whether the goods were conform to order. Furthermore, I take it, before the possession could be held to have passed, something else remained to be done. The purchaser had to return the draft. Now, no time was lost in all this. He had got the invoice intimating that the goods had been despatched upon Saturday evening, and upon Monday forenoon, shortly after learning that they had been received, he made up his mind, in consequence of a letter which he had received from the bank, to suspend business, and then he at once sent orders to lay these goods in question aside, like a sensible and honest man. Mr Bell in his Commentaries (i. 238) lays it down thus, without hesitation—"So if it be stipulated as the condition of a bargain, or if goods be sent accompanied by a draft to be accepted and returned, and the goods are received, but the acceptance not sent, the property is not passed, the goods are still unsold." And the case of *Brodie* v. *Tod & Co.*, 20 March 1814, F. C., on which he founds, is directly in point. If that be so, we must decide for the pursuers on the second ground of action, and direct the goods to be returned to them.

LORD GIFFORD concurred.

The Court pronounced the following interlocutor:—

"Find that the goods in question were ordered from the respondents (petitioners) by the bankrupt, Robert Lumgair, on 24th November 1874, at the price of £40, 10s. per ton, for which a bill was to be granted as at that date; that the goods were forwarded on the evening of Friday, 27th November, by railway from Dundee, and were delivered at the bunkrupt's warehouse on Saturday morning, and were received into stock by his manager, who used a certain portion of the goods, but without the bankrupt's knowledge; that the respondents on the 28th November sent by post a letter of advice, invoice, and bill, which were received after business hours by the bankrupt at his private residence: Find that the bankrupt on calling at his works on Monday the 30th November learned for the first time that the goods had arrived; that, without giving any instructions, the bankrupt proceeded to his office, and there found a letter from the bank with which he did business, restricting his credit to an extent which obliged him to stop payment: Find that the bankrupt did not accept the bill sent him, and directed the goods to be put aside: Find that in these circumstances the property in these goods never passed to the bankrupt, and that the sellers were entitled to have them back: Therefore dismiss the appeal and affirm the judgment appealed against, and decern; and in respect that the goods in question were sold of consent of both parties, and that the proceeds thereof, amounting to £416, 8s. were deposited by Messrs David Martin & Company, merchants, Dundee, in the National Bank of Scotland, Dundee, to await the orders of the Court, conform to deposit-receipt, dated 13th September 1875, No. 25 of process, grant warrant to the Accountant of Court, or other custodier thereof, to deliver up the said receipt to the respondents or their agents, and ordain the Bank to make payment to the respondents of the said sum of £416, 8s. with the interest accrued thereon, upon delivery of the said receipt, and decern: Find the respondents entitled to expenses, and remit to the Auditor to tax the same, and to report."

Counsel for the Petitioners—Dean of Faculty—H. Johnston. Agents—Leburn, Henderson, & Wilson, S.S.C.

Counsel for the Respondent—Balfour—Pearson. Agents—Webster & Will, S.S.C.

Tuesday, January 11.

FIRST DIVISION.

[Lord Mackenzie.

LADY GRAY *v.* RICHARDSON AND OTHERS.

Property—Title—Salmon Fishing.

A and B were co-terminous proprietors of lands situated on the river Tay. The description in A's titles was "All and haill, the just and equal sunnie half of all and haill the lands of I . . . as the same is presentlie occupyed and possessed by A. P . . with the just and equal half of the salmond fishings and others fishings of the saidis lands of I." The description in B's titles was —"All and haill, the quarter or fourth part of the town and lands of I., ... last occupyet be J. B., and now by myself," as also "the other quarter or fourth pairt of all and haill the said town and landis of I., . . presentlie possesset by G. L., my tennent, . . together with the just and equal half of the salmond fishings and other fishings of the saidis lands of I." Prior to 1795 the whole lands of I. were held by the predecessors of A. and B. in alternate lots or kavels, and each proprietor possessed the salmon fishing *ex adverso* of his respective kavels. In 1795, by decreet-arbitral, the kavels were done away with, and the lands of I. were divided into two continuous parts, the one to belong to A. and the other to B. By this decreet the salmon fishings were reserved to the parties "according to their present boundaries." *Held*, that A and B had each an absolute right of property in the salmon fishings, not *ex adverso* of their lands, but as reserved by the decreet-arbitral, and defined by possession.

Opinion per Lord Deas that A and B were not *pro indiviso* proprietors of the lands and salmon fishings of I., but that by their titles each was sole and absolute proprietor of one-half of the lands, and of one-half of the salmon fishings.

Salmon Fishing—Crown Charter.

Circumstances in which *held* that a Crown grant in favour of a proprietor of the salmon fishings *ex adverso* of certain lands

which he had acquired by excambion was inoperative, the said fishings having been formerly granted to the party with whom the contract of excambion had been carried out, the fishing not having been dealt with in the excambion, and the Crown having had no possession adverse to that of the original granters.

Property—Division—Runrig.

Review per Lord Deas of the law in regard to the nature and effect of dividing an estate between two or more proprietors in the form of runrig or rundale.

This was an action at the instance of the Right Honourable Margaret Baroness Gray of Gray and Kinfauns, against Sir John Stewart Richardson of Pitfour, Baronet, and Mrs Fleming of Inchyra, and her husband, the Rev. Archibald Fleming, as her administrator-in-law and for his interest.

The question raised was as to the right of the salmon-fishings in the Tay *ex adverso* of that piece of ground now part of the estate of Pitfour, and the property of the defender Sir John Richardson, but formerly part of Inchyra, and called the Meadowpows or Powlands of Inchyra, which was situated immediately to the east of the march ditch, running northwards from the Tay, and separating the land of Inchyra from the estate of Pitfour. The pursuer, who was proprietor of one half of Inchyra and of one half of the salmon fishings thereof, claimed the sole and exclusive right to the salmon fishings in the Tay *ex adverso* of that piece of ground, or at all events *ex adverso* of the westmost portion thereof, to the extent of 120 yards eastward of the said march ditch, that is, as far down the river as three stones, averred to have been put down towards the beginning of the century to mark the boundary between the fishings of Pitfour and of Inchyra. The defenders, Mrs Fleming and her husband, also claimed the exclusive right to these salmon fishings as far down as the said three stones, and Sir John Richardson claimed the whole of the fishings in respect of his title to the lands of Cairnie and others, part of Pitfour, and of prescriptive possession following thereon, and in respect also of two dispositions obtained by him from the Commissioners of Her Majesty's woods, forests, and lands revenue in 1873.

The summons accordingly concluded for declarator that the pursuer had the sole and exclusive right to the salmon fishings in the river Tay *ex adverso* of the said Meadowpows or Powlands of Inchyra or otherwise *ex adverso* of the said 120 yards thereof, and that the defenders had no right to the said salmon fishings. There were also conclusions for interdict.

The pursuer's averments were to the following effect:—She was heiress of entail in possession of the estate of Gray and Kinfauns, which consisted, *inter alia*, of the Barony of Kinfauns. This Barony consisted, *inter alia*, of one-half of the lands of Inchyra (the other half belonging to the defender Mrs Fleming), lying on the north bank of the river Tay, and described in the pursuer's titles as "All and whole the just and equal sunny half of all and whole the town and lands of Inchriff, now commonly called Inchyra, with the houses, biggings, yards, orchards, tenants, tenandries, and services of free tenants, tofts, crofts, parts, pendicles, and pertinents thereof, as the same were occupied and possessed by Andrew Lyall and Allan Peat, with the just and equal half of the miln of the said lands of Inchyra, mill lands, multures, and sequels thereof, used and wont, together with the just and equal half of the salmon-fishings of the said lands of Inchyra; all and haill the passage or place of passage upon the said water of Tay, called the Ferry, &c., lying within the sheriffdom foresaid (Perth), and all which lands, baronies, teinds, fishings, heritable offices, milns, miln-lands, and others above mentioned, belonging to the said estate of Kinfauns, were united, erected, and created into one whole and free barony, called the barony of Kinfauns, conform to a charter under the Great Seal in favour of the deceased Mrs Ann Blair, grandmother of Margaret Lady Gray, the mother of the said William Lord Gray, of date the last day of February 1673 years."

Prior to the year 1795 the whole lands of Inchyra were held by the respective proprietors thereof in alternate lots or kavels, with the exception of one lot held in common; and the salmon-fishings in the river Tay *ex adverso* of each lot or kavel also were exclusively possessed by the proprietor of that lot. The eastmost lot or kavel of lands of Inchyra called the Meadow Pows or Powlands of Inchyra belonged in 1744 to Margaret Lady Gray, the pursuer's predecessor, and was bounded on the east by the lands of Cairnie, then belonging to James Hay of Pitfour (author of the defender Sir John Stewart Richardson), and on the west by the adjoining kavel belonging to Alexander Blair of Inchyra (author of the defenders Mr and Mrs Fleming). By deed of submission, dated 1st and 3d May 1744, entered into by the "Right Honourable Margaret Lady Gray, heritable proprietrix of the lands and barony of Kinfauns, whereof the Priorlands and Powlands of Inchyra after-mentioned are a part, with the special advice and consent of the Right Honourable John Lord Gray, her husband," and the said John Lord Gray for his right and interest, on the one part, and "James Hay of Pitfower, heritable proprietor of the lands of Cairny after-mentioned" on the other part—these parties agreed as follows:—"That is to say, the said parties, considering that the said Priorlands and Powlands of Inchyra belonging to the said Lady Gray, and the said lands of Cairney, belonging to the said James Hay, do ly contiguous and march together south from the mill of Cairny to the water of Tay, and that there are severall pieces of the said lands of Cairny which do ly in among the said Priorlands and Powlands, at a pretty considerable distance from the common march, as, on the other hand, there are several pieces of said Priorlands and Powlands of Inchyra which do ly in amongst the said lands of Cairny, likewise at a pretty considerable distance from the common march, which both parties find to be inconvenient for them, and a hindrance to their enclosing and improving their ground, and the occasion of debates and quarrels among their tenants: and both parties being willing, and finding it to be for their mutual advantage to have these extraneous pieces of ground so lying interspersed among the ground of the opposite heritors excambed and exchanged the one for the other, and their march made clear and distinct so as that there may be no ground of dispute betwixt

the said parties or their tenants, do hereby mutually and unanimously nominat, make choice of, and authorise William Gray of Balledgarno, Esquire, and Charles Alison, late bailie of Perth, to be judges, arbitrators, and amicable compositors betwixt them to the effect before and after mentioned, giving and hereby granting to the said judges, arbitrators, full power, warrant, and commission to settle, adjust, and determine the march betwixt the said parties their lands, from the miln of Cairnie unto the water of Tay, and to settle and determine how and in what proportion the foresaid extraneous pieces of ground lying interspersed among the ground of the neighbouring heritors shall be excambed and exchanged the one for the other, according as they shall think them in value, and to adjudge, decern, and declare these pieces of ground so excambed to pertain and belong to the heritor to whom they shall allot them as part and pertinent of their land in all time coming."

The arbiters appointed under the deed of submission pronounced the following decreet-arbitral on 11th April 1745:—"We decern and declare the lead or pow running from the miln of Cairnie to be the march betwixt the said parties their lands south from the miln of Cairnie unto the place where the said lead turns to the south-west; and there, on the south bank of the said lead or pow, we have caused dig or cast a ditch from the said Pow southward, in the field commonly called the West Inches of Cairnie, in a straight line, until we come to the old march ditch betwixt the lands of Inchyra and Cairnie, which ditch so presently digged we decern and declare to be the march betwixt the said Lady Gray's lands on the west of the said ditch and the said James Hay's lands on the east thereof in time coming, and then from the south end of the said new digged ditch, at the place where it joyns with the said other old march ditch, the said old march ditch runs towards the south-east, and is the march betwixt the lands of Inchyra and Cairnie, until it ends at the north end of a balk betwixt the lands belonging to Alexander Blair of Inchyra on the west and that piece of ground commonly called the Meadow Pows or Powlands. which formerly belonged to the said Lady Gray, but which we have now given off to the said James Hay, on the east of the said march balk, and which march balk leads down to the water of Tay; and we appoint march stones to be set up in the midst of the said march balk in different places thereof, at the mutual charge of the said parties, and to be marked with the capital letters I on the side of the said stones towards the west, and P on the side towards the east; and thus we fix and determine the march betwixt the said parties submitters their lands, from the miln of Cairnie down to the water of Tay; and we decern and declare the samen to be their fixed and established march in all time coming; and we hereby adjudge, decern, and declare all the pieces of ground which formerly belonged to the said Lady Gray lying on the east or north sides of the said march now to pertain and belong to the said James Hay and his heirs and successors, as part and pertinent of their lands of Cairnie in all time coming; and, on the other hand, we adjudge, decern, and declare all the pieces of ground which formerly belonged to the said James Hay, lying on the west or south sides of the foresaid march, now to pertain and belong to the said Margaret Lady Gray, as proprietrix of the said barony of Kinfauns, and her heirs and successors, and to the said Lord Gray, her husband, for his interest, as part and pertinent of their lands of Kinfauns, and their part of Inchyra, in all time to come." By this decreet-arbitral the piece of ground referred to in the summons became the property of the said James Hay, and was now part of the lands of Cairnie, belonging to the defender Sir John Stewart Richardson, but the salmon-fishings of, or *ex adverso* of, said piece of ground were not transferred.

