prepared to ask the creditors to adopt these subjects as assets in this sequestration" . . . he was clearly making use of an expression of which he really did not know the meaning. What he really meant to say was, that he would allow the estates to remain unsold provided the bondholders would do the same, and he would pay the interest as it fell due out of the rents he obtained from letting the houses. That was all he meant to say in this letter, and in so acting he was just doing what in the circumstances he ought to have done. To extract from such an expression anything calculated to fix on the trustee personal liability for this debt is to my mind extravagant, and I look in vain in the letter for any foundation for such liability. No doubt language might be used in such an arrangement which would have the effect of binding the trustee personally, but it would require to be very explicit, and nothing of that kind is to be found here.

I think, therefore, that the Lord Ordinary's decision is right, and I am for adhering to his interlocutor.

Lords Mure, Shand, and Adam concurred.

The Court adhered.

Counsel for Pursuers—Mackay—J. A. Reid. Agents—Philip, Laing, & Trail, S.S.C.

Counsel for Defender—J. Burnet—M'Neil. Agent—Knight Watson, Solicitor.

Friday, January 8.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

EARL OF MORAY *v.* THE BURGH OF FORRES AND ANOTHER.

Salmon-Fishings—Possession—Ambiguous Title.

In an action to have it declared that the pursuer (Earl of Moray) had exclusive right to the salmon-fishings in a certain portion of the river Findhorn, between a point named Dunduff and a point named the Red Craig, one of the earliest charters produced was a royal charter of the sixteenth century, granting to the pursuer's predecessor the fishings "de Speya, Fyndorn, Slewpule, et Lossy." The defenders contended that the meaning of this title was a bounding title conferring only the right to the Sluiepool in the river Findhorn. Prescriptive possession of the whole fishings claimed was established. *Opinion per curiam* that the charter did not confine the grant to the Sluiepool, but was ambiguous, and had to be construed by possession, but *held* that as the pursuer could produce a charter by progress of 1730, which did not confine the fishings to the "Sluiepool," and on which prescriptive possession for the portion of the Findhorn claimed had followed, he had made out his case.

This was an action at the instance of the Earl of Moray against Peter Higgins, residing in Forres, and the Provost and Magistrates of the royal burgh of Forres, as representing the community, concluding to have it found and declared that the pursuer was heritable proprietor of and had the sole and exclusive right to the salmon-fishings in that part of the river Findhorn from Dunduff (where the boundary between Elgin and Nairn touches the Findhorn) to the Red Craig, a point on his estate of Darnaway, subject to a reservation of such rights as the proprietor of the estate of Relugas might possess, and that defenders had no right or title therein, and for interdict against defenders fishing therein for salmon in any manner of way. The Findhorn flows from south to north at that part.

The immediate title of the pursuer was a Crown writ of *clare constat*, dated on the 13th and recorded in the Register of Sasines on the 17th August 1872. The earliest title upon which he founded in his record was a Crown charter of resignation dated 30th November 1730, on which sasine was expede on 15th February 1731. By this title the pursuer's ancestor was infeft in the Earldom of Moray "cum salmonum piscationibus de Findhorn, Spey, Sluipool, et Lossie," and the subsequent titles were identical in expression. In particular, the Crown writ of *clare constat* of 1872 first mentioned was so expressed. He averred that he and his predecessors had from time immemorial, or at all events for more than forty years, exclusive right of salmon-fishing by net and coble and rod in the part of the Findhorn which was the subject of this action, and that no right by the defenders existed or had till recently been asserted. The water in question was known generally as Darnaway water.

With regard to the ancient documents which he produced, though the summons was not founded upon them, and they did not constitute a continuous title, it appeared that on 1st June 1501 James IV. granted to Janet Kennedy, Lady Bothwell, a liferent conveyance of Darnaway Castle and the fishings of the Slewpule while she should remain there with James Stuart, her son by the king, and afterwards Lord Moray.

In a Crown charter of 12th June 1501, by which he granted to this son the Earldom of Moray, James IV. granted to him the castle of Darnaway with the fishings "de Speya, Fyndorn, Slewpule, et Lossy."

The earliest title with which the pursuer connected himself was a charter by Henry and Mary, dated 1st June 1566, which gave the Earl of Moray the salmon-fishings "in aequis de Spay, Findorne, Slewpule, et Lossy."

The same order is followed in an instrument of sasine in favour of James Earl of Moray and his wife, dated the 25th–28th June 1566, in an Act of Parliament in favour of James Earl of Moray dated 11th August 1607, and in a royal charter in favour of James Earl of Moray dated 19th April 1611. Later titles varied the order in which these words were used.

