishings specified in their titles embraced the whole fishings on the river of Awe *ex adverso* of the lands described in the summons.

Between 1768 and 1810 there were three joint leases granted by the different proprietors of the fishings, to each of which the defenders' author was a party, and in each of which that author's fishing was described as "all and hail the said Duncan Campbell's fishing upon the water of Awe, consisting of the following pools, viz., Criebag, Pollanstuick, and Pollandunan, with the stell-nett fishings upon Lochcity, near the mouth of the said water commonly called Sheanluib."

From 1847 onwards the defenders and their predecessors fished for salmon in the river Awe *ex adverso* of the lands of Eachterachine—that is, in the water in question—by rod and line, and let the fishing right of fishing to others.

The pursuer pleaded—" (1) Under and by virtue of his Crown titles condescended on, the pursuer has right to the whole fishings of salmon and other fish in the river or water of Awe, subject to the grants thereof made by himself and his predecessors to their vassals and others. (2) The defenders having no express grant and no title to which they can ascribe possession of the fishings mentioned in the summons, excepting as mentioned in the summons, the pursuer is entitled to decree as concluded for. (3) The defenders holding the said lands of Eachterachine and others, in the barony of Lochow, of the pursuer as his superior, under the express reservation of the whole fishings in the water of Awe, have no right to the fishings so reserved, with the exceptions mentioned in the summons, and are bound to cede possession of the same to the pursuer, as concluded for. (4) The pursuer having the right to the said fishings, is entitled to access to the same through the defenders' said lands, and to use the defenders' said lands so far as necessary for the due exercise of his said right."

The defenders' pleaded—" (1) The pursuer

is not entitled to decree, in respect that (1st) he has not under his titles any right to the salmon-fishings claimed, or any part thereof; and (2nd) neither he nor his predecessors or authors have ever had any possession of the said salmon-fishings. (2) The defenders ought to be assoltized in respect that (1st) by virtue of their titles they have the sole and exclusive right to the said salmon-fishings; and *separatim* (2nd) they have such right by virtue of their titles and the prescriptive possession which they and their predecessors and authors have had thereupon."

A proof was allowed which brought out the facts given above. The history of the cruives was somewhat obscure, but in any case they had not been used within living memory. Eachterachine appeared to be situated as stated by the pursuer, but wherever it was, it was held of the defenders and their authors.

Upon 19th November 1890 the Lord Ordinary (KYLACHY) found that the pursuer had failed to instruct that he had any title to the salmon-fishings in dispute, and therefore assoltized the defenders from the conclusions of the summons.

"*Opinion.*—The question in this case is, whether certain salmon-fishings in the river Awe, opposite a part of the defender's estate of Lochnell, belong to that estate, or on the other hand, belong to the pursuer the Duke of Argyll as part of his barony of Lochow. It is not disputed that the fishings in question have been possessed by Lochnell for more than forty years—that is to say, it is admitted that since about 1846 the Lochnell tenants have had continuous possession by rod fishing, and that in the circumstances such possession is sufficient. But the pursuer maintains that the lands opposite which the fishings are situated are certain lands held of him as superior, and parts of his barony of Lochow; that those lands were given off at an early period to the defenders' authors under express reservation of fishings; that the fishings thus reserved include the fishings in question, and that these fishings are accordingly still part of the barony, the defenders having no title thereto, either sufficient by itself, or sufficient as a basis for prescription.

"I may say at once that I think the pursuer has sufficiently proved (1) that the lands opposite which the fishings in dispute are situated are the lands of Eachterachine, feued off by the pursuer's authors to the defenders' authors in the year 1529; (2) that these lands formed and form part of the pursuer's ancient barony of Lochow; (3) that they were given off to the defenders' authors under express reservation of fishings; and (4) that the pursuer, while he has no express grant of salmon-fishing attached to his barony of Lochow (or at least no grant contained in any original charter or charter of *novodamus*), has yet, in virtue of his barony title, possessed by himself and his vassals various salmon-fishings in various parts of the barony for at least the prescriptive period.

"The questions which remain and on

which the case turns are—(1) How far the pursuer's possession under his barony title applies to or can be made to cover the fishings in dispute? (2) How far, in the absence of such possession, the pursuer has a title to challenge the defenders' title? And (3) How far, apart from their Eachterachine title, the defenders have a title to fishings comprising, or capable of comprising, the fishings in dispute?

"(1) It is clear that the pursuer's title requires proof of possession. The original charters of the barony of Lochow do not contain any grant of salmon-fishings, and although the charter of 1667 and subsequent charters do include such grant in general terms, these are all charters by progress, and apart from possession, have no force. Possession, therefore, is as I have said, necessary, and that being so, the first observation is that there has certainly been no possession—I mean by the pursuer and his authors—of the particular fishings in dispute. On the contrary, it is common ground that these fishings have for the prescriptive period (and presumably, therefore, all along) been possessed by the defenders, whose possession (as they hold no grant from the pursuer) is necessarily adverse possession. The possession, therefore, on which the pursuer relies must be not actual but constructive possession, and constructive possession sufficient in some way to override the actual possession of the defender. Now, what is the possession of this sort on which the pursuer relies? It seems to be threefold:—(1) Salmon-fishing exercised at and near Inverary by the pursuer and his authors; (2) Salmon-fishing partly by net and coble, and partly by rod, at various points in Lochawe, by vassals of the pursuer holding parts of the barony of Lochow; (3) Salmon-fishing in the river Orchy and at the head of Lochawe, and of the river Awe, also by vassals of the barony of Lochow.