From 1745 down to the year 1795 the lands of Inchyra were held, as already mentioned, in separate kavels, and the kavel immediately to the west of the Meadow Pows or Powlands of Inchyra belonged to the Blairs of Inchyra, and their successors, the authors of the defenders, Mr and Mrs Fleming, who also possessed the salmon-fishing *ex adverso* of it called the "Hen" Fishing. In 1794 a submission was entered into between William Lord Gray and John Anderson, the then proprietor of the other half of said lands, for a division of "the said whole lands of Inchyra betwixt the parties according to their different rights and interests therein," so that they might cease to be possessed "runrig and rundale" as theretofore, "with power to the said arbiters or oversman to divide the said lands between the said parties, according to their different rights and interests therein, quantity and quality considered, by a line running from the water of Tay northward to the north boundary of said lands, so as best to accommodate both parties, and to adjudge and declare the west part thereof to belong to the said William Lord Gray, and the east part thereof to belong to the said John Anderson." The submission contained the following reservation regarding the salmon-fishings:—"reserving always to both parties the right of the salmon-fishings in the river Tay respectively belonging to them, according to their present boundaries, and which boundaries are not to be affected by any division that may be made in consequence thereof, but that the said arbiters, after such division, shall have power to put in march stones in the ground belonging to either party, to ascertain the boundaries of the salmon-fishings belonging to the parties respectively, which are not to be affected by the said division."

By decreet-arbitral in this submission the lands were divided according as now possessed by the pursuer and the defenders Mr and Mrs Fleming; and the decreet-arbitral contained the following provision regarding the salmon-fishings of the respective parties:—"*Septimo*, We reserve to the parties submitters the salmon-fishings on the river Tay respectively belonging to them according to their present boundaries, wherein we have infixed march stones in the ground; and we also reserve to both parties access to their different fishings, and to draw and to dry their nets according to use and wont. We find that the lowest or eastmost fishing belongs to Lord Gray, and is altogether opposite to the lands of Pitfour, being bounded to the west by the old march stone between the lands of Pitfour and Inchyra, which we ordered to be marked number one. That the several fishings between

the stones number one and number two, numbers three and four, numbers seven and eight, numbers nine and ten, numbers eleven and twelve, numbers thirteen and fourteen, and numbers fifteen and sixteen, being seven in number, do all belong to the said John Anderson. The stone number sixteen stands in the march between the lands of Inchyra and Ribney. That the several fishings between the stones numbers two and three, numbers four and five, numbers six and seven, numbers eight and nine, numbers ten and eleven, numbers twelve and thirteen, numbers fourteen and fifteen, being also seven in number (besides the fishing opposite to the estate of Pitfour), do all belong to Lord Gray, and that the fishing between the stones number five and six, called Hurle Carle, is the joint property of Lord Gray and Mr Anderson; and, in terms of the said submission, we do hereby declare that the said fishings respectively belonging to each of the said parties shall not be hurt or affected by the division now made of the lands, but that the said fishings shall be enjoyed and possessed according to the rights, custom, and usages heretofore observed by the said parties, their authors, and predecessors."

At the date of this said decreet-arbitral the fishings in the Tay were not so valuable as they afterwards became, and the said eastmost fishing had not been fished. There was then in the Tay *ex adverso* of the Meadow Pows an island called Cairnie Island, which belonged to the proprietors of Pitfour, and they fished for salmon from the south bank of this island; but they did not fish from the Meadow Pows. Between this island and the eastern portion of the Meadow Pows a branch channel only of the river flowed, but not sufficient to induce the proprietor of the "eastmost fishing" to fish in it; and between the westmost end of the island and the march with the Hen fishing there was a space of clear water of about 120 yards or thereby *ex adverso* of the western portion of the said Meadow Pows. In 1807 or 1808 the branch channel was partially closed, and in 1826 it was totally closed and converted into arable land by the construction of an embankment, and became part of the mainland or north shore of the river Tay. It was the fishing between what had been the westmost end of the island and the lands of Inchyra which was the subject of the alternative conclusions of the summons.

Sir John Richardson was heir of entail in possession of Pitfour, which comprehended, *inter alia*, "All and haill the lands of Cairney or Cairnie, with towers, fortalices, mill and mill lands thereof, and the free and astricted multures of the said mills, as also the salmon and other fishings in the water of Tay belonging to the said lands, and with all other tofts, crofts, parts, pendicles, outsets, tenants, tenandries, and services of free tenants thereof," &c. Cairnie Island formed part of these subjects.

Sir John Richardson averred that in virtue of their titles his authors had from time immemorial a sole and exclusive possession of the salmon fishings *ex adverso* of their lands, and in particular *ex adverso* of Cairnie Island and a gravel bank known as Cairnie Bank, which lay opposite to the said Meadow Pows or Powlands. Further, he had obtained in 1873, from the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, a grant of the said fishings.

Mrs Fleming was proprietor in fee, and her husband was liferenter of the lands and barony of Inchyra, described in the title as "All and haill that quarter or fourt part of the towne and landis of Inchyra, with houses, biggings," &c., "and pertinents thereof last occupyet be James Blair, and now by myself," and "sicklike," "All and haill the other quarter or fourt pairt of all and haill the said towne and landis of Inchyra, with houses, biggings, pendicles, and pertinents thereof presentlie possesst be Gilbert Lyell, my tennent, with the just and equal half of the mylne of Inchyra, mylne lands, multers, and sequels of the salmen, used and wont, with the just and equal half of the salmond fishings and other fishings of the saidis landis of Inchyra, and all and haill that malt-barn, kill and condbill presentlie possessit by the said Gilbert Lyel, and all and haill these houses and yards of Inchyra, presentlie possessit by Francis Jack."

The lands and barony of Inchyra were bounded on the west by the lands of Kinfauns, and on the east by the lands of Pitfour. The Pow meadows immediately on the east side of the barony of Inchyra, was formerly part of the Pow lands of Inchyra, and was situated on the riverside. In virtue of the grant of the just and equal half of the fishings contained in their titles, Mrs Fleming averred that her predecessors had from time immemorial exercised the rights of salmon-fishing in the river Tay not only *ex adverso* of their lands (called the Hen fishings), but as far down the river as three march stones which had been placed between the years 1807 and 1826 to mark the boundary between the fishings of Pitfour and those of Inchyra.

In 1756 the pursuer's predecessor had raised an action in the Court of Session against the defender's predecessor for declarator that the pursuers had right to one half of the fishings of the lands of Inchyra, and that the defenders had no exclusive right to any particular fishings thereon. This process was submitted to the Lord President and Lord Prestongrange as arbiters. In this arbitration Mr and Mrs Fleming averred that a decreet-arbitral was pronounced in 1757 in the following terms:—"Find that the parties submitters, as heritors of the two-half lands of Inchyra, and salmon-fishings thereto belonging, have each of them a distinct and divided right and possession of the said salmon fishings belonging to the parties, and lying opposite to the greens adjoining to the different kavels or gleibs of the said lands, and that they and their heirs and successors may continue to possess the said fishings, or any other fishings to be made out by them belonging to the said lands, and to sett, use, and dispose thereon in a separate divided manner in all time coming, as they have done in times past, unless the partys submitters or their heirs and successors shall find it their mutual interest, and shall agree to alter that manner of possession; in which event the arbiters find that they may possess the same, and sett, use, and dispose thereof in a joint and undivided manner, if they should think it convenient, and the arbiters decern and declare accordingly." A scroll only of this decreet was produced.

The pursuer pleaded—"(1) The pursuer, by virtue of her title to the barony of Kinfauns, including the half of the lands of Inchyra, and

salmon-fishings thereof, has the sole right and title to fish for salmon and other fish of the salmon kind in that part of the river Tay *ex adverso* of the piece of ground libelled known as the Meadow Pows or Powlands of Inchyra, and is entitled to decree of declarator in terms of the conclusions of the summons. (2) The defenders having no right or title to the fishings in question, the pursuer is entitled to interdict against them as concluded for."

The defender Sir John Richardson pleaded—"(1) The action is unfounded, in respect that the defender, by virtue of his titles to the lands of Cairnie, salmon-fishings, and others aforesaid, and, *separatim*, in respect of the possession had under the said titles, has the sole and exclusive right to the salmon-fishings claimed in this action. (2) *Separatim*, the defender has right to the said salmon-fishings by virtue of the Crown grants of 1873 above mentioned. (3) The action cannot be maintained, in respect that the pursuer has no right or title to any part of the fishings claimed. (4) Even assuming that the pursuer's predecessors had at one time right to the said salmon-fishings, or part thereof, such right has been cut off and lost by the operation of the positive and also of the negative prescription. (5) The pursuer's whole material statements being unfounded in fact, and the action being groundless, the defender ought to be assoilzied, with expenses."

The defenders Mr and Mrs Fleming pleaded—"(1) The allegations of the pursuer are not relevant and sufficient to support the conclusion of the action as regards the fishing possessed by the present defenders as a part of their 'Hen' fishing. (2) The claim stated in the summons, so far as applicable to the fishing possessed by the defenders within the three march stones referred to in condescendence, art. 11, is excluded both by the negative and the positive prescription. (3) It is *res judicata* that the defenders have a distinct and divided right to the salmon-fishings belonging to them, and lying opposite to the old 'greens' adjoining to the different kavels of Inchyra, as the same was formerly possessed, excepting in so far as they or their predecessors may have agreed to alter that manner of possession; and no such agreement being alleged, and the defenders and their predecessors having possessed the fishings in dispute, within the limits indicated by the foresaid stones, from time immemorial, as a part of their 'Hen' fishing, and as pertaining to their lands and barony of Inchyra, they are protected by the Statute 1617, cap. 12, against being disturbed in the possession and enjoyment of the same, and are entitled to *absolvitor* from the action, so far as directed against them, and applicable to the salmon-fishings above the said stones. (4) The allegations of the pursuer as against the present defenders being ill-founded in fact, the defenders are entitled to *absolvitor*."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 5th January* 1875.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process—Finds that the pursuer is infeft in All and Whole the just and equal sunny half of all and whole the town and lands of Inchriff, now commonly called Inchyra, and pertinents, with the just and equal half of the salmon-fishings of the said lands of Inchyra, all which lands, fishings, and others were created into one whole and free barony, called the Barony of Kinfauns, conform to charter of resignation under the Great Seal in favour of Mrs Ann Blair, dated 28th February 1673: Finds that the defender Mrs Isabella Rattray or Fleming is infeft in All and Whole one equal half of all and sundry the said town and lands of Inchyra and pertinents, with the just and equal half of the salmon-fishings and other fishings of the said lands of Inchyra, which lands, fishings, and others were united into one whole and free barony,. called the Barony of Inchyra, conform to charter under the Great Seal in favour of Alexander Blair, dated 3d May 1662: Finds that the said salmon-fishings of the lands of Inchyra, in which the pursuer and the defender Mrs Isabella Rattray or Fleming are infeft, include the salmon-fishings in the Tay situated *ex adverso* of that portion of the estate of Pitfour and others now belonging to the defender Sir John Stewart Richardson, and formerly called the Meadowpows or Powlands of Inchyra, as far to the east of the march-ditch running northward from the river Tay, between that part of the lands of Inchyra now belonging to the defender Mrs Isabella Rattray or Fleming and the estate of Pitfour as a line drawn to the centre of the river Tay through the three stones situated on the said portion of the estate of Pitfour and others, formerly called Meadowpows or Powlands of Inchyra, and marked the said three stones A B C on the copy of the Ordnance Survey plan, No. 79 of process: Assoilzies the defender Mrs Isabella Rattray or Fleming and the Reverend Archibald Fleming, her husband, from the conclusions of the summons as laid, and decerns, reserving right to the pursuer to institute, with reference to the said salmon-fishings of Inchyra, such other action or actions as she may be advised, and to the defender Mrs Fleming and her husband their defences thereto as accords: Finds that the defender Sir John Stewart Richardson has not proved that he, his predecessors and authors, proprietors of the lands of Cairnie, and of the salmon and other fishings in the water of Tay belonging to the said lands, possessed the salmon-fishings *ex adverso* of that portion of ground now part of the estate of Pitfour, and formerly called the Meadowpows or Powlands of Inchyra, situated between the said march-ditch and the stones A B C above mentioned, for forty years prior to the institution of the present action, or for any consecutive period of forty years, whereby their title to the salmon-fishings attached to their lands and estate of Cairnie can be made applicable to the said salmon-fishings: Finds that the dispositions obtained by the defender Sir John Stewart Richardson from the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, dated 28th July and 8th August 1873, do not confer on him any right to the salmon-fishings in the Tay *ex adverso* of the portion of ground above mentioned, in respect that the pursuer and the defender Mrs Isabella Rattray or Fleming have a valid and effectual title thereto, completed anterior to the granting of the said dispositions: Finds and declares that the defender Sir John Stewart Richardson has no right

of salmon-fishing in the river Tay *ex adverso* of the said portion of ground, and that he is not entitled to fish for salmon, or fish of the salmon kind, in any part of the said river *ex adverso* of the said portion of ground, and interdicts, prohibits, and discharges the defender Sir John Stewart Richardson from fishing for salmon, or fish of the salmon kind, in any manner of way *ex adverso* of the said portion of ground: Finds that the defender Sir John Stewart Richardson has right to the salmon-fishings in the Tay situated *ex adverso* of his property as far west or up the Tay as the line drawn to the centre of the river through the three stones A B C above mentioned, and decerns;. and appoints the cause to be put to the motion roll, with a view to the disposal of the question of expenses.

"*Note.*—The question raised in the present action is as to the right to the salmon-fishings in the Tay *ex adverso* of that piece of ground now part of the estate of Pitfour, but formerly part of Inchyra, and called the Meadowpows or Powlands of Inchyra, which is situated immediately to the east of the march-ditch running northwards from the Tay, and separating the lands of Inchyra from the estate of Pitfour. The pursuer, who is proprietor of one-half of Inchyra and of one-half of the salmon-fishings thereof, claims the sole and exclusive right to the salmon-fishings in the Tay *ex adverso* of that piece of ground, or at all events *ex adverso* of the westmost portion of said piece of ground, extending 120 yards or thereby eastward of the said march-ditch, that is, as far down the river as the three stones marked A B C on the copy plan No. 79 of process. On that footing she has raised the present action of declarator and interdict against Mrs Fleming, proprietrix of the other half of Inchyra, and her husband, and also against Sir John Stewart Richardson, proprietor of the adjoining estate of Pitfour. The defenders Mrs Fleming and her husband also claim the sole and exclusive right to these salmon-fishings as far down as the said three stones A B C, and Sir John Richardson claims the whole of these fishings in respect of his title to the lands of Cairnie and others, part of Pitfour, and of prescriptive possession following thereon, and in respect also of two dispositions obtained by him from the Commissioners of Her Majesty's Woods, Forests, and Land Revenues in 1873.