The defence was a denial that the pursuer's title was sufficient to give him an exclusive right claimed, and a denial of his alleged exclusive possession, and *separatim*, the defenders contended that the pursuer's title gave him no right to salmon-fishing in any portion of the water claimed except the Sluiepool. The burgh maintained right to salmon-fishings from Dunduff House to the "banks of the Findhorn" by a Crown title (except so far as conveyed away by the burgh), followed in any view by immemorial possession. This Crown title is fully discussed in the opinion of Lord Rutherfurd Clark. It

was of this nature (1) a royal charter dated 23d June 1496, in favour of the burgh of Forres. After narrating that the charter, &c., of the burgh had been lost "by the hazards of wars, by burnings and such like," it proceeds to confirm lands, waters, fishings, *inter alia*, "the water and fishings at Findern, from Dunduff as far as to the bank of Findern, as well in fresh water as in salt, with all fishes and fishings, mussels and mussel skawps, and with all other fishings, possessions, and freedoms which from of old pertained or are known to pertain to our said burgh, and liberty thereof; and with power to the said burgesses of setting in tack the said water, and of fishing and labouring upon the same in whatsoever part they may please within the said bounds with boats and nets." The tenendas clause of the said charter is as follows: "To be held and had, our aforesaid burgh of Forres, to the aforesaid alderman, bailies, burgesses, and community thereof, and their successors, of us, our heirs and successors, in free burgh, burgage fee, and heritable for ever . . . with the water and fishery of Findern, fishes, fishings, mussels, mussel skawps, boats, nets, port and station of ships within the same water, with all the bounds and pertinents of the same as above is expressed, and with all other sundry lands, annual rents, possessions, waters, fishings, mills, multures, muirs, marshes, roads, paths, and other emoluments," &c. The reddendo clause is in these terms—"Paying therefor yearly, the said alderman, bailies, burgesses, and community and their successors, to us, our heirs and successors, the burghal fermes and duties due and wont to us from the said burgh, and rendering other services and burdens for their part as other burghs within our kingdom do; paying also yearly to the Abbot and Convent of our monastery of Kinloss and their successors, the sum of twenty merks usual money of our kingdom, at the two usual terms of the year, to the said Abbot and Convent of the fermes of the waters and fishings aforesaid, given and granted by the old foundation thereof made by our sometime most noble progenitors only."

(2) The next charter on which the defenders founded in their record was a charter of 1539 by which the Abbot of Kynloss set, disponed and let in feu to the magistrates and community of Forres "seven-sixteen parts of our fisheries on the fresh water of the Findhorn." (3) The next was a charter of 24th June 1592 by James VI. in favour of the town of Forres confirming their right to the seven-sixteenths of salmon-fishings acquired from the Abbot of Kinloss. (4) The next was a Crown charter of 1641 confirming that of 1496, and expressly confirming the grant of water and fishing of Findhorn from Dunduff unto the bank of Findhorn, both in fresh water and salt. The defenders alleged possession under these charters from time immemorial by net and coble where practicable, and by rod and line elsewhere, through themselves and their vassals and tenants, and particularly such possession for the whole piece of river to which the pursuer's summons related.

The immediate cause of the raising of the question was an appeal to the Circuit Court of Justiciary at Inverness by the defender Higgins, an inhabitant of Forres, against a conviction by the Sheriff of fishing for salmon without legal right within the boundaries in dispute. The conviction was set aside by Lord Mure in respect that a competition of civil right was the real nature of the dispute. See *ante, Earl of Moray* v. *Higgins*, vol. xxii. p. 8, Sept. 9, 1884.

Proof was led. The proof showed that Lord Moray had had exclusive possession.

The Lord Ordinary (KINNEAR) pronounced the following interlocutor:—"Repels the defences; finds and declares, and interdicts, prohibits, and discharges in terms of the conclusions of the summons, and decerns.

"*Opinion.*—The pursuer claims an exclusive right to the salmon-fishings in the river Findhorn between the boundaries libelled, *i.e.*, from Dunduff, on the south to the Red Craig on the north, subject to the right of the proprietor of Relugas to fish with rod and line *ex adverso* of his property.

"The defenders maintain—(first) That the pursuer's right does not extend over the whole reach of water described in the conclusions of the summons, but is limited by the express terms of his title to the fishing of a single pool called the Sluiepool; and (secondly) that assuming that his title, as explained by possession, could be construed as extending beyond the Sluiepool, he has had no exclusive possession, but, on the contrary, that the burgh of Forres has for time immemorial possessed salmon-fishings within the boundaries libelled by virtue of a Crown title.

"The first question to be considered, therefore, is the construction of the pursuer's title.

