that all rights and remedies competent to a superior for recovering or making effectual, *inter alia*, casualties shall continue to be available to the superior. The words have a sensible meaning as regards feu-duties, &c., but as to casualties, all rights and remedies, either by way of refusing an entry without payment or compelling an entry, are expressly destroyed, and I know of no others. The utmost effect, I think, that can be given to these words is that they indicate that those who used them would have preferred a scheme which left the pecuniary rights quite unvaried if they had known how to frame one. But this does not, I think, justify a Court in attaching to the form of action given by the fourth subsection a condition that such a plea as that used here should be good. Lord Gifford does not seem to me to attach sufficient importance to the necessity of finding words in an Act of Parliament sufficient to express an intention on the part of the Legislature to give such a plea, even if the language used is such as to lead to a suspicion that those who used such words had a wish to produce such a result.

Lord Deas says that the Legislature intended things to stand as they would have done if the deeds or instruments which would in the particular circumstances of each case have fallen to be executed, had actually been executed; whatever, he says, would formerly have been done as a matter of title is now to be held as actually done. I doubt whether it would have been thought judicious to enact this. In such a case as the present, where the disponer was settling his estate on the person who was his heir, and the heirs of that person's body, it may be conceded to be tolerably certain that the heir of entail, who must necessarily be the heir of the disponer, would not have any objection to hold the lands direct from the superior, and to hold the estate tail base from himself as mid-superior; but where the heir of the vassal is a stranger it would be very difficult indeed to say what he would have done if the circumstances had been different. It seems to me objectionable, as being a scheme well contrived to produce litigation. But I base my judgment on this, that I can find nothing in the Act which expresses any intention to make such a scheme.

Lord Young says that to compel every proprietor of land to enter with the over-superior would subject some proprietors in casualties which they would not otherwise have had to pay; and without expressing any opinion as to the extent to which it would have this effect, I agree that it would to some extent have that effect, and would so far interfere with the relative value of estates of superiority and property. He thinks this so objectionable that to avoid it he adopts a very strained interpretation of the third subsection, by which, if I rightly understand it, the superior is never to receive composition from the purchaser on a sale so long as an heir of the vendor exists and the purchaser is willing to pay relief in his name. This would interfere with the relative values of superiority and property by prejudicing—indeed destroying—the rights of superiors to composition, whether taxed or untaxed, in all feus where subinfeudation was not effectually prohibited, which is at least as objectionable as what Lord Young deprecates, and is, I think, much more clearly contrary to the words of subsection 3.

Perhaps Lord Young meant to confine his judgment to the cases in which the heir not only existed but would have been willing to enter if the law had not been changed. If so, his judgment comes to nearly the same thing as that of Lord Deas, and seems to me subject to the same objections.

I again repeat that I base my judgment on the absence of any language proper to express an intention to attach a condition to the action given as against a successor for composition, that it should be a defence that there was an heir of the vassal last entered who could under the old law have entered paying only relief. The proviso at the end of subsection 3 has not that effect. It is not now the question whether it postpones the time for bringing the action till after the death of the vassal last entered, and I express no opinion on that, either one way or the other.

I think for these reasons that the judgment below should be affirmed and the appeal dismissed with costs.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants—Russell, Q.C.—C. S. Dickson. Agents--Hewitt & Alexander, Solicitors.

Counsel for Respondent—Benjamin, Q.C.—Balfour. Agents—Faithful & Owen, Solicitors.

Friday, February 27.

(Before the Lord Chancellor (Cairns), Lord O'Hagan, and Lord Blackburn.)

THE LORD ADVOCATE *v.* LORD LOVAT.

(In Court of Session March 7, 1879, *ante*, vol. xvi, p. 418.)

Fishing — Salmon-Fishing—Barony Title—Possession—Rod-Fishing.

L had a barony title to the lands on both sides of a river, dating from 1774, and also express grants of salmon-fishing of a much earlier date to certain parts of the river situated below the falls of K. He had from time immemorial exercised a full and exclusive right of fishing below these falls, *inter alia*, by means of close cruives, which caught almost all the salmon ascending the river. In consequence of the cruives and the falls, the fishing above the falls was, up to 1862, when close cruives were abolished, almost worthless. L had asserted his right above the falls for a prescriptive period (1) by protecting the river during the spawning season; (2) by exercising the right of fishing occasionally; (3) by taking his tenants bound to protect the water; (4) by preventing others from fishing. Since 1862 he had fished regularly above the falls. It was not alleged that any other party had possessed the right of fishing. *Held* (*affirming* Court of Session), in an action at the instance of the Crown, who claimed the fishings above the falls, that apart from the question of express grant, L was entitled to attribute his possession of the whole river to the barony title, and that under it the possession which had been had

from the highest portion of the stream down to the sea had been one and continuous, and sufficient to maintain L's rights within the limits of the barony lands.

Observed (*per* Lord Blackburn) that the doctrine that salmon-fishings as being *inter regalia* belong to the Crown unless there is express mention of them by grant, is not of the earliest origin in the law of Scotland.

In this action the Lord Advocate on behalf of the Crown asked for declarator that certain salmon-fishings in the Affaric and Cannich and their tributaries, and in the Glass or Beauly, belonged to the Crown. The action was brought against Lord Lovat and others, of whom Lord Lovat alone defended, on the grounds (1) of express grant, and (2) of barony title with possession of the fishings. The Lord Ordinary (Curriehill) gave decree against Lord Lovat, but on a reclaiming note the Second Division recalled his Lordship's interlocutor, decerning in terms of the conclusions of the summons in regard to the Affaric and Cannich, but *quoad ultra* assoilzieing the defender.—March 7, 1879, 16 Scot. Law Rep. 418.

The Lord Advocate appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, in this case, which is a case arising upon a claim by the Crown to the salmon-fishings of the river Glass or Beauly in Inverness-shire, the Lord Ordinary decided in favour of the appellant, the Lord Advocate, but the Judges of the Second Division of the Court of Session decided in favour of the respondent Lord Lovat.

My Lords, after hearing the very elaborate and able arguments at your Lordships' bar, I was of opinion—and that opinion has been confirmed on a careful examination of the documents and evidence—that the decision of the Court of Session was right, and ought to be affirmed. I find that my noble and learned friend Lord Blackburn has in some observations, which I have had the advantage of reading, so fully expressed the conclusions which I draw from the papers that I do not propose to go over ground which your Lordships will find when you hear those observations has been completely occupied. I will only say that in moving, as I am prepared to do, that the interlocutor of the Court of Session of the 7th March 1879 be affirmed, I think that the interlocutor should be qualified so as not to prejudice one aspect of the case which I do not think that it was meant to touch. I propose that after the words "*quoad ultra* sustain the defences" there should be inserted these words—"without prejudice, however, to any right of the Crown or its grantees to the salmon-fishing *ex adverso* the lands of the ancient barony of Comarmore," which includes the lands of Breackachy.

My Lords, I do not think this variation—which I have no doubt the Court of Session would have made in the form of the interlocutor if it had been asked—ought to exempt the appellant from payment of the costs of the appeal, and I shall move accordingly.

Lord O'Hagan—My Lords, this case is of great interest, and in one at least of the aspects in which it has been presented of great difficulty. The contest is exclusively between the Lord Advocate, representing the Crown, and Lord Lovat.

The proceedings were instituted not only against the respondent, but also against The Chisholm, Mr Gordon, and Sir Dudley Coutts Marjoribanks, who have declined to dispute the right of the Crown to the salmon-fishings in question, and submitted to a decree in its favour. Lord Lovat maintains an adverse right, insisting that either by express grant or by continuous possession for a sufficient period in connection with his barony title he has those fishings vested in him as their sole proprietor.

The Lord Ordinary decided against the respondent's claim. The Judges of the Second Division of the Court of Session decided in his favour. And this House is now to determine between the conflicting views which have been discussed, as well in the judgments of the Courts below as in the arguments at your Lordships' bar, with singular care, astuteness, and research.

It does not appear that from the beginning of the 13th century until the present time any assertion of right to the fishings of the river Beauly as against the Lovat family was ever made by any person, save in a single instance, when after a legal controversy judgment was given in their favour, and there is no pretence for saying that at present any individual dreams of making such an assertion or has any claim to make it.