"The Lord Ordinary is of opinion that the pursuer has failed to instruct any right to the salmon-fishings to the east of the three stones A B C.

"In regard to the salmon-fishings *ex adverso* of that part of the Meadowpows or Powlands between the march-ditch and the said three stones, it is necessary to notice the state of the title and the acts of the predecessors of the parties.

"Previous to the year 1744, the predecessors and authors of the pursuer Lady Gray and of Mrs Fleming were each infeft under titles flowing from the Crown in one-half *pro indiviso* of the lands of Inchyra, and in one-half *pro indiviso* of the salmon-fishings of these lands. These lands were then possessed by them and their predecessors in runkavels or by separate glebes. The eastmost kavel of Inchyra, being the Meadowpows or Powlands, was then possessed by Lady Gray, and the adjoining kavel on the west was possessed by Alexander Blair, proprietor of the other half of Inchyra. The lands of Cairnie, part of the estate of Pitfour, were situated immediately to the east of the Meadowpows or Powlands of Inchyra. Lady Gray was also proprietrix of certain lands called the Priorlands, which formed no part of the *pro indiviso* lands of Inchyra, but were a separate estate. In the year 1744, Lady Gray and her husband, and Mr Hay of Pitfour, entered into a submission, which, on the narrative that there are several pieces of the lands of Cairnie lying among the Priorlands and Powlands of Inchyra, and several pieces of the latter lands lying amongst the former, provided for the adjustment of the march between these lands by the excambion of portions of the interspersed pieces of ground. In 1745 the arbiters adjusted the march, by their decreet-arbitral, from the mill of Cairnie down to the Tay, and they gave off to Mr Hay of Pitfour the Meadowpows or Powlands then possessed by Lady Gray, and appointed march stones, with the capital letters I on the west side of each stone and P on the east side, to be set up in the march-baulk between the lands, that is, the kavel on the west belonging to Mr Alexander Blair of Inchyra and the Meadowpows or Powlands. The arbiters also, by their decreet-arbitral, adjudged the pieces of ground which previously belonged to Lady Gray, lying on the east and north sides of the march so fixed by them, to belong to Mr Hay, his heirs and successors, as part and pertinent of their lands of Cairnie in all time coming. No title was ever expede to the Meadowpows, and that piece of ground was thereafter held under the decreet-arbitral as a pertinent of the lands of Cairnie.

"The said submission did not include the Inchyra salmon-fishings situated *ex adverso* of the Meadowpows. Accordingly the decreet-arbitral did not deal with these fishings in any way, and they remained the property of the *pro indiviso* proprietors of the lands of Inchyra and of the fishings thereof. The Meadowpows or Powlands had a frontage to the Tay, as is proved by the old estate plan of Pitfour, No. 81 of process, of about 260 yards.

"The salmon-fishings of Inchyra were possessed by each of the two *pro indiviso* proprietors opposite to the kavels respectively held by them until the year 1756, when Lady Gray and her husband Lord Gray raised a summons of declarator in the Court of Session, concluding that they and the Misses Blair, the other proprietors *pro indiviso* of Inchyra, had no exclusive right to any particular fishings, and that these other proprietors should be ordained to desist from appropriating to themselves any particular fishings of the lands of Inchyra.

"This process was submitted to the Lord President and to Lord Prestongrange as arbiters, with whom various written pleadings were lodged by the parties. In the first of these pleadings, being a memorial for the Misses Blair, in 1756, the various fishings are mentioned, from the lands of Ribney on the west to the lands of Pitfour on the east. In this memorial the Misses Blair state that to the east of a kavel of Lady Gray and her fishing opposite thereto, called the Lady's Glove, there 'lyes a kavel belonging to the respondents (Misses Blair), and opposite thereto there's a fishing called the Laying Hen,

and next thereto lyes a kavel, the eastmost part of the lands of Inchyra, adjoining to the lands and estate of Mr Hay of Pitfour, which sometime belonged to Lady Gray, and was the largest kavel on the river of any belonging to the lands of Inchyra, and was some years ago sold off and disponed by her to the deceased Mr Hay of Pitfour, in excambion for the piece of land adjoining to the lands called the Priorlands, belonging to the Lady Gray.'

"After thus stating the situation of the lands, the Misses Blair maintained, in defence to Lady Gray's process, 'that as the claimants have some years ago disponed the largest and broadest kavel of the whole lands to Hay of Pitfour, with the water adjoining thereto, the respondents therefore humbly think that by such alienation the claimants can't now demand any share of the respondent's fishings, because they have sold off a considerable part of their own, and so are not capable, on their part, of making ane equall division; and the respondents observe this the rather because a most commodious and convenient fishing, it's thought, might have been, and is now, actually made opposite to that kavel of land which was disponed by the claimants to Hay of Pitfour. With reference to this defence, Lady Gray stated, in a memorial lodged for her in 1757, that she does acknowledge that she did excamb some part of her eastmost kavel of the lands of Inchyra with Mr Hay of Pitfour, and that this excambion was settled by a submission and decreet-arbitral, an extract whereof is herewith produced to the honourable arbiters, from which it will appear that the claimant gave to Pitfour no right of fishing opposite to that part of the lands given to him, and if there can be any fishing opposite to these lands, the same does still belong to the heritors of Inchyra; and it is a certain fact that Mr Hay of Pitfour has not extended his fishing opposite to the lands of Inchyra farther than he was in right or in use to do before that excambion.'

"The arbiters issued a scroll decreet-arbitral in 1757, but there is no evidence that any decreet-arbitral was ever executed. Various pleadings were thereafter lodged by the parties in 1758, in one of which the Misses Blair claimed that the fishing called Hurlcarle should be possessed in common, and in another of which Lady Gray maintained that if the Misses Blair should still insist upon this fishing being common, she and Lord Gray must 'adhere to their first claim, viz., that the whole fishings be in common, and that each party draw their equall shares of the profites thereof, in terms of their rights and infeftments.' In a subsequent pleading the Misses Blair maintained that the Hurlcarle fishing should continue to be possessed as joint property or in commonty by the parties, 'in the same way and manner as they have been possest since the said fishings were made out.' This the parties seem to have done down to the year 1794, when a submission was entered into between Lady Gray and Mr Anderson of Inchyra for the division of the lands of Inchyra, but not of the fishings.

"That submission of 1794 did not embrace the salmon-fishings of the lands, but expressly reserved the same to the parties respectively, according to the then existing boundaries; but power was given to the arbiters to define the fishing by putting in march stones. This the arbiters accordingly did. By their decreet-arbitral, dated in 1795, they found 'that the lowest or eastmost fishing belongs to Lord Gray, and is altogether opposite to the lands of Pitfour, being bounded on the west by the old march stone between the lands of Pitfour and Inchyra, which we ordered to be marked Number One;' that the several fishings between the stones No. 1 and No. 2, and the other stones therein specified and numbered, being seven in all, did all belong to Mr Anderson; that the several fishings between the stones No. 2 and No. 3, and the other stones therein specified, 'being also seven in number (besides the fishing opposite to the estate of Pitfour), do all belong to Lord Gray; and that the fishing between the stones Number Five and Six, called Hurlcarle, is the joint property of Lord Gray and Mr Anderson.'

"In making the division of the lands of Inchyra contained in this decreet-arbitral of 1795, the Lord Ordinary thinks that the arbiters must have been fully aware that the Meadowpows was the eastmost kavel of the lands of Inchyra, and that they had been given in excambion by Lady Gray to Mr Hay of Pitfour, but that the salmon-fishing had not been excambed, and that they also must have taken that kavel into computation in effecting the division of the lands, because they dealt with the fishing *ex adverso* thereof as then forming part of the *pro indiviso* salmon-fishings of Inchyra. They found that the lowest or eastmost fishing belonging to Lady Gray was bounded on the west by the old march stone between the lands of Pitfour and Inchyra, which they ordered to be marked No. 1. The boundary between the kavel belonging to Alexander Blair of Inchyra on the west, and the Meadowpows or Powlands of Inchyra given by the decreet-arbitral of 1745 to Mr Hay of Pitfour, is therein stated to be a baulk leading from the old march ditch between the lands of Inchyra and Cairnie down to the Tay, and march stones were thereby appointed to be set up in different places in that baulk. The old march stone so ordered by them to be marked No 1 must have been one of these march stones appointed to be placed in the baulk by the decreet-arbitral of 1745. In or shortly before 1826 a ditch was cut in the line of this march baulk, and it is proved that the march stones which were then in the march baulk were, after the ditch was cut, put into it, where they still remain, being five in number. On the third stone from the river there is an I on the west side and a P on the east side of the stone; and on the stone nearest the river there is cut, according to the witnesses for the pursuer and for Sir John Richardson, the figure 1, but according to the witnesses for Mrs Fleming, the letter I. There is no other mark on this stone. The pursuer's witnesses state that this stone is in its original state, while Mrs Fleming's witnesses say that a piece has split off the stone from the side opposite that on which the letter I is cut. There are no marks on the other three stones in the march ditch. The fact remains that this stone has only one figure or letter upon it. Whether the stone has split, and whether it is the figure 1 or the letter I which is cut upon it is mere matter of conjecture, and it is of no great importance, because the decreet-arbitral of 1795 proves beyond all doubt that the stone which

the arbiters ordered to be marked No. 1 is the old march stone between Inchyra and Pitfour, and that old march stone must have been one of those placed in the above-mentioned baulk in the line of which the present march ditch was cut in or about 1826. Mrs Fleming maintains that the stone A on the Ordnance Survey plan, No. 79 of process, is the stone ordered to be marked No. 1 by the decreet-arbitral of 1795. But that is, it is thought, impossible, because the stone A is 86 yards to the east of the march ditch.

"In and previous to 1826 there was situated in the Tay opposite the lands of Cairnie and the eastern part of the Meadowpows an island called Cairnie Island, which formed part of the lands of Cairnie, and from which, or part of which, the proprietor of Pitfour was in use to fish for salmon. It is, the Lord Ordinary thinks, proved that the westmost or upper point of that island was situated opposite the old stone A, in the river bank, on the sides of which are cut the letters I and P. This stone could not be a land march, as it is situated on the Meadowpows river bank 86 or thereby yards to the east of the march ditch between Inchyra and Pitfour, while the Meadowpows extended from that march ditch 260 or thereby yards down the river. In 1826 Sir John Richardson connected Cairnie Island with the Meadowpows, and filled up the channel of the river between that island and the Meadowpows. And in or about 1831 two other stones were put in the new river bank in a line between the above-mentioned old stone A and the centre of the river. These two stones, marked B and C on the copy of the Ordnance Survey plan, No. 79 of process, were placed, according to the evidence of Sir John Richardson, by Mr John Anderson, W.S., brother of the then proprietor of Inchyra, and his (Sir John's) commissioner, Sir John himself and his ground-officer being present, and also the Inchyra ground-officer, an old fisher of the name of Ireland, and some others. Sir John Richardson states that he heard that the stones were prepared by Lord Gray's mason.

"The above-mentioned Hen fishing was in and prior to 1838 fished at its lower or eastern extremity from a cairn. That fishing cairn was removed in 1838 by the Tay Commissioners, and a new cairn was erected nearer the land. That new cairn, called the Commissioners' cairn, was used as the fishing cairn at the lower or eastern end of the Hen fishing until 1843, when it was removed, and a hauling place formed near the line of the three stones A B C on the river bank, which has been used from that date to the present time by the tacksmen of the Hen fishing.

"The Lord Ordinary thinks that he has now adverted to the chief matters which require to be attended to in disposing of the question between the parties as to the salmon-fishings between the march ditch and the three stones A B C above-mentioned.

"1. In so far as the action is directed against Mrs Fleming and her husband, the Lord Ordinary is of opinion that the pursuer cannot obtain decree in terms of the conclusions of the summons. By these conclusions the pursuer asks for decree of declarator that she has the sole and exclusive right to the salmon-fishings in question, and that Mr and Mrs Fleming have no right thereto, and should be interdicted from fishing them. Mrs Fleming is infeft in the one-half *pro indiviso* of the Inchyra salmon-fishings, and the pursuer is infeft in the other half thereof. The pursuer, therefore, cannot obtain against Mrs Fleming and her husband the absolute and exclusive decree which she claims.

"The Lord Ordinary is satisfied that the Hen fishing terminated at the march ditch separating the lands of Inchyra from Pitfour, that is from the Meadowpows or Powlands, and that this fishing was situated *ex adverso* of the kavel on the west, which belonged in 1745 to Alexander Blair of Inchyra. That is clear from the decreet-arbitral of 1745, and from the memorial of 1756 for the Misses Blair of Inchyra, the predecessors of Mrs Fleming, and also from the decreet-arbitral of 1795. Even assuming that there had been no change since 1795 in the possession of the fishings by the *pro indiviso* proprietors, either by consent of these parties or *rebus et factis*, that old allocation or possession of the fishings would not, the Lord Ordinary thinks, warrant the absolute declarator of property in the fishings opposite the Meadowpows concluded for by the pursuer; although it might have warranted a decree of a limited and possessory nature, such a decree cannot, it is thought, be pronounced under the conclusions of the present summons. But even although that were competent, the pursuer could not obtain it, because it is proved that in 1844 a new allocation of the Inchyra fishing was made by the two *pro indiviso* proprietors. At that date Mrs Fleming's predecessor was in possession of the fishing to the east of the old Hen fishing and of the march ditch, and was fishing that fishing as far down as the stones A B C as part of the Hen. That extended piece of fishing only became available in 1843 by the removal of stones from the bed of the river, which interfered with the hauling of the net; and from the time that it became available down to the date of the present action it has been fished as part of the Hen under that new division or allocation of the fishing made in 1844.