"The immediate title is a Crown writ of *clare constat*, dated on the 13th, and recorded in the Register of Sasines on the 17th of August 1872, and in this instrument the salmon-fishings are described, as in the conclusions of the summons, as the salmon-fishings of Findhorn, Spey, Sluiepool, and Lossie. It is not maintained that this would be insufficient to cover fishing in the Findhorn other than that of the Sluiepool. But it appears that in some of the earlier titles, and in particular in the earliest with which the pursuer connects his own, a Crown charter dated 1st June 1566, in favour of James Earl of Moray, the fishings are described in a different order as 'salmon-fishings in the waters of Spey, Findhorn, Slewpule, and Lossie,' and it is suggested that in this collocation the names Findhorn and Sluiepool must be read together as defining the particular portion of the water of Findhorn to which the grant was intended to relate. It is said that if it had been intended to cover a continuous reach of water, extending for several miles above and below the Sluiepool, the specification of that particular pool alone would be unintelligible, and that the only reasonable construction of the description is to read it as meaning the 'Sluiepool of the Findhorn,' or, in other words, as a short way of saying 'that part of the water of Findhorn known as the Sluiepool.' And if this be the true construction of the original grant, it is said that the right which it confers cannot be extended by a mere transposition of names in subsequent charters by progress, whether such transposition is to be ascribed to design, or to the carelessness of conveyancers.

"This is, in my opinion, too slight a reason for disregarding the evidence of possession. The fishings are described by names and not by specific boundaries, and if no other reason could be suggested for the mention of the Sluiepool except that put forward by the defenders, the ex-

tent of the grant intended by the use of that name must still have been ascertained by the possession which has followed upon it. But the explanation proposed by the Dean of Faculty appears to be at least plausible. It appears that by a conveyance in liferent, dated 1st June 1501, King James IV. granted to Janet Kennedy, Lady Bothwell, the Castle of Darnaway, with certain lands in the county of Moray, and the fishings of the Slewpule for the whole term of her life, so long as she should remain unmarried and reside with her son by the King, James Stuart, afterwards Earl of Moray, in the Castle of Darnaway, or any other residence approved of or provided for her by the King. By a charter, dated the 12th day of the same month and year, the King granted to his son the lands and Earldom of Moray in fee, with, *inter alia*, the fishings of Spey, Findhorn, Slewpule, and Lossie. A part of the lands and a part of the fishings belonging to the earldom were thus carved out and given in liferent to the mother, while the entire earldom and the whole fishings were given in fee to the son. In this way it is suggested that the fishings of Slewpule, which was really a portion of the fishings in Findhorn belonging to the earldom of Moray came to be mentioned as a separate tenement in the titles of 1501. Later conveyancers finding it so mentioned naturally repeated it as a separate tenement in preparing the subsequent titles, and, as appears from the extracts from retours of services, they repeated it without any regard to the particular order in which it should be placed among the various names descriptive of the different fishings included in the title to the earldom.

"On the other hand, there is evidence in the precept, dated 3d February 1498-9, extracted from the Register of the Privy Seal, that at that date the fishings of "Sloypule" was known as a separate tenement, the precept being for infeftment of certain persons named in 'the fishings of the water of Findhorn from the place called Dunduff to the sea . . except the Shireff feith and Sloypule of the water foresaid, and also except all fishings within the said bounds, and utouth pertaining to the king's hienes in property.' The inference was that in 1498 there were fishings in Findhorn between Dunduff and the sea known as the Sloypule fishings—other fishings between the same points which had been given out by the Crown, and to which the precept relates, and others which had not been given out but still remained in the Crown. These last would be carried by the charters of 1501 and 1566, if this were intended, and whether they were in fact so carried, and if so, how far they extended, are questions of fact to be determined in accordance with the evidence of possession.

"It is therefore immaterial whether the words Sluiepool and Findhorn were used as separate names by the framers of the charters of 1501 and 1566, or were used together as one name to describe a single fishing. In either case the extent of the grant must be construed by the possession had upon it, for it is not pretended that it will cover the whole of the river Findhorn irrespective of possession, and if the pursuer has in fact possessed the entire fishings within the boundaries libelled, such possession will be conclusive in his favour, not as a mode of acquisition, or as enabling him to enlarge the grant, but as the best evidence, and indeed the only available evidence, to explain the grant.

