Counsel for the Pursuer—Comrie Thomson—MacWatt. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—Jameson—A. S. D. Thomson. Agent—F. J. Martin, W.S.

Tuesday, November 28.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

OGSTON *v.* STEWART.

Salmon Fishings—Fishings not ex adverso of Lands—Title to Sue—Prescription.

The lands belonging to A and B, bounded on the north by the Dee, marched inland, but at the river bank were separated by a glebe. It was quite uncertain out of what lands the glebe had originally been designated, but it was admitted that the salmon fishings *ex adverso* did not belong to it. Those *ex adverso* of the eastern part belonged to B. A, who held his lands, "together with the salmon fishings in the water of Dee belonging to the said lands," raised an action against B claiming exclusive right to those *ex adverso* of the western part, and adduced a large amount of evidence supporting his contention as to the boundary, but failed to prove exclusive possession for the prescriptive period.

Held that he had no title to sue, and that the fishings in question did not necessarily belong to either A or B, but might belong to the Crown.

Opinion expressed that salmon fishings were an estate in land in the sense of the 34th section of the Conveyancing Act of 1874, and that accordingly proof of possession for twenty years would have been sufficient; also that possession by rod alone would have sufficed, as net and coble could not be used in the water in question.

In September 1892 Alexander Milne Ogston, Esquire of Ardoe, brought an action against David Stewart, Esquire of Banchory, and another, as trustees of the late John Stewart, and against the said David Stewart as an individual, to have it found and declared "that the pursuer has the sole exclusive right to the salmon fishings in the river Dee *ex adverso* of the lands of Ardoe, in the parish of Banchory-Devenick and county of Kincardine, and also *ex adverso* of that portion of the glebe lands of the said parish of Banchory-Devenick extending eastwards from the point where the said glebe lands meet the lands of Ardoe on the river bank to a point *ex adverso* of the office houses of the manse of Banchory-Devenick, or the drain proceeding from the said office houses to the river, which drain forms the eastmost boundary of the said fishings, and that the pursuer is entitled to fish for salmon and other fish of the salmon kind in the said river *ex adverso* of the said lands of Ardoe and of the said glebe lands of Banchory-Devenick for the distance claimed, and that by net and coble, rod and line, and every other lawful mode, and it ought and should be found and declared, by decree of our said Lords, that the defenders have no right of salmon fishing in the said river Dee *ex adverso* of the said lands of Ardoe, and of the said glebe lands for the distance claimed by the pursuer, and that they are not entitled to fish for salmon or fish of the salmon kind in any part of the said river *ex adverso* as aforesaid, and the defenders ought and should be interdicted, prohibited, and discharged by decree foresaid from fishing for salmon or fish of the salmon kind in any manner of way, and also from molesting or interfering with the pursuer, and those deriving right from him in the peaceable possession and enjoyment of their right of fishing for salmon and fish of the salmon kind in the river Dee *ex adverso* of the said lands of Ardoe, and the said glebe lands for the distance claimed by the pursuer in all time coming."

The lands of Ardoe marched inland with those of Banchory, but along the (south) bank of the Dee the glebe of Banchory-Devenick lay between them. The earliest title of Ardoe produced was of date 1594, but the pursuer founded on an instrument of sasine in favour of Alexander Ogston, his father, recorded 29th June 1840, and a charter of confirmation from the Crown also in his father's favour, of date 30th March 1853. In these writs the land and estate were described as "all and whole the town and lands of Ardoe or Ardoch, both sunny and shadowy halves thereof, with the mill of Ardoe or Ardoch, mill lands, astricted multures, sucken, sequels, and knaveships of the same, together with the salmon fishings on the water of Dee belonging to the said lands," &c.

In 1853 the late Alexander Ogston, who died in 1869, sold a portion of the lands of Ardoe nearest to the glebe, and called Cotbank, "with the salmon fishings in the Dee, so far as comprehended within the boundary of the said lands," to the Rev. Dr Gillan, but his son, the present pursuer, made up a title to the remaining lands of Ardoe in 1870, bought back Cotbank in 1873, and in 1874 consolidated the lands of Ardoe and Cotbank.

The glebe was designed about or before 1602, but out of what lands was uncertain. The pursuer averred—"It would appear as if the said glebe lands had originally been taken partly from the lands of Ardoe and partly from those of Banchory." In 1797 the west boundary of the glebe was straightened by taking part of the lands of Ardoe and adding them to the glebe, while part of the glebe was added to the lands of Ardoe in exchange therefor.