The titles are in some respects imperfect. They come down from the year 1206, and although notwithstanding the lapse of centuries, the effects of civil commotion, the destruction of documentary evidence, and the changes of possession, they deduce the descent of his estates to Lord Lovat from his predecessors with remarkable precision, they are necessarily affected by these things with some obscurity and incompleteness, which render many of the questions raised before us almost, if not altogether, insoluble. But this, I think, may be confidently said, that in all its dealings with the property with which those titles are concerned there is clear indication that the Crown had given up at some long past period its interest in the salmon-fishings which it now seeks to recover, and there is no ground for alleging that that interest was ever reconveyed either by the Bissets or the Monks of Beauly or by the Lovats, or anyone else, or that it ever was re-invested by any Act of which we have any record.

There may be insuperable difficulties of detail as to some of the transactions which were proved to have occurred, and some of the expressions which are used in ancient documents, but the impression left by the entire proof is in my mind irresistible that the fishings of the Forne passed from the Sovereign, and, so far as those proofs instruct us, have never returned to him.

It is, if possible, still clearer that for some 700 years no claim was made to those fishings by the Crown. They were the subjects of family arrangements, and charters, and royal confirmations; there were changes in the proprietorship of them from time to time; but there is no proof that in any way those who represented the Crown, or anyone professing to derive under it, ever for many generations made a claim or did any act inconsistent with the title of the Lovats. And in later days, whilst unquestionably for at least a hundred years that title was more or less openly and continuously asserted, so as to create,

according to the evidence, a universal belief in the district that it was uncontested and unassailable, the Crown never made the demand which it makes now.

Of the legal effect of the acts of possession I shall speak fully hereafter, but there seems to be no doubt that by fishing and watching, and in other ways, Lord Lovat and those who went before him dealt with the fisheries as their own, and that after the removal of the cruives in 1862 he formally and unostentatiously made an annual assertion of his right, and so emphatically called to it the attention of all whom it might concern, yet the Crown never awoke from its inaction, or interfered with his proceedings, or denied his claim, or set forward its own. What may have roused it to attempt the disturbance of an enjoyment which so many centuries had established, apparently as of absolute right, and referable reasonably only to a legal title consecrated by time, and passively admitted by those whose duty should have required them to challenge it if it was insufficient, we do not know, and need not inquire. But such a state of things and such a course of conduct warranted the declaration of one of the learned Judges of the Court of Session (the Lord Justice-Clerk) that "this is not a favourable case on the part of the pursuer," and I think that the defender has had reason to complain of "the lapse of time and the loss of evidence," to which another of the learned Judges made reference, as rendering it impossible to act on his titles alone "without invoking the aid of surmise and conjecture to an extent which is scarcely admissible." For that lapse of time and loss of evidence he is not certainly responsible. He might fairly rely on the practical admission of his right, and the obscurity which clouds it if tested only by the ancient grants has not arisen from any default of his. The evidence of witnesses competent to settle the position of localities, or to illustrate facts by the light of authentic tradition, may have been lost for ever, and documents may have been destroyed which might have enabled us undoubtedly to construe those remaining, but rendered in their absence equivocal or unintelligible. If presumption were to be made under such circumstances one way or the other, it would not seem reasonable to press it in aid of the delay and acquiescence which have taken from us the means of reaching a satisfactory ascertainment of the truth.

But it appears to be the admitted law of Scotland that the Crown is to be assumed to be entitled to all salmon-fishings to which the vassal cannot affirmatively establish his claim. The respondent's counsel have not disputed that this is the law, and accepting the obligation which it casts upon them, have sought to show Lord Lovat's right to defend his possession of the fishings on the separate grounds either of which would suffice for the purpose. They do not rest on any presumption in his favour as reversing or overbearing that on which the Crown has warrant for relying, and they use its passive allowance of possession of the fishings for such a length of time, not as creating any title in Lord Lovat, or estopping the Lord Advocate from legitimately controverting any title alleged by him, but as sustaining their substantive case, and leading to the conclusion they desire from the facts and documents in proof. They insist that Lord Lovat has shown good title to the fishings founded on express grants, or grants explained and interpreted by possession.

It has been contended with great ability that Lord Lovat can sufficiently sustain his right to the entire salmon-fishing of the river Beauly from the source to the sea by virtue of his titles. As Mr Benjamin puts it, he claims under them not only his lands but an independent right of fishing without any reference to possession, and the question becomes one largely dependent for its solution on the construction of ancient deeds. But although the view so urged upon the House has undoubtedly the countenance of some of the learned Judges of the Court of Session, I prefer to avoid the complicated and embarrassing considerations which it involves, and to rest my opinion on the simpler and surer grounds of the operation of a barony title sufficient for prescription with possession under it. If that title and possession did not exist, I should find it difficult—having listened carefully to the arguments upon them—to speak with full confidence as to the effect of the express grants alone.

The respondent principally relies on the royal charter of 1512, the charter by King James erecting the barony of Lovat, of the 26th March 1539, and the conveyance by the Monks of Beaulieu in 1571, which received confirmation by the Crown eight years afterwards, and was ratified by Parliament in 1584. These are connected by reference and description with each other, and in the same way with the prior grant to John Bisset, who conveyed to the Monks of Beaulieu, and the subsequent charter of novodamus of 1774, which recites the royal purpose to restore the property possessed by Lord Lovat before his attainder. The grant to Bisset exists no longer, and we have no means of ascertaining its precise terms. But it does not seem to be controverted that the Monks took from him, and what he gave *intuitu pietatis* included, as appears from the Papal Bull of 1231, amongst other possessions, "piscaria de Forne." It seems to me that the charters of 1512 and 1539, and the conveyance of 1571, indicate at once and very strongly the abandonment by the Crown of its right to the fisheries at an antecedent period, and the largeness of the interest with which the charters and conveyances were meant to deal. The Bull is evidence that the Prior of Beaulieu had the property in the "piscaria de Forne," and the charter combining two estates in the barony of Erchless describes the first as containing certain lands "cum piscationibus earundem in aqua de Forne," and the second as containing other lands "cum piscationibus," while the whole of those lands are constituted a barony "cum molendinis piscationibus le zaris," &c. It is the common case that "zaris" points to salmon-fishing by cruives or yairs; so much for the charters of 1528 and 1539.

When we come to consider the subsequent conveyance from the Monks, who had all the "piscaria de Forne" which Bisset previously enjoyed, we find it granting "omnes et singulas piscarias nostras salmonum piscium ad et super aquam de Forne extendent a lie Carnecot usque ad mare," &c. And the charter of novodamus of 1774, framed to give back all their forfeited estates to the Lovat family, follows closely the conveyance and grants "totas et integras salmonum piscationes super aquam de Forne a

Cairncross usque ad mare . . . . jacen. infra dict. baroniam de Beulieu." I do not go further into these documents, as I do not mean to found my opinion chiefly upon them, but I am bound to say that they seem to me to make a persuasive case in favour of the respondent on the first branch of his contention. Whatever was the "Forne" in ancient days, there is ground for concluding that throughout its entire course Bissett, the Monks, and the Lords of Lovat were successively owners of the salmon-fishings, the right to which the Crown had given to the subject, and whatever may have been the terms of the lost grant to Bisset, it was expressly recognised as continuing in force by solemn charters specifically showing what had been originally bestowed.

Under these circumstances, and with these impressions, I should have been slow to disturb a possession so long continued, with the apparent assent of the Crown, by reason of any obscurity created in the title through loss of documents and failure of oral testimony, even if on the second branch of the case I had not satisfied myself that Lord Lovat has successfully met the challenge of the pursuer and established a clear legal right to continue that immemorial possession.

I am glad that the House is relieved from any necessity of proceeding upon grounds of a dubious or equivocal character. Probably no one who has heard the argument can fail to have had difficulty in reaching a clear ascertainment of the extent of the "aqua de Forne," and the course of the river which that name was meant to designate; a similar difficulty undoubtedly applies to the interpretation of the words "de Kilmorack" in some of the ancient documents, and it is not easy to determine whether they were intended to point to a territorial title or to designate and describe topographically a particular locality. The position of Cairncross or Carnecott, which was the subject of such elaborate inquiry and discussion in the Courts below, seems to have become more undiscoverable in proportion to the amount of evidence and the affluence of reasoning which was applied to define it on the one side and on the other, until at last the quest after it has been abandoned in despair and your Lordships have been relieved of any trouble about it.