"Without examining the evidence in detail, it is enough to say that I think it proved that the pursuer and his predecessors have possessed the entire salmon-fishings within the boundaries libelled for a period extending far beyond the period of prescription. Their estate of Darnaway lies on one side of the river only, but they have exercised the right of salmon-fishing from both sides, not only by drawing their nets, but, as appears from certain proceedings in a litigation in the Sheriff Court in 1783 between Lord Moray and Mr Cumming of Altyre, by building huts for the accommodation of their fishers. The defenders have endeavoured to shew that their possession has been practically limited to the fishing of the pool now known as the Sluiepool, but the evidence to the contrary is conclusive. The pools above the Sluiepool are impracticable for net and coble, but they have been fished by rod and line, and while these modes of fishing were legal by the hand-net and by the clip, the pools below the Sluiepool are not, in their present condition, so well adapted for net and coble as the Sluiepool is. But the evidence of Mr Hogarth [who was partly proprietor and partly tacksman of salmon-fishings on the Findhorn] and his fishermen establishes that they have, nevertheless, been regularly fished when the condition of the water allowed of their being fished to advantage, and the documentary evidence shows that the Earl had successfully asserted his right to the fishing of St John's Pool (which is one of those lying below the Sluiepool) on various occasions in the seventeenth and eighteenth centuries.

"The question remains, whether the pursuer's right is exclusive, or whether the burgh of Forres may not also have a right of salmon-fishing in some portions of the same water. But in my opinion they have failed to show either title or possession sufficient to establish the right which they have alleged on record. The possession on which they rely is not by net and coble, but by rod and line, and it is proved that inhabitants in Forres have in fact fished with rod and line in the water in question. But such possession as they have had is neither in character nor in extent sufficient to establish a right. It is unnecessary to consider under what conditions rod fishing might be a sufficient exercise of the right in waters where fishing by net and coble is impracticable, because it is proved that fishing by net and coble is practicable, and has been practised in the water in question, for the evidence of Mr Hogarth and his fishermen leaves no room for doubt that if the right to fish between Sluiepool and the Red Craig had been in other hands than the pursuer's, the lower pools might, and in all probability would, have been fished by net and coble.

"But if the evidence of possession had been more satisfactory than it appears to me to be, the defenders have no sufficient title to which it can be ascribed. The title on which they rely is a Crown charter, dated 23d June 1496, which they construe as granting to the burgh, *inter alia*, 'the water and fishings of Findhorn, from Dunduff as far as to the bank of Findhorn, as well in fresh water as in salt.' But this is not an

original grant of rights vested at the time in the Crown. It proceeds on the narrative that the charters and evidents of the ancient foundation of Forres had been burnt or destroyed in war, and for remedying the inconvenience so occasioned to the burgh, the king regrants and confirms the rights already conferred upon the burgh, but makes no new or additional grant in their favour; and in so far as regards the fishing in the Findhorn, it appears, from the reddendo, to be practically a confirmation of rights, not held directly of the Crown, but from the Abbey of Kinloss. The effect of the charter, therefore, would depend upon the extent of the rights already held by the burgh from the Abbey; and the subsequent titles flowing from the Abbey, when construed with the aid of the evidence as to possession, leave no room for doubt that the entire salmon-fishings held by the burgh were situated considerably below the Red Craig. The most important of these is a feu-charter by the Abbot and Convent in 1539, confirmed by King James VI. in 1592. It proceeds upon a renunciation by the provost, magistrates, and community of all right, title, property, and possession which the burgh had, or claimed to have, to the fisheries in the water of Findhorn, both in the fresh and salt water; and for the total ending of a lawsuit respecting the value of seven-sixteenths of the fresh water of Findhorn, and other fisheries, of which the burgh had kept violent possession without any just title; and further, for implementing all agreements between the Abbey on one part and the burgh on the other, the Abbot and Convent dispone in feu to the provost, magistrates, and community 'seven-sixteenth parts of our fisheries in our fresh water of Findhorn, to be held for payment of ten pounds Scots to the granters of the charter and their successors, in name of feu-duty."

"As this charter is accepted by the burgh, the narrative is conclusive evidence against them, that they had no right or title, as in a question with the Abbey, to any other fishing in the fresh water of Findhorn, except the seven-sixteenths parts now feued out to them. But the Crown charter of 1496 gives them nothing more than they already held from the Abbey, the extent of the right so held being presumably unknown to the Crown by reason of the destruction of titles. The title, therefore, to which any possession had by the burgh subsequent to 1539 must be ascribed is the feu-charter of that year; and it is not maintained by the defenders that this is a sufficient title to support possession in any part of the water above the Red Craig. It is admitted that the water to which the feu-charter relates lies below Red Craig; and the concession could hardly have been withheld, having regard to the evidence as to the situation of the water fished in sixteenth shares. But further, it is proved—and I did not understand it to be disputed—that no portion of the seven-sixteenths included in the feu-charter now remains in the hands of the burgh. The seven-sixteenths formerly belonging to the burgh, and seven of the remaining nine portions in addition, have been acquired by Mr Hogarth, who is tenant of the pursuer in the water in question, and who concedes that he has no title to compete with the pursuer in respect of any right which he has derived from the burgh.