The lands of Banchory or Banchory-Devenick were formed into a barony at an early period. In 1618 the proprietor of these lands purchased Kirkton of Banchory, which until then had remained a separate subject, and the titles of which contained no reference to salmon fishings. Since 1618 these two subjects have be-

longed to the same proprietor. In 1645 the then proprietor was confirmed by Act of the Scots Parliament in All and whole the lands and barony of Banchory-Devenick, with the salmon fishing on the water of Dee belonging thereto, and in 1650 obtained a Crown charter to the lands of Banchory, and the salmon fishing of the same on the water of Dee. In 1743 a disposition was granted of the whole lands of Banchory including the Kirkton, with "the whole salmon fishing in the water of Dee belonging to the said whole lands," and that was followed in 1744 by a Crown charter of resignation in similar terms. In 1873 the lands of Banchory were disponed to the late John Stewart (who died 1887), "together with the whole salmon fishings upon the water of Dee belonging to the said lands," and upon that title the present defenders, John Stewart's trustees, held Banchory, having completed their title in 1889.

They stated that "the whole glebe of Banchory Devenick was designed out of the church lands of the Kirkton of Banchory before the year 1571."

The pursuer averred—"(Cond. 6) The pursuer and his predecessors and authors have, in virtue of said titles to the estate of Ardoe, exercised peaceably and without interruption the sole and exclusive right of fishing for salmon in the river Dee *ex adverso* of the lands of Ardoe, and also *ex adverso* of the said glebe lands from the point where the lands of Ardoe meet the glebe lands on the river bank eastwards to a point opposite the manse offices, or a drain running from the offices to the river, from time immemorial, or at least for upwards of forty years. They have always understood that the said office-houses or drain formed the eastmost boundary of their fishings, and that has been the understanding in the neighbourhood. Owing to the nature of the bank it is impossible to fish the south side of the river Dee *ex adverso* of the glebe with net and coble, but the proprietors of Ardoe have always exercised the right by fishing with rod and line and other lawful and possible modes. The defenders never had or exercised any right of salmon fishing *ex adverso* of said lands, and their statements in answer, so far as inconsistent herewith, are denied."

The defender answered—"(Ans. 6) Admitted that owing to the nature of the bank it is impossible to fish the south side of the river Dee *ex adverso* of the glebe with net and coble. *Quoad ultra* denied. Explained that until about four years ago neither the pursuer nor any of his predecessors ever asserted any right to the salmon fishing now in question, nor did they nor any of them up to the said date exercise any acts of possession of the salmon fishing. On the contrary, it is explained and averred that so far as the said salmon fishing was capable of being possessed it has been possessed for time immemorial, or at least for more than forty years, by the defenders and their predecessors, by fishing with rod and line, and all other lawful and possible modes."

The defenders pleaded—"(1) Having the exclusive right of salmon fishing in the portion of the river Dee in question in this case, they are entitled to absolvitor. (3) In respect of the defenders' titles and the possession following thereon, they are entitled to absolvitor from the conclusions of the summons."

The Lord Ordinary (WELLWOOD) allowed a proof. The proof failed to show out of what lands the glebe was designated. The pursuer failed to prove exclusive possession for even twenty years. The leases of the Banchory fishings, however, since before 1851 recognised the manse offices to be, as asserted by the pursuer, the western boundary of these fishings; the Ardoe leases after 1878, and before any dispute had arisen, gave the manse offices as the eastern boundary of the Ardoe fishings; and the pursuer was able to produce a large body of parole evidence showing that the manse offices were recognised as the boundary between the Banchory and the Ardoe fishings by persons whose duty it was to know, *e.g.*, river watchers. The nature of the evidence sufficiently appears from the opinion of Lord Adam.

Upon 8th February 1893 the Lord Ordinary found, declared, and interdicted in terms of the conclusions of the summons, and decerned.

"*Opinion.*—The peculiarity of this case is that the salmon fishings in the river Dee, which are the subject of dispute, are not *ex adverso* of the lands of either of the parties. The pursuer's lands of Ardoe and the defenders' lands of Banchory march inland, but at the river there is interjected between them the glebe of Banchory-Devenick, which extends along the river for about 300 or 350 yards. It is common ground that the fishings do not belong to the glebe, and it is admitted that both the pursuer and the defenders have in their titles a grant of salmon-fishing. It therefore appears that the fishings *ex adverso* of the glebe belong either to Ardoe or Banchory or partly to both properties. The pursuer admits that the defenders have an exclusive right to the salmon fishings to a point on the river opposite the offices of the manse of Banchory-Devenick, but he claims the exclusive right to the fishings to the west of that point.

