undue concealment. I think that is a verdict for the pursuer, and that this is not the case of an alternative issue in the ordinary sense of that term. It is an issue as to one ground of reduction, namely, essential error. It is alternative only as to the mode in which the error was induced. It was said that undue concealment only applied to cases where there was a duty of disclosure, and it was proposed to read this issue as if the word "undue" was not in it. I think that is taking too great a liberty with the issue.

The pursuer was allowed expenses from the beginning, subject to modification.

Agents for Pursuer—Macgregor & Barclay, S.S.C.

Agent for Defender—Thomas Ranken, S.S.C.

Wednesday, Nov. 21.

SECOND DIVISION.

ADAM *v.* LATTA (TUNNOCH'S TRUSTEE).

Bankruptcy — Appeal — Expenses. Held that a trustee who had unsuccessfully resisted two claims on a sequestrated estate which were identical in interest and involved the same inquiry was not entitled to deduct the expenses of either action from the dividend payable to either of them.

Mr Adam of Messrs Adam & Kirk had for some time a cashier in his employment. He afterwards assumed a partner, and the cashier continued in the employment of the firm of Adam & Kirk. He died while in this employment, and his estates were ultimately sequestrated. A claim in the sequestration was brought by Mr Adam, on the ground that while the cashier was in his individual employment he had embezzled and appropriated to his own uses large sums of money by over and under summing the cash books. A similar claim was brought by the firm on the same ground, applicable to the period during which the cashier was in the firm's employment. The trustee rejected both claims, but on appeal they were sustained by the Court. The trustee then prepared a state of the funds, out of which the final dividend was to be paid, and he proposed to deduct from the divisible fund the expenses of the litigation, which he had unsuccessfully maintained. The claimants appealed to the Lord Ordinary (Ormidale), praying him to rectify the state of the trustee, and to add to the divisible fund the whole of the expenses in both processes, so that their dividend might not thereby be diminished. The Lord Ordinary pronounced the following interlocutor :—

"*Edinburgh, 27th July* 1866.—The Lord Ordinary, having heard counsel for the parties, and considered the argument and proceedings, sustains the appeal, and recals the deliverance of the trustee complained of, but in so far only as it proceeds on the footing that the expenses of the litigation in question, betwixt the appellants and the trustee, have been properly paid out of the estate, and in so far as concerns the sum of £10 referred to in the appeal; and remits to the trustee to rectify the state of the funds, and to rank the appellants on the footing and to the effect that, in so far as their claim is concerned—(1) No part of the expenses of said litigation, as betwixt them and the trustee, is to be paid out of the estate; and (2) the said sum of £10 is not to be paid out of the estate; – and decerns: And in respect that each of the parties has been partly right and partly wrong, finds neither entitled to any expenses.

"R. MACFARLANE.

"*Note.*—In regard to the £10 there was no discussion before the Lord Ordinary, as it was at once admitted on the part of the trustee that, in regard to that sum, he had made a mistake which he was ready to rectify. In regard to the appeal otherwise, the Lord Ordinary holds it to be a well established principle of law that no part of the expenses of a litigation betwixt a trustee for the general body of creditors and a claimant whose debt is disputed, but who has succeeded in the litigation, and been found entitled to the expenses thereof, can be allowed to affect or diminish the dividend—Houston and Others *v.* Duncan, 25th November 1847, 4 D. 80, and the cases there cited. The Lord Ordinary, however, cannot extend the principle the length of holding that, in a question with the appellants, Messrs Adam & Kirk, the trustee must not only take care that their dividend is not affected by any of the expenses in the litigation with them, but also that it is not affected by the expenses incurred in the litigation with the other appellant, Mr James Adam. No authority was cited in support of any such extension of the principle, and the Lord Ordinary has been unable to see any sufficient reason for so extending it, especially in the present instance, where it was admitted, in the course of the discussion, that the appellants had not, by protest or otherwise, expressly stated their dissent from the litigation which took place with the other appellant."

The claimants reclaimed.

A. R. CLARK and MACKAY, for them, contended that there was no principle upon which the two cases should be distinguished as they were by the Lord Ordinary. The claims were identical and should be similarly disposed of.

PATTISON and WATSON supported the interlocutor of the Lord Ordinary.