"The defenders' case required that they should establish, first, that the charter of 1496 gave them a right to fishings in the Findhorn, separate and distinct from the fishings which they held off the Abbey of Kinloss; and secondly, that in virtue of that title, they had possessed salmon-fishings in the portion of the water in question. I think they have failed in both points, and that the pursuer is therefore entitled to decree."

The defenders reclaimed, and argued—The burgh of Forres and Lord Moray had a *pro indiviso* right above the Sluiepool, and the burgh had exclusive right to seven-sixteenths below. By the decree of the Lords of Council in 1505-6 all that had ever been the King's was the Sluiepool, and yet he had granted to the Earl of Moray by a charter dated 12th June 1501 the fishings "de Spaya, Findorn, Slewpule, et Lossy." But Sluiepool means a "populous pool," and Findhorn was a qualifying adjective distinguishing it from other populous pools. The "et" between Findhorn and Sluiepool which appeared in subsequent charters was a clerical error. The pursuer's right thus limited could not be extended by a larger possession. Hogarth undoubtedly had had possession, but the question was, to what title was that possession to be referred? He fished as vassal of the burgh with "net and coble." The title of the burgh was to salmon-fishing. Fishing by net and coble had been the method in use; and the fishings were treated of as a feudal subject—treatment only applicable to salmon-fishings.

Argued for pursuers—There was no doubt that Lord Moray had a grant of salmon-fishings. Proof of possession was necessary to show the extent. These seven-sixteenths were not lengths, but shares in a *pro indiviso* fishing. Accordingly, if one-sixteenth was localised, all were localised. Urquhart and Wiseman, mentioned in the feu-charter by the Abbot of Kinloss, were partakers in this unit, and their possession was altogether below the Sluiepool. Possession by Urquhart could not be possession for the burgh, for if a superior gave off a *universum jus*, he had no estate left except his right to draw feu-duties.

Defenders' authorities—*M'Donall* v. *Lord Advocate*, April 16, 1875, 2 R. (H. of L.) 49; *Dunbar, &c.* v. *Brodie*, February 15, 1765, 6 Pat. App. 769.

Pursuer's authorities—*Earl of Galloway* v. *Murray and Others*, July 8, 1870, 42 Scot. Jur. 562; Stuart on Salmon-Fishing, 80; *Forbes* v. *Udney*, December 3, 1701, M. 7812 and 14,250; *Campbell* v. *Campbell*, February 16, 1610, M. 14,250; *Lord Advocate* v. *Commissioners of Northern Lighthouses*, May 27, 1874, 1 R. 950; *Stuart* v. *M'Barnet*, July 21, 1868, 6 Macph. (H. of L.) 123; *Duchess of Sutherland* v. *Watson*, Jan. 10, 1868, 6 Macph. 199.

At advising—

Lord Rutherfurd Clark—By this action the pursuer seeks to have it declared that he has the sole and exclusive right to the salmon-fishings in the river Findhorn from Dunduff to the Red Craig, subject to a reservation of such rights as the owner of the estate of Relugas may possess.

In support of his claim the pursuer produces various Crown titles, duly feudalised, to salmon-fishings in the Findhorn. But though these titles contain an express grant of salmon-fishings, they do not specify the part of the river in which the

right is to be exercised. In consequence the pursuer appeals to the possession which has followed on them, and in my opinion he has proved by very conclusive evidence that for time immemorial he and his predecessors have possessed the salmon-fishings within the boundaries libelled. This is decisive in favour of the pursuer, for nothing can more clearly establish a right of property than a sufficient title followed by prescriptive possession. I shall refer hereafter to the evidence.

The defenders maintain that the title of the pursuer is not sufficient. They say that he has a grant of no more than the fishings in one pool, viz., the Sluiepool, and that a larger possession is unavailing to extend his right as it is not supported by any title.

The earliest title on which the pursuer founds in his record is a Crown charter of resignation dated 30th November 1730, on which sasine was expede on 15th February 1731. By this title the predecessor of the pursuer was infeft in the earldom of Moray "cum piscationibus salmonum de Findhorn, Spey, Sluiepool, et Lossie," and the subsequent titles are expressed in the same way. It is true that the charter of 1730 is not an original grant. But in a question of prescription this is of no importance. For it is not doubtful that a charter by progress furnishes as good a foundation for a prescriptive title as an original grant, so much so that when the charter by progress has been clothed by prescriptive possession there ceases to be any obligation to produce any earlier or other title.