"If it could have been shown that the glebe was taken from the lands of Banchory, that, if not conclusive in the defenders' favour, would have gone far to support his contention. But I agree with the pursuer's counsel that the evidence on this point is entirely inconclusive, and that no aid is to be derived from it. The pursuer's counsel passed by the point with that observation, and although the defenders' counsel did not give up the point, I was not favoured with any detailed argument. It appears that the lands of Kirkton of Banchory were originally bishop's lands, but the property of the lands was parted with at a very early date, and after the thirteenth century only the superiority remained with the church. On the other hand, the lands of Ardoe were also church

lands, having originally belonged to the monastery of Arbroath, and the property as distinguished from the superiority was not parted with until long after the lands of Kirkton Banchory were in the hands of a layman. So long as the lands of Kirkton appear alone in the titles they have no grant of salmon fishings attached to them. And it is not until 1744, when they are included in the same Crown charter with the lands of Banchory, that there is mention of 'the fishings belonging to the whole of said lands.' Lastly, there is positively no evidence to show out of what lands the glebe was designed. . . .

"The evidence for which one would naturally look in such a case is evidence of possession. But unfortunately the evidence of possession by rod-fishing is unsatisfactory and inconclusive, and it is admitted for the pursuer that upon that evidence alone he cannot succeed. It is not surprising that the evidence upon this point should not be more decisive. At best the fishing in dispute is, even now, of comparatively little value; the river at that point cannot be fished with net and coble; and even for the purposes of rod-fishing it cannot be of much value, because at the upper part there is back water, and lower down it is difficult to fish. Add to this, that until recently rod-fishing was of little value in the market, and therefore proprietors of salmon fishings were not so particular in preventing rod-fishing in those parts of a river where it would not interfere materially with the net-fishing, and they were more liberal in giving leave to fish when that was asked by friends or neighbours, or even by strangers.

"No aid is to be obtained from the older titles of the parties, because they each have a right of salmon fishings described in general terms as belonging to their respective lands.

"In the absence of aid from the titles and satisfactory evidence of possession, beyond doubt the most important evidence in the case is to be found in the terms of the leases of salmon fishings granted by the respective proprietors of Ardoe and Banchory. The terms of the leases of the Banchory fishings are of themselves almost conclusive against the defenders' contention, because they show that not merely from 1851 but for long before the western boundary of the Banchory fishings as defined in the leases was the manse offices, which is the boundary claimed by the pursuer as the eastern boundary of the Ardoe fishings. . . .

"The leases of the Ardoe fishings are not so conclusive, because I do not find a description by boundaries in the earlier leases, but supplemented by parole evidence they complete the pursuer's proof; and taken in connection with the Banchory leases present, it seems to me, an irresistible body of evidence that the drain is the true boundary. Since 1878 the fishings have been described as 'the net and rod fishings on the south bank of the river Dee, on the said estate of Ardoe, extending from the Mill of Ardoe Burn down to the Established Church manse of Banchory-Devenick,' and it is to be observed that in 1878 no dispute had arisen in regard to the boundaries. . . .

"On the other hand, the defenders found strongly upon the description of the Ardoe fishings given in a disposition, dated 1853, of the lands of Cotbank, part of the lands of Ardoe, in favour of the Rev. James Gillan. The lands of Cotbank were sold, with reference to a plan which was prepared in 1836, but on which the boundaries of Cotbank as disponed were laid down. Now, that disposition conveys 'the salmon fishings in the river Dee so far as comprehended within the boundary of the said lands above described.' The eastern boundary of Cotbank strikes the river at the western extremity of the glebe, and therefore does not include the 150 yards of water in dispute. The defenders, I think, are well entitled to found upon this description, but I am of opinion that it does not counterbalance the evidence afforded by the leases. There is no limitation in the earlier titles, and the lands of Cotbank are now consolidated in the pursuer's person with the rest of the estate of Ardoe, he having reacquired them in 1873. If the fishings to the east of Cotbank belonged to Ardoe before the conveyance of Cotbank to Gillan they still remained in the proprietors of Ardoe if they did not pass under the disposition to Gillan. Any importance therefore which that description has lies in its being evidence that the proprietor of Ardoe did not consider that he had any right of salmon fishing to the east of the boundary of Cotbank. But we find that at the date of the disposition to Gillan the Banchory fishings had been let for years under leases which described their western boundary as the drain or manse offices, and we also find that the Reids, the tacksmen of the Ardoe fishings, regarded the drain as the eastern march of their fishings. There is also in process a minute of lease of the Ardoe fishings in favour of Alexander Hector dated in 1841, in which the fishing let is described as 'the right of salmon-fishing in the river Dee opposite the said lands of Ardoe, presently possessed by Alexander Duncan, George Duncan, and William Duncan.' That expression, again, if strictly construed, would limit the fishings to the water *ex adverso* of Ardoe. But it was not so construed by the tacksmen; it is a general expression, and I attach much greater importance to the precise limits which are inserted in the leases of the Banchory fishings. I therefore think that while the terms of the disposition of Cotbank are a material element to be considered, the description of the limits of the salmon fishings may be regarded as a not unnatural error on the part of the conveyancer, whose attention was principally directed to the boundaries of the lands, and not to the small and comparatively worthless bit of fishing to the east of the lands conveyed.