"The defenders Mr and Mrs Fleming maintained that they have proved prescriptive possession of the fishing between the Glove fishing and the stones A B C. A great amount of evidence has been led on this point. After carefully considering that evidence, the Lord Ordinary is of opinion that the account given with reference to this fishing by the pursuer's witnesses George Gelletly, John Lennox, Andrew Swan, tacksman of the Hen from 1835 to 1843, and by Sir John Richardson's witnesses, Archibald Powrie, tacksman of the Hen fishing in 1843, and from that date to 1847, and James Davidson, also a tacksman of the Hen fishing, is entitled to much greater weight than the account given by the witnesses for Mr and Mrs Fleming. From the evidence of these witnesses the Lord Ordinary is satisfied that until 1838 the Hen fishing terminated at a fishing cairn situated nearly opposite the march ditch, which is the old eastern boundary of that fishing according to the memorial for the Misses Blair in 1756 above mentioned; that this cairn was removed by the Tay Commissioners in 1838, and a new fishing cairn erected nearer high water-mark, and a short distance further down the river than the march ditch, and that this new cairn, called the Commissioners' Cairn, was re-

moved in 1843, at the expense of the Tay Commissioners, by Archibald Powrie, who ploughed and levelled the beach with levelling boxes, in which operation he took away thousands of tons of gravel; that he thus formed a new hauling place for the salmon nets on the river bank, a little above the line of the stones A B C; and that this new hauling-place was used as the place for hauling the nets of the fishers fishing the Hen from 1843 down to the date of the present action. Mr and Mrs Fleming maintained that they have been in possession of the Hen fishing for forty years and upwards prior to the date of the action, and had acquired a prescriptive right thereto, and were entitled to have it found that they had the sole and exclusive right to that fishing. The Lord Ordinary is of opinion that they have not proved possession for forty years and upwards; and that it is proved that the Hen was not fished by them and their predecessors below the march ditch until 1838, and that the fishing was only extended down to the present hauling-place in 1843. There is great discrepancy in the evidence on this point. But the Lord Ordinary considers that the evidence for the pursuer and for Sir John Richardson is entitled to much greater reliance than the evidence for Mr and Mrs Fleming. Farther, Mr and Mrs Fleming can never acquire, as in a question with the pursuer, an exclusive right to any part of the Inchyra fishings in the face of their own title, which gives them only a right to one-half of these fishings, while the pursuer is infeft in the other half thereof.

"Upon this question of prescription Mr and Mrs Fleming maintained that there was a stripe of uncultivated ground or 'green' extending from the march ditch down to the old stone A, and situated between the old river bank and the river, which belonged to and was pastured by their predecessors. But that ground or 'green' was part of the Meadowpows which was adjudged to Pitfour by the decreet-arbitral of 1745, his western boundary being therein defined as the baulk which 'leads down to the water Tay.' It appears from the evidence that the Inchyra cows pastured this piece of ground for a few years prior to 1826, when it was of little value, but in doing so they trespassed upon Sir John Richardson's property, and all such trespass ceased in 1826, when the new embankment was formed and the march ditch deepened.

"2. As regards the defender Sir John Richardson, the Lord Ordinary is of opinion that he has completely failed to prove prescriptive possession of the salmon-fishings on his title to the lands of Cairnie, above the western extremity of Cairnie Island, which, as proved, extended up the river only as far as the line of the stones A B C. His title to the lands of Cairnie gave him only a right to the salmon-fishings of these lands, and the western boundary of these fishings was the western end of Cairnie Island. The decreet-arbitral of 1745 gave him no right to the salmon-fishings of the Meadowpows. These fishings then belonged, and still belong, to the proprietors of the estate of Inchyra. The old march stone A, which has I and P cut upon it, was not a land march stone. It has been in its present place beyond the memory of man. It is proved by the witness James Davidson to have been there 61 years ago. The faggot dyke, which was erected in 1807 with a view to the filling up of the channel between Cairnie Island and the north river bank of the Meadowpows, ran between this stone and the western extremity of Cairnie Island. The Lord Ordinary is of opinion that this old stone must have been a fishing march stone put in to indicate the eastern end of the Inchyra fishing, probably in or about 1795, when the other march stones were placed in the march baulk. The view that this old stone was a fishing march stone is supported by the fact that more than two-thirds of the Meadowpows are situated to the east of it, and by the placing in 1831 of the stones B and C in the new embankment connecting and incorporating Cairnie Island with the north river bank. There is also a great deal of evidence in the proof to the effect that when these two stones B and C were put in the new river bank they were inserted in connection with the old stone A, for the purpose of defining the march between the Inchyra and Cairnie fishings, a very necessary act, seeing that Cairnie Island had been recently incorporated with the river bank, and its western end obliterated. It is also proved that the old stone A went by the name of the old Hen march stone, and was so called by aged witnesses long since dead. Sir John Richardson, his ground-officer, the gardener of Mr Anderson of Inchyra, who was the predecessor of Mrs Fleming, an old fisher called Ireland, and some others, were present when the two new stones B and C were fixed. Robert Young, who fished the Glove fishing in 1834 and 1835, depones that the two stones were called the march stones of the Hen betwixt Sir John and Inchyra, and that Ireland (who sometimes fished with him) told him that he 'howkit' the holes and put the two new stones into them, and that they were put in 'for the march betwixt Sir John and Inchyra.'

"Sir John Richardson maintained, on the authority of the opinions expressed in the case of *Lord Wemyss* v. *The Town of Perth*, 31st May 1867, 39, Scottish Jurist, p. 429, with reference to Balhepburn Island, that his Cairnie fishings were not limited by the western extremity of Cairnie Island, and that as proprietor of that island he was entitled to fish as far up the river from its western extremity as his nets could reach. But that case is not, the Lord Ordinary thinks, in point. Sir John has a title to the lands of Cairnie and to the salmon-fishing belonging to these lands. In the Balhepburn case the title gave the town of Perth the sole and exclusive right to the salmon-fishings in the 'Tay pertaining to Balhepburn Island, lying either round about the said island, and upon every part of the same, or wherever the same lyes, or may and shall lye, any manner of way,' and the town was in possession of that right. Sir John Richardson has not proved that he ever possessed any right to fish as he now claims from the western end of Cairnie Island. From 1843 Mr and Mrs Fleming and their predecessors have been in possession of the salmon-fishings opposite the Meadowpows as far down as the stones A B C, that is, as far down the river as the western extremity of Cairnie Island, where Sir John's Dadhead fishing begins, and when his Dadhead fishers attempted to come upon the water above these three stones, on two or three occasions since 1843, the tow-rope of their nets was cut and they were

turned off. That possession, and these acts of Mrs Fleming and her predecessors, are, the Lord Ordinary thinks, available to the pursuer, seeing that they are *pro indiviso* proprietors, and that such possession was obtained and held under an arrangement between them for the allocation of the fishings.

"It was also maintainedby Sir John Richardson that the pursuer had failed to instruct that the Meadowpows were a part of the lands of Inchyra, to which a grant of salmon-fishings is attached, and that the Meadowpows are not a part of the Priorlands belonging exclusively to the pursuer, the titles to which do not confer a right of salmon-fishing. The Lord Ordinary is of opinion that the Meadowpows were a part of the lands of Inchyra, and not a part of the Priorlands. The Meadowpows are situated at the eastern end of Inchyra, and are a continuation of these lands along the Tay, whereas the Priorlands are at a distance from the Tay, and are separated from the Meadowpows by other parts of Inchyra and by the lands of Cairnie. This is proved by the old Inchyra estate plan of 1769, No. 80 of process, and by the table of contents therein, and also by the old estate plan of Pitfour, No. 81 of process. Sir John Richardson, when examined as a witness, also proves this, and so do other witnesses. There is also another old estate plan of the lands of Inchyra, No. 141 of process, which shows that the Priorlands are situated at a considerable distance from the Meadowpows. It is no doubt the case that the submission of 1744 was between Lady Gray and Mr Hay of Pitfour, and that Mr Blair, the other *pro indiviso* proprietor of Inchyra, was not a party to it; but that arose, the Lord Ordinary thinks, from the mistaken notion that each *pro indiviso* proprietor was entitled to deal with any kavel possessed by him as if it were his absolute property. Accordingly, the decreet-arbitral of 1745, in defining the western march of the Meadowpows, described it as a 'march-baulk betwixt the lands belonging to Alexander Blair of Inchyra on the west, and that piece of ground commonly called the Meadowpows or Powlands' which belonged to Lady Gray, and was given off by that decreet to Pitfour. Now, the land belonging to Alexander Blair on the west was simply the kavel of the *pro indiviso* lands of Inchyra situated immediately to the west of the Meadowpows, which was the eastern kavel thereof, possessed by Lady Gray.

"The pleadings of the proprietors of Inchyra in the submission of 1756 also clearly proves this. The memorial of 1756 for the Misses Blair states that the kavel adjoining the Meadowpows on the west belongs to them, 'and next thereto lyes a kavel, the eastmost part of the lands of Inchyra adjoining to the lands and estate of Hay of Pitfour, which sometime belonged to Lady Gray,' and was some years ago given by her in excambion to Hay of Pitfour. The memorial for Lady Gray in 1757, in answer to that for the Misses Blair, acknowledges 'that she did excamb some part of her eastmost kavel of the lands of Inchyra with Mr Hay of Pitfour,' as settled by the decreet-arbitral, but that she gave to Pitfour no right of fishing opposite to that part of the lands given to him, and that the fishing belongs to the heritors of Inchyra. In the decreet-arbitral of 1795 the lowest or eastmost fishing of Inchyra, situated to the east of the Inchyra and Pitfour march, is dealt with as belonging to Lord Gray.

"Sir John Richardson maintains that these memorials and the decreet-arbitral of 1795 are not competent evidence against him on the question whether the Meadowpows are a part of Inchyra or of the Priorlands. The Lord Ordinary is of a different opinion. These memorials contain statements of fact of very old date, made by parties with reference to fishings belonging to them. Sir John Richardson's predecessors acquired in 1745 a piece of land then also their property, but he did not acquire any right to the salmon-fishing *ex adverso* thereof, and never had any right thereto. The submission of 1794 and decreet-arbitral of 1795 had reference, besides the division of the remainder of the lands of Inchyra, to the possession of these salmon-fishings and the insertion of march stones for the purpose of defining the boundaries of the salmon-fishings belonging to the proprietors respectively. The stone A, which has the letter I cut on the east side and the letter P cut on the west side thereof, is not without significance in connection with the decreet-arbitral of 1795, placed as it is in the land then acquired by Sir John opposite the upper end of Cairnie Island, and at a distance of 86 yards from the march ditch, and of 174 yards from the eastern end of the Meadowpows. But even if it were held that these pleadings and the decreet-arbitral of 1795 cannot be founded on as evidence against Sir John Richardson on this question as to the identity of the lands, it is sufficiently established by the parole proof that the Meadowpows are not a part of the Priorlands, but are a part of the lands of Inchyra."

The pursuer reclaimed.

The pursuer argued—(1) Taking the case upon the footing of the lands and fishings being held upon a *pro indiviso* title, the fishings *ex adverso* of each kavel had since before 1745 been separately possessed along with their respective kavels, and when the lands were divided by the decreet-arbitral of 1795 it was agreed that the fishings should continue to be separately possessed according to the marches therein defined, therefore the fishings in dispute being *ex adverso* of a kavel originally belonging to or at least separately possessed by the pursuer's ancestors, now belonged to her. But (2) if the title was not a *pro indiviso* title, each party (the pursuer and defender Mrs Fleming) was the separate and exclusive proprietor of her respective kavels and the fishings *ex adverso* thereof.

The defender Mrs Fleming argued—(1) Both the lands and fishings were upon a *pro indiviso* title, and although the lands were divided in 1795, the possession which had been had of the fishings since that date had been a mere arrangement between the parties, each being still *pro indiviso* proprietors of the whole; the Lord Ordinary was therefore right in holding that the pursuer could not get decree as concluded for; (2) the Lord Ordinary was wrong upon the evidence of possession of the fishings in dispute, these having been possessed by this defender for more than forty years.

Sir John Richardson argued—(1) He had possessed the said fishings under his title to the lands and fishings of Cairnie for more than forty years; (2) these fishings were never part of the Inchyra estate, but the Meadow Pow was part of Priorlands, which had no grant of salmon-fish-

ings, and therefore now belonged to him under the Crown grant of 1873.

At advising—

Lord Deas—The summons in this case concludes that it should be found and declared that the pursuer Lady Gray "has the sole and exclusive right to the salmon fishings in the river Tay *ex adverso* of that piece of ground formerly called the Meadow Pows or Powlands of Inchyra, and which formerly belonged to the pursuer's predecessor, and which now belongs to the defender Sir John Stewart Richardson, or otherwise to the salmon fishings *ex adverso* of the westmost portion of that piece of ground to the extent of 120 yards." The summons contains a farther conclusion that it should be found and declared that neither Sir John nor Mr and Mrs Fleming, who are the only other parties called as defenders, have any right of salmon fishing *ex adverso* of the said piece of ground, or at all events *ex adverso* of said westmost portion thereof, and that they should be interdicted from interfering with the pursuer's possession and enjoyment thereof accordingly.

It will contribute to clearness to consider, in the first instance, the question as between Lady Gray on the one hand, and Mr and Mrs Fleming on the other. The dispute with Sir John Stewart Richardson is of quite a different nature, and I shall deal with it afterwards.

The Lord Ordinary has assoilzied the defenders Mr and Mrs Fleming "from the conclusions of the action as laid, reserving right to the pursuer to institute, with reference to the said salmon fishings of Inchyra, such other action or actions as she may be advised."