On this title there is no room for the argument of the defenders, for in the face of it the fishings in the Findhorn are not confined to the Sluiepool. But the defenders refer to the Crown charter of 12th June 1501 in favour of James Earl of Moray, in which the fishings are described as "salmon-fishings in the water of Spey, Findhorn, Slewpule, and Lossie." They contend that this, as the original grant, furnishes the measure of all the succeeding titles, which are charters by progress, and that it conveys no other fishings in the Findhorn than the fishings in the Sluiepool. Hence they argue that as the pursuer and his predecessors have possessed on a bounding charter they cannot acquire by prescription any right of fishing beyond the limits of the grant.

I do not think that this reasoning is sound. I have said—and the point is not doubtful—that a charter by progress is a good title for prescription, or, in other words, that the grantee may acquire by possession a right to all the subjects which it professes to convey. We have not before us a continuous title deduced from the charter of 1501. There is no reason for supposing that the grant contained in that deed, if it be limited to the Sluiepool, may not have been subsequently enlarged, and indeed there is every presumption that it was, if the charter of 1730 contains a larger grant on which the Earls of Moray have possessed. But it is idle to enter on these conjectures, because unless the charter of 1730 is necessarily limited to the same subjects as the charter of 1501, which I see no reason to hold, the pursuer has acquired a good right by prescription to all that was granted by the former charter.

But even if we have to consider the charter of 1501 as the only title which the pursuer possessed, I do not think that the defenders would prevail. The grant is by no means clear and unambiguous, and if so, it cannot be read as a bounding charter. It may mean a grant of the fishings in the Sluiepool only, or it may mean a grant of these fishings and other fishings in the Findhorn. We have thus to appeal to possession for an explanation of it, and the answer is given with no uncertain sound. It is thereby interpreted as a grant of the salmon-fishings extending from Dunduff to the Red Craig.

If the pursuer has established his right to the fishings in question by the production of a sufficient title and by proving exclusive possession, it is in one sense unnecessary to inquire into the titles founded on by the defenders. But as they have an important bearing on the proof of possession, which I shall hereafter examine, it is proper to notice them.

The defenders found, in the first place, on a Crown charter of 1496, which professes to give to the burgh the fishings in the Findhorn from Dunduff to the sea. It is in unusual form, and it is a question whether the charter does or does not convey salmon-fishings. It is remarkable that the feu-duty payable for such fishings as are conveyed is to be paid to the Abbot and Convent of Kinloss. The charter was granted to supply the place of titles which have been lost "through the devastation of war, by fire, and other means." It is to be inferred that as the feu-duty for the fishings was payable to the Abbey, the fishings had been previously held of that body, and we shall see from the subsequent productions that this was probably the case. But that at this time the Crown dealt somewhat unscrupulously with the fishings in the Findhorn is made manifest by the fact that the defenders produce a precept from the King, dated no later than 3d February 1498, for the infeftment of Sir James Dunbar and others in the same fishings as had been granted to them by the charter of 1496.

The Abbey of Kinloss raised an action against James Dunbar, son of Sir James Dunbar, and the other persons mentioned in the foresaid precept of infeftment, and also against the burgh of Forres. One purpose of the action was to reduce the infeftment of 3d February 1498. They obtained decree of reduction on 2d March 1505-6. The burgh does not appear to have founded on the charter of 1496, at least no mention is made of it in the decree, nor can we discover what claim they put forward. Indeed, the decision of the Council does not determine conclusively the right to the fishings, with respect to which there was "a pley dependand between the said venerabill fader and his Convent onto the ta pairt and the burgesses and communitie of Forres on the tother pairt." For the Lords of Council, while loosing the recoguition under which those fishings were said to stand, "lets the samyn to borgh to the said venerabill fader and his Convent," and ordains letters to be directed to void and redd the said fishings of all occupiers, and input the Convent in the possession thereof. The expression "lets the samyn to borgh" seems to mean that the fishings were to be held by the Abbey in wadset or on some such title until the rights of all concerned, and specially those claimed by the burgh, were ascertained. But it is to be noticed that by the

decree the Abbey were taken bound to pay to the King three lasts of salmon "after the form of the infeftment made to them by our said Sovereign Lord," for I have ascertained that the word "heires" in the print is a mistake for "highness." This shows that theAbbey were infeft in the fishings, and that they were put into possession of them. We may, I think, safely infer that their right of superiority was recognised by this decree, and that nothing was left for determination except the subordinate rights.