Then we had a great deal of curious argument as to the translation of certain passages of the latin in which the charters and conveyances are couched, and when it has not been found quite intelligible *per se* we have been asked to seek assistance from comparison of one document with another, and from rude translations into the phraseology of the Scottish Parliament—sometimes illustrative of the process *obscurum per obscurius.* On these matters and others, after they have received the fullest possible elucidation, more or less of doubt may fairly be entertained, and whilst I am disposed to agree with the Lord Justice-Clerk that "If I were to draw an inference of fact and law from the older titles I could not assent that the Crown had made out their right," I would be obliged to decline the admission of it with doubt and hesitation.

In this state of things, my Lords, I turn to the second ground on which the respondent defends his title to the fishings, and in my judgment it is clear and satisfactory. The possessor of a habile title to a barony is warranted in prescribing a right of fishing, and without reference to the older titles, under which I agree with the Judges of the Court of Session the Lords of Lovat had such a warrant to prescribe, it is not denied that under the charter of novodamus of 1774 a habile title was created which, if accompanied by fit possession for a sufficient period, gave an indisputable claim to the fisheries in question. This disembarrasses the case of the many debateable considerations with which it has been overladen, and reduces our inquiry to the single point, whether an adequate possession has been sufficiently established for a sufficient length of time?

As to time, more than a hundred years have passed since the charter of 1774 was granted, and it is therefore abundant to admit of the establishment of a prescription.

As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts implying possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow, with a due regard to his own interests—all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession. The dealing with a river requiring activity and vigilance for the realisation of profit from its fisheries may fail to give reliable evidence of this which might be satisfactory if the stream were unproductive and incapable of compensating for larger effort and expenditure. Again, in a case like the present it is not necessary for the purpose of proving possession of a fishery that the claimant of a baronial title should show the exercise of his right in every portion of the river capable of yielding fish. I adopt the opinion of the Lord Ordinary on this point. He says—"I do not mean to express or indicate any opinion to the effect that where a right to fish salmon depends on a barony title followed by possession, it is necessary that the party pleading prescription should prove that he has regularly fished in the proper manner every part and stream in the river in which a salmon might be expected to be caught. It would be enough, in my opinion, were it proved that he substantially fished over the whole of the river within his bounds in the appropriate manner, and regularly and continuously from year to year throughout the prescriptive period. I would be slow to hold that if he fished certain pools regularly, and others occasionally or not at all, he had failed to establish a right to fish in the whole." I differ from the Lord Ordinary as to the conclusion to which he arrived, but it seems to me that these reasonable and just observations have material value when we come to consider the evidence of the acts on which the respondent relies.

I shall only make one other remark before I come briefly to summarise that evidence. If possession has not been established by Lord Lovat, it is not even alleged to have been in anybody else. The fishings above the Falls at Kilmorack are no doubt less valuable than those below them, but they are not valueless. The long and laborious and costly controversy which this House is now to terminate has not been urged by the Crown for nothing, and it seems to me of great significance that if the respondent's proof of possession fails, there is no proof whatever

tendered or suggested that for the many centuries since Bissett received his grant any such possession has been ever enjoyed save by him and those deriving under him. And if since the Lovats got the barony title they have not had possession, there is no pretence for saying that it was held in fact and action by the Crown or any landowner of the district. The failure of the one attempt by the Chisholm to make out an adverse title only gives force to the statement of this suggestive fact. Upon the evidence I think that the respondent's proof of possession is persuasive and satisfactory. Lord Lovat's right to the fishings below the falls is not disputed. He and his successors have admittedly exercised that right since the year 1774, just as they had exercised it for many previous generations. The river Beauly, whatever was its ancient designation, is a continuous river. It is properly described in language which this case has made familiar to us as *unum quid*—a single entity. It is not broken into two by the Falls of Kilmorack, or divided in any other way. And upon the authorities and the reason of the thing I am of opinion that possession of a part of it was possession of the whole. The case of the *Lord Advocate* v. *Cathcart*, 9 Macph. 744, on which the counsel for the Crown have relied, is on this point adverse to their contention. We have here what was wanting there, the "*unum quid*"—the "one continuous and connected subject"—with reference to which "possession of a part" is possession of the whole.

It is said by a great authority on the law of Scotland (Erskine, ii. 6, 18) that "possession of any part of a barony is reputed possession of the whole, and preserves to the baron his possession as entire as if it had been total," and this on the ground that the barony is "*unum quid*—one individual right." So, a river which is within the bounds of a barony, and is "one thing" from its source to its outflow, is possessed in the whole if it is possessed in any portion, unless there be, as there may be, dealings with it by conveyance or testament, or otherwise creating a several proprietorship in various divisions of it. I agree with Lord Gifford that "(in certain circumstances) possession of a part of the barony will not always be equivalent to the possession of other parts." But in this case there is no allegation that such special circumstances exist, and the rule applies to the river in its unbroken integrity.

In answer the counsel for the Crown contend as to the fishing below the falls, that the respondent's right to its enjoyment was referable "to express grants of salmon-fishings, or of *piscationes* in particular lands on that part of the river," and that therefore the practice of fishing there is insufficient to imply a right in the waters above. I do not go into the controversy in this regard as to the effect of the ancient titles, and the absorption of them by the barony title. There seems ample authority for holding that in Scotland if a man has two sets of titles he may ascribe his possession to one or to the other, according to his interest or his choice. If the charter of 1774 had alone grounded the claim of Lord Lovat to prescribe for the right of fishing in the entire river by reason of his undeniable possession below the falls, there would have been no pretence for such an answer to it, and I do not think that anterior grants giving a cumulative interest can have diminished its validity.

But the case of the respondent does not rest on mere constructive possession, or on the operation of any rule of law. He and his ancestors had for a time far beyond the period of prescription the control of the salmon-fishings of the whole stream, and the enjoyment of all the profit which they yielded, and therefore effectively the possession of them all. The fishings below the falls were the valuable fishings. Those above were not valueless, but comparatively so. The case of the respondent is, that as owner of both, in the open and continuous exercise of an undisputed and apparently indisputable right, he arranged to take all the fish of the river in the way he deemed best for his own interest. His predecessors placed salmon-cruives below the falls, and so constructed them as to prevent the fish from ascending, and they and he took what has been called the "crop" of the whole waters at a position most convenient for themselves with the greatest gain and at the least expense. It seems to me difficult to imagine an exercise of dominion more complete and an assertion of right more unequivocal. All the Lovats could have done if they had pursued the salmon to the upper waters and appropriated them there, they did by stopping their passage and taking the fish below. And what they did they did openly. The cruives were permanent, and the fishing was exclusive, and it does not appear that resistance or remonstrance from any person at any time raised a single question as to their perfect right to do it.

It has been said that the formation and the working of the cruives was illegal, and on this an argument has been founded in favour of the Crown. But I do not feel the force of it. On the contrary, if illegality there was, it appears to me on this question of possession to tell in favour of the respondent. If in the assertion of a claim and the enjoyment of a privilege to which they were not entitled the Lovat family transcended the limits of the law, it was all the easier to call their acts in question and restrain them from proceedings inconsistent with the rights of others. If the Crown or any grantee of the Crown had to complain of the invasion of such rights, the alleged illegality making that invasion more palpable and injurious was a challenge to assert them. But no one interfered, the detention of the salmon went on without complaint, and the inference that it was allowed because it was rightful was strengthened if it was really illegal. Therefore I conceive that the argument tells rather the other way. The title of the respondent is not rested on illegality, and though his acts in asserting it may not have been authorised by law, they could not derogate from that title, even if they did not, as I think they do, tend to demonstrate a complete possession under it. In my opinion, if the case had stopped here the respondent would have given a sufficient answer to the Crown's demand. I do not concur with the Lord Ordinary that "the question as to the right of Lord Lovat to fish for salmon above the falls must depend solely on the question of fact, viz., whether he has to any, and if so to what, extent fished for salmon above the falls in the appropriate manner and during the prescriptive

period?" For the reasons I have given, I think that, acting upon the clear titles to prescribe a right of salmon-fishing created by the charters of 1539 and 1774, Lord Lovat under the circumstances can rely successfully upon his undoubted possession of a part of the river as a possession of the whole, and that the exclusive dominion which he exercised over the fishery below the falls would establish his claim to the fishery above them, whether he has proved or failed to prove actual fishing in the upper waters. But in my opinion he has given abundant evidence, if it were needed, to show that he had possession above as well as below, and asserted and enforced his right to it for a longer period than is necessary for the maintenance of his argument.