The Court recalled the Lord Ordinary's interlocutor, and held that in the specialities of the case, which did not admit of its being used as a precedent unless the precise circumstances concurred, the interest of Mr Adam, and of Adam & Kirk being identical, and the case of both against the trustee being the same, and established by the same proof, the fairest mode of dealing with the case was to hold that the trustee was not entitled to charge any of the expenses of either appeal in a question with either of the appellants against the appellants' final dividends.

Lord BENHOLME concurred with the other Judges on the ground rather of community than of identity of interest between the claimants.

Agent for Claimants—Alex. Howe, W.S.

Agent for Trustee—James Somerville, S.S.C.

Friday, Nov. 23.

FIRST DIVISION.

STUART *v.* M'BARNET.

Salmon Fishings—Opposite Proprietors—Narrow Stream—Title to Prevent Fishing—Interdict—Trespass. A. and B. were opposite proprietors on the banks of a narrow stream, the whole breadth of which was swept by fishing from either side. A. held a Crown grant of lands *cum piscationibus* fortified by immemorial exercise and possession of salmon fishing. B. held a title to salmon fishings over one-half of the

stream from a subject superior, whose right he did not connect with a Crown grant, but upon which he had possessed from time immemorial, and exercised the right by rod and line, and during two seasons by net and coble. Held (affirming Lord Jerviswoode) that A. had no title to prevent B. from fishing from his own lands, and interdict granted against A. fishing from B.'s lands. *Observations* upon the extent of use required to preserve a positive right, and upon the rights of subject proprietors *inter se*, and as regards trespassers upon the opposite banks of a narrow stream.

This was a litigation between Sir John Stuart, one of the Vice-Chancellors of England, and Lieutenant-Colonel Alexander Cockburn M'Barnet, with reference to the right of salmon fishing in the river Balgy in Ross-shire. Sir John Stuart is proprietor of the estate of Balgy, and M'Barnet is proprietor of the lands of Torridon, between which the river Balgy runs. The proceedings commenced by a petition for interdict in the Sheriff Court of Ross-shire presented by M'Barnet against Sir John Stuart and his son. In that petition M'Barnet narrated that he was heritable proprietor of the estate of Torridon and of the half of the salmon fishings of the water of Balgy and linn thereof, and that he had by himself and his authors possessed the right of salmon fishing under titles from time immemorial, and that Sir John Stuart and his son had illegally commenced to fish for salmon from the Torridon side of the river, and *ex adverso* of his lands, and craved interdict against their so doing, and against their invading his right to half of the salmon fishing of the river. Interim interdict was granted, and a record was thereafter made up, in which the parties condescended upon their titles and possession of the fishings. M'Barnet, under titles which were derived from a subject superior, was infeft in the lands of Torridon and others with the "salmon fishings of the water of Torridon and Lochanaskaith, and the half of the salmon fishings of the water of Balgy and linn thereof," &c. Sir John Stuart, on the other hand, held under Crown titles, which gave him right to the lands of Balgy *cum piscationibus*. M'Barnet averred that under his titles he and his authors had from time immemorial possessed and enjoyed the one-half of the salmon fishings of the Balgy from the Torridon side, both by net and coble and rod and line, and every other lawful mode of fishing, and without challenge. Sir John Stuart, on the other hand, maintained that from the narrowness of the stream and the steepness of the banks on the other side, the whole salmon fishing had been conducted and exercised from and *ex adverso* of the lands of Balgy —that the river could not be fished by net and coble from the opposite side, that it was so narrow that it could be swept by the cast of a salmon rod, and that he and his predecessors had had from time immemorial the exclusive possession of the fishings of the river, and had exercised the right of salmon fishing in it to the exclusion of all other persons.

The Sheriff-Substitute having allowed a proof, the interdict process was advocated under the provisions of the 6 Geo. IV., c. 120, sec. 40.