The decree reserves to the King "the fishing of the Sluiepool pertaining to our Sovereign Lord in property," and I may notice by the way an argument which the defenders founded on this reservation. They say that it shows that no fishings belonged to the Crown except the Sluiepool, and therefore that the charter of 1501 must be construed as limited to that pool. But this is altogether fallacious—first, because it is evident from the decree of reduction itself that the Crown had been asserting much larger rights, and therefore there is no reason for supposing that the grant of the King was confined to the fishings which according to the subsequent decree were ascertained to be his; and second, because a charter which is pleaded as the foundation of a prescriptive right must be construed according to its own terms, and without an appeal to extraneous evidence. If it can be reasonably construed as capable of comprehending the subjects which have been possessed under it, the subjects are acquired by prescription, though a part, or even the whole, could be shown to be held under a prior title. The existence of a prior or better title is no bar to the running of prescription, the effect of which is to destroy the better title and set up the worse; so that if a subject has been possessed under a title capable by reasonable construction of comprehending it, the possessor has acquired a right which cannot be successfully challenged.

From the decree of 1505 we see that the fishings of the Findhorn from Dunduff to the sea, with the exception perhaps of the Sluiepool, had been in recognition, and it is probable that the Crown was in possession of them, as apparently the Abbey was not. This may explain why the King may have come to dispose of them. But as the Abbey was put into possession by the decree of 1505, and its right of superiority recognised, it came to be in a position to settle the subordinate rights.

Accordingly we find that in 1505 a feu-contract was entered into between the Abbey of Kinloss on the one part, and the burgh of Forres, Alexander Urquhart, and William Wiseman, on the other. By this contract the second parties resigned to the Abbey their whole fishings of the Findhorn, and the Abbey feued out to them the fishings in the water of Findhorn "rennand doowne from the Sluypule to the entering of the Burn of Masset in the sea." These fishings were given off in sixteenths—of which eight were feued to Urquhart, one to Wiseman, and seven to the burgh of Forres. They are not described as salmon-fishings. But considering that they are given out without any conveyance of land, and that by the *reddendo* the vassals are taken bound to deliver a certain quantity of salmon, the contract may be read as giving out a right of salmon-fishing.

It does not appear that any alteration was made on the right of Urquhart or Wiseman. But in 1539 the burgh again resigned to the Abbey all their right and title to the fisheries in the Findhorn, and received in feu "seven-sixteenths of our fisheries in our fresh water of Findhorn." It will be observed that there is no description of the situation of these fishings. But I think that they may be assumed to be the same fishings of which Urquhart and Wiseman held the remaining nine-sixteenths. No inference more favourable to the defenders can be drawn.

The resignation by the burgh of all their fishing rights into the hands of the Abbot in 1505 and 1539, and the new grant which on each of these occasions they received, deprives the charter of 1496 of all importance in this case. As we are not in possession of the whole titles we cannot examine these deeds as we would examine a modern feudal progress. If the burgh were infeft in these fishings under the Crown by virtue of the charter of 1496, a resignation into the hands of the Abbey would be inconsistent with feudal principle. But considerations of that kind have little weight when we are dealing with titles so old and with so imperfect a production. We do know that the infeftment and therefore the superiority of the Abbey was recognised, and we are bound to presume *omnia rite et regulariter acta esse*. Hence we must take it that all the fishing rights of the burgh were resigned to the Abbey. So far as we see they were all held on the same title, and there is nothing to suggest that any restriction should be placed on the general words. The title of the Abbey as determined by the decree was as broad as that of the burgh even under the charter of 1496, for it extended from Dunduff to the sea. Hence in my opinion it follows that we are no longer concerned with that charter, and that the only rights to which the defenders can pretend are to be found in the feu-contract of 1505 and in the charter of 1539, or rather in the latter deed, which again was preceded by a general renunciation or resignation.

The fishings given out by the Abbey by the feu-contract of 1505, and which I take to be the same as those contained in the subsequent charter of 1539, are described as the fishings in the Findhorn "rennand down from the Sluypule to the sea." *Prima facie* I should construe these words as meaning a grant of the fishings from the Sluiepool to the sea, and therefore as being a grant to a part of the fishings which are claimed by the pursuer. But from what I have said it will be evident that the case of the burgh must be limited to fishings below the Sluiepool, for they have no other title. The burgh being therefore in possession of a title which may include a part of the fishings which are claimed by the pursuer, we must next inquire into the possession which followed on it. And in this question we are assisted by the circumstance that two other persons (Urquhart and Wiseman) had nine-sixteenths of the fishings of which the burgh held seven-sixteenths. The title may extend up the river as far as the Sluiepool. But two other things are possible, viz., either that the possession will interpret the grant so as to show that the fishings were situated lower down the river, or that the possession of the pursuer under his titles will give him a prescriptive right

to fishings which once belonged in the several shares I have mentioned to the burgh, Urquhart, and Wiseman.