The single ground assigned by the Lord Ordinary for this decision is that one-half *pro indiviso* of the whole fishings of Inchyra, including the fishing in dispute, belongs to Mr and Mrs Fleming, and the other *pro indiviso* half thereof to Lady Gray. If this be so, I cannot doubt that his Lordship's decision falls to be affirmed. But after very full and careful investigation into the titles, I am humbly of opinion that such is not the state of the titles here, either as regards the fishing *ex adverso* of that part of the estate of Inchyra called the Meadow Pows, which is directly in controversy, or as regards the other fourteen or fifteen valuable fishings belonging to the two parties respectively along the river boundary, the property of which, it is quite clear, must be governed by the same rule which is applicable to the Meadow Pow fishing.

The Lord Ordinary holds that, anterior to the submissions and decrees-arbitral, to be immediately noticed, there was no distinction between the right and title of the parties to the lands of Inchyra and their right and title to the fishings—that is to say, that both lands and fishings equally belonged to them *pro indiviso*. He says in his note—"Previous to the year 1744 the predecessors and authors of the pursuer Lady Gray and of Mrs Fleming were each infeft, under titles flowing from the Crown, in one half *pro indiviso* of the lands of Inchyra, and in one half *pro indiviso* of the salmon fishings of these lands." Following out this view to its legitimate conclusion, the Lord Ordinary accounts for the fact that Lady Gray did not obtain the consent of Mr and Mrs Fleming's predecessor to the transference of the Meadow Pows to Sir John Richardson's predecessor under the submission of 1744, by observing that this "arose, the Lord Ordinary thinks, from the mistaken notion that each *pro indiviso* proprietor was entitled to deal with any kavel possessed by him as if it were his absolute property."

If the Lord Ordinary were right in supposing that the title of the parties to the Inchyra estate—consisting as it did of a great number of interjected portions called kavels, of which the Meadow Pows was one—was a *pro indiviso* title, it would follow of course that the predecessor of Lady Gray could not possibly transfer the property of the Meadow Pows to the predecessor of Sir John Richardson without the concurrence of the predecessor of Mr and Mrs Fleming. That the Lord Ordinary should have proceeded on the assumption that the title was a *pro indiviso* title is not perhaps surprising when it is considered, that the parties themselves had at different periods of their former litigations maintained varying and inconsistent views on this subject, influenced no doubt by their supposed interests for the time being, and that it has only been after the case came into the Inner-House that an approximation has been made to a full recovery and placing before the Court of important titles and documents which were not before the Lord Ordinary in this case, nor before the Court and the House of Lords in the action instituted by Sir John Richardson against Mr and Mrs Fleming, decided in this Court on 16th July 1868, and in the House of Lords on 28th July 1871.

From the titles latterly produced we find that in and prior to 1655 Sir Alexander Blair of Balthayock stood vested under the Crown as proprietor of the whole lands of Inchyra with the salmon and other fishings pertaining thereto. By charter and disposition dated 16th June of that year, Sir Alexander, in consideration of a price paid, sold and disponed to William Blair of Tunsappie, the predecessor of Lady Gray, "All and haill the just and equal sunie half of all and haill the town and lands of Inchyra, with houses, biggings," pendicles, and pertinents, &c., "as the same is presentlie occupyed and possessed by Andro Lyell and Allan Peat, with the just and equal halff of the salmond fishingis and uthers fishingis of the saidis landis of Inchyra, and all and haill the passage upone the water of Tay called the ferry, with the ferry boates, privileges, and commodities thereof."

Having thus disposed of the one-half of the estate of Inchyra, Sir Alexander Blair shortly thereafter sold and disponed the other half to his brother Andrew Blair and his wife, for a price paid, apparently out of the wife's funds. The disposition is dated 2d August 1655, and conveys to the purchasers and the heirs-male of their marriage (reads *ut supra*).

These two deeds were respectively followed by infeftment, and the same description of the subjects has been substantially continued in the feudal titles of the respective parties down to the present time. The first mentioned deed forms the commencement of Lady Gray's separate progress, and the second mentioned deed the commencement of that of the Flemings.

Reading these two deeds together, we find that the one half, which now belongs to Lady Gray, is described as the sunny half (synonymous, it is understood, with the eastern half), and is said to

be then occupied and possessed by Andrew Lyell and Allan Peat, and the other half, which now belongs to Mr and Mrs Fleming, is stated to consist of two quarters, the one of which had been last occupied by James Blair, and was now occupied by Sir Alexander himself, while the other quarter is stated to be then possessed by Gilbert Lyell, Sir Alexander's tenant, and the houses and yards belonging thereto to be then possessed by Alexander Jack. It seems impossible, therefore, *prima facie* at least, to resist the conclusion that what Sir Alexander Blair conveyed to each of his original disponees and their successors was not a *pro indiviso* but a separate half of the town and lands of Inchyra, each disponee becoming the exclusive proprietor of the half conveyed to him.

But this point is somewhat complicated by the fact that within less than a century after the date of the two conveyances thus granted by Sir Alexander Blair we find evidence under the hands of the predecessors of both of the parties whose rights I am now considering (and indeed the fact is not disputed), that long before that time (how long does not appear) the whole estate of Inchyra (extending to between 400 and 500 Scots acres) had been parcelled out into lots or kavels, upwards, I think, of one hundred in number, of various sizes, but the two next each other being generally nearly of a size, and that Lady Gray's predecessors and the predecessors of the Flemings had been respectively and immemorially in the enjoyment of each alternate kavel, in regular succession, and that this continued down to the date of the decreet-arbitral of 1795, to be immediately adverted to. The counsel on both sides have referred to the plan No. 141 of process as sufficiently accurate for reference on this subject, with the explanation that the Meadow Pows, which formed the eastmost kavel, is not shown on that plan, having been previously transferred to Sir John Richardson.

The way in which this ancient parcelling out of the lands has complicated the question of title has been by giving rise to an idea, which seems to have impressed the mind of the Lord Ordinary, that the parcelling out had been intended for occupancy only, and not as marking out the separate property of the parties. To remove this idea as regards the lands is vital to the question of title to the fishings, to which, by natural transition, the Lord Ordinary applies the same rule when he says "that old allocation or possession of the fishings would not, the Lord Ordinary thinks, warrant the absolute declaration of property in the fishings opposite the Meadow Pows, although it might have warranted a decree of a limited and possessory nature," which is not concluded for.

I have therefore been anxious to obtain what light I could upon the nature and effect of dividing an estate by kavels, or, in other words, of parcelling it out between two or more proprietors in the form of runrig or rundale. The practice has been long abandoned, and the means of information in regard to it, although they may be considered sufficient, are certainly not more than sufficient for the present purpose. It was frequently resorted to in early times where an estate had to be divided among heirs-portioners or adjudgers, so that each got a share of the different kinds of soil and climate which the locality afforded, although at other times one continuous portion was allotted to each, as is invariably done in modern times since planting and improvement introduced a preference for a compact estate. The most common mode of proceeding, whether by heirs-portioners or adjudgers, was by obtaining a brieve of division from Chancery, directed to the Sheriff or other Judge Ordinary, who summoned a jury, at whose sight kavels, as they were called, were cast for the different lots, which, after an equalising valuation, were apportioned accordingly.

Lord Stair, who published his work in 1693, gives a form of the brieve, which is retained in our familiar style books at the present day. There is no difference either in the form of the brieve or in the effect of the procedure, whether the division is to be by alternate kavels or in any other way. The object and effect was and is to divide the right of property, and so the matter is treated of by all the authorities. Balfour, in his Practicks (p. 440-1), gives a full account of the procedure under the brieve of division, the object of which, he says, is "to ken ilk ane of thame to thair awin partis" of the lands. "And efter the inquest has partit and dividit the saidis landis the Clerk of the Court sould put the samin in form of ane rolment and decrete of the said inquest, and cause the samin to be seillet with the seilles of the persounis of inquest togidder with the Schiref's seill; and thairefter the said Schiref sould cause the saidis persounis to cast cavellis upon the said partis;" after which the parties are to be entered "ilk ane to thair awin part, conform to the cavil obtenit be thame, and to be bruikit and joisit be thame in all time cuming, conform to the decrete and deliverance of the said inquest, and the meithis and merchis expremit thairin." He afterwards says, in substance, that although the division may be reduced. if not fairly and equally done, yet "gif ather of the parties gevis infeftment to his sone or any uther persoun of ony part of the landis fallin to him be the said divisioun, he ratifies and approvis the samin, and thairfoir on na wayis may impugn the said divisioun, nor call for reduction thairof."

Bankton says (i-8-38) — "The division among co-heirs, co-adjudgers, or other conjunct proprietors, *pro indiviso*, proceeds on a brieve out of Chancery, directed to the Sheriff of the bounds, subject to the review of the Lords of Session, though the sentence is founded on a verdict. In the division among heir-portioners, the mansion-house, yards and garden, or orchards, not in use to be set for rent, will be alloted to the eldest; and she is likewise preferred to the custody of the writings." This is obviously treating the division as a division of property and not of occupancy merely. I may observe, however, that what the learned author says about review by the Court of Session must be taken as qualified by the judgment in *Cathcart* v. *Rocheid*, February 1772, M. 7663.

Mr Bell, in his Commentaries (vol. i. p. 64, 5th edition), in like manner treats the brieve of division as applicable to the property of the subjects; and in a note he observes—"For the case of heirs-portioners the very old form of a brieve of division still subsists. It is directed to the Sheriff, a jury is named under his authority to measure and lay off the shares, and by lot they are appropriated to those interested. The matter

is commonly arranged extrajudicially by referees." In his Principles (§ 1081, 3d edition), he details the procedure, and says—"5. The verdict settles the shares; and lots being cast, the division is fixed by decree of the Court. 6. Extract and possession complete the separate rights of the parties in their shares of what was formerly common." Mr Bell describes the remedy by brieve as competent to all joint proprietors, and, in § 1083, he mentions that, among heirs-portioners, "peerage or superiority go as *præcipuum* to the eldest," and that this preference is extended to a mansion-house.

But it is from Dallas, our oldest and most authoritative formalist, that we get the most direct and valuable information, because he gives us the style of a decreet of division in which the mode adopted is division into two halves by *runrig*, which is just the mode in which we find the lands of Inchyra to have been here divided.

It would appear to have been the practice to issue a decreet to the party to whom fell the sunny half of the lands, and a separate decreet to the party to whom fell the shadowy half. Accordingly the style given by Dallas is the style of the decreet issued to the party to whom had fallen the shadowy half. After narrating the brieve, the swearing of the inquest, and other preliminary proceedings, the style bears "which persons of inquest, after long consultation and advisement, divided the forenamed lands into halves, betwixt the said portioners, by *runrig*, as it shall happen them by cavel, conform to the points of the brieve, as they lie in length and breadth, after which declaration and deliverance in plain Court the Judge caused cast cavels, and to the said J. fell the shadow half; to the which verdict the said Judge instantly interposed his authority, and kenned and entered the said J. B. compearing the said J. in her name, and himself for his interest; which division of the forenamed lands, made in manner foresaid, the said Judge decerned and ordained to be observed and kept by both the said parties, and the said lands to be brinked and joysed by them, their heirs and successors, conform to the said division. In witness of the which I have caused my Clerk of Court subscribe these present letters testimonials with his hand at S, the day of years."

A *nota* is added—"This brieve is not retoured, for the Judge puts all immediately in execution, and the parties in possession conform."

It will be specially noted that in the style thus given by Dallas, the inquest are said to have "divided the forenamed lands into two halves, betwixt the said portioners, by runrig," and, at the same time, the half which fell to one of the parties (consisting obviously of kavels alternating with those which fell to the other party) is called the shadowy half. We have thus the authority of that eminent conveyancer for holding that where the just and equal half of certain lands was conveyed to one party, and the other just and equal half to another party, such conveyances were quite apt and habile to cover the case of each half, consisting of alternate kavels, lying runrig or rundale, although that could only be seen on going to the ground. And this again (I may as well here observe by anticipation) suggests that similar conveyances of the just and equal halves of the fishings of the same lands would be equally apt and habile, in the language of those days, to convey to each of the parties the alternative fishings *ex adverso* of their respective kavels, although this peculiar position and alternation of the fishings, in like manner with the peculiar position and alternation of the lands, could only be known by going to the locality and ascertaining how these fishings were marked out and possessed. It follows that infeftment in "All and haill the just and equal sunie half of all and haill the towne and lands of Inchyra, together with the just and equal half of the salmon fishings of the said lands of Inchyra," was then, and consequently still is, in point of expression an apt and habile feudal title to the exclusive property of all and each of the kavels which constitute that half, and to the exclusive property of all and each of the fishings connected with that half, if such appears to have been really the meaning intended to be expressed, of which afterwards.

The parties, I understand, have made every effort in order to discover at what period the lands of Inchyra were parcelled out into kavels, but without success. All the probabilities are against this having taken place subsequent to the deeds of alienation of 1655, and as no writings connected with it have been found within that period, I conclude that it must have occurred anterior to the date of these deeds, either by voluntary deed of agreement now lost, or under a brieve or action at the instance of adjudging creditors or heirs-portioners. The fact that the whole estate in the person of Sir Alexander Blair was made up of a half and two separate fourths, points strongly to the conclusion that there had been a judicial division by kavels in or before his time, and that the estate stood in that form when he transferred it to his disponees respectively in 1655. We have no titles showing how he acquired either the sunny half or the two fourths, but the presumption *post tantum temporis* is that the division by kavels was made in a manner lawful and usual at the time, and if so the result would be the same whatever the precise form of procedure may have been.