"There is a good deal of conflicting parole evidence as to this or that place having been pointed out as the boundary of the fishings. I think, on the whole, that the

evidence on that subject given for the pursuer is more reliable, because the witnesses who speak to the drain having been pointed out as the boundary applied for and received information in most cases from the persons who had the most accurate information, viz., the lessees of the respective fishings, or Dr Paul, the venerable minister of Banchory-Devenick. There is some of the evidence, however, which cannot easily be explained on the ground of mistaken recollection on the one side or the other. For instance, the pursuer's witness George Duncan, who was watcher on the Dee in 1881, states—'As regard the Ardoe and Banchory fishings, I applied first to James Cruickshanks, inspector of the river at that time, and then to the lessees of the fishings. They all three gave me as the boundary a drain crossing the road from the manse at an old saugh tree. I acted upon the information I then got as to the marches.' Now, Cruickshanks declares that he considered the march to be a stone in the hedge, and that Mackie told him that the march was back and forwards thereabouts. Again, Ewen Ritchie says that he asked William Duncan, the minister's man, and Robert Leith, forester of Banchory, and that they both told him that the drain was the march. . . . As I have said, the evidence of rod-fishing is inconclusive. There is evidence on both sides, but its value is much diminished by considerations which I have already indicated, and it is still further confused by the fact that many of the persons who from time to time fished that piece of water had permission to do so both from Banchory and Ardoe. On the whole matter I think the pursuer is entitled to declarator and interdict."

The defenders reclaimed, and in the course of their argument asked leave to amend the record by adding an additional plea of "No title to sue," which was granted.

They argued—The pursuer's title by itself was insufficient, and the possession explaining it was insufficient, as it had not lasted for the prescriptive period. The Lord Ordinary was with them on these points, but had decided in favour of the pursuer upon the question of boundary. But the question of boundary did not arise unless it was certain that the fishings belonged either to Banchory or to Ardoe. There was nothing to show that. Until the contrary was proved, the presumption was they remained with the Crown.

Argued for respondent—No one doubted that the lands of Ardoe marched with those of Banchory. The salmon fishings clearly belonged to one or other. No one suggested they belonged to the glebe, about which all surmises were equally unsatisfactory. A common sense view of salmon fishings must be taken. They consisted here of a succession of pools which were not divided by a no-man's land. Undoubtedly the division might be at a place where no one could fish with net and coble, and yet fishing at that place would belong to either Ardoe or Banchory. Ardoe had fished with rod, and that in the circumstances was sufficient—*Warrand's Trustees* v. *Mackintosh*, February 17, 1890, 17 R. (H. of L.) 17, Lord Watson, p. 23. There was no doubt fishings not *ex adverso* might belong to the lands under a general title of salmon fishings—*Fraser* v. *Grant*, March 16, 1866, 4 Macph. 596 (Lord Justice-Clerk Inglis). It was really a question of identification of fishings, and in that view the recognition of the pursuer's boundary in the defender's leases, and the parole evidence of witnesses, such as river inspectors, was highly important, and had rightly been given effect to by the Lord Ordinary, whose judgment should be affirmed.

At advising—

LORD ADAM—The pursuer is proprietor of the lands of Ardoe situated on the south bank of the river Dee. Immediately adjoining the lands of Ardoe on the east is the glebe of the parish of Banchory-Devenick, and adjoining this glebe are the defenders' lands of Banchory; all these subjects are bounded by the river Dee on the north, the glebe lands lying between the lands of the pursuer and defenders.

The object of the action is to have it declared that the pursuer has the sole and exclusive right to the salmon fishings in the river Dee *ex adverso* of the lands of Ardoe, and also *ex adverso* of that portion of the glebe lands extending eastwards from the point where the said glebe lands meet the lands of Ardoe on the river bank to a point *ex adverso* of the office-houses of the manse of Banchory-Devenick, or the drain proceeding from the said office-houses to the river, and to have the defenders interdicted from fishing for salmon in any part of the river *ex adverso* as aforesaid.

There is no question as to the pursuer's right of fishing *ex adverso* of the lands of Ardoe. The sole controversy is as to the right of fishing *ex adverso* of the portion of the glebe lands above specified.