It is to be observed, in the first instance, that there seems to be no controversy about the adequacy of the possession of Lord Lovat of the upper fishings since the year 1862. This is equally and expressly conceded by the Lord Ordinary, whose view was adverse to the respondent, and affirmed by the Judges whose view was in his favour. Until 1862, when the Salmon Act was passed, close cruives were maintained in the lower waters, and the effect of them is thus described in the evidence of Lord Lovat—"When the cruive was a close cruive, any fish was kept there which could not pass through the aperture an inch and a-half wide. All salmon and grilse would thus be stopped—all fish of any weight more than a pound and a-half."

If the cruives were broken down and the fish could get up at any time before 1862, the proof is that there was fishing with net and coble above the falls; and after that time, when the cruives were removed altogether, net and coble fishing there went on every year, sometimes for the profit from the fish, and always, Lord Lovat has sworn, "to maintain his rights." And it is noteable that whilst this fishing was practised openly, at least, on the admission of the Crown, for some 15 or 16 years, affording the clearest evidence of possession, and consistent with the respondent's title to it, it does not appear to have been the subject of interruption or protest by anyone. But whilst this was also admitted by the Lord Ordinary, he was of opinion that the want of proof of salmon-fishing above the falls during the antecedent 17 or 18 years, which were needed to complete the period of prescription, was fatal to the respondent's case. I cannot think so after full consideration of the documentary and oral evidence of the transactions of those antecedent years. Whilst the close cruives existed, the river above the falls was, as I have said, for fishing purposes, comparatively worthless, and did not require or justify on the part of the proprietor such continuous and special attention as was necessary when it became more productive. But in the actual circumstances, the exercise of control, the assertion of ownership, and the protection of right were quite as full and careful as could reasonably have been expected. I do not trouble your Lordships by going through the mass of evidence on this matter, but I shall indicate the points which it seems to me to establish.

In the first place, there is proof that long before the commencement of the period of prescription the Lovat family, and their tenants and friends by their permission, fished all through the river. There was rod-fishing as well as net and coble fishing, more or less, above as well as below the falls. The upper waters were usually let, as were the lower, and the tenants of shootings above the falls practised salmon-fishing in every year opposite their holdings, as Lord Lovat says, "for payment of rent." The Chisholm also fished in the upper waters with the rod, but his action was permissive. Lord Lovat did not interfere with him, according to the evidence, because he knew that rod-fishing would not establish a right, and because he desired to make no breach of friendship with a neighbour; but as soon as a legal conflict arose between them the Chisholm was defeated, and when his factor Robertson attempted to act adversely, and as of right, in taking the fish, he was arrested by Lord Lovat's keepers, and paid a penalty of 20s. to stay proceedings. The course of action thus indicated by uncontradicted proof as to the user of the fishings above as well as below the falls is scarcely consistent with the validity of a latent right which all the while it must have habitually violated.

The documentary evidence is of great consequence on this matter of possession. A long series of leases are in proof, executed successively from the commencement of the 18th century downwards, which all proceed on the assumption of the right of the lessors to the fishings of the Beauly, and grant to the tenants advantages, and impose upon them obligations, which were not altogether illusory—only on the condition of the justice of that assumption. Thus, a number of the Lovat leases, dated before 1814, of lands far above the Falls of Kilmorack, are carefully framed to secure access for the lessor to the river, with facility of enjoying the salmon-fishing, whilst they forbid the lessee to fish for himself, and bind him to watch the water for the benefit of the lessor.

Then there is another series of leases of the fishings of the Beauly, making no distinction between those above and those below the falls, and implicitly asserting a full and an equal right to exclusive dominion over both. One of the latter class of leases is remarkable as having been made by "the commissioners and trustees of the forfeited estate of Lovat in the month of May 1757." They recite their appointment and proceed to "demise All and whole the salmon-fishing on the water of Beauly, with the cruives and croff-houses thereto belonging . . . which salmon-fishing is a part of the forfeited estate of the said Simon, late Lord Lovat," &c. Certainly this lease is a document of importance. It tells us what the Crown conceived to have been the property of Lord Lovat in "All and the whole the salmon-fishing in the water of Beauly." Whatever so possessing he forfeited in 1745, now belongs to the respondent. The lease seems at once an act of possession and an admission of title by the Crown. There is another lease of 1771 from the same commissioners containing the same description of the property demised, and when the charter of 1774 had revested the estate, we find Colonel Fraser making leases which adopt that identical description. I fail, with Lord Ormidale, to appreciate the force of the Lord Ordinary's observation as to these leases—that "there is nothing in them to show the limits of the fishings." The claim of the respondent is to the

whole of these which were in the "Water of Beauly," and the want of such limits is what might be expected in a grant or a lease designed to deal with them all.

Finally, my Lords, we have the evidence of watching above the falls for a long series of years, which seems to me of the most persuasive kind. The watching was exactly such as the state of the property required. Lord Lovat tells us that from his earliest recollection watchers were sent up as soon as the fishing below was closed, and were kept there until the spawning was over; that they watched up to the falls and so far as salmon would go; that they watched any of the rivers which are tributaries of the main stream where salmon would go in any numbers; and that the gamekeepers were always told to keep people from fishing even during the open season. Mr Peter, his agent, corroborates the statement and proves the regular payments of the watchers by himself. He says that "no other body watched any part of the river," that "the watchers were never impeded or interrupted in any way," and that "during the open season Lord Lovat's keepers had instructions to see that no one fished in the upper reaches of the river." And then we have accumulated proof to the same effect from the respondent's gamekeepers, fishermen, factors, and others, who show that not only were orders given to watch throughout the river, but that those orders were obeyed and were effectual for their purpose. Fishers were warned off and stopped from fishing either with rod or with net and coble, and when they did not desist they were dealt with by the strong hand, and as in the case of Chisholm's factor, to which I have already adverted, apprehended and punished.

This part of the evidence has impressed me very strongly, although it did not receive much attention from the pursuer in the course of the argument. The open assertion of a right to protect the waters by the respondent, and by him alone; the universal admission of that right by non-resistance to it, although resistance was challenged continually—and there were proprietors in the neighbourhood having strong interest and full capacity to make it if they had had a chance of making it successfully—these things corroborate at once the case of title and the case of possession. There is no conflict as to the facts, and they seem to me to furnish all the *indicia* of a rightful claim immemorially established and actively and unequivocally asserted on all fit occasions.

As to the minor question raised for the first time by the Lord Advocate in this House, I doubt whether it should be entertained. No reference was made to it in the pleadings in the arguments before in the Court of Session, or in the "reasons" relied on by the appellant's case. But if your Lordships should approve the suggested modification of the interlocutor, leaving it open to future discussion, I do not think that the change should affect the costs, to which, and on affirmation of the judgment so modified, the respondent, for the reasons I have given, appears to me to be entitled.

Lord Blackburn—My Lords, it is not disputed on the part of the respondent that salmon-fishings in Scotland belong to the Crown *jure coronæ,* and consequently that the conclusion of the summons in this case, that "it ought and should be found and declared, by decree of the Lords of our Council and Session, that the whole salmon-fishings in the rivers Affaric and Cannich, and their tributary rivers, streams, and lochs, and in the river Glass (part of which is sometimes erroneously called the Beauly) down to the falls known as the Falls of Kilmorack, with its tributary rivers, streams, and lochs, in the parishes of Kilmorack and Kiltarlity, and county of Inverness, belong to us *jure coronæ*, and form part of the hereditary revenues of the Crown in Scotland falling under the management and control of the said Commissioners of our Woods, Forests, and Land Revenues, and that the said Right Honourable Simon Lord Lovat, James Sutherland Chisholm, James Gordon Oswald, and Sir Dudley Coutts Marjoribanks have no right or title, and that none of them have any right or title, to fish for or take salmon, grilse, or other fish of the salmon kind, in the said rivers, streams, and lochs in the said parishes and counties, or any of them, in any manner of way,"—was right as against all the landowners who could not show, either by express grant from the Crown or by a habile title followed by the necessary possession for the proper time, a title against the Crown. Three of the landowners made no defence, and they are out of the case, except in so far as their titles or their possession may be relevant to the title claimed by Lord Lovat, who does appear, and sets up and has endeavoured to prove a title to the whole of the salmon-fisheries, not only in the waters above the falls—by whatever names they are called—but also in the waters below the falls, which fishings, as he maintains, are all held by one title—a title to the whole of the salmon-fisheries in all the streams which ultimately flow into the Firth of Beauly from their source to the sea.