In the meantime, however, an action of declarator had been raised by Sir John Stuart against M'Barnet, in which he sought to have it found and declared that he had the only good and undoubted title to the lands of Balgy, in the county of Ross, with the salmon fishings in the river or water of Balgy, and that he had the sole and exclusive right and privilege of fishing for salmon, and fish of the salmon kind, in the said river or water; or otherwise, that he had right to the salmon fishings in the said water or river *ex adverso* of the said lands of Balgy, and that he had good right and title to fish for salmon, and other fish of the salmon kind, in th said water or river *ex adverso* of his own lands, and that by net and coble, rod and line, and every other legal mode; and further, that it ought and should be found and declared that the defender had no right of salmon fishing in the said water or river, and that he was not entitled to fish therein for salmon, or fish of the salmon kind; and that the defender should be decerned and ordained to desist and cease from fishing in the said river with rods, nets, leisters, or any other engines or instruments whatever, in all time coming; and should be prohibited, interdicted, and discharged from fishing in said water or river for salmon, or other fish of the salmon kind, in all time coming, and from troubling or interrupting the pursuer in the peaceable possession and exercise of his right of salmon fishing in the said river or water.

A record was made up between the parties in this action, in which the statements as to rights and possession which had been made in the interdict were substantially repeated. The pursuer claimed the exclusive right to fish in the river; alleging that the defender held under titles from a subject superior who had no right of salmon fishings in his title and could not therefore legally give such a right; and that the modes of fishing which could be practised from his side of the river were not recognised by law as possession on which a title could be founded. The defender denied these statements.

Upon this state of the record the pursuer, *inter alia*, pleaded in the declarator (which became the leading process) as follows:—1. The pursuer and his predecessors having had, under their titles, exclusive possession of the salmon fishing in the said water or river, and there being no salmon fishing *ex adverso* of the defender's lands by any mode of fishing which is legal or recognised by the law as a possession on which a title can be founded, the pursuer is the sole and exclusive proprietor of the same, and is entitled to decree of declarator to that effect. 2. The defender has no right to the salmon fishing in the said water or river, or to any part thereof, in respect (1) that he has not a Crown grant of salmon fishings; and (2) that he and his ancestors have had no possession of the said salmon fishings, or any part thereof. 3. At all events, in respect of the pursuer's titles, and of the possession which has followed thereon, the pursuer is entitled to decree of declarator, in terms of the alternative conclusion of the summons; and in respect that the defender has no right to salmon fishings in the said river, the pursuer is, in any event, entitled to interdict as craved.

The defender pleaded, *inter alia*—1. The pursuer has no title to sue the present action, except in so far as he seeks, under the terms of the second or alternative conclusion of the summons, to establish a right by prescription to one-half of the salmon fishing of the water of Balgy, being the salmon fishing *ex adverso* of his own lands, and from the side or bank of the river on which they are situated. 2. The pursuer having only a grant of lands *cum piscationibus*, has no title under which he could by prescription acquire a right of salmon fishing in the water of Balgy, except in

connection with his own lands, and from the side or bank of the river on which they are situated, and he could only acquire such limited right of salmon fishing by forty years' possession thereof, by net and coble. 3. The pursuer having no title to lands or fishings on the Torridon side of the Balgy, and there having been no possession, as averred by the pursuer himself, by him and his authors, of salmon fishing from that side by net and coble, the present action, in so far as it relates to the salmon fishing from the Torridon side of the Balgy, and to the defender's exercise thereof, is groundless. 4. The defender, in virtue of his titles, has the exclusive right to half of the salmon fishing of the water of Balgy, being the salmon fishing *ex adverso* of the lands of Torridon, and from the Torridon side of the said water. 5. At any rate, the defender, in virtue of his titles, and the possession which has followed thereon, has exclusive right to the said half of the salmon fishing of the water of Balgy. 6. The pursuer having no right or title to the salmon fishing in the Balgy from the Torridon side thereof, is not entitled to challenge or object to the defender's titles to the said salmon fishing, or to his fishing for salmon *ex adverso* of his own lands, and from his own side of the river.

In the interdict process Lord Ordinary Jerviswoode (before whom the case came to depend) continued interim interdict against Sir John Stuart and his son trespassing on the lands of Torridon for the purpose of fishing for salmon *ex adverso* of them, and *quoad ultra* refused the interdict craved.

This judgment was adhered to by the First Division.

Thereafter in the declarator a proof was allowed the parties of their respective averments, which was taken on commission. Of consent, the proof in this action was held as proof in the process of interdict. The import of the evidence will sufficiently appear from the opinions of the Court as given below.