The Lord Ordinary has decided the case in favour of the pursuer. After describing the situation of the subjects, he says—"It is common ground that the fishings do not belong to the glebe, and it is admitted that both the pursuer and the defenders have in their titles a grant of salmon fishings. It therefore appears that the fishings *ex adverso* of the glebe belong either to Ardoe or Banchory or partly to both properties." It is on that assumption that the Lord Ordinary has decided the case. But it does not follow that the fishings in question, because they are not claimed as belonging to the glebe, necessarily belong either to the pursuer or defenders. I think that as the fishings in question are not *ex adverso* of the lands either of the pursuer or defenders, that the legal presumption is that they belong to the Crown, and that in order to displace that presumption, the pursuer or defenders, as the case may be, must establish a right to them, either by showing an express grant or by proof of possession following upon and explaining a general grant

of salmon fishings. That this is the ordinary rule of law cannot I think be disputed, but it is maintained that there are specialties in this case arising from the fact that the fishings are *ex adverso* of the glebe, and from the circumstances attending its designation which are sufficient to displace that presumption.

It is said by the pursuer that the glebe was designated partly out of the lands of Ardoe and partly out of the lands of Banchory, but that the right of salmon fishing *ex adverso* of the lands designated did not pass to the proprietors of the glebe, but remained with the proprietors of these lands, and hence it is, he maintains that the pursuer and defenders are now in right of the fishings. On the other hand, it is maintained by the defenders that the glebe was designated solely out of the lands of Kirkton of Banchory, which are now part of the lands of Banchory, and that the fishings remained with the proprietors of these lands.

As it appears that the glebe was designated about the year 1602, and as it further appears that the right of salmon fishing was attached to the lands of Ardoe prior to that date, if it had been shown that part of the glebe had been designated out of these lands, that might have been sufficient to overcome the presumption in favour of the Crown as regards these lands. But there is no evidence that any part of the glebe was designated out of Ardoe.

As regards the lands of Kirkton of Banchory, it appears from the titles that these lands were originally held as a separate subject from the lands of Banchory-Devenick, and belonging to different proprietors. In 1618 the proprietor of Banchory-Devenick purchased Kirkton of Banchory, and these lands have since belonged to the same proprietor.

In the titles of Kirkton of Banchory, however, there is no mention of salmon fishings so long as it remained a separate subject. In November 1743 James Gordon of Banchory disponed to Alexander Thomson the whole lands of Banchory, including the Kirkton, with "the whole salmon fishing in the water of Dee belonging to the said whole lands," and that was followed by a Crown charter of resignation in Thomson's favour dated 8th May 1744 in similar terms. This is the first time a grant of salmon-fishings appears in the titles in connection with Kirkton of Banchory. It appears to me therefore that at and prior to the date of the designation of the glebe the salmon fishings of Kirkton of Banchory presumably belonged to the Crown, and if it be that the glebe was designated out of these lands, there is nothing to displace the presumption that these fishings now belong to the Crown. But, as has been pointed out by the Lord Ordinary, there is no evidence to show out of what lands the glebe was designated, whether wholly out of Kirkton of Banchory or partly out of these lands and partly out of Ardoe.

In these circumstances it appears to me that the pursuer must, in order to succeed in this action, show a title to the fishings, either by express grant, or by a general grant followed by possession.

This view of the case, however, does not appear to have been presented to the Lord Ordinary, and has not been considered by him, but the defenders were allowed in the Inner House to add a plea to the effect that the pursuer had no right or title to the fishings, and that plea must be first disposed of.

The grant of salmon fishings on which the pursuer founds is expressed in his titles in the following terms—"All and whole the town and lands of Ardoe or Ardoch, both sunny and shadowy halves thereof, with the mill of Ardoe or Ardoch, mill lands, astricted multures, sucken, sequels, and knaveships of the same, together with the salmon fishings on the water of Dee belonging to the said lands."

The pursuer has, it thus appears, no express grant of these fishings, and the question therefore is whether he has proved exclusive possession of them for the time requisite to give him a right to them.

I may premise that although there have been some changes in the extent of the glebe since it was designated, none of these affect the present question. Thus, in the year 1797, the march between the lands of Ardoe and the glebe was straightened, but there is nothing to show that any alteration was made where these lands met at the river.

It also appears that when the turnpike road was made along the banks of the river in 1837, certain parts of the lands of Banchory facing the river were added to the glebe in place of part of the glebe which was taken for the road, but this was at the east boundary of the glebe where it joins the lands of Banchory, and does not affect the present question.

The part of the glebe *ex adverso* of which the fishings are claimed by the pursuer is of limited extent, being only about 130 yards in length. It is common ground that the river at this place cannot be fished by net and coble in the usual way, and it further appears that there is at the upper part of it a backwater in which fishing for salmon even with the rod is not practicable, so that the dispute between the parties in fact relates merely to the angling in a small portion of the river, between the end of this backwater and the top of the manse pool, the fishing in which admittedly belongs to the defenders.