"Now, it does not appear to me to be possible to hold that possession of those salmon-fishings—all of them discontinuous to, and some of them remote from, the fishings in dispute—can on any principle of construction be held as possession of the fishings in dispute. The argument of the pursuer was that the salmon-fishings of the barony of Lochow are a *unum quid*, and therefore that possession of a part must be held as possession of the whole. But as pointed out in the case of *Cathcart* and elsewhere, the question always is—What are the salmon-fishings of the barony? Do they, or do they not, include the particular salmon-fishings in controversy? And that, depending on the proof of possession, it is a *petitio principii* to establish the possession by assuming that the particular fishings are part of the salmon-fishings of the barony. It is true that a grant of lands with fishings *prima facie* conveys the whole fishings within the boundaries of the lands. But whether and how far fishings include salmon-fishings depends, and must depend, on the extent to which salmon-fishings have been pos-

essed. There is no presumption that because the salmon-fishings, *e.g.*, of one river are shown by possession to have been within the grant, therefore the grant includes the salmon-fishings, *e.g.*, of some different river. As expressed by Lord Deas in the case of *Cathcart*, the pursuer in a case like the present is really in the same position as if his charter had borne 'with salmon-fishings so far as possessed.'

"Indeed, the case of *Cathcart* appears to foreclose this question, and it did not appear to me that the pursuer's counsel was able to draw any substantial distinction between that case and the present. The only distinction which I can see is one unfavourable to the pursuer—*viz.*, that in *Cathcart's* case there was no element of adverse possession, while here, as already mentioned, there certainly is.

"(2) I am accordingly of opinion that the pursuer has failed to show that he has any title to the salmon-fishings in dispute, and that being so, I am further of opinion that he has no title to challenge the defender's possession or to examine the defender's title. The only ground on which the contrary was maintained was this—that he (the pursuer) being the defender's superior in the lands within which the salmon-fishings in dispute are situated, and having given off those lands reserving the fishings, the defenders are disabled from asserting against him any right of fishing, or of challenging his title to the fishings reserved. I do not think this argument sound. It may be doubted whether the reservation in question applied to salmon-fishing at all. But assuming that it did, I cannot read it as amounting to a contract that the defender should acknowledge the pursuer's right to the fishings reserved. At the utmost it only, I think, implied this—that the defender should not found as against the pursuer on any title derived from him; and that the defender does not do. He takes his stand, so far as the argument has yet gone, on this—that if the right is not in him (the defender) it is in the Crown, and that, the Crown not molesting him, the pursuer has no title and no interest to do so.

"(3) But this brings me to the third and remaining question, *viz.*—Have the defenders a title of their own? They maintain that they have. They say that, altogether apart from their title to the lands of *Eachterachine*, they have a separate and express title to these salmon-fishings, and this they say they have in the shape of a grant from the Crown of certain lands known as *Ardchonnell* or *Ardchonnell-Callen*, situated on *Loch Etive*—'*Cum salmonum piscatione aquæ de Awe, viz., Tractus lie draughts salmonum de Polindownan et Polenstuick et tractus lie draughts salmonum de Cruback et tractus lie draughts salmonum Sanluip jacen. in aqua et ore ejusd. cum omnibus earund. privilegiis et pertinen. atque lie cruives super dict. aquam de Awe omnes extenden. ut prædicitur et jacen. in Baronia de Archattan dominio de Lorn et vicecomitatu antedict.*'

"The charters on which the defenders thus found are, it is right to say, charters by progress, the separate title referred to having been derived by the proprietors of *Lochnell* through the Priors of *Ardchattan*; but as the defenders have had prescriptive possession of the fishings in dispute, and the only question is whether they have a title on which to prescribe, the absence of the original grant does not appear to be material. The same remark applies to the absence in the titles prior to that of 1727 of any mention of 'cruives'—a circumstance on which the pursuer's counsel a good deal commented.

"The question, however, is, whether this title to the salmon-fishings covers the portion of the river now in dispute, or is, on the other hand, confined to the pools or draughts mentioned, which are quite well identified, and are situated at or near the mouth of the river where it issues into *Loch Etive*. The defenders say that the grant at its date covered the whole water of *Awe*, and, according to the modes of fishing then practised, was exhaustive—the lower water being assumed to be fished by net and coble, and the upper water—that in question, where net fishing was impracticable—being fished by cruives. They say further, that while there is not evidence of cruive fishing on their side of the river—at least in recent times—there is evidence of the existence in the last century of a cruive at their upper march, which they claim as a cruive used by their authors in virtue of the grant of cruives referred to. The pursuer, on the other hand, denies that there is any evidence of cruive-fishing by the defenders or their authors, and he maintains that the grant of salmon-fishing is limited to the pools mentioned, and that in the absence of proof of possession by cruives the grant of cruive-fishing cannot extend the right, or at all events support a general right, of salmon-fishing over the area claimed.