After hearing parties upon the case and the proof, Lord Jerviswoode in the interdict repeated the foresaid judgment, by which interdict *ad interim* had been granted, and found no expenses due to either party. In the declarator, his Lordship found—"1st, That under the titles set forth on the part of the pursuer on the record, he has right to, and is infeft on the lands of Balgy and others, with all right of salmon fishing in the river of Balgy or Balgay, heretofore belonging to the estate of Applecross; and finds that the pursuer and his authors, as proprietors of the subjects above mentioned, did, for a period of forty years and upwards prior to the year 1845, possess and exercise the right of fishing for salmon by means of net and coble, and other legal modes of fishing, in the river or water of Balgy, but in so far only as the same runs *ex adverso* of the pursuer's said lands of Balgy and others. 2d, That the defender is proprietor of, and stands infeft in the lands of Torridon and others, with the 'salmon fishings of the water of Torridon and Lochanaskaith, and the half of the salmon fishing of the water of Balgy and linn thereof, with houses,' &c., conform to the writs produced, and which are referred to in the statement of facts on his behalf; and finds that the defender and his authors, for a period of forty years and upwards, under their titles and infeftments in the said subjects, have by themselves, their tenants therein, and others, fished for salmon in the said water or river of Balgy *ex adverso* of their said lands of Torridon, by means of fishing with rod and line and otherwise, and occasionally, but not continuously, by means of net and coble. 3dly, With reference to the preceding findings, finds, in point of law, that the pursuer holds no right and title to fish for salmon in the said river or water *ex adverso* of the said lands of Torridon, the property of the defender, or to enter on the said lands for the purpose of fishing in the said river or water therefrom, or to interfere with or prevent the defender, by himself, his tenants, and others, from fishing with the rod, or by other legal means, in the said water or river of Balgy, for salmon or other fishes *ex adverso* of the defender's said lands of Torridon; and with reference to these findings in fact and in law, assoilzies the defender from the first declaratory conclusion of the summons: Finds and declares in terms of the first alternative conclusion of the summons, and *quoad ultra* dismisses the same: Finds no expenses due to either party, and decerns.

"CHARLES BAILLIE."

In a note appended to this judgment, the Lord Ordinary, *inter alia*, stated the following views:—

"The titles of the parties are in *pari casu*, in so far as neither of them can point to a direct grant from the Crown of salmon fishing. But there is a material difference in favour of the pursuer, as respects legal consequences, between the character of the possession had by him and by his authors as compared with that of the defender, in so far as fishing for salmon on the water of Balgy has been prosecuted on the Balgy (pursuer's) side by means of net and coble, while that on the defender's side has not been so continuously. It is true, and is one of the peculiarities here, that for a considerable period the fishings of both parties were held by the same tenants, and that these tenants, while thus exercising a right derived in part from the defender or his authors, did in fact fish the river with net and coble, and pay a portion of the rent to the defender or his authors therefor. But the net used by them was shot from and drawn to the Balgy shore or bank of the stream, and therefore, as it appears to the Lord Ordinary, the act of so doing cannot be held in law as amounting to an act of possession of the fishings through the right of the defender, as proprietor of Torridon.

"It is true, too, that the authors of the defender had profitable possession of salmon fishings, as attached to their lands, by letting and drawing rents therefor. But this will not, as the Lord Ordinary thinks, supply the want of a direct grant from the Crown, and in absence of such grant, come in the place of possession of salmon fishings, by the known symbols of net and coble.

"While the Lord Ordinary is thus unable to see his way to any judgment here which will directly sustain a right on the part of the defender to salmon fishings in the stream in question, he is strongly impressed with a conviction that he would err were he to give effect to the pleas of the pursuer, and to the conclusions of the summons to their full extent. It appears to him to be clear that in fact the possession of the fishings had by the pursuer and his authors has been confined entirely to that which had its direct connection with the lands of Balgy themselves, and that, so far as respected such fishings as were profitably enjoyed by the proprietors of Torridon, no dispute or question had been raised until recent times. Indeed, it seems to be sufficiently proved that for a considerable period the fishings of both sides of the river were let to, and were in the occupation of, the same tenants, and that the authors of the pursuer allowed a portion at least of the rents payable

by the tenants of the whole fishings to be drawn by the proprietor of Torridon for the time, as in his own right. In such a state of circumstances, and in the absence of direct grant from the Crown to either party, the Lord Ordinary is not prepared to hold that the pursuer is entitled to prevail here, so far as to have declarator of sole and exclusive right, or to have the defender interdicted from fishing for salmon by lawful means from his own lands in the water of Balgy, so far as that stream forms the boundary thereof."