It was not disputed that Lord Lovat and his ancestors have a perfect title to the salmon-fisheries from the falls to the sea. It was disputed very strenuously that the title which was good for the salmon-fishings below the falls was, as his contention was, equally good for the salmon-fishings above the falls.

The title on which Lord Lovat relied consisted of documents which, it was argued on his behalf, when coupled with parole evidence, more particularly as to the position of a spot called Cairncott or Cairncross, to explain them, amounted to an express grant of the salmon-fishings in the whole of these waters in dispute, and which at all events showed a baronial title to much the greater part of the lands through which the waters flow, and of evidence which he contended showed such possession of the salmon-fishings for so long a time as to make the baronial title sufficient throughout the barony at least.

The Lord Ordinary by his interlocutor found that Lord Lovat had proved no title at all above the falls. He explains his reasons in a very carefully prepared note.

The interlocutor of the Second Division was as follows:—"*Edinburgh, 8th March* 1879.—The Lords having heard counsel on the reclaiming note for the defender Lord Lovat against Lord Curriehill's interlocutor of 20th August 1878, Recal the said interlocutor: Of new find that the said defender has no right of salmon-fishing in the streams Affaric and Cannich, and to that

extent and effect repel the defences, and decern and declare in terms of the conclusions of the summons: *Quoad ultra* sustain the defences, and assoilzie the defender from the conclusions of the summons, and decern," &c.

This interlocutor proceeded on the ground that Lord Lovat had made out no express grant to the salmon-fishings in the two streams named, which lie entirely out of his baronies, but had established a sufficient title to the salmon-fishings within his barony. Against this interlocutor Lord Lovat did not appeal. The Lord Advocate did. It would therefore have been enough to dispose of the appeal if this House was satisfied that there was sufficient proof of such possession, and for so long a time as to support this finding, had it not been the fact that the barony of Comarmore, which never belonged to Lord Lovat's ancestors, came down to the river in two places, and there the barony of Lovat only includes the south-east or right side of the river; one of these placesis in Strathglass, where the lands of Western Comar, which are part of the barony of Lovat, occupy the right side only. Those lands are specifically named in an early charter, to which I will allude afterwards. The other place was at Breackachy, where the barony of Lovat occupies the right side, but I have not been able to trace the name of the particular lands forming that part of the barony. The Lord Advocate said the interlocutor was at all events wrong, for the same reasoning that led the Second Division to find against the title of Lord Lovat to the Affaric and Cannich, ought to have led them to find that he had no title to more than the salmon-fishings *ex adverso* that portion of the barony which lay only on one side of the stream, or at least that the interlocutor should be altered so as to prevent its being *res judicata* against the Crown that the Crown had not retained its salmon-fishings *ex adverso* the barony of Comarmore. This point does not seem to have occurred to anyone on either side till they came into this House. It is not of nearly so much importance as the main ground of the appeal. But as the counsel for the respondent resisted it, and in so doing relied, in part at least, on the express title which the Judges below had all negatived, it renders it necessary to consider the whole case.

I think it will be most convenient to examine first the documents put in evidence.

Being printed for the use of the House, they can be examined more minutely than could have been conveniently done below.

Many of these documents have not been regularly proved. They are admitted as taken apparently from some antiquarian publications, and though I doubt very much whether some of them could have been proved, I think this House ought to act upon the admission and take the documents as if proved to be what they purport to be. But many of the documents—such, for instance, as the different genealogical statements—are not, I think, evidence at all. I mention this because the genealogical statement of the family of Ross of Kilravock (though some of the other genealogies do not agree with it) seems to be accepted by Lord Curriehill and by the Lord Justice-Clerk as sufficient to establish that John de Bisset had three daughters co-heiresses, their names, and whom they married. It is of no consequence, in the view I take of the case, whether he had or had not children, or whether those children were male or female, but such documents seem to me not in a court of law evidence of anything. But there are other documents much more relevant.

Before beginning to examine them I may remind your Lordships that the system of conveyancing, founded on feudal investiture, now established throughout Scotland was not indigenous. In the highlands the old habits, founded no doubt on the laws of the Scots and Brets, long prevailed; even down to the Rebellion in 1745 there were some proprietors who continued to hold their lands as their ancestors had done, by occupancy and the right of the sword, and treated with scorn those who held their lands in a sheepskin. It is not surprising, therefore, to find a lack of early titles in a highland district. But after the Crown acquired strength and proceeded to enforce the feudal system, the position of those who held by such a highland title became precarious, and feudal titles began to prevail.

The greater part of the salmon-fishings in question lie within the ancient earldom of Moray; the remainder lie within the ancient earldom of Ross. The charter of 1512 mentions the forfeiture of both of these earldoms. Nothing more appears on the documents in process concerning the earldom of Ross, but from general Scotch history we know that after troubles rising to the dignity of a civil war, during which occurred the battle of Harlaw, it was finally inalienably annexed to the Crown by an Act of the Scotch Parliament.

More appears about the earldom of Moray. An extract is set out from the charter by which Robert the Bruce grants to his nephew Thomas Randolph all the King's lands in Moray such as they were in the hands of King Alexander, and this specifies the boundaries of a territory stretching northwards from the Spey on the East Coast, and from the Bay of Glenelg on the west, till it meets the earldom of Ross, which also stretched from sea to sea. The precise date of this charter does not appear, but Robert the Bruce first laid claim to the Kingdom of Scotland in 1306, and was in full possession after the Battle of Bannockburn in 1314. Thomas Randolph, Earl of Moray, died Regent of Scotland in 1332. After his death a turbulent time ensued; and in 1454, in the reign of James II., the earldom of Moray was finally annexed to the Crown, and then it appears from the accounts of the King's chamberlain beyond Spey in 1456, that he charges himself with the proceeds of the lands of the Ard, Strathglass, Abertarf, and Strathardock, which were in the hands of the King since the death of Thomas Fraser of the Lovat, as being in ward of the earldom of Moray. The lands of the Lovat were, I conjecture, at the time held as jointure lands. At all events, the proceeds of those lands are not then accounted for as being in the hands of the King. This is, I think, the first evidence of the Frasers holding lands either of the Earls of Moray or of the Crown on which a court of law could act. The evidence that they held lands from the Bishop of Moray goes back a good deal earlier.

In 1367 Hugh Fraser, there styled "dominus de Lovat portionanus de la Ard," does homage to the Bishop of Moray for Kyntallergy, and the fishing

in the esse or linn there, which leads to an inference that between 1258 and 1367 the lands of Lovat and Ard, which at the earlier date were the property of John Bisset, had come into the hands of the Frasers.

The titles from, I think, 1499 downwards seem complete, but reliance is placed on the very able argument contained in the respondent's case, on the documents, which on the admission we must take as proved relating to the state of things from 1171 down to the grant of Robert the Bruce to his nephew Thomas Randolph.

It appears that William the Lion granted the Bishop of Moray tithes of all his returns from Moray throughout the whole bishopric of Moray. The charter of King Alexander in 1221 confirms a compromise of a controversy between the Bishop of Moray and John de Bisset as to, amongst other things, the tithes of the return from certain lands to the Crown made "before the said lands were to the said John given and granted." This sufficiently shows that John de Bisset had got a grant from the Crown of those lands sometime between 1221 and the grants of the tithes of the Crown returns made in 1171. The Crown's returns there specified seem to have all been payable in kind—cattle, pigs, corn, cheese and butter are all specified. There is no mention of fish of any kind, but it is not at all improbable that part of the returns may have consisted of fish. In the composition itself fishings are mentioned, but salmon-fishings are not specified. It is most probable that the fishings were in reality salmon-fishings. And in the charter of Alexander II., of 1232, the King grants to the Bishop of Moray, *inter alia*, "20 shillings coming from the lands of Lovat, which belong to John de Bisset," showing that he held the lands of Lovat.

Now, I think this is evidence that John de Bisset held the lands of Lovat and the lands mentioned in the composition of 1221 by grants from early Kings. And it is very likely, though not proved, that the Bissets held more lands in that district. But I can see nothing to give rise to even a surmise that the grants to John de Bisset were made in the terms which according to the modern doctrine of conveyancers are required to give salmon-fishings, or even in the terms which are required to give a habile title to found a prescription.