"In the view I have expressed as to the pursuer's title, it is not necessary that I should decide the question thus raised; but as it was anxiously argued on both sides, I think it right to say that the inclination of my opinion is with the defenders. I incline to think that a grant in general terms of salmon-fishing over a river (or at all events over a river like the *Awe*), followed by an enumeration of specified salmon draughts and unspecified cruives, is at least a sufficient title on which to prescribe if necessary the whole salmon-fishings of the river. In other words, I have not, so far as I have been able to consider the matter, seen any sufficient reason why a proprietor having a grant of cruives on which he is seeking to prescribe, may not, without prejudicing his title, supersede the cruives in favour of a more profitable mode of possession, *viz.*, rod fishing. As I have said, however, it is not necessary to decide this point. My judgment is for the defenders, on the ground that the pursuer has failed to show that he (the pursuer) has any title to the salmon-fishings in dispute."

The pursuer reclaimed, and argued—He claimed a mile and half's salmon-fishing from the left bank of the river Awe *ex adverso* of the defenders' lands of Eachterachine with the exception of four pools. He admitted that he had no possession, but he had a good grant of salmon-fishings from the Crown by the charter of 1667. Before 1667 he had a grant of barony *cum piscationibus*, but after 1667 it was expressly specified that these fishings were *salmonum*. That included the right to fish for salmon in all the waters in or *ex adverso* of the barony of Lochow. The river Awe bounded the barony, and was *ex adverso* of it. He had not lost that right by non-user. His right could only be defeated by a better title fortified by prescription. The defender had possessed, but in no valid title whatever. *Cathcart's case (infra)* only laid down that what are the fishings of the barony must be determined by possession where the grant is not specifically of salmon-fishings, but a grant of barony with salmon-fishings *prima facie* included the right to salmon-fishing upon all waters within the barony and in waters *ex adverso* of the barony as a *unum quid* if there was no better competing title—*Campbell v. Campbell* (1610), M. 14,250; *Forbes v. Udney* (1701), M. 7812 and 14,250; *Stuart v. M'Barnet*, July 21, 1868, 5 Macph. (H. of L.) 123; *Lord Advocate v. Lord Lovat (Beavly case)*, February 27, 1880, 7 R. (H. of L.) 122; *Warrand's Trustees v. Mackintosh (Ness case)*, February 17, 1890, 17 R. 13. The defenders had no title upon which to prescribe. The barony of Kilmarnaig, erected in 1603 in favour of the defender's author, was entirely within the barony of Lorne, and included no part of the barony of Lochow. It did not include the lands of Eachterachine, and upon that barony title it was impossible to prescribe fishings *ex adverso* of Eachterachine. To prescribe on a barony title it was necessary to show that what was possessed along with the barony was truly a part of the barony—*Lord Advocate v. Hunt* (Palace of Dunfermline), February 11, 1867, 5 Macph. (H. of L.) 1. The defenders right to the lands of Ardhonnell, and to fishing in certain pools and by cruives in the Awe appeared as part of his barony of Kilmarnaig in the title of 1727 relied upon by the defenders, but that was a charter by progress which required construction, and into which, looking to the charter of 1663, these lands and fishings could not have been inserted. The fishings were definite pools, and the cruives did not confer a title to prescribe a right to the rest of the river. There had, besides, been no proof of the exercise of the cruive right—See on cruives Rankine on Landowners (2nd ed.), page 270, and the cases of *The Don Heritors* (1665), M. 10,840; *Grant v. Duke of Gordon*, M. 14,297; *Forbes v. Earl of Kintore*, January 31, 1826, 4 S. 656. Further, the defenders could not prescribe against the pursuer, for their right to the lands of Eachterachine flowed from him, and was qualified by a distinct reservation of the salmon-fishings in dispute.