It is not now very easy to see the consistency of calling one half of a divided estate the sunny half and the other the shady half, where both halves were intermingled with each other in alternate kavels, as the halves of the estate of Inchyra undoubtedly were. Mr Johnstone suggested an explanation which I think probably correct, viz., that the party to whom fell the sunny or eastern half was entitled to the kavel nearest the morning sun, the party to whom fell the shady half to the next kavel, and so on alternately, so that a kavel of the first party was always to the east of a kavel of the second party, so long as the whole were not exhausted. Beginning with the Meadow Pows, and leaving out of view what were then the commonty lands farther inland, this would pretty well accord, in a rough and round way, with what we find to have been the distribution of the kavels of Inchyra. Be this as it may, however, it is certain, as we see from Dallas, that in those days it was quite well known which half was the sunny and which the shady half, although the whole consisted of kavels lying runrig or rundale, and that is enough for the present purpose.

After the passing of the Act 1695, cap. 23, "Anent Lands Runrig," questions arose whether

the Act was meant to be applicable to the lands of two proprietors which lay intermixed, in alternate fields (more accurately called rundale) or had in view only lands which lay in alternate ridges. such as were within my own memory, and perhaps may be still to be seen within burgh where the Act does not apply. At first the Court was inclined to put what was called a liberal construction on the Act, and held it to extend to fields of considerable size. But when it afterwards came to be clearly perceived that what the Act authorised was really not division of common property, but excambion of separate property, the Judges generally came to think that it could not have been intended to compel an excambion except where the lands to be excambed were of comparatively limited extent; and, after varying decisions, it was latterly decided, in a suit at the instance of Lady Gray against Mrs Blair and others, applicable to the very lands or kavels we are now dealing with, that an action on the statute could not be sustained as to fields containing more than four acres (17th January 1782, M. 14,151). Looking to the number of fields shown on the plans produced of smaller extent than four acres, that judgment would apparently have warranted a decerniture as concluded for with reference to these smaller fields, but an appeal entered against the judgment was withdrawn, and no further procedure in the action is understood to have taken place. If that decision was a sound one, Bankton (i. 8-9,) had put too limited a construction on the Act when he confined it to cases "where one heritor has one ridge or rig and another the second, and so on interchangeably over the whole parcel of land; and this takes place between two or more proprietors; and from the nature of the thing can only be of arable lands." Erskine had anticipated more accurately what the Court ultimately found, when he said (iii. 3-59.)—"The division competent to landholders by the last quoted Act, 1695, is not in practice confined to runrig lands in a strict sense of the word, but is by liberal interpretation extended to cases where the properties of the several heritors are broken off, not by single ridges, but perhaps by roads or acres."

The whole estate of Inchyra, both infield and outfield, stood in 1782 parcelled out into kavels, some of them large and some of them small, and thus afforded an example at once of rundale and of runrig, strictly so called. The word runrig appears to have been the generic word, but the nature of the power conferred by the Act 1695, which enabled one of two neighbours to compel an excambion of property without the other's consent, coupled with the declared policy of that Act, in connection with previous statutes, led ultimately to a somewhat strict construction being put on the word "runrig" as used in the Act. But the general principles applicable to runrig and rundale had always been the same; and when the Lady Gray and the Blairs of 1782 joined issue upon whether the Act 1695 was applicable to their Inchyra kavels or not, they necessarily did so upon the footing that the kavels of each were the separate and exclusive property of each. The report of the case, accordingly, narrates that "their respective properties lay blended together in a great number of fields of different sizes. Some of these fields consisted of thirty-five acres, some of them of ten; but by far the greatest part did not exceed five acres." The judgment obviously proceeded upon the footing that the kavels were the separate and exclusive property of the parties respectively, and the Court accordingly applied to the case the principle affirmed in the previous case of *Buchanan* v. *Clark* (M. 14,143, bottom), "that the Act, 1695, which, in the cases to which it applies, obliges a man to part with his property without his consent, being in some measure an encroachment on it, ought not to be extended."

Long before the date of the judgment of 1782, viz., in 1745, the same Lady Gray, who afterwards became pursuer in that action, had asserted and exercised her separate and exclusive right of property in the kavel called Meadow Pows in the strongest of all ways, viz., by transferring it for other land equivalent in value, to the proprietor of Pitfour, through the medium of a submission and decree-arbrital, which were both publicly recorded in July of the same year. The land so transferred has been openly possessed and enjoyed ever since as part and portion of the Pitfour estate; and neither Mr and Mrs Fleming nor any of their predecessors have ever either objected to or judicially challenged that transaction. No difference has been or can be suggested between the nature of what was Lady Gray's right of property in that kavel and her right of property in the other Inchyra kavels alternating with those of the Flemings.

An objection to this transaction, on the ground that it was *ultra vires* of Lady Gray, would indeed have been altogether inconsistent with the relative position which the parties had all along assumed towards each other as proprietors of their respective kavels, and which they were at that very time acting upon under a submission entered into in September 1743, and which issued in a decreet-arbitral in October 1747, recorded along with the submission in October 1748.

There was an uncultivated muir called the Muir of Inchyra, and there were certain greens along the margn of the Tay (which is there a public navigable river) of the nature of sea greens—that is, greens over which the tide occasionally flowed, and which, as Mr Erskine explains (ii, 6-17), have been sometimes thought to be *inter regalia*, but which he himself, agreeing with Bankton (vol. i. p. 83, § 4), considered to be ruled by the case of *Bruce*, 25th November 1714, M. 9342, in which it was found "that the sea greens might belong to the neighbouring heritors as part and pertinent without special right," and assoilzied from a declarator to the contrary "in so far as the defender's exclusive possession of property by pasturage or casting feal and divot was proved."

The submission of 1743 bore to be between Lady Gray, "heritable proprietor of the half lands of Inchyra, with consent of her husband, on the one part, and Alexander Blair, with consent of his daughters, the heirs-apparent of their deceased brother Dr John Blair, who (it is stated) was heritable proprietor of the other half lands of Inchyra," on the other part.

It is clear enough (particularly from what followed) that this meant that each was heritable proprietor of the respective kavels, which were then, and had immemorially been, possessed by each. There was not a suggestion of *pro indiviso* property in any of these kavels. On the contrary, the Muir of Inchyra and other rights held in com-

mon, and which were singled out as the subjects of dispute in the submission, were carefully distinguished throughout from the property lands, which could only have been the kavels. The subject matter of the submission was stated to be the "several rights, claims and pretensions of the parties" to the muir commonly called the Muir of Inchyra, and to the whole other commonties of the saids whole lands of Inchyra, and likewise anent any illegal or unwarrantable encroachment, made or pretended to be made by either of the parties submitters upon the property or commonty of the said lands or any part thereof, with full power to the arbiters before named to divide the said common muir and other commonties belonging to the said lands, and to allocate and assign such parts or portions thereof to either party as they shall think fit, and to decide and determine what either of the saids parties submitters shall do, pay, or perform to one another for any cause or occasion preceding the date hereof.

The decreet-arbitral which followed bears — "We find that each of the saids parties submitters have an equal right of commonty in the said Muir of Inchyra, and in that other piece of ground besouth the miln and on the heal greens from east to west, lying betwixt the laboured lands of Inchyra and the river of Tay." Following up this finding, the arbiters allocated a specific portion on the north side of the Muir of Inchyra, then marked out by march stones, to belong to Lady Gray "in full property," and a specific portion, likewise marked by march stones, on the north side of the muir, "to be the sole and full property of the Blairs."

In like manner, the arbiters appointed "the eastmost part of the high grounds of the miln inch, lying between the milne of Inchyra, and adjacent to the said Alexander Blair his part of the miln inch, long since divided, as ascertained by march stones now fixt, to be the property of the said Alexander Blair and his said daughters and their heirs, and the westmost part of the said high grounds of the foresaid miln inch as already meithed out and divided from the other part by march stones sett, to be the property" of the Blairs. A similar appointment was made as to the east and west parts of the low ground of the Miln Inch "long since divided," excepting in both cases what was marched off for repairing the damdike, the use of the miller, and access along the miln lead, and declare the same to continue in common.

Lastly, the arbiters appointed "the greens that ly from east to west betwixt the laboured lands of Inchyra and the river of Tay and possesst in common by both heritors of Inchyra, to belong in property to each of the said heritors and their heirs as aforesaid, opposite to their laboured grounds respectively, so that their property shall extend to the river opposite to the lands that are laboured by them in the same manner that the laboured grounds belong to them respectively, with this qualification that notwithstanding of the exclusive property upon the foresaid greens determined as above each heritor and his tenants shall have a right of loaning upon one another's property of the foresaid greens, in so far as is or shall be necessary for carrying manure to their respective lands and possessions, and that either from the river or from their several steadings or dwellings."

If the principal estate belonging to the parties had been held *pro indiviso*, I need hardly say that the portions of commonty or common property allocated to each, in respect of their pertinential rights would have been declared or appointed to be *pro indiviso* also. In place of this the portions allocated to each are so allocated "in full property," and what had been previously divided (probably by march stones only) is declared to be property also. Each party who was designed in the submission as proprietor of the half lands of Inchyra, is described in the decreet-arbitral as the heritor of the particular lands (that is the particular kavels) to which the newly divided portions of what had been common were added and attached. All this is utterly inconsistent with the supposition of a *pro indiviso* title to the whole estate of Inchyra, either in the form of kavels or in any other form.

That portion of the decreet-arbitral which relates to the stripes of greens along the shore is specially valuable and explicit, because it expressly recognises the right of exclusive property of each of the parties in the kavels respectively possessed by each, and totally extinguishes the somewhat startling idea that the enjoyment of centuries, during which leases had been let for terms of years, farm steadings and houses had been built, and large sums expended on fencing, planting, and other improvements, had been under some possessory arrangement merely. The respective portions of the greens opposite the laboured lands of each are declared thenceforth to be the exclusive property of each "in the same manner that the laboured lands belong to them respectively." It neither has been nor can be alleged that the laboured lands of each thus referred to were other than the kavels stretching down to the shore which the parties had respectively cultivated and improved for time beyond memory or written record, just as they had improved the kavels further inland by the expenditure of money in ameliorating the soil, planting trees, building houses, in the manner already mentioned, and upon one of which kavels the mansion-house kept up and occupied by the Blairs stood and still stands, or recently did so.

The contract of 21st August and 18th September 1784, and the submission dated 2d and registered 7th November 1795, likewise bear ample evidence under the hands of all parties interested that the different kavels were the exclusive property of the respective parties by whom they had been immemorially possessed. Thus, for instance, the contract finds Lady Gray, "after the expiry of the present tacks of her ladyship's part of Inchyra," to grant to Mrs Isobel Blair (wife of the Rev. Thomas Beat) "a valid and formal tack of the two yards belonging to the said Lady Gray, lying nearest to the mansion-house of Inchyra, the one whereof is presently in the possession of the said Mrs Isobel Blair and Thomas Beat," meaning obviously as tenants of her ladyship, "and the other lying immediately behind the onsted of houses belonging to the said Mrs Beat, which were lately possessed by James Richardson per tenant."

And the deed of submission with a view to

the excambion and division thereby authorised of the runrig and rundale lands, as well as of the commonty lands of Inchyra, empowers the arbiters to "appoint a land measurer to measure the lands, distinguishing the parts thereof belonging to the said parties respectively, and to make a plan or plans thereof," and to adjudge the miln, the ferries, and the customs, and timber growing on the lands, to belong to the person to whom the lands on which the same are situated shall be adjudged, "and to fix and determine the value thereof to be given to the other party in land or money, as the said arbiters shall think proper; and in case any of the then existing houses or steadings and growing timber on the ground of the one party should be adjudged to the other, the arbiters were empowered to decern the one party to pay the value of the houses or steadings and growing timber to the other party.

It was thus mutually acknowledged and declared in probative deeds, duly subscribed by both parties, that the lands possessed by each (personally or by their tenants) were and had all along been the separate and exclusive property of each. A plan and measurement, shewing what was thus acknowledged to belong to each, was prepared by Mr Ireland, land surveyor, by order of the arbiters, as we find from the decree-arbitral; and it is not disputed that what was so shewn embraced and substantially consisted of the kavels regularly alternating with each other, and that these were valued and dealt with by the arbiters as the separate and exclusive property of the respective parties accordingly. If the lands had been held *pro indiviso*, they could of course have been divided at any time at the suit of either party at common law. It was just because they were not held *pro indiviso* that the action which failed in 1782 had been brought on the Act anent runrig. And it was in like manner just because they were not held *pro indiviso* that the contract of September 1794 and the submission of November 1795 were necessary and were entered into. What thus required to be done, although called a division, was truly an excambion, which the common law had no power to compel. That the excambion was of a very substantial description is seen from the fact that the arbiters struck a line of division through the centre of the estate, from south to north, whereby all that had belonged to each party on the one side of the line became the property of the other.

If the lands of Inchyra had been held *pro indiviso*, as the Lord Ordinary holds, or rather assumes them to have been, it would have been very difficult to make out that the fishings were not *pro indiviso* also. Hence the care (perhaps greater than necessary) with which I have investigated into the title and history of the lands before entering specially upon the question as to the fishings, which I shall now proceed more directly to consider—still however only as between Lady Gray and the Flemings—reserving a few further observations applicable to the title both of the lands and the fishings, which it will save repetition to make once for all when I come to consider the question with Sir John Richardson.

I refrain from quoting again the dispositive clause of the deed of June 1655, describing the subjects conveyed by Sir Alexander Blair to William Blair (Lady Gray's predecessor), because it is easy to refer back to it. It conveys the sunny half of the town and lands of Inchyra, which I shall now assume not to have been a *pro indiviso* conveyance. Next, it conveys the half of the miln, with its adjuncts, then "the just and equal half of the salmon-fishings and other fishings of the saidis landis of Inchyra." Next the ferry, with its boats and privileges and the boatman's house, and lastly, the tiend shares or parsonage tiends "of the saidis halff of the landis of Inchyra and the parsonage tiends of that rig of land in the said towne of Inchyra pertaining to David Lord Balvaird."