Against these judgments both parties reclaimed to the Inner House. Sir John Stuart contended that the interdict should be recalled, and that he was entitled to decree in terms of the conclusions of the declarator. M'Barnet, on the other hand, in the interdict reclaimed against the finding as to expenses, and in the declarator, in so far as the interlocutor pronounced upon the right and possession of the pursuer, and in so far as it found and declared in terms of the first conclusion of the summons, or so far as its findings affected his rights; and also in so far as it dealt with expenses and craved to be found entitled to expenses, and to be assoilzied from the first conclusion of the summons, at least in so far as it affected his rights.

At advising,

The LORD PRESIDENT said—These questions relate to the right of salmon fishing in the water of Balgy, and began with an application for interdict, at the instance of M'Barnet against Sir John Stuart. That process came here by advocation. A declarator, however, had been brought, which took the lead. In that action Stuart sought to have it found and declared as follows (his Lordship here read the conclusions of the summons as above given). M'Barnet maintained, in defence, that Stuart had no such exclusive right as he contended for, and it was maintained that Stuart had not established any right to salmon fishing in the river at all. M'Barnet says, further, that he has right to one-half of the salmon fishing in the river, and he doesn't ask more. The Lord Ordinary thought it advisable to have an inquiry, and we have had before us the proof consisting of deeds and parole evidence. Stuart was the pursuer in the proof, and the first matter to be considered is whether he has established a right to pursue this action. He appears to be, by his own immediate titles, infeft in "salmon fishings," but in the earlier titles the right which seems to have been transmitted was "Fishings." That is a good title to salmon fishings if there is a proof of the exercise of the right of salmon fishing by net and coble. I shall state the import of the proof upon the matter of use and possession. I think it establishes, with regard to this river (the main question having been with respect to a mile of it next the sea, that being the only place where net and coble could be practised), that there was exercise of the right of salmon fishing by these means on the south or Balgy side of it. The evidence carries us so far back as to convert the word "fishings" in the titles into salmon fishings. This applies to fishings *ex adverso* of Stuart's lands, and from his own side; and so far I think the case of Stuart has been made out. In regard to the possession by M'Barnet, he appears to have been in possession for a long time under titles which give him *nominatim* salmon fishings. That title begins nearly 200 years ago. Now, what has followed upon that title? I think it appears that there has been fishing practised on the north or Torridon side of the river—use by rod and line, and for two seasons a certain amount of fishing by net and coble. This is irrespective of the use by joint proprietors, who drew their nets upon the south side, so that we have a person with right *ex facie* of the title to salmon fishings, exercising the right by rod and line, and occasionally by net and coble. I think this an avowed open exercise of the right. If the title was sufficient to give a right of salmon fishing, it was not lost *non utendo*. An intention was shown to use the right. I don't think the strict rules as to the constitution of a right to fish salmon by the exercise of it by net and coble apply to a case where such a title exists. I don't wish to give any opinion as to the necessity of fishing by net and coble in all cases—for example, in cases where it is almost impossible to fish in this way. I think that in the present case M'Barnet has made out his right to the fishings. But it is said that he has no Crown grant of the fishings. Now, I am of opinion that, whatever the right of the Crown might be, in the face of the possession which he has had in virtue of the titles which he has, Stuart has no right to stop his fishing. The conclusion, then, at which I arrive is very much the same as that come to by the Lord Ordinary. M'Barnet has shown no right to fish on Stuart's side, and, therefore, can't stop him; and as little can Stuart dispossess M'Barnet. The result is that I can't affirm the first conclusion of the summons. I can affirm, however, that Stuart has a right to fish for salmon from his own side of the stream; and, lastly, that he can't interfere with M'Barnet doing the same from the other side.