Argued for respondents—(1) The pursuer had no right to salmon-fishings unless by

the charter of 1667. That was a charter of *novadamus*, and such a charter was not to be presumed to enlarge the previous rights, but only to continue them unless the change was clearly contemplated—*Magistrates of Inverkeithing v. Ross*, October 30, 1874, 2 R. 48; *Earl of Perth v. Lord Willoughby de Eresby's Trustees*, March 9, 1875, 2 R. 538, December 13, 1877, 5 R. (H. of L.) 26. The grant of salmon-fishings occurred at the end of the charter, and did not refer to the barony of Lochow but only to subsequent lands. The want of possession was conclusive against the pursuer's claim, for he had not proved, as he was bound to do by possession, that the fishings claimed were fishings belonging to the barony—*Duke of Richmond v. Earl of Seafeld*, February 16, 1870, 8 Macph. 530 (special case); *Lord Advocate v. Cathcart*, May 19, 1871, 9 Macph. 744; *Earl of Zetland v. Tennent's Trustees*, February 26, 1873, 11 Macph. 469. (2) The defenders had a good title upon which to prescribe. They were proprietors of a barony which included under the charter of 1727 the right of fishing in the pools and the right to the cruives. Even if these rights were not properly included in the barony of Kilmarnaig, they were rights possessed under a separate title which itself formed a good basis for prescriptive possession. An undefined grant of cruives—the highest mode of salmon-fishing recognised by the law—was a good title upon which to found prescription—*Forbes v. Earl of Kintore, supra*. (3) The defenders were not debarred from prescribing against the pursuer, because these fishings had been specially reserved, for it was exceedingly doubtful whether the fishings reserved were those now in question. (4) The pursuer had failed to establish any title. The defenders had a good title upon which to prescribe, and it was admitted that they had possessed the fishings for the prescriptive period by methods which fully asserted their rights. The Lord Ordinary's interlocutor should be affirmed.

At advising—

LORD RUTHERFURD CLARK—The pursuer is in feft under a Crown charter in the lands and barony of Lochow with the salmon-fishings. The earliest Crown title in which salmon-fishings are given out is a charter of confirmation and *novadamus* granted by Charles II. on 15th October 1667. In the previous titles the lands are granted with fishings only. For some reason it was not brought under the notice of the Lord Ordinary that the pursuer had a Crown title to salmon-fishings, and in consequence his judgment has been pronounced under a misconception.

The charter of 1667 is of course a charter by progress, and is in form a renewal of existing rights. But it may be explanatory of them, and in this case I so read it. It defines the fishings which had been previously given out as being salmon-fishings. Nor was this unmeaning, for under the older law it was doubtful whether an express grant was necessary to give a good title to salmon-fishings, and if the Crown

meant to recognise that such a right had been conferred by the previous titles this could be conveniently and competently done by introducing an express grant into the charter of *novodamus*.

But apart from these considerations the charter gives a good title to whatever it expressly conveys. The Crown might challenge it on the ground that the estate of the vassal had been unduly enlarged. But I do not think that the challenge is open to any other. It is true that a charter of *novodamus* wherever doubt exists will be construed as commensurate with the previous title. But when the words are clear they must receive effect according to their terms so long as the charter stands unreduced.

It was urged that according to the true construction of the charter of 1667 the grant of salmon-fishings was limited to the baronies of Over Cowal and Otterinverane. I cannot so read the charter. Several lands and baronies are conveyed, but at the end of the description there is added a general clause which in my opinion refers to the whole. It runs thus—"Cum castris . . . piscationibus salmonum . . . omnibus aliis partibus pendiculis et pertinentibus terrarum baroniarum aliorumque praedict." This is a usual clause in such a charter. It is intended to gather up and enumerate the subordinate rights which are conveyed with the lands. And as it is made applicable to the "lands and baronies foresaid," I do not see on what principle of construction it can be limited. And unless it be read as applicable to the whole there would not be a grant of fishings with the barony of Lochow, though such a grant was contained in the Crown charter of 14th March 1540. I am therefore of opinion that a right of salmon-fishing is given along with the lands and barony of Lochow.

The next question is, what is the legal meaning and effect of such a grant? I do not think that the answer is doubtful. A grant of lands with salmon-fishings implies a grant of the salmon-fishings in the rivers within or bounding the lands. If the river runs through the lands the owner of the lands has the sole right of fishing. If the river is the boundary he has the right to fish from his own bank. I take this to be clear and well-settled law, even though the river in which the salmon right exists is not mentioned in the charter. And similarly I hold that a grant of a barony with salmon-fishings confers an exclusive right to the fishings of such rivers as are within the barony, and a right to fish from one bank when the river is the boundary. Of course I am speaking of the effect of the grant itself, and apart from any question which may arise on possession or in regard to a competing title.

And in so holding I am not in any way violating the rule of the case of *Cathcart*. In that case there was a grant of a barony, but without any grant of salmon-fishings. Apart from possession, therefore, the owner of the barony could have no right to salmon-fishings. He had a good title on which to prescribe such a right, or to put

it otherwise, he might show by his possession that the barony contained a grant of salmon-fishings. But in either view his right was necessarily measured by his possession. Such fishings as he possessed would be held to form part of the barony and no others, or if the barony is looked on as a title for prescription, he could only acquire by prescription such fishings as he actually possessed. But no such principle can be applied where there is an express grant of salmon-fishings. The right of the grantee depends on the legal construction of the grant, and is effectual without any possession.