I do not doubt that, as a general rule at least, those who in those early times held lands from the Crown did, however their title was expressed, enjoy the salmon-fishings with the lands; and that the doctrine that, being *inter regalia*, salmon-fishings remain in the Crown unless there is mention of them as being granted out, is of much more recent origin.

But when the Bissets lost the lands they lost their salmon-fishings, and as there is no evidence of a legal title taking the salmon-fishings in the Bisset lands out of the Crown, there is no occasion to show a legal title re-vesting them in the Crown. In the beginning of the reign of James IV., when the titles became regular, the name of Bisset has disappeared from the landholders in this district. How this came about in the course of the two centuries and more which elapsed between the last mention of John de Bisset in 1258 and the time when the titles became clear must be matter of conjecture.

The Bissets were, I believe, a great Anglo-Norman family holding extensive possessions in England and Ireland as well as Scotland, and like others in their position they probably supported Edward I. Barbour mentions Mandeville, Bisset, Lurgon, and Savage as the four of English Lords of lands in Ulster who raised a force with which they unsuccessfully attacked Thomas Randolph when besieging Carrickfergus. But this Bisset, though probably a relative, may not have been the Bisset who owned the Scotch lands. Robert the Bruce made it the business of his life to drive the English and their adherents out of Scotland, and his nephew Thomas Randolph (a man not, if we may trust the chronicles, likely to pause in any undertaking either for want of ability, courage, or ruthlessness) had ample time to carry out this policy in the earldom of Moray between the grant to him of the earldom and his death in 1332. This seems to me quite sufficient to account for the fact that when the earldom of Moray was annexed to the Crown others are found holding from the earldom of Moray much of the land which had belonged to the Bissets. But this is speculation merely.

I think in deciding this matter your Lordships should look at the titles produced, and those being in the reign of James IV., it is a sufficient ground for your Lordships to act upon that no others are shown to exist, and that *de non apparentibus et de non existentibus eadem est ratio.*

There has been since the beginning of the sixteenth century a complete title shown as to all the lands in the watershed from which the drainage flows into the sea by the river (by whatever name the river is called) which falls over the Falls of Kilmorack.

In 1538 King James V. erects in favour of the Chisholm of the day certain lands into the barony of Commermore. That barony, it is agreed, lay entirely to the north of the main stream, and came down to the main stream, and was bounded by it at two places, one at the upper part in Strathglass, including in it the two affluents specifically named in the interlocutor, the Affaric and the Cannich, and one lower down at Breackachy. There was no express grant of salmon-fishings; the Baron of Commermore had, however, a habile title to prescribe for salmon-fishings *ex adverso* of those two portions of his barony.

All the rest of the lands in this watershed belonged before the end of the sixteenth century to the Frasers, but not all by the same name.

I will state what seems to me the effect of the titles, referring to the page in the appendix which contains the instrument, which proves what I say without reading it, except where the words of the instrument seem material. In 1501 the inquisition, on the death of Hugh Lord Fraser of Lovat (who I suppose was the first peer), finds that he died seised of the castle of Lovat and the lands thereof, the third part of the barony of Ard, the barony of Abertarf with its pertinents, viz., Strathavrik, and the third part of Glenelg—"et de tribus leys mokvay ballabrait leonach et duabus daltoleis et dalcors cu. ptinen.," which I cannot translate—and of Guisachan, Comerkyle, Mauld Mains, Western Eskadale, and the two buitants in the earldom of Moray, and that Thomas Fraser was his son and heir.

During his father's lifetime this Thomas

Fraser purchased portions of the lands of Mucrow, Phoppachie, and Ingleston from Henry Douglas. Hitherto there is no mention in the titles either of fishings or of yairs.

In 1510 Thomas, now become Lord Fraser of Lovat, purchases from Douglas of Culbryny the whole lands of Culbryny with the castle now called Beaufort, "cum piscaria aque de Forn nucupat. tollie," other portions of the lands of Mucrow, Phoppachie, and Ingleston, an eighth part of the lands of Belladrum, and half of the Croft of Downie with the fishings of the yairs. On his death in 1524 the inquest find that he died seized of the same lands which are mentioned in the inquisition on his father's death, and of all these new acquisitions, and here though there is no mention of salmon-fishings, there is mention of Beaufort "cum piscaria aque de Forn nucupat. tollie," and of Downie "cum piscationibus de lie yair." The inquest also mention the lands of Kilmorack "cum lie crag et esse cum piscationibus earun."—all of which it is found lie in the earldom of Moray except Kilmorack and its fishings, which lie in the earldom of Ross, and are held in fee-farm of the Bishop of Ross.

In 1536 Hugh Lord Fraser of Lovat purchases from Forbes of Pitsligo, Eastern and Western Aigas with the mill thereof. Fishings are mentioned in the tenendas clause only. There is no mention anywhere of salmon-fishings.

In 1528 Hugh Lord Fraser of Lovat purchases the barony of Erklass *alias* Strathglass from Haliburton of Gask. The title of Haliburton of Gask to the barony of Erklass begins in 1496 by a charter of James IV. confirming a grant by John Haliburton of Gask to William his son —[*reads extract from charter*]. I think there is here an express mention of the salmon-fishings of Dunbalach, and there is also an express mention of the yairs of the Kirktoun of Kyngele and of the yair of Inchbary, but there is no mention of either salmon-fishing or yair in any of the other lands, and as *expressio unius est exclusio alterius*, I should say, on the construction of that deed, that it was not intended to grant them. At all events, such an intention is not expressed.

Next, on the 13th of May 1512 King James IV. erects those lands and others into a barony.

What seem to me the material parts of that charter are as follows:—[*reads*].

In this charter, again, there is express mention of yairs in some parts of the lands. It may be difficult now to prove where these yairs were situated, but I think it may safely be said that they were not in Easter or Wester Struy, nor in West Comar. This is material with reference to an opinion of the Lord Justice-Clerk, on which I shall afterwards remark.

Then comes, in order of date, the charter of 1539 erecting the greater part of the lands held by Lord Lovat into a barony. Under that title the greater part of them were enjoyed down to the forfeiture in 1745. . . .

It is agreed that this charter of 1539 included all the lands in this watershed to the south-east of the stream from its source in Strathglass to the sea, with the exception of a portion of the lands at Kiltarlity, and the fishing there in what is called the Linn or Esse, the one word being of lowland Scotch, and the other the Gaelic for a pool below a fall or rapid.

This he and his ancestors had for a long time held, not from the Crown, but from the Bishop of Moray, and apparently this portion of Kiltarlity was not included in the grant of barony, which included all his other lands; another portion of Kiltarlity had been by a less scrupulous scribe, who ignored the Bishop's superiority, included in the barony of Erchless, which also had come to Lord Lovat, and was included in the barony of Lovat. It is agreed also that this grant included in the barony of Lovat, which it created, all the lands on the north of the stream from below the barony of Commermore, which comes down to the Glass, and above Breackachy, including the whole course of an important affluent, the Farrar, of which mention must be made hereafter when examining the proof of possession. Below Breackachy the lands on the north side of the stream down to the sea belonged to the Prior of Beauly, with the exception of the lands of Kilmorack and the salmon-fishing in the Linn or Esse on that side of the river, which from an early time had been held by the Frasers from the Bishops of Ross.

In the return of the service of Hugh Lord Lovat as heir to his father Thomas, in 1524, special mention is made of "the lands of Kilmorack with *lie crage et esse*, with the fishings which lie in the earldom of Ross as they are held in fee-farm of the Bishop of Ross and his successors, paying therefor annually £10, 6s. 10d. Scotch;" and in 1532 Hugh Lord Lovat obtained from the Papal Nuncio a precept directed to the Abbots of Kynless and Perne to have his grant from the former Bishop of Ross confirmed by the present Bishop of Ross, which is done.

Kilmorack and the fishings thus held from the Bishop of Ross are not included in the barony of Lovat created in 1539, nor did they form part of the possessions of the Monks of Beauly. This is of some consequence in construing the title derived from the charter of the Prior of Beauly, which I will next come to. It is of no consequence in any other way, for Kilmorack and its fishings are by name included in the new barony of Lovat erected in 1774, as also are the lands of Kiltarlity.