Lord CURRIEHILL, after narrating the claims made by the pursuer, said—In considering these matters, it is to be kept in view that the right of salmon fishing is *inter regalia*, and that no one can exercise it without a grant from the Crown. The first thing we have to deal with is the right of the pursuer himself. He has no title from the Crown containing an express grant of salmon fishings, but a right of fishings generally. Such a right admits of being construed by the use which follows upon it. He has led proof of possession and use. He has proved that he and his predecessors have practised salmon fishing from time immemorial. Two-thirds of the stream is so narrow and of such a rugged channel that fishing by net and coble was impracticable. They have accordingly been fished in the only legal and practicable manner. In the remaining part of the river, fishing by net and coble has been practised by the pursuer's authors. This has not been done since 1845, but it has been so used as far back from that year as the memory of man goes. But that was not exclusive possession of the fishings on the river. The proprietors of Torridon participated in it to a certain extent. The present question, however, is whether that possession on the part of the pursuer's authors is sufficient to establish right under their titles to salmon fishing. I think it is, and that the pursuer is in the same position as he would have been had he had an express grant of salmon fishings. I don't give an opinion as to what might be the result of a competition between him and the Crown. The Crown is not here, and it must be taken that it tacitly acquiesces. But in a question between the pursuer and an opposite proprietor I think the former has a good title, and therefore that he is entitled to decree in terms of the second conclusion of his summons, and to fish for salmon from his own side of the river. For I think it is not established that he has the sole title to fish. Notwithstanding, the grant to the pursuer's authors I think the Crown could have fished upon the other bank of the river, and therefore the pursuer is not en-

titled to decree under the first conclusion of his summons. So much for the title of the pursuer. The question now occurs whether he is entitled to have the defender interdicted from fishing from his own bank and exercising the possession he has had. The proof brings out that the defender and his predecessors have from time immemorial fished with rod and line; further, that with regard to the upper two-thirds of the stream they have had just the same kind of use as the pursuer. In the lower part of it, I don't think they have had any possession by net and coble except during the two seasons of 1839 and 1840. There has been another kind of possession, the general import of which is that the same tenant had right to the fishings on both sides and paid rent to both proprietors. Now, the question is whether the pursuer is entitled to dispossess the defender. That requires us to look at the defender's titles. These, *prima facie*, give him right to one-half of the salmon fishings in the water of Balgy. His title is not of modern date. It is as old as 1668, and the defender and his predecessors have been in possession in virtue of a regular feudal progress for a period of nearly two hundred years. The pursuer says the grant didn't come from the Crown. To this the defender makes two answers. He says—(1) That it does, and refers to the titles. I have looked into these, and they seem to me to give rise to very nice questions, and if the Crown were here challenging the defender's right, I don't say what the effect of such a challenge might be. But the defender says—(2) There has been prescriptive possession. Now, again, if the Crown were here, a question might arise as to the character of that possession. But the Crown is neither challenging the right nor the possession, and it is the only party entitled to do so. It tacitly acquiesces in the defender continuing the possession he and his authors have had. The question is, can the pursuer challenge that right, he not alleging a competing one? Now, my opinion is that whatever difficulties might arise were the Crown here, the pursuer can't challenge the defender's right. I therefore concur with the result come to by the Lord Ordinary.