I have now to consider whether the barony of Lochow extends to the river Awe, and on this point I do not think that there is any room for doubt. The lands belonging to the defender on the left bank are held of the pursuer, and are described in the titles as forming part of the barony of Lochow. The defender pleads that the lands held by him from the pursuer are called in the title *Eachterachine*; that the lands which now go by that name do not come down to the river; and that he possesses other lands called by a different name which lie between the river and *Eachterachine*. To my mind the plea has no force. The point is, I think, conclusively determined by the fact that the defender has no other title than that flowing from the Earls and Dukes of Argyll. Everything he possesses is possessed under that title and no other. I cannot therefore attach any importance to mere names which may be more or less accurate and more or less modern. As he has no title to any lands except such as are described as forming a part of the barony of Lochow, and as the lands which he possesses under that title are *de facto* bounded by the Awe, I hold that at this point and along the entire frontage of the defender's lands the barony is bounded by the Awe.

From what I have said the inference is plain. The pursuer has a good title to the salmon-fishings in the Awe *ex adverso* of the defender's lands, and that title must prevail unless the defender can show that he has a better title to these fishings. This he endeavours to do. But inasmuch as he does not allege a title prior in date to that of the pursuer, he can only prevail by showing that he has possessed the fishings on a sufficient title and for the prescriptive period.

The defender connects himself with a Crown charter granted to Sir D. Campbell of Lochner on 28th July 1727, by which there was disposed and confirmed to him "*Totas et Integras Terras Baronium, Bali-vatum et Regalitatem de Kilmachronag alias vocat Muckairn*," comprehending, *inter alia*, the lands of Ardchonnell "*cum salmonum piscatione aquae de Awe vizt. tractus (lie) draughts salmonum de Polindownan et Polinstuck, et tractus (lie) draughts salmonum de Cruback, et tractus (lie) draughts salmonum de Sanluip jacen in aqua et ore ejusdem cum omnibus earundem privilegiis et pertinent, atq^e lie cruives super dictam aquam de Awe, omnes*

extenden ut praefertur et jacen in Baronia de Ardhattan Dominio de Lorn et Vicecomitatu antedict. Una etiam cum officiis et privilegiis liberae regalitatis justiciariae et balivatus omnium praedict. terrarum et terrarum de Muckairn aliorumque terrarum particulariter supramentionat cum molendinis piscationibus, insulis et omnibus earumdem pertinent jacen infra omnes bondas hujusmodi." In these subjects the defender and his predecessors were duly infeft under titles regularly derived from the Crown charter. They have possessed the salmon draughts. Further, they have since 1846 possessed the salmon fishings *ex adverso* of the lands of Eachterachine by rod-and-line fishing, and have drawn a considerable rental from them. Such possession has been complete and exclusive. There has been no cruive fishing within living memory. There are, however, the remains of a cruive at the eastmost limit of the defender's property. The history of it is very uncertain, and dependent entirely on local tradition. I am inclined to think that the probability is that it was erected by the Lorne Iron Forge Company when they were tenants of the defender's predecessor, and that it was taken down or disused on the objection of salmon-fishing owners on the other side of the Awe. But however this fact stands, we have no proof that the defender or his predecessors possessed any cruive fishing, or that they had any other possession of the fishings in question save by rod and line. At the same time I think that there can be no doubt but that this was the most profitable mode of possession.

There is a fact in connection with the state of possession which it is right to notice. We have before us three leases during the period from 1768 to 1810. They do not cover the entire period. They extend to thirty-five years in all. To these the predecessors of the defender were parties along with other proprietors on the Awe. It had been found that it was more advantageous for the several proprietors to let their fishings jointly than to let them separately. Hence the joint leases. In all these leases the fishings let by the defender's predecessors are described with slight variations as "All and hail the said Duncan Campbell's fishing upon the water of Aw, consisting of the following pools viz. Criebag, Pollanstuicck and Pollandinan, with the stall-nett fishings upon Lochey near the mouth of the said water commonly called Sheanluib." It is plain that these fishings do not comprise those which are now in question. Nor did they or predecessors of the defender at that time assert a right to any other fishings than those which they actually let. For by the leases of 1794 and 1805 the lessors let to their tenants "all and whole the several salmon-fishings upon the water of Awe belonging to them respectively" with the exception of the chest or cruive fishings belonging to Campbell of Monzie. Nor can it be said that river fishings were of no value and could not be let. For Campbell of Monzie

let nothing but river fishings, and he drew a third of the entire rent.

From this it will be seen that at a time not long posterior to the charter of 1727 the predecessors of the defender made no claim to the fishings in question as being comprehended within the barony of Kilmaraonaig. Further, we have seen that that barony was erected in 1603 by Crown charter granted to Sir John Calder. His successor obtained in 1673 from the Earl of Argyll a charter of confirmation applicable to the lands of Eachterachine, but under the reservations in favour of the granter and his successors of their whole fishings in the Awe. It is not conceivable that a charter with such a reservation would have been accepted if the fishings so reserved were claimed as part of the barony.