In the beginning of the reign of James VI. the Lord Lovat acquired the barony of Beauly from the Prior and Convent. The transaction was a questionable one, and probably for that reason pains seem to have been taken to make it as good on paper as Lord Lovat's lawyers could.—[*His Lordship then proceeded to examine these titles.*]

It is under these titles that the Lords Lovat held their land of Beauly down to the forfeiture of Simon Lord Lovat in 1745, and questionable as it probably was originally, after so long a possession it cannot be shaken. The *dominium utile* in portions of the lands in the barony of Lovat was in the beginning of the 17th century alienated, but the superiority in the baronies and lands was unaltered, and it is not contended that any salmon-fishings which had before 1745 been acquired by the Lords Lovat had returned in anyway into the hands of the Crown before the forfeiture.

In 1774 King George III., by virtue of an Act of Parliament empowering him so to do, of new gave and granted to General Fraser and his heirs all that had been forfeited to the Crown in 1745. I do not cite its terms, for I do not think there is room for any difference of opinion as to the construction of this charter of novodamus

It expressly gave to General Fraser everything which had belonged to the Lords of Lovat before the forfeiture, and had by that forfeiture come to King George II., and no more. The salmon-fisheries expressly granted are those which came to George II. by the forfeiture of Simon Lord Lovat.

But as all those lands were then erected into a new barony, it gave to the grantee, and his heirs and assignees, a habile title on which they might found a prescription, and between 1774 and the date of the summons, 1877, there was ample time for a prescript, and part of the case for the defence is that during that time there was a sufficient possession to establish a prescription.

My Lords, I have stated at some length, and in what I fear may be tedious detail, the titles appearing on the documents, because I think that when they are apprehended this appeal may be disposed of without deciding any controverted point as to the law of salmon-fishing in Scotland. I do not say what might or might not have been the construction of the charter of novodamus in 1774 if it could be shown that the place called Cairncross in that charter and Cairncot in the charter of feu in 1571 was situated at the upper part of Strathglass, some twenty miles above the Breackachy Burn, which seems to have been the march of the priory lands of Beauly. As it is, I agree with what was the opinion of the Lord Ordinary and of all the three Lords of Session in the Second Division—and I believe of all the noble and learned Lords who heard the argument—that it is not proved where Cairncross or Cairncot was. Neither, in my view of the case, is it necessary to decide whether the old name of Forne was confined to the river flowing *ex adverso* of the priory lands, or extended to the whole river, with its affluent, which there flowed into the sea.

It is not and could not be disputed that the grant of a barony gives a title, which though it does not carry with it the right of salmon-fishing within the bounds of the barony, is a habile and competent title on which by proof of possession for 40 years to found a title. The Lord Justice-Clerk, however, takes a view of the effect of the charter of 1512 erecting certain lands into the barony of Erchless which it is necessary to notice. He says—"Now, that charter, which I think the Lord Ordinary has not sufficiently adverted to, unites into the barony of Erchless lands below the falls and lands above the falls—as, for instance, Fenellan, which is partly above and partly below; the lands of Crew, which are above; the lands of the two Erchless, which lie entirely above; the lands of Struy, wester and easter, Croichail, wester and easter, and Comar, all of which lie above the falls. This brings us up close to the junction of the Affaric and the Glass, and all those lands are erected into a barony 'cum molendinis le zaris piscationibus croftis,' and so on. And when we come to the tenendas clause, it concludes thus as regards the whole lands—'Nunc unitas annexatas et incorporatas in una libera baronia cum molendinis piscationibus lie yaris,' &c. These lands therefore embracing many of the lands in dispute—Erchless, Struy, Comar, Croichail, Fenellan, Crew, all above the falls—are united into a barony 'cum piscationibus lie zaris.' The terms of the tenendas clause, whatever may be said of the prior part of the disposition, are quite general and universal, and on the principles which we took occasion to lay down in the case of *M'Culloch*, we are here entitled to infer from the generality of the tenendas that these lands were erected into a barony with 'fishings called zaris,' and that, in my humble opinion, is nothing more or less than a grant of salmon-fishings, extending throughout the whole course of the stream which I have already described." If this is a correct view of the effect of that charter, it would undoubtedly follow that the Crown had parted in 1512 with the salmon-fishing throughout the barony of Erchless, and as it is not shown or even pretended that any rights they parted with were resumed before the forfeiture of Simon Lord Lovat in 1745, it would decide a great deal of what is in dispute, but not all, for the lands of Eastern or Western Aigas were acquired in 1536 by Hugh Lord Lovat, and were not part of the barony of Erchless. But I am not prepared to assent to this. The charters to the Haliburtons in 1496 and 1512, of which I have already read what seem to me the material parts, show that there had been an express grant of salmon-fishing in the lands of Dumbalach, and more than one grant of lands with yairs, and I agree that a yair or cruive is a fixed engine for catching salmon, so that a grant of a yair or cruive is a grant of the right to catch salmon in that particular yair or particular cruive, and these lands are erected into a barony "cum piscationibus lie zaris." I agree in thinking this is equivalent to a grant to take salmon by these yairs at those spots where those yairs were situated. But what I am not prepared to assent to is that such a grant is equivalent to an express grant of salmon-fishing throughout the whole barony. It is not, however, necessary to decide this point. I agree with Lord Gifford that it is enough for the decision of this case to say that Lord Lovat had, as early as 1539, an ample and sufficient title to prescribe a right of salmon-fishing as far as the barony of Lovat extended.

It is on the sufficiency of the proof of possession, and the nature of that possession which is proved, that the difference of opinion between the Lord Ordinary and the Second Division becomes important.

There seems no doubt that salmon-fishings by net and coble all along the river below the Falls of Kilmorack have been enjoyed by Lord Lovat and his authors, not only where there were old cruives or yairs—not only in one particular place or another—but the whole way, at different spots on both sides of the river, and at such places as the state of the water for the time made good drawing places—in short, wherever they wished to fish. This is the undisputed account of what was done as far as living memory goes, extending more than forty years, and I see no reason to doubt that this had been done at least from 1571. And this part of the river is all within the barony of Lovat erected in 1774 by the charter of novodamus, and except the cruives at the Linn or Esse of Kilmorack, is all within the older baronies of Lovat and Beauly.

The Lord Ordinary says—"Now, as I have already explained, the only express grants of salmon-fishings in any of Lord Lovat's titles is in connection with lands below the Falls of Kilmorack; and the question is, Whether these lands and the lands above the falls having been all united into one barony, a right of salmon-

fishing over those parts of the barony in connection with which there are no express grants has been established by the possession which the defender has proved? Now, it is clearly proved, and not disputed, that in virtue of their titles Lord Lovat and his predecessors have for centuries had the full and exclusive possession of the whole salmon-fishings below the falls. But I think that as the fishing for salmon below the Falls of Kilmorack was practised either by virtue of express grants of salmon-fishings or of 'piscationes' in connection with particular lands on that part of the river, such practice is quite insufficient either to create or imply a right of salmon-fishings in the river above the falls. The question therefore as to the right of Lord Lovat to fish for salmon above the falls must depend solely upon the question of fact, viz., Whether he has to any, and if so to what, extent fished for salmon above the falls in the appropriate manner and during the prescriptive period?"