Lord DEAS, after narrating the first two conclusions of the action of declarator, said—I am of opinion that the pursuer is not entitled to decree under the first, but I think he is under the second, construing it to mean that he has a right in common with the defender. There are two things necessary to be kept in view in dealing with this case—1st, That it is altogether a question between two subjects, not between a subject and the Crown. Any decree pronounced here can only affect the question raised as between the parties themselves, although it be in the form of a declarator. 2d, The river, from its limited breadth, when fished for salmon, is fished all the way across it. Keeping these things in view, the pursuer has a grant of fishings. A written title (which is essential) we have, and that title may be construed by use, and has been construed, to mean salmon fishings. But that is salmon fishings in connection with the lands of Balgy. With the exception of affirming the second conclusion, I think there should be absolvitor granted in favour of the defender. There are two reasons for this opinion, either of which, however, would be sufficient to prevent the pursuer getting the judgment he seeks further than under the second conclusion. First, The pursuer has no title to the fishings in the Balgy in connection with the lands of Torridon. The pursuer's grant only gave him a right to fish from his own side, and a right might have been given by the Crown to the fishings on the other side. This would be very clear had the river been a broad one. But the same law applies to a narrow stream. I don't say that this state of his title would have been sufficient to prevent the pursuer from obtaining interdict against the defender had he been a mere trespasser. Though the pursuer had no right to the fishings on the Torridon side, he might still prevent one intruding there, because he had a right to fish all the way across the stream, and any one fishing from the other side would be fishing on ground of which the pursuer was a common proprietor. His interest, therefore, to prevent trespass, is palpable and direct. But then comes the second ground on which the pursuer can't get judgment against the defender to the extent craved. The defender is a person who, in the most limited view which can be taken, has a title of such a character as at least to raise questions requiring to be combated and adjudicated upon in this Court. This relieves him from the character of an intruder. But, further, I think he has a very good title as against the pursuer. He has a base title to one-half of the salmon fishings in the river. He has had sufficient possession to prevent that title being lost, even if it could be lost, by disuse. The possession required is reduced by reason of the positive title. I don't give an opinion as to whether the defender has a good title on which he could prescribe a right against the Crown. But the Crown is not here, and the prescriptive possession has been such as to indicate the assertion and maintenance of the right, and that is enough. It is not necessary to be quite continuous. I think, further, that the evidence shows that the proprietors on each side of the river thought that both had right to the fishings. On these grounds I arrive at the same conclusion as your Lordships.

Lord ARDMILLAN said—This is a case of some interest, which has been felt by the parties to be important, and which is in some respects important as regards the law. After deliberate consideration of it, I have come to the same conclusion as your Lordships. I have directed attention to four points—(1) What is the pursuer's right upon his titles and possession? (2) What is his right in a question with trespassers encroaching on the fishing? (3) What is the defender's right upon his titles and possession? And (4) what is the pursuer's title to challenge the defender fishing on the Torridon side of the river? With respect to the 1st of these points, I think the pursuer has instructed a title to the fishings attached to the estate of Balgy which could be reared up and has been made good to embrace salmon fishings *ex adverso* of and from his own lands. The 2d point depends on the peculiarity of the river. If it had been a broad stream, on which the rights of proprietors extended only to the middle, a proprietor would not have been entitled to challenge a trespasser on the opposite bank. But the stream in question is a narrow stream, which, even with rod and line, is fished from bank to bank, and therefore any fishing, even from the other bank, is an encroachment on the ground to which the proprietors have right. 3d, I think it clear that the defender has instructed a base right of about two centuries duration, not to the fishings merely, but to one-half of the salmon fishings in the water of Balgy, and consequently he did not require the same kind of possession as the pursuer did to rear up his right. His possession was only required to show that he was in the avowed exercise of his legal right. I don't give any opinion as to whether, in

a river, where there can't be possession by net and coble, a right may be reared up by other means. But where a proprietor has a title to salmon fishings, it is not required that he should use net and coble to the same extent as in rearing up a title of "fishings" only. But the defender has used net and coble for two years. There has been rod fishing for a long time, and the fishings have been let by advertisement from the Torridon proprietors. Then, 4th, Can the pursuer challenge the defender with two centuries of possession upon ground competent to the Crown that he has not connected his title with the Crown? There are elements in the titles produced which give indications to connect the title by the subject superior with a right from the Crown. But I think it is not competent to the pursuer to insist in this ground of challenge.

Judgment accordingly, and adhere in interdict case.

The SOLICITOR-GENERAL, for defender, asked expenses. In the interdict he had been successful. In the declarator he had never disputed the pursuer's right to one-half of the fishings. The whole question had been as to his right to fish from the defender's side as well as his own, and he had failed to establish such right. The defender's objection to the pursuer's title was as to his title to interfere with the defender's fishings.

The DEAN of FACULTY, for the pursuer, said the interdict sought had been only granted in part. In the declarator, the defender had all along disputed the pursuer's right to the fishings, and put him to proof of the possession he had had to explain his title. He had established his right.