The pursuer avers that he has exercised, peaceably and without interruption, the sole and exclusive right of fishing for salmon in this water from time immemorial, or at least for upwards of 40 years. I doubt, however, whether the pursuer requires to undertake so heavy an *onus*. A right of salmon fishing is a heritable subject, and is therefore an estate in land in the sense of the Conveyancing Act of 1874, and, by the 34th section of that Act possession for twenty years would appear to be sufficient to constitute a prescriptive right to the fishings.

This action was raised in September 1892, and therefore I think the question is,

whether the pursuer has proved that he and his predecessors and authors have had sole and exclusive possession of these fishings for at least twenty years prior to that date. I further think that fishing by net and coble being in fact impracticable in the water in question, proof of such possession by rod-fishing would be sufficient to establish the pursuer's right.

On considering the evidence in the case, one finds a great deal of evidence as to the supposed boundary of the fishing between Ardoe and Banchory, on the supposition that it belonged to one or other of these estates, but there is not much proof as to the actual possession had by the pursuer of the fishings.

Such evidence as there is appears to me to show that down to a comparatively recent date everybody who chose angled on the water in question without objection. For example, David Collison, one of the pursuer's principal witnesses, says—"When I was a boy" (he was born in 1835) "I used to fish at and about Ardoe and Banchory-Devenick. There was nc permission wanted at that time. Rod-fishing was of little repute then. In my early days everybody fished anywhere up and down without asking permission. I have seen other people fishing there besides myself"—and there is plenty of other evidence to the same effect.

But perhaps it is enough to refer to the evidence of the pursuer himself as to this. In order to understand his evidence, however, it is necessary to mention that in 1853 Mr Ogston, the pursuer's father, sold certain parts of the estate of Ardoe which marched with the glebe on the east, with the salmon fishings *ex adverso* of the parts sold to a Dr Gillan. These lands and fishings, which were subsequently known as Cotbank, were thus interjected between the glebe and the parts of Ardoe which remained with Mr Ogston. Cotbank and the fishings were, however, re-acquired by the pursuer in 1873.

The pursuer's evidence is in these terms—"(Q) During the whole time," he is asked, "from 1853 till you bought back Cotbank, did anyone from Ardoe, or in right of the proprietor of Ardoe, fish that detached portion opposite the manse?—(A) It could not be fished by net and coble. (Q) Did anybody fish it in anyway?—(A) I cannot say; I knew there was very little rod-fishing during that time. I was absent for three or four years, from 1851 or 1852. I was frequently going about Ardoe from 1855 to 1873. (Q) During that time did you you see people sometimes fishing in the Ardoe water, friends of your father or yourself?—(A) No. I do not recollect seeing anyone fishing with rod and line there in the Ardoe water. There was not much angling in those days; it only commenced when the Dee Association took over the nets. From 1853 to 1873 I cannot name anyone who fished this piece of water in dispute in right of the proprietor of Ardoe,"—and he refers to the terms of the leases. Leases have been produced covering the period from the year 1833 till 1887. The fishings are described in general terms in the earlier leases. But in November 1878 the pursuer let the fishings to Mr Booth and others for three years from February 1879. In that lease for the first time there is a description of the extent of fishings let. They are described as being "the net and rod fishings on the south bank of the river Dee on the estate of Ardoe, extending from the Mill of Ardoe Burn down to the Established Church manse of Banchory-Devenick." The same description of the subjects let is contained in the subsequent leases.

It is not of course material what description of the subjects let the pursuer may have inserted in his leases unless exclusive possession has followed thereon; but it is not immaterial to notice that it was not until 1878, after the pursuer had re-acquired Cotbank, and when, as I think, he first thought of asserting a claim to the fishings in question, that these fishings were included *nominatim* in the subjects let.

It will be observed that the pursuer in his evidence says he cannot recollect seeing anyone fish in the disputed water with rod and line between 1853 and 1873, that he cannot name anyone who fished in right of the proprietor of Ardoe, and he does not say that anyone was ever challenged for fishing during these years.

There is, I think, no evidence that anyone angling in the water in question was ever interfered with by anyone before 1873, and there is no evidence that anyone was interfered with by the pursuer or those in his right prior to 1887. In the year 1873, Dr Arthur, who had a Banchory permission, was challenged while angling in the disputed water, by Ritchie, a water-bailiff. But Ritchie did this at his own hand, and not under the authority of the pursuer or anyone in his right, and he does not appear to have had any business to interfere in the matter. Dr Arthur is asked why he left—"Well," he says, "I was a boy, and water-bailiffs are water-bailiffs. I had an idea that he was a keen fisher himself, and probably wanted to preserve the best part of the pool for his own benefit, and he being a water-bailiff I did not want to come into collision with him."