Now, here it will be observed that the words *pro indiviso* do not occur throughout the dispositive clause. It is true that the conveyance of one-half of the miln and its adjuncts which immediately precedes the conveyance of the half of the fishings imports in law a *pro indiviso* conveyance, but this arises solely from the subject conveyed being indivisible in its nature. That does not seem to afford a very cogent reason for construing the conveyance of one-half of the fishings (which are not indivisible) as *pro indiviso* also. The conveyance of the ferry, which immediately follows, with the ferry boats, privileges, and commodities thereof, and the boatman's house, is clearly not a *pro indiviso* conveyance; for no interest whatever in these subjects is given to Andrew Blair, the disponee of the other half of the lands, by the deed of 2d August immediately following. They are accordingly not in his Crown charter of 3d March 1662, but they are in the Crown charter in favour of the heir of William, of 28th February 1673. It was in consequence, no doubt, of this state of the titles that the decreet-arbitral of 1795 found and declared that the right of ferry was to continue with and belong to Lady Gray. It is equally clear that the conveyance of the teinds "of the saidis halff lands of Inchyra," and the teinds of Lord Balvaird's rig, in the town of Inchyra, is not *pro indiviso*, but exclusive.

In like manner, in the deed just mentioned in favour of Andrew Blair, if we lay out of view the fishings themselves, we find no *pro indiviso* conveyance of anything except the one-half of the miln and its adjuncts, the conveyance of which falls to be construed as *pro indiviso*, simply for the reason I have just assigned in analysing the deed in favour of William.

If each of these deeds of 1655, after conveying a just and equal half of the lands of Inchyra, had simply said "with the salmon and other fishings of the said half of the said lands," this, no doubt, would have been a clearer form of expression. But it seems to me not to be a very strained construction to hold the words actually used as meaning the same thing, that is to say, to hold that by the just and equal half of the fishings of Inchyra was meant the half of the fishings connected with the just and equal half thereby conveyed of the lands of Inchyra. But let it be assumed that *ex facie* of the deed, while as yet nothing had followed upon it, the reasons would considerably preponderate for construing it otherwise, still there can be no better evidence of the meaning of an old deed, which it is at all possible to read in two ways, than the construction which, so far as we can discover, the parties interested themselves put upon it at the time and ever since. In the present case the evidence thus afforded is peculiarly strong, because there are here two

deeds similarly expressed in favour of two different parties, each of whom has immemorially construed them, *rebus ipsis et factis*, in the same way. There are, I think, some 14 or 15 valuable fishings *ex adverso* of the different kavels which stretch down to the river. With the exception of some promiscuous fishing at what is called the Hurle Carle, the position of which is admittedly peculiar, none of the fishings have ever been possessed as *pro indiviso* fishings. The parties have respectively had exclusive possession of the fishings *ex adverso* of their respective kavels. They have immemorially let these fishings to tenants, laid out money in improving them, and treated them in every way as their separate and exclusive property. The defenders Mr and Mrs Fleming retain possession upon that footing of what they still call their own fishings. They say in the record that the defender Mrs Fleming and her predecessors "have from time immemorial, or at least for more than forty years, exercised without interruption, on the part of the pursuer or any one else, the right of salmon fishing in the river Tay, and that within the limits and bounds marked and pointed out by march stones placed in the embankment of or near the river, along the whole of the said fishings."

More particularly, they say that the defender Mrs Fleming and her predecessors have possessed their fishing called the Hen fishing for time immemorial. And after mentioning a stone which they say marks the northern boundary of that fishing, they add—"The stone is a very old stone, and indicates the ancient boundary of the said fishing at the time when the greens adjoining the separate kavels of Inchyra still existed," that is to say, as I understand it, when the greens were not yet divided and the divided portions thrown into the adjoining kavels, which they were by the decree-arbitral of 1747. In their sixth statement Mr and Mrs Fleming farther say—"The said fishing known as the Hen, or the Laying Hen, has existed and has belonged to the defenders and their predecessors for more than a century." And in their seventh statement they quote from a decreet-arbitral which they allege to have been pronounced in 1757 in a submission between their predecessors and the predecessors of Lady Gray, by which they say it was found "that the parties' submitters, as heritors of the two half lands of Inchyra and salmon fishings thereto belonging, have each a distinct and divided right and possession of the said salmon fishings belonging to the parties and lying opposite to the greens adjoining to the different kavels or gleibs of the said lands, and that they and their heirs and successors may continue to possess the said fishings or any other fishings to be made out by them belonging to the said lands, and to sett, use, and dispose thereon in a separate and divided manner in all time coming as they have in times past." I quote this only as being adopted by Mr and Mrs Fleming as part of their statements. We have only an alleged scroll of this submission, and the supposed decreet-arbitral probably was never pronounced.

All this, whatever else may be contended for, is very conclusive of the fact that the defenders Mr and Mrs Fleming do not dispute that there has been separate and exclusive possession by the parties respectively of the fishings *ex adverso* of their own kavels, although they do not admit that the frontage of each kavel is now the precise limit of each fishing; but, on the contrary, contend that the Hen fishing has been extended by possession upon the Meadowpows, which is a separate question arising upon the proof led upon that point.

Thus, then, apart altogether from the submission of 1794 and decree-arbitral of 1795, we have the conveyance of the fishings by the deeds of 16th June and 2d August 1655 sufficiently construed as having imported a separate and exclusive, and not a *pro indiviso*, conveyance of one-half of the fishings to each of the disponees under these deeds respectively.

That submission and decreet-arbitral are, however, most important documents in this case, and would go far of themselves to settle the present dispute, which necessarily involves, not the property of the Meadowpows fishing only, but of the whole fishings which the parties have respectively hitherto enjoyed as the separate and exclusive property of each.

I have already adverted to this deed of submission as regards the lands, and I now proceed to quote the clause which follows as to the fishings. Reading it in the first person, as it would of course be in the deed of submission, it runs thus—"Reserving always to both parties the right of the salmon-fishings on the river Tay respectively belonging to them, according to their present boundaries, and which boundaries are not to be affected by any division that shall be made in consequence hereof, but that the said arbiters, after such division, shall have power to put in march stones in the ground belonging to either party, to ascertain the boundaries of the salmon-fishings belonging to the parties respectively, which are not to be affected by the same division."

Now, what does this import? Obviously, that although the kavels were thenceforth to be obliterated and the lands divided into two portions in place of very many portions, this was not to affect the fishings, which were expressly admitted to be then "belonging to them respectively" according to the existing boundaries, and which boundaries were not to be affected by any division of the lands. The property of each fishing, separately possessed, was thus recognised as separate and exclusive in the person of the party who so possessed it. The boundaries are spoken of as existing boundaries, known to both parties with less or more precision, although they had not yet been marked out by march stones, and then follows a power, equally important with the narrative on which it proceeds—"that the said arbiters shall have power to put in march stones in the ground belonging to either party to ascertain the boundaries of the salmon-fishings belonging to the parties respectively." Here again we have an admission, in one breath, of the exclusive nature of the property of the kavels and in the next of the exclusive nature of the property of the fishings. By empowering the arbiters to put in march stones to ascertain the boundaries was obviously meant that the arbiters were first to ascertain with precision what the boundaries were, and then to put in march stones to mark them for the future.

Both functions the arbiters accordingly performed. The seventh finding of the decreet-arbitral is so important that I shall make no

excuse for quoting it at length. It is in these terms:—"We reserve to the parties submitters the salmon-fishings on the river Tay respectively belonging to them according to their present boundaries, wherein we have infixed march stones in the ground; and we also reserve to both parties access to their different fishings, and to draw and dry their nets according to use and wont. We find that the lowest or eastmost fishing belongs to Lord Gray, and is altogether opposite to the lands of Pitfour, being bounded to the west by the old march stone between the lands of Pitfour and Inchyra, which we ordered to be marked number one. That the several fishings between the stones number one and number two, numbers three and four, numbers seven and eight, numbers nine and ten, numbers eleven and twelve, numbers thirteen and fourteen, and numbers fifteen and sixteen, being seven in number, do all belong to the said John Anderson. The stone number sixteen stands in the march between the lands of Inchyra and Ribney. That the several fishings between the stones numbers two and three, numbers four and five, numbers six and seven, numbers eight and nine, numbers ten and eleven, numbers twelve and thirteen, numbers fourteen and fifteen, being also seven in number (besides the fishing opposite to the estate of Pitfour) do all belong to Lord Gray, and that the fishing between the stones number five and six, called Hurle Carle, is the joint property of Lord Gray and Mr Anderson; and in terms of the said submission we do hereby declare that the said fishings respectively belonging to each of the said parties shall not be hurt or affected by the division now made of the lands; but that the said fishings shall be enjoyed and possessed according to the rights, custom, and usages heretofore observed by the said parties, their authors and predecessors."

Now, there can be no doubt at all that this seventh finding was within the powers conferred upon the arbiters. The submission sets forth in substance that the respective fishings were the property of the respective parties who had hitherto possessed and enjoyed them according to certain boundaries, in the same way as they had possessed and enjoyed the runrig and rundale lands—that is to say, the respective kavels. It stipulates that there should be no division—that is to say, no excambion of the fishings, as there was to be of the lands, but that, although these fishings would be no longer *ex adverso* of the kavels belonging to the respective parties, they should continue to be possessed and enjoyed as they had previously been by the parties to whom they respectively belonged. We have thus, in the form of a probative deed, at once the admission and the evidence of the parties themselves who had the best means of knowledge of what had been the state of things in time past, as well as a mutual stipulation that so far as regarded the fishings the same should continue to be in time to come.

In fulfilment of the duty devolved upon them by the submission, the arbiters did ascertain what had been, and consequently what were, the boundaries of the different fishings belonging to the respective parties, and caused march stones to be set, that there might be no mistake about them in future. Following the very language of the submission, they reserved these fishings to the respective parties according to these boundaries; and by an enumeration, without which their duty would have been imperfectly performed, they specified the position of the fishings belonging to each party, and the numbers of the march stones which marked the boundaries of each. In particular, they found "that the lowest or eastmost fishing" (that is the fishing opposite the Meadow Pows) "belongs to Lord Gray, and is altogether opposite to the lands of Pitfour, being bounded to the west by the old march stone between the lands of Pitfour and Inchyra, which we ordered to be marked number one." Eighty years or thereby elapsed between the date of that decreet-arbitral and the date of raising the present action. We see from the detailed powers and privileges anxiously conferred on the heritable keeper of the water of Tay by the ancient charters in process that even in the seventeenth century the salmon-fishings were considered important; but, at the same time, it is undoubted that the value of these fishings has only been gradually developed, and that some of the fishings connected with the lands of Inchyra, of which that *ex adverso* of the Meadow Pows is an instance, have only come to be considered valuable in comparatively recent times. But in so far as there has been fishing at all *ex adverso* of the lands of Inchyra, the right has been exercised since the date of the decreet-arbitral in accordance with the rights of parties as therein set forth, and in a manner inconsistent with the supposition that the fishings *ex adverso* of the different kavels were or are held under a *pro indiviso* title. The presumption in fact and in law *retro* to the date of the two deeds of 1655, being a period of 140 years prior to the date of the decreet-arbitral, is, that the possession during that period was equally inconsistent with the supposition of the fishings being held under a *pro indiviso* title, as it has been during the additional eighty years which have elapsed since the date of that decreet.

I should consequently come to the conclusion that the fishings were not and are not held under a *pro indiviso* title, although I had nothing to go upon but the terms of the two deeds of alienation of 1655, and the fact that from that time to this—a period of 220 years—the possession has been inconsistent with the supposition of such *pro indiviso* title.

An ambiguous title may no doubt be construed by possession as a *pro indiviso* title, but apart from such possession there is no presumption in favour of a *pro indiviso* title. The law, on the contrary, is hostile to *pro indiviso* titles, and favourable to their conversion into separate and exclusive titles. Here the fishings are all connected with the lands. They are included in the same titles, and although the words used in the titles had been less open to construction than they are, I could not have construed them in one way where the parties themselves, *rebus ipsis et factis*, had for between two and three centuries construed them in a different way. And I should come to this conclusion although the submission and decreets-arbitral of 1747 and 1795 were to be altogether laid aside or had never existed.

As to the contention of Mr and Mrs Fleming that the negligence of Lady Gray has enabled them to extend the eastern boundary of their Hen fishing so as to embrace a portion of the

space *ex adverso* of the Meadow Pows down to the stones A B C, it is obvious that before this claim can be entertained it must be held or assumed that the title to the fishings (including the Hen fishing) is not a *pro indiviso* title. The question of title to be solved necessarily comes to be whether the whole fishings of Inchyra are held *pro indiviso?* The two parties (Lady Gray and the Flemings) have between them the whole of these fishings. The words in the deeds of 1655 which fall to be construed comprehend the whole. If these words are held, notwithstanding of the usage, to import a *pro indiviso* title to the fishing *ex adverso* of what down to 1795 was the kavel called Meadow Pows, they necessarily import that the title to the fishings *ex adverso* of the other kavels, including the defenders' title to the Hen fishing, is *pro indiviso* also. Now, it is superfluous to say that one *pro indiviso* proprietor cannot, in virtue of his *pro indiviso* title, prescribe against another *pro indiviso* proprietor a separate and exclusive right to a portion of the *pro indiviso* property, which is really what Mr and Mrs Fleming, in this branch of their case, are seeking to do. To call this a question of bar or of personal bar, would be a misapplication of words. It is a question of title to an heritable subject, and nothing else. If the Lord Ordinary were right in holding that the title to the fishings is *pro indiviso*, his conclusion would be irresistible that "Mr and Mrs Fleming can never acquire, as in a question with the pursuer, an exclusive right to any part of the Inchyra fishings in the face of their own title." Accordingly, if I thought, with his Lordship, that the title to these fishings is a *pro indiviso* title, I should be of opinion that the plea of the Flemings that they had acquired a portion of the fishings *ex adverso* of the Meadow Pows by prescriptive possession, fell to be rejected without entering upon their proof of possession, in respect of the claim being in that view inconsistent with the nature of their own title.