The title to which the defender ascribes his possession is, as I have said, the charter of 1727. He contends in the first place that he and his predecessors have possessed on a title of barony and that barony includes *per expressum* the lands of Ardchnonell, the draught fishings and cruive fishings in the water of Awe. If we are to look at the charter of 1727 alone, it is clear that these lands and fishings are comprehended within the barony. But it is a charter by progress, and is not the charter of erection. It recites the charter of erection as being a charter granted by James VI. in 1603. On turning to that charter we find that it does not comprise the lands of Ardchnonell or the fishings above mentioned. It was urged that the charter of 1727 merely contained a fuller description of the same lands. But this cannot be, because the lands of Ardchnonell are held for a separate feu-duty, which is not specified in the charter of 1603. Therefore I cannot hold that the lands of Ardchnonell and the salmon draughts and cruive fishings are part of the barony of Kilmaraonaig.

But not the less is the defender the owner of a barony though it does not comprehend these lands and their pertinents. It is situate at a distance from the Awe, and does not *per expressum* contain any fishings in that river. The question then comes to be, whether the defender can ascribe his possession to his barony title?

It is not sufficient for the defender that he has had possession, and that he has a barony title. The two things must be capable of being legally connected. The case of *Hunt v. The Crown* shews that the mere possession of a subject does not establish that it is part of the barony of which the possessor is the owner. For it was held by the House of Lords that though Mr Hunt had possessed the Palace of Dunfermline for the prescriptive period, his possession did not prove that it was part of his barony of Pittencreiff. Their Lordships construed the barony title. They held that it did not contain the palace, and the possession was in consequence of no avail.

We in like manner must construe the defender's title, and I am unable to hold that it comprehends, or that it can be read as capable of comprehending, salmon-fishings in the Awe. Such fishings as are

given out in general terms are given out with the lands, and such fishings as are specially mentioned are plainly not in that river. I think that we should violate the rules of legitimate construction if we held that such a grant could embrace fishings in a river so distant as the Awe. For the fishings are defined by reference to the lands in connection with which they are given out. I do not say that fishings so granted are necessarily limited to the fishings within or *ex adverso* of the lands. But if it had been intended that fishings so distant as those in question should be included in the barony, I think that they would have been specially disposed. In the absence of any such disposition I hold that they are not contained in the barony, and that mere possession will not shew that they are comprehended within it. In so holding, I am following the opinions of the Lord Justice-Clerk and Lord Gifford in the case of *Lord Lovat v. The Crown*. There is nothing to indicate that the predecessors of the defender possessed the fishings contemporaneously with the erection of the barony, or at any time when they were owners of the barony alone. The presumption, and indeed the proof, is entirely to the contrary. For I have shewn that in their title to the lands of Eachterachine, granted in 1673, the fishings are reserved to the Earl of Argyll, and that they made no claim to them when they granted leases in the end of the last century and the beginning of the present. I am therefore bound to deal with the case on the footing that the possession began in 1846. I do not think that I would be justified in ascribing the modern possession to an ancient title which was not followed by possession for nearly two hundred and fifty years, or, in other words, in holding that the predecessors of the defenders began in 1846 to possess the fishings under a charter which was granted in 1603. The case of the defenders would have been stronger, and might have been sufficient, if the fishings in question could be regarded as an enlargement of the fishings which had been from ancient times possessed under the barony title. But I think that that is impossible. They are different fishings and situate in a wholly different locality. And considering that they have been possessed from the lands of Eachterachine, they seem to be the fishings of these lands, and in no sense to be fishings of the barony.

But the defender has yet another title to which he ascribes his possession. He is infeft in the lands of Ardchonnell "*cum salmonum piscatione super aquam de Awe*"—viz., the three draughts which have been mentioned "*atque lie cruivis super dictam aquam.*"

It is in favour of the defender that these salmon-fishings are not given out in connection with adjoining lands. For the lands of Ardchonnell are not situate on the river Awe, but as I understand about ten miles from it. There is not therefore the usual limitation in the grant, and we may the more easily read the defender's title as comprising the whole fishings in the river Awe.

But we can only so read it if the words "cruives on the said water of Awe" can bear such a meaning. The defender indeed contends that he has a general grant of all the fishings in the Awe. But I cannot adopt that view. It is neither consistent with the words of the charter nor the possession which has followed on it. I construe the charter as being a grant of particular fishings—viz., the three salmon draughts and the cruives in the water of Awe.

But it is said that the fishing by cruives is the highest mode of salmon-fishing known to the law, and therefore that a grant of cruive fishing means or may mean a grant of salmon-fishings, so as to furnish a sufficient title for prescriptive possession.