There is no evidence that anyone else was challenged until one of the fishery inspectors, a good number of years after 1881, challenged a man who had a Banchory permission. "I had no right," he says, "to put him off the water where he was fishing legally, but I told him he was over his march." I do not see how the pursuer can found on these two acts of interruption. They were not done by him or by his authority.

The only instances of interruption on the part of the pursuer, or those in his right, to be found are those spoken to by James Ogg, who was gardener to Dr Stewart, who was tenant of the Ardoe fishings from 1887 to 1890 inclusive. He says that it was part of his duty to look after the fishings, and that he used to challenge people who came upon the Ardoe water without permission. "I challenged

people," he says, "on several occasions fishing at the extreme eastern boundary, and turned them off. I remember several of them saying they had a right to be there. They said they had a right from Mr Clark (the tenant of Banchory fishings). I told them they must go by the march, and they went."

Such being the evidence adduced by the pursuer in support of his claim, I do not think it necessary to examine in detail the evidence for the defender. It shows, however, that many persons, some with and some without permission from Banchory, angled in the disputed water during the last twenty years without interruption or challenge. It shows that on one occasion a Mr Mathieson, who had a Banchory permission, while so fishing, was challenged by Mr Booth, who was tenant of Ardoe fishings for some years subsequent to 1878. But Mr Mathieson asserted his right to fish where he was fishing. "I took no notice," he says, "and fished away. I went back and fished the same place afterwards."

I concur in the view of the evidence expressed by the Lord Ordinary. "The evidence," he says, "for which one would naturally look in such a case is evidence of possession. But unfortunately the evidence of possession by rod-fishing is unsatisfactory and inconclusive, and it is admitted for the pursuer that upon that evidence alone he cannot succeed. It is not surprising that the evidence upon this point should not be more decisive. At best the fishing in dispute is even now of comparatively little value; the river at that point cannot be fished with net and coble; and even for the purposes of rod-fishing it cannot be of much value, because at the upper part there is a backwater, and lower down it is difficult to fish. Add to this, that until recently rod-fishing was of little value in the market; and therefore proprietors of salmon fishings were not so particular in preventing rod-fishing in those parts of a river where it would not interfere materially with the net-fishings, and they were more liberal in giving leave to fish when that was asked by friends or neighbours, or even by strangers."

I am therefore of opinion that the pursuer has failed to prove that he has had sole and exclusive possession of the fishings in question for the prescriptive period, and that the plea now insisted on by the defenders, that the pursuer has no title to them, must be sustained.

If that be so, it is enough for the decision of the case. It is not necessary to consider whether the defenders, as they claim, have made out a right to these fishings. In the absence of the Crown, I do not think it would be right to find that either party had made out such a right.

I therefore think that the interlocutor of the Lord Ordinary should be recalled.

LORD M'LAREN—I have had an opportunity of reading Lord Adam's opinion, and I concur in it.

LORD KINNEAR—I am of the same opinion. I think the observation of the Lord President in the case of *Richardson* v. *Hay*, March 12, 1862, 24 D. 775, that the pursuer's case was not based upon the strength of his own position, but upon the weakness of his opponent's, is a very apt description of the argument which was addressed to us by the pursuer in this case, and indeed it expresses accurately also the ground of the Lord Ordinary's judgment, because the judgment appears to me to be based upon the hypothesis that if the fishings in dispute are not shown in this action to belong to the defender, they must of necessity belong to the pursuer. Now, that might be a very legitimate mode of reasoning in a question of disputed marches between conterminous proprietors, but in the present case the riparian properties of the pursuer and defender are separated from one another by the glebe lands of Banchory-Devenick, which extend for about 350 yards along the river, and we cannot assume that their fishing rights are in fact conterminous until one or other has established an exclusive right to fish *ex adverso* of the glebe, but no one can have such a right except by grant flowing from the Crown, and if neither party can show a title which either includes the fishings in dispute in terms, or can be shown by competent evidence to have been intended to embrace them, the inference is that these fishings remain in the hands of the Crown if they have not been given out to some other grantee. The pursuer's conclusion is that he has right not only to the undisputed fishings of his estate of Ardoe, but that he has an exclusive right to the salmon fishings in the river Dee *ex adverso* of that portion of the glebe lands of the parish of Banchory-Devenick extending from one point described in the conclusion of the summons to another. Now, that is an assertion of a good right to a separate heritable estate, and before we can affirm that proposition in the pursuer's favour, he must produce a clear title to that specific subject. The earliest title which he has produced is a Crown charter of 1594, including the sunny half of the estate of Ardoe, with the salmon fishings in the water of Dee adjacent to the said lands. The second is a feu-charter by a subject of the shadow half of the estate of Ardoe with the fishings. Now, the first of these titles contains words of limitation. It is a fishing adjacent to the land granted out which is given to the grantee. The second title does not contain any express words of limitation, but it is a grant of the shadow half of the lands with the salmon fishings. The two halves came to be combined in one proprietor (the titles, I think, have not been produced, but it is not of any importance that they should be) until in 1840 we have the title upon which the present pursuer founds, by which he holds the estate of Ardoe, both shadow half and sunny half, with the salmon fishings in the water of Dee belonging to the said lands. Now, there again we have words of limitation.