I find from the evidence that none of the *pro indiviso* proprietors ever asserted a right to fish or ever fished further up the river than the Red Craig. Of course the right of each proprietor is of the same quality, and is to be exercised in the same locality. It is very remarkable that with a right of this kind vested in three proprietors there is no evidence to show that anyone of these disputed the right of the Earl of Moray to the fishings which are claimed in this action. Apart from the evidence as to rod fishing, to which I shall afterwards advert, the burgh had no possession at all, either by themselves or by tenants or vassals. The only other persons who connect themselves with this *pro indiviso* right, are the proprietor of Moy, Mr Arbuthnot, and in succession Mr Hogarth. But it is very clear that none of them ever asserted a right to fish or ever fished higher up than the Red Craig. We have the most distinct evidence of this from fishermen employed by Moy and Mr Arbuthnot, and from Mr Hogarth himself. The title to the *pro indiviso* right has not been very distinctly deduced, but it is clear that Mr Hogarth has acquired nearly the whole of it with the exception of two-sixteenths which belong to Moy, and his evidence is very decided that these fishings as they were possessed were all below the Red Craig.

At one time I thought that the defenders might be able to shew that they had possessed, to some extent at least, through Mr Hogarth as their vassal, and that as superiors they might found on this possession in answer to the pursuer's case. But further consideration has satisfied me that they cannot. It is not sufficient for them to shew that Hogarth was in possession of the fishings. They must shew that he was in possession of them as their vassal. So far as Mr Hogarth's evidence goes it is clear against the defenders. For he says that he and his predecessors possessed the fishings above the Red Craig as tenants of the Earl of Moray. Nor is this in the least surprising when we consider that the other owners of the fishings in which the burgh had a share never possessed or claimed to possess beyond the Red Craig.

So far therefore it is plain enough that the fishings which were feued out in 1505, and again in part to the defender in 1539, have been identified by the possession which has followed on the grant as lower down the river than those in question. But it is as clear that the Earls of Moray have had for time immemorial possession of the fishings as far as the Red Craig. There has been produced a tack dated so early as 18th February 1655, by which the Earl of Moray lets for a period of years the salmon-fishings of Findhorn from the pool called Duwein to the pool called Stoneypool. The situation of the former has not been well ascertained, nor is it material. The Stoneypool is below the Red Craig. A series of accounts have been produced from 1642 downwards, and we see from them that the Earls had high and low net-fishings in the river, and the latter must have been below the Sluiepool, which was the highest net-fishing. St John's pool is mentioned in them as part of Lord Moray's fishings, and this pool is close to the Red Craig. Further, there is the concurrent evidence of all those who were engaged in the salmon-fishing of the Findhorn, that the Earls of Moray owned and possessed the salmon-fishings down to the Red Craig. There is not a syllable to the contrary. To my mind it is just as clear that they possessed above the Sluiepool. But this is not of as much importance, because the defenders have not produced any title under which they could claim fishings higher up the river than that pool.

I have only to notice in conclusion the allegation of the defenders that the "burgesses and members of the community of Forres" have in virtue of the Crown charter of 1496, and other titles of the burgh, been in use for time immemorial to angle for salmon within the limits of the fishings claimed by the pursuer. That there has been a great deal of rod-fishing cannot I think be disputed. But I do not think that it can in any way affect the decision of the case—first, because for that the burgh has no title to fishings above Sluiepool, and secondly because the rod-fishing was not exercised in virtue of any right belonging to the burgh. There may have been a vague notion that the burgh had some right of salmon-fishing of which the inhabitants of the town might avail themselves. But this is not enough. Such fishings as belonged to the burgh would form part of the common good, and fall under the administration of the town council. It does not appear that the council took any charge of these or granted any licences to fish. Indeed, they could not, for though the titles of the *pro indiviso* fishings of which the town had part are not very clearly traced, it appears from the treasurer's accounts that the share of the town had been feued out. If so they could have given no licences to fish by rod. I can come to no other conclusion than that the rod fishing was either a trespass on the pursuer's right, or by his tolerance, and in either case it will not avail the defenders.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD JUSTICE-CLERK—That is the opinion of the Court.

Counsel for Pursuer (Respondent) — D. F. Balfour, Q.C.—Mackay. Agents — Melville & Lindesay, W.S.

Counsel for Defenders (Reclaimers)—Comrie Thomson — Dickson. Agent — Robert Stuart, S.S.C.

Friday, January 8.

FIRST DIVISION.

[Court of Exchequer.

MILLER (SURVEYOR OF TAXES) *v.* THE GLASGOW CORPORATION WATER COMMISSIONERS.

Revenue—Assessment—Income-Tax.

The Glasgow Water Commissioners were appointed under a local Act of Parliament, by which they were authorised, *inter alia*, to acquire the works of certain private water