The Court thought the defender entitled to expenses in the interdict as having been substantially successful in the case. In the declarator the defender had contended to the last that the pursuer had not established any right to salmon fishings in the river. No expenses would be awarded in that action.

Counsel for Sir John Stuart — The Dean of Faculty, Mr Young, and Mr Adam. Agent—James Steuart, W.S.

Counsel for Colonel M'Barnet—The Solicitor-General, Mr Gifford, and Mr Balfour. Agents—W. H. & W. J. Sands, W.S.

SECOND DIVISION.

BEATTIE *v.* ADAMSON.

Poor — Settlement — Residence — Retention — Pupil Child — Desertion by Father — Statutory Notice — Parochial Relief. A female child, aged 11, and in a weak state of health, was deserted in 1856 by her father, who had then a residential settlement in the parish of C., and she was relieved by the parish of B. Statutory notice was not given to C. until 1860. Held (*alt.* Sheriffs of Lanarkshire and Lord Barcaple, *diss.* Lord Cowan) (1) that the time for ascertaining the settlement was the date of first obtaining relief, and not the date of the statutory notice; (2) that the settlement which the child had in 1856 was one acquired by her in her own right, and was not lost by reason of her father's absence from the parish of C.; (3) that her own absence for four years did not cause the loss of her settlement, as she was in receipt of parochial relief; (4) that the parish of C. could not plead that the relief given was not parochial relief, because it had admitted that it was. *Opinion* (per L. J. Clerk) that there may be something exceptional in the state of a pupil child's mental or bodily health to make it, although not deserted, a proper object of parochial relief.

This was an advocation from the Sheriff Court of Lanarkshire. The advocator, who is Inspector of the Barony Parish of Glasgow, sued the respondent, who is Inspector of the City Parish of Glasgow, for repayment of certain advances amounting to £64, 2s. 4d., made by him for behoof of a pauper, Elizabeth Clark, betwixt 20th August 1857, and 9th October 1863, with interest thereon, and also for relief of her maintenance and support in time coming. He averred that the City Parish was the parish of her settlement.

Elizabeth Clark was born in the parish of St Cuthbert's in the year 1845. She was taken into the poorhouse of the Barony Parish in September 1856, her father having then deserted her and three other children. The father was then in possession of an acquired residential settlement in the City Parish, but he has not resided in that parish since 1854. On 20th August 1857, the father returned to the Barony Parish and repaid to the pursuer the advances which had been made on behalf of the three other children, but refused, as was alleged, to pay the advances made on behalf of Elizabeth, or to remove her from the poorhouse. This refusal was denied by the City Parish and there was no proof led in regard to it; but as matter of fact she remained in the poorhouse, and is there still. A statutory notice was sent to the City Parish on 20th August 1857, but it was contended that this notice did not apply to Elizabeth, but only to the other children. A good statutory notice was, however, admitted to have been given on 12th June 1860. The pursuer made the following averment on record in regard to the condition of the pauper's health:—

"The said Elizabeth Clark was, during the period embraced in said account, in delicate health, having scrofulous swellings, and being subject to falling sickness and other disease, rendering her unable to earn her own livelihood, and she was then, and still continues to be, a proper object of parochial relief;" and the answer to this averment was—"Admitted that Elizabeth Clark was, during the period mentioned, in delicate health, but denied that she was and is a proper object of parochial relief."

The defender stated the following pleas in law:—

"1. Alexander Clark having ceased to reside within the City Parish of Glasgow, in or about the month of May 1854, and not having resided thereafter within said parish for one year during the period of five years subsequent to said date, he lost the settlement he had acquired within said parish for himself and children. 2. The said Alexander Clark being an able-bodied man, neither he nor his children were proper objects of parochial relief, and any relief given by Barony to the children was therefore illegal, and can have no effect as against the defender in the present question. 3. Assuming that the defender is legally liable in relief to the pursuer for advances on account of the foresaid Elizabeth Clark, such liability would only arise for advances made subsequent to the foresaid 12th day of June 1860, in respect that no statutory notice was given to the defender of her having become chargeable prior to said date. 4. When the said Alexander Clark returned to Glasgow, as before mentioned, and repaid Barony a sum on account of their advances to his children, and relieved them of the chargeability of three of them, Barony was bound to have handed over the care and custody