The Lord Ordinary, without expressing a decided opinion, thinks that the title of the defender is sufficient. He says, "that a grant in general terms of salmon-fishing over a river (or at all events over a river like the Awe), followed by an enumeration of specified salmon draughts and unspecified cruives, is at least a sufficient title on which to prescribe if necessary the whole salmon-fishings of the river." He seems to think that there is a general grant of salmon-fishings. As I have already said, I do not concur in that opinion. The grant is not general but specific. It consists of certain specified pools and of cruives. The pools are known and have been possessed by the defender. I do not see how a grant to the fishing of these pools is a title for prescribing other fishings. Nor do I think that the grant of cruives can be read as a general grant of the salmon-fishings in the Awe. The most authoritative exposition of such a grant is to be found in the opinion of Lord Blackburn in the case of *Lord Lovat v. The Crown*. Without expressing a final opinion on a question which was not necessary for the decision, his Lordship says that a grant of cruives is merely a right to fish by cruives at the places where such engines have been or may be erected. I think that I am bound to proceed on this view of the law, and it seems to be conclusive against the defender's title in so far as it is founded on a grant of cruives.

But the case does not turn on that consideration alone. For inasmuch as the charter contains a grant of particular fishings followed by a grant of cruives in the same river, we would violate the ordinary rules of construction if we were to hold that the latter grant comprised or was intended to comprise the whole fishings. There is no meaning in the former grant if the latter is held to include it. I think, therefore, that I am bound to construe the grant as a grant of particular fishings, and consequently it is not a sufficient title on which to prescribe a right to fishings generally.

But there is another limitation on the defender's title which it is proper to notice. I need not say that the defender cannot prescribe any subject which lies beyond the limit of his title. The whole subjects granted by the charter of 1727 are described

as lying within the lordship of Lorne. On the south side of the Awe this lordship does not extend further eastward than the Nant, while the lands on the north side are within it. It seems to me difficult to hold that salmon-fishings *ex adverso* of the barony of Lochow can lie within the lordship of Lorne. If they had been possessed in conformity with the grant, that is to say, if the defender had possessed cruive fishings, this difficulty might have been overcome. But I cannot attribute any such force to a possession by rod and line only from the lands of Lochow. Such possession indicates that the fishings which have been so possessed are the fishings of those lands rather than fishings lying within the lordship of Lorne.

On the whole, I am of opinion the pursuer is entitled to our judgment. The grant of cruives not having been followed by possession, is unavailing to the defender; for the title of the pursuer is prior in date, and comprises the whole fishings *ex adverso* of the defender's lands. A grant of cruive fishings within the fishings previously given to the pursuer would in my opinion be invalid, because it would be in derogation of a prior title.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD YOUNG—I am obliged to say that I dissent, and I shall state my ground—for it is really one—of dissent very briefly. I assume of course—indeed it is not disputed—that the Duke of Argyll is proprietor of the barony of Lochawe. I shall further assume, what is disputed and is contrary to the view of the Lord Ordinary upon the case as presented to him, that the Duke is also proprietor of the salmon-fishings thereof, that is, pertaining thereto. The question is, upon the assumptions whether he is proprietor of the fishings in question in the river Awe? There is not in his title a specification of salmon-fishings in the river Awe; but it is said that the barony of which, with the fishings pertaining thereto, he is the owner adjoins the river Awe and comes down to the banks of it, and that it is therefore to be assumed that the fishings in the river are fishings pertaining to the barony. I cannot assent to that. A title to a barony is a good title to all the water therein—that is to say, all the land covered with water, such as a lake or a river; a title to a barony is a title to the land including waters and rivers within the bounds and limits of the barony. But the franchise of fishing for salmon in waters which contain salmon is another matter. The franchise of salmon-fishing pertaining to a barony is not at all necessarily limited to waters which are within the bounds and limits of the barony. Salmon-fishings in the sea *ex adverso* of the barony but not within the bounds and limits thereof, and salmon-fishings in the sea not *ex adverso* of the barony at all, may very well be salmon-fishings of the barony and pertaining thereto. On the other hand, the salmon-fishings of a barony and pertaining thereto

do not necessarily include the franchise of fishing in all the waters within the barony. On the one hand, as I have stated, the right of fishing pertaining to a barony, and conveyed by a title to the barony with the fishings, may be out with the bounds of the barony altogether—that is, the franchise, the right, may be exercised in waters outside the barony. On the other hand, the franchise of fishing in waters within the barony may be no part of the fishings of the barony. I therefore cannot assent to the proposition that it is to be assumed that the fishings, the right of fishing for salmon in the water of Awe, is the right of salmon-fishing of the barony and pertaining thereto because the lands of the barony adjoin and extend to the banks of the river Awe; and indeed, upon the face of the summons and record here the pursuer assumes that his barony fishings do not include all the fishings in the river Awe although his barony extends down to the river all along the banks. There may therefore be salmon-fishings in waters to which the barony adjoins, or in waters which are within the barony which are no part of the fishings of the barony at all. I think it is a question of evidence, a question of identification, whether any particular fishing—the right of fishing in any particular water—is a right of salmon-fishing of and pertaining to the barony or not. I think it is a question of fact, a question of identification, of which possession is the most material of all evidence. I do not say it is the only evidence, but it is the most obvious and the most common. We have not in this case any occasion to consider the question whether a title of barony with the salmon-fishings pertaining thereto does not, *prima facie*, apply to all waters within the limits of the barony—that is to say, *prima facie*, and in the absence of evidence to the contrary. That may be so, and I shall assume if you please that it is. But possession adverse to that view may have existed for any period you please. Here the possession is adverse to the view that the fishings in question are in fact, and as a matter of identity, fishings of the barony of Lochawe. All the possession which has ever existed is adverse to that view. Lord Rutherford Clark has pointed out upon an examination of the evidence that the possession of the particular fishing here—and that is upon an examination of the defender's title which I am not considering now—the possession of these particular fishings has only existed since 1846; that is, a period of forty-five years, very close upon half-a-century; and so far as I see the case would have been the same in principle upon evidence, so far as principle goes, if the possession had been for one hundred years or two hundred years. The proprietor of Lochnell, or anybody else you like, but never the proprietor of the barony of Lochawe, has possessed these fishings for a century or two centuries; nevertheless, as he has a title to the barony of Lochawe with the fishings thereof, *prima facie* these belong to him. I think upon that evidence they do not,—whoever