The question is, what is meant by the salmon fishings belonging to the lands of Ardoe? There can be no doubt at all that that is a perfectly good title to the fishings *ex adverso* of the lands included in the charter, but it is not an express title to fishings lying beyond these limits. It may be explained by evidence to comprehend fishings *ex adverso* of the adjoining lands, or altogether discontiguous from the lands conveyed, but without such evidence it cannot, by force of its own terms, be made to cover any adjacent or discontiguous water. *Prima facie*, it means the fishings *ex adverso* of the lands conveyed.

Now, the kind of evidence by which a title of that kind may be extended, so as to comprehend fishings that are not precisely *ex adverso* of the lands, was very fully considered in the case of *Fraser* v. *Grant*, and the principle upon which such evidence is to be considered is there laid down by the late Lord President, then Lord Justice-Clerk. His Lordship points out, in the first place, that such a title may be explained by evidence of possession, but then he goes on to say that it is also perfectly competent to show by proof of a different kind that the true meaning of the grant is of such a comprehensiveness, because the words used have a certain definite and well-known signification, and having that signification at the time that the grant was made. Now, it appears to me, in the application of that principle, that if the pursuer could have shown that the glebe of Banchory-Devenick had been taken in whole or in part from his estate of Ardoe, or that the lands which are now glebe lands were part of Ardoe at the date of the Crown grant, it would have been very conclusive evidence indeed to show that the fishings *ex adverso* of the glebe land had been part of his salmon-fishing right. But then there is no evidence from which any inference of that kind can be drawn, and indeed the pursuer himself does not contend that there is, because his case upon record with reference to the glebe of Banchory-Devenick is, that it is impossible to determine with certainty whether the glebe lands had been taken from the lands of Ardoe or from the lands of Banchory, or partly from the one and partly from the other. There is no evidence of the date when the glebe was first designed, and there is no evidence by which we can identify the portion of the glebe *ex adverso* of which the salmon fishings now in dispute lie with any part of the estate of Ardoe. And therefore the pursuer must fall back on the other kind of evidence, the only evidence which can really be relied on in this case to show that the salmon fishings belong to the estate of Ardoe, and that is by showing that from time immemorial he has exercised a right of salmon fishing beyond the limits *ex adverso* of his own lands, and extending to the lands within the glebe of Ardoe to which the conclusions of the summons relate. Now, upon the kind of evidence which is necessary to clear a title which is to be explained by possession only, the Lord Justice-Clerk, in the case I have referred to, says this—"If the pursuer and his predecessors, as proprietors of the land and fishings contained in the infeftment, can show that for forty years or from time immemorial they have exercised the right of salmon-fishing *ex adverso* of the disputed land, that will be sufficient to explain the title as applying to and comprehending these fishings." But then his Lordship goes on to say—"I know no authority for holding that possession to explain the terms of a Crown grant of salmon-fishing can be possession for anything short of time immemorial or forty years." Now, agreeing with Lord Adam that the pursuer may probably be entitled in this case to substitute the period of twenty years for the period of forty years, I entirely agree with him also that there is no evidence of exclusive possession of the salmon fishings in dispute by the pursuer or his predecessor for the period of twenty years. If the question here, apart altogether from any weakness, real or supposed, in the defenders' case, were whether the pursuer had established a right to salmon-fishing by exclusive possession during that period, I think that the pursuer's case could hardly be maintained. I am therefore of opinion with Lord Adam that the pursuer has failed to make out his case. But while we must therefore negative the right alleged by the pursuer, I agree that we are not in a position to affirm the right put forward by the defender. Whether he may or may not be in a position to make out a title against the Crown or any undoubted grantee of the Crown, we do not know. It is not necessary for the purposes of the present action to decide that, and therefore I think we can do nothing more than affirm the plea-in-law added in this Division.

The LORD PRESIDENT concurred.

The Court sustained the additional plea of "No title to sue," recalled the Lord Ordinary's interlocutor, and assoilzied the defenders.

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