I am inclined to agree to some extent in what I may call the major proposition here laid down. I think that though the cruives at Kilmorack have since 1774—now a full century—been part of the barony of Lovat, it would be unreasonable to say that the use of those cruives for that century in the same way as Lord Lovat's authors had used them for two or three centuries before was evidence, on which a Court could act, of possession under the new baronial title. But I must deny his minor. There is evidence of express grants of fishing with yairs at some fixed points along the right bank of the river (it may not be easy now to ascertain where these spots were), and those were included in the barony of Erkless; but I do not think there was any express grant of salmon-fishing on the right bank below the falls so far as it was included in Erkless; and I cannot find any evidence of a grant of any kind of the fishings with regard to the lands of Lovat, which never were in the barony of Erkless at all, before the lands of Lovat were included in the barony created by the charter of 1539; and I think therefore that there is sufficient evidence of possession of part of the salmon-fishery in the river under the baronial title, at least from 1539—more than three centuries. The weight of this as proving possession of the salmon-fishing through the whole river depends upon different considerations. I quite agree in the decision in the *Lord Advocate* v. *Sir John Cathcart*, 9 Macph. 744. If it had been attempted here to use this possession of salmon-fishings in the Beauly as proving possession of salmon-fishings in the Bay of Glenelg, that case would have been directly in point. But that case has no application to the case before the House, where it is a question whether there was possession of the salmon-fishings throughout one river and its affluents so far as they lay in the barony; that one river is, as expressed by the Scotch Judges, a *unum quid*—as it has been expressed in England in *Jones* v. *Williams*, 2 Meeson and Welsby 326, by Baron Parke—a subject having such a common character of locality as to raise a reasonable inference that he who had possession of one part of it had possession of the rest. I retain the opinion which I expressed in *Lord Advocate* v. *Lord Blantyre* (L.R., 4 App. 791) that this possession of part is evidence, but not conclusive evidence, of possession of the whole, its weight depending upon circumstances. What in my mind gives it in this case great weight is that this undisputed possession was of the salmon-fishings in the whole of that portion of the river in which the salmon-fishings were of any commercial value. Still, if it had been shown that either the Crown or any other proprietor had been in adverse possession of any portion of the salmon-fisheries higher up the river, I should have paused before acting upon the piece of evidence above, but this is not so.

What evidence there is of possession of salmon-fishing above is all in favour of Lord Lovat. No one else appears ever *de facto* to have fished for salmon, unless with the rod, in the upper part of the river. No one ever set up a claim to a right to fish there except the Chisholm in 1801, and he failed in his attempt. The oldest tack produced—that of 1701—expressly mentions the fishings in the Farrar, which is above the falls. The later tacks, beginning in 1757, though not expressly mentioning fishings in the upper part of the river, are not in terms limited to the fishings below. The Lord Ordinary thinks that the tacks of fishing, if they included fishings above the cruives of Kilmorack, could not have been acted upon. This is on the assumption that the illegal mode of fishing by a close cruive without allowing any weekly slap, which prevailed for at least sixty years before 1862, must have prevailed for centuries before. I do not see how this is made out. The illegality of this mode of fishing would not go for much. The law, said the old proverb, did not come further than Inverness. But surely the old Lords of Lovat may have read the fable of the man who killed the goose that laid the golden eggs, and for their own sakes have acted and made their tacksmen act on the policy of the old Scotch Acts. The *viva voce* evidence, as far as it goes, is all in favour of Lord Lovat. It is not such that if it stood alone I should like to act upon it, for the fishing by net and coble annually to assert the right did not begin till 1862, much less than forty years ago, and the evidence of prior Acts is very meagre. Still this is all confirmatory of the inference which I draw from the undoubted possession of the fishings in the only part of the river where they were of value. I cannot express my meaning better than by adopting as my own the concluding words of Lord Gifford's opinion—"This is one continuous river from source to sea. The interposition of the Falls of Kilmorack on the river does not make the least difference; it does not spoil the continuity of the stream. Now, in the special circumstances of the locality, and which are essential to be kept in view, the falls make this river, and the character of its salmon-fishings, different so far as below and so far as above the falls; and I do not think anybody can contend that possession of the salmon-fishings should be exactly the same in character below and above the falls. Practically, the fishings below the falls, which belonged partly to the Monks and partly to Lord Lovat, are the most valuable part of the fishings, and they will be far more productive probably than the fishings above the falls. But this view is intensified when you look at the circumstances under which the fishings were really possessed. Not only were there falls which made it difficult for salmon to ascend except in floods, but there

were immediately below the falls two sets, I think, of salmon cruives, and these were very deadly to the salmon, and very few comparatively got up; and the case becomes still stronger when we see that besides using cruives, which was quite within his right, the Lord Lovat of these times seems to have narrowed the yairs and the meshes of the net to an extent greater than the law allowed. It is said that this was illegal, and so it was; but its illegality does not make it the less an important element in showing what the possession was. Practically, the result was that Lord Lovat by means of these cruives, with the additional assistance of the illegal meshes, could take all the salmon he wanted below the falls instead of going up above them; as expressed in argument, he took his crop of salmon at that point, but the crop he took there was that of the whole river. That, whether legal or not, is perfect possession of the whole river; and if there had been anybody above who had right to the salmon, it is impossible to imagine that they would have remained passive, and not objected to that mode of dealing with the salmon in this river. It is a valuable salmon stream, and if it belonged to different proprietors, upper and lower heritors, or even to the Crown, I think it may be said that they never interfered in the least with the entire possession which Lord Lovat and his ancestors had of the whole salmon upon this river. I have come without difficulty to the conclusion that there is here a possession and title sufficient to give Lord Lovat the salmon-fishings in this stream. But under his titles I think Lord Lovat cannot claim the salmon-fishings beyond the limits of his barony. It would require something very express in his title to give him a right to fishings, locally situated it may be in another man's barony, or at all events in another man's lands, and, separately, I do not think there is sufficient proof of possession outside the defender's barony."

But from this it follows that the Lord Advocate is right on the subordinate point, and that there should be such an alteration in the interlocutor as will prevent its being at any time contended that it is *res judicata* that the Crown has no right to grant the salmon-fishings *ex adverso* of the parts of the barony of Commermore which come down to the river. I do not think it necessary to inquire whether possession by the Lords Lovat of the fishings in the barony of Commermore from time immemorial could have explained these titles so far as to embrace more than was within the barony of Lovat, for no evidence sufficient to raise that question is given.

Interlocutor appealed from affirmed, with the qualification that after the words "*quoad ultra* sustain the defences" there be added the words "without prejudice, however, to any right of the Crown or its grantees to the salmon-fishing *ex adverso* of the lands of the ancient barony of Comarmore." Appellant to pay to respondent the costs of the appeal.

Counsel for Appellant—Lord Advocate (Watson) — Dean of Faculty (Fraser) — Pearson. Agent—T. W. Gorst, Solicitor.

Counsel for Respondent—Benjamin, Q.C.—Balfour. Agents — Grahames, Wardlaw, & Currey, Solicitors.

Friday, February 27.

(Before the Lord Chancellor (Cairns), Lord Hatherley, Lord O'Hagan, and Lord Blackburn.)

DUNDAS *v.* WADDELL.

(In the Court of Session, *ante*, Dec. 13, 1878, 16 Scot. Law Rep. 340, 6 R. 345.)

Teinds—Res judicata—*Process of Augmentation and Locality.*

In a process of augmentation and locality brought in 1795 the minister produced a rental of the whole lands in the parish, in which 81 acres belonging to one of the heritors were entered as teindable. The heritor in question subsequently lodged a minute stating that these subjects were held *cum decimis inclusis*, and craving that they might be struck out. No one contesting that, the Court then pronounced an interlocutor, dated 2d December 1795, ordaining them to be so struck out. A stipend was then modified, and a locality prepared, to which the heritors lodged objections. The 81 acres were not inserted in any of the schemes which were prepared, but before that process was terminated a new process of augmentation and locality was brought, again localling upon the lands in question. The Court of Session, by a majority of four Judges to three, held that the decree of 2d December 1795 was not *res judicata* as regarded the 81 acres, it having been pronounced upon the minister's rental, and having related solely to the augmentation, which was a different proceeding from the locality. *Held* (*reversing* judgment of Court of Session) that as it was not incompetent for the Court to decide at any stage of the proceedings in a process of augmentation, modification, and locality that particular lands were teind free, and as that question had been fairly raised here in the presence of all parties and determined, the plea of *res judicata* fell to be sustained.

The questions for decision in this case arose in a process of augmentation, modification, and locality brought by the Rev. Walter Waddell, minister of the parish of Borthwick, against the heritors. Objections were lodged by Robert Dundas of Arniston to the state of teinds and scheme of locality. These objections were repelled by the Lord Ordinary (Rutherfurd Clark), and on appeal a Court of Seven Judges, by a majority of four—Lord Deas, Lord Gifford, Lord Shand, and the Lord President (Inglis) — to three (the Lord Justice-Clerk (Moncreiff), Lord Ormidale, and Lord Mure dissenting), affirmed the Lord Ordinary's interlocutor,—Dec. 13, 1878, 16 Scot. Law Rep. 340, 6 R. 345.

Mr Dundas appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case, on the question of *res judicata*, which is the only question for the determination of your Lordships, the Lords of the Second Division of the Court of Session consulted with the Judges of the First Division; and your Lordships have the judgments of the Lord Justice-Clerk, Lord Ormidale, and