they may belong to, they do not belong to him. The evidence is abundantly sufficient to show that these are not part of the fishings of the barony. I am exaggerating it into possession for a century or two centuries. Here it is only possession for forty-five years. The party who has possessed (the defender) refers to a title—a variety of deeds and a variety of facts—to show that he has the right. The titles upon which he relies, and the grounds upon which he relies upon them, are subject to very powerful objections—critical objections—I shall assume that they are strong—and the defender might therefore in a question with the Crown, which, if these fishings have not been given off otherwise, is the party to contend with, find them very formidable. His right, his title, to defend the possession which he has had for forty-five years, or for a century or two centuries, may be difficult enough to maintain, or easy enough to maintain with the Crown, but the Crown is making no dispute in the matter. It is the proprietor of the barony of Lochawe, who has been proprietor of the barony during all that period of possession of forty-five years as it happens—he might have been, as I have said, for centuries—and he has never had any possession at all. I am therefore disposed to agree in the view of the Lord Ordinary, notwithstanding his assumption that there is not an express grant of salmon-fishings to the Baron of Lochawe—of the salmon-fishings pertaining to the barony. I am of opinion that the pursuer has failed to show that he has a title to these salmon-fishings in dispute; and that being so, I am further of opinion that he has no title to challenge the defender's possession, or to examine the defender's title. That is exactly my opinion. He is seeking to disturb a possession which has existed so far back as evidence will reach, and might have been for any period so far as the legal principle is concerned; he is challenging that possession, seeking to disturb it and take it to himself, he never having had it. Now, if the defender had got at any time a title from the Crown, he would have had an excellent good title. The Crown could not have given it, if these are part of the fishings of the barony of Lochawe, for they had parted with the fishings of the barony of Lochawe and conveyed them to the Duke of Argyll. But if the Crown had conveyed them to defenders, what would the conclusion have been? Not that they were violating and acting contrary to their grant to the Baron of Lochawe, but that these fishings in the river Awe were no part of the barony of Lochawe. That is a matter of evidence and identification, and so any adverse possession—for it is adverse possession as the Lord Ordinary somewhat emphatically says—will upon a question of identifying the fishings of and pertaining to the barony be most material, and may be conclusive against the baron with respect to fishings in the waters locally situated within the barony, just as for him with respect to waters locally situated outwith the limits of the barony. The fishings

will be identified with possession for him in the one case, against him in the other case. And as I suggested in the course of the argument, the patronage of church livings of the barony and pertaining to the barony—the identification of these also is a question of fact to be determined most obviously by possession, although there may be other evidence. *Prima facie* you would assume, in the absence of anything to the contrary, that the patronage—church patronage—related to livings, parishes, benefices, within the limits of the barony. But it might be shown by possession, by evidence appropriate to such a subject, that patronage to a living outwith the barony was a living pertaining to that barony; and on the other hand, that the patronage to a living, a parish altogether situated within the barony was not a patronage pertaining to the barony at all. If, for example, during one hundred years another party had always presented to a particular parish church without challenge or interruption, that would be, I should assume, conclusive evidence that that was not a presentation pertaining to the baron. He might not be able to exhibit a title, one not at all events subject to criticism on the part of the Crown or any other having right if he did not establish his; but the Baron of Lochawe to assert a right of presentation to a church within the barony to which he had never presented, and to which another had always presented during the period of a century would be a proposition to which I could not assent. And so with respect to these fishings in the Awe. I have pointed out the grounds upon which I am of opinion that the fact that the lands of the barony come down to the margin of the river is not conclusive and is not sufficient to countervail the possession to the contrary which has been had, it may be upon an examinable title and one subject to objections if the Crown chooses to challenge it, for if these fishings are not part of the barony of Lochawe they belong to the Crown now unless they have been given off to some other by a sufficient title; and that they are not part of the barony is the conclusion which I arrive at upon the grounds which I have just expressed.

The Court recalled the interlocutor and granted decree of declarator and interdict as concluded for.

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