Holding, however, as I do, that each of the two parties has an exclusive title to their separate fishings, I recognise the competency and relevancy of Mr and Mrs Fleming's contention, that by prescriptive possession they have added the fishing, or a portion of the fishing, *ex adverso* of the Meadow Pows to their Hen fishing. But then I am of opinion that they have failed to prove that possession. To have the effect contended for, the proof of possession would require by our law to be clear and unequivocal for a complete period of forty years. I think it is not proved to have been so. I agree upon this point, not only with the result arrived at by the Lord Ordinary, but with his detailed observations upon the proof made in his note, and having had so much to say otherwise, I shall add nothing on this particular subject to what has been well said already.

To come now to the case of Sir John Richardson, I take first his claim in virtue of his Crown grant of 1873 to the fishing *ex adverso* of the Meadow Pows, because many of the observations I have already made upon the case between the Flemings and Lady Gray have necessarily an intimate bearing upon that claim. I certainly am of opinion that one *pro indiviso* proprietor cannot sue a declaratory action as to the common subject without the concurrence of the other or others; and if the title to the Inchyra fishings were held to be a *pro indiviso* title, I think Sir John Richardson would be entitled to have the present action, so far as directed against him, at once dismissed. It has been held that a *pro indiviso* proprietor may defend his possession against a mere intruder; but it is fixed law that he cannot, by himself, pursue an action of declarator, which this is, with reference to the title of the common subject. It is true Sir John might take very little by that degree of success. I think he would substantially take nothing. Because if the title to the respective fishings were not separate and exclusive in each of the two parties (Lady Gray and the Flemings) it would be *pro indiviso* in these parties jointly, and that would, equally with the other view, exclude the claim of Sir John under his recent Crown grant, because the Crown cannot give out a second time the fishings given out previously, whether in exclusive property or *pro indiviso*.

But I am of opinion that Lady Gray and the Flemings have each a perfectly good title to the separate and exclusive property of their respective fishings in a question with Sir John and with all the world, and this independently altogether of the submissions and decreets-arbitral to which Sir John was no party, and consequently that Sir John's ground for the total dismissal of Lady Gray's action entirely fails.

Sir John could not well plead ignorance of Lady Gray's title to the lands and the fishings, even if others could do so; for the progress which constituted that title was and is the identical progress under which he acquired the property of the Meadow Pows. But nobody can plead ignorance of the terms of the titles of others which appear, as they do here, on the face of the public record of sasines. As little can anybody plead ignorance of the position and nature of the subjects,—the mode in which they have been publicly possessed, and other patent facts which go to explain the title, and which are open to the observation or enquiry of all. For instance, when lands are described, with whatever obscurity, as within certain boundaries, the purchaser or other singular successor must find out the boundaries for himself. If the lands are described simply as being possessed, or as having been formerly possessed by parties named, he must find out what was then, or had formerly been so possessed. If neither boundaries nor possessors are mentioned, he must still take the burden of finding out what the lands consist of, and how far the terms of the titles have been affected or explained by what has followed upon them. A familiar and instructive instance of this occurs in the case of a barony, the title to which frequently specifies nothing as to the lands beyond describing them as the lands and barony of A., with the addition of the parish or county within which they are situated. The law thus applicable to lands is, of course, equally applicable to fishings and other heritable subjects; and if the fishings are described, as in this case, as the fishings of certain lands, the enquiry of the purchaser or other stranger claiming a right to or interest in the fishings must be extended to all the purticulars relative to the lands which have a bearing upon the right and title to the fishings. Here we have the actual case of a barony to deal with. For by the Crown charter of 3rd March

1662, in favour of Andrew Blair, the predecessor of the Flemings, the two quarters which made up one half of the town and lands of Inchyra, together with the half of the fishings, &c., were erected into a barony called the barony of Inchyra. The Lord Ordinary finds that the sunny half of the lands of Inchyra, together with the half of the fishings now belonging to Lady Gray, was incorporated into the barony of Kinfauns by the Crown charter of resignation in favour of Miss Anne Blair (and her husband Alexander Carnegie) dated 28th February 1673, and this was not, I think, disputed by either party at the hearing, although owing to blanks in the print of the titles I have not been able quite satisfactorily to verify the fact for myself, and it is not of moment in this part of the discussion, except as farther illustrating the reasonableness, or rather the necessity of that principle of our law of conveyancing which will not allow Sir John Richardson or any other stranger to found upon the terms of the titles of Lady Gray and the Flemings without having reference at the same time to the separate and exclusive possession which has publicly followed upon them and by which they have been immemorially construed and explained.

I therefore require nothing but the terms of the titles and the possession which has followed upon them to exclude Sir John Richardson from claiming the fishings *ex adverso* of the Meadow Pows in virtue of his Crown grant of 1873, as well as from insisting that, so far as directed against him, Lady Gray's present action should be dismissed. It is not in the least necessary, in order to arrive at these results, that Lady Gray should have possessed the particular fishing *ex adverso* of the Meadow Pows. The fishings, of which she has had separate and exclusive possession (some six or seven in number), are part and portion of the same Crown grant with the fishing *ex adverso* of the Meadow Pows; for it is quite clear that the Meadow Pows was part of the lands of Inchyra proper, and not, as Sir John alleges, part of the Priorlands, which lay apart from all the kavels. The Crown grant of the Inchyra fishings has therefore been immemorially possessed upon, and is possessed upon at this hour, both by Lady Gray and by Mr and Mrs Fleming. The Crown has had no possession adverse to that of the original grantees, and in these circumstances the Crown could not *cum effectu* grant to Sir John in 1873 any one or more of the fishings which had been given out to others centuries before.

As regards Sir John Richardson's claim to the Meadow Pows fishings, in his capacity of proprietor of the lands of Cairnie, I think it only necessary to say that I agree with the Lord Ordinary both in the finding on the subject embodied in his interlocutor and in the observations made in his note.

I further agree with the Lord Ordinary that Sir John Richardson has the property of the fishings *ex adverso* of his Cairnie property as far west as the line drawn through the three stones A B C, because, to that extent, his Cairnie Island, prior to the embankment, came directly between the Meadow Pows and the main channel of the river, and he has not lost any of his frontage by the embankment. I think, further, that it follows from this that Sir John is entitled to be assoilzied from the alternative conclusion of Lady Gray's summons, which embraces the space to which his right thus extends.

On this addition being made, and the absolvitor of the Flemings from the action as laid being recalled, I see no objection to the findings in the Lord Ordinary's interlocutor so far as they go. But whether we adopt these findings *simpliciter* or not, there must, if my opinion be well founded, be an important alteration in the substance of the operative judgment itself, by decerning in favour of the pursuer Lady Gray, and against the defenders, in terms of the last alternative conclusion of the libel.

Lord Ardmillan—The question raised in the present action relates to the salmon-fishings in the Tay *ex adverso* of a certain piece of ground on the north side of the river, formerly part of Inchyra, and called the Meadowpows or Powlands of Inchyra, and conveyed in 1746 by the pursuer's author to James Hay of Pitfour, and now forming part of the estate of Pitfour.

After the very able and elaborate opinion of Lord Deas I would not at any length express my views, were it not that I consider the case to be of the highest importance to the parties and to the law.

The pursuer Lady Gray of Kinfauns alleges, and has produced titles to instruct, that she is proprietrix of one-half of the lands of Inchyra, and she claims the exclusive right of salmon-fishing *ex adverso* of the piece of ground formerly part of Inchyra and now of Pitfour, to which the action relates. It is to be observed that the right of salmon-fishing was not conveyed with the lands to Hay of Pitfour, the predecessor of the defender Sir John Richardson. If Sir John has any right to the salmon-fishing opposite to that piece of ground, it is not in respect of that conveyance. It is on another title that he claims them.

The other half of the lands of Inchyra appears to have formerly belonged to Blairs, of the family of Balthayock, and now belongs to the defenders Mrs Fleming and her husband.

It is important to consider the right which on the titles before us these two parties, the pursuer and the defenders Fleming, have respectively instructed to the lands of Inchyra. The statements on the record and the pleadings at the bar have not been quite consistent on this point. But without dwelling at present on that consideration, I am of opinion that the right of Lady Gray, and the right of Mrs Fleming and her husband under their titles to the lands, are both rights of separate estate, and not rights *pro indiviso*.

On this point I cannot agree with the Lord Ordinary. Indeed I imagine that his Lordship's opinion was to some extent influenced by the consideration that the *pro indiviso* character of the rights was assumed in a previous case which went to the House of Lords. The point was, however, not decided in that case, nor was the decision of it necessary to the question then involved; and on careful consideration of the titles I am humbly of opinion that the rights of both parties respectively to the two halves of the lands of Inchyra are separate rights to separate halves, and are not held *pro indiviso*.

The pursuer Lady Gray has alleged and produced a title to "the just and equal sunny half

of all and whole the town and lands of Inchriff, now commonly called Inchyra, with houses, biggings, &c., as the same were occupied and possessed by Andrew Lyall and Allan Peat."

The defenders Mr and Mrs Fleming have alleged and produced a title to "All and haill that quarter or fourth part of the town and lands of Inchyra, with houses, biggings, &c., last occupied by James Blair, and now by myself," that is, Sir Alexander Blair of Balthayock, and a second title to the other quarter. We have here in both titles a description of the lands as occupied and possessed by certain individuals named. This of itself indicates a separate estate, and not a *pro indiviso* estate. But further, and yet more specially, the description of the pursuer's just and equal half as "the sunny half" is conclusive in my opinion of the separate and divided character of the right. If the whole lands were held *pro indiviso*, there could be no sunny half to one of the parties, for the sun would shine equally and the shadows fall equally on the estate of both parties. The description of the half disponed to the pursuer's author is necessarily the description of the divided subject—a subject to be ascertained and known by the physical or natural distinction that it is the side on which the sun shines, perhaps supposed to be the lightest and warmest, like the sunny side of a peach. In the Latin charter founded on by the pursuer the description is *solarem dimidietatem*, and I think that "sunny half" is clearly the correct translation. In one description of another subject in the titles the words are *tam solarem quam umbralem dimie dietatem*. This contrast of *solaris* with *umbralis*, taken along with the obvious derivation of the word, supports the translation "sunny half;" and besides, there is classic authority for the expression *arcus solaris*, meaning the rainbow or the sunny bow.

Taking this view of the expression, I have no doubt that we have here a description of some importance; the half conveyed is distinguished by a special natural or physical peculiarity. On this point I entertain no doubt. It appears to me clear that, taking into view the fact that special occupancy or possession is set forth, and that the one half is described as the sunny half and the other is not, the rights to these lands are separate and not *pro indiviso*. Nor does the fact that the lands appear to have been possessed in alternate lots or kavels affect my opinion that they are held on separate and not on *pro indiviso* rights. I look upon the division into lots or kavels as an adjustment for convenience of parties—regulating the mode of possession—but affording no conclusive proof and raising no presumption in favour of a *pro indiviso* right, but rather the contrary. In the face of these titles, which are not dubious, I could not give effect to the fact of possession by alternate kavels as altering or qualifying the separate rights to the respective halves as they stand on the titles. The pursuer states, as I think erroneously, on the record, and the pleadings were opened accordingly, that the lands of Inchyra were before 1795 held *pro indiviso*. I am of opinion that on the titles the lands were not and are not held *pro indiviso*.

I understand Lord Deas to be of opinion that the allocation and possession by kavels was prior to the charters here founded on. That may be so, but, whether it be so or not, I am of opinion that on the words of these charters the rights are separate. I agree with Lord Deas in holding that the right of each party to the lands is, and has been since the charters, separate and not *pro indiviso*.

But passing from the titles to the land, and coming to the title to the fishings, I have felt the question, whether the right to the fishings was on the old titles separate or *pro indiviso*, to be attended with more difficulty. Take Lady Gray's title. Immediately following the conveyance of the just and sunny half of the lands is the conveyance of the "just and equal half of the mylne of Inchyra, mylne lands, multures, and sequels of the same." This is the conveyance of a *pro indiviso* right, for the mylne could not be divided so as to be conveyed in two halves as two separate subjects. There is no dispute about this. But observe the effect of it on the construction of the remainder of the titles. The course or flow of the conveyance in separate parts has thus stopped at the point where the mill is introduced into the title. The description by physical peculiarity is no longer present; the ascertainment of the subject conveyed in halves by specification of the separate occupancy of each of these halves is no longer present. These peculiarities, appropriate in the description of a separate estate, but inappropriate in the description of a *pro indiviso* right, have been dropped at that point. The words "just and equal half" standing alone without the aid of any reference to any natural feature or boundary or specified possession, or some equivalent, might mean or appear to mean "just and equal half *pro indiviso*, such a half as is conveyed as regards the mill.

The next subject conveyed is "the just and equal half of the salmon-fishings and other fishings of the said lands of Inchyra." What do these words mean, reading them as they stand in the context? In the first place, the words are not the salmon fishings of the just and equal half of the lands as above described. That could easily have been stated if intended, and that would have been the conveyance of a separate right—a right to salmon-fishings *ex adverso* of the lands. But the words are, the just and equal half of the salmon fishings of the lands. There is no part of the salmon fishings of the lands of Inchyra of which the just and equal half is not conveyed. Every portion of this fishing is divided into just and equal halves. No part is exempt from division. If so, the right to each half so conveyed is the right to a *pro indiviso* half. But still further, the peculiar features by which in the previous clause the several parts were distinguished are dropped in the description of the fishings. I do not know whether the fishing opposite the sunny half is better or worse than the fishing opposite the shady half of Inchyra. Nor do I know whether the fishing opposite the land possessed by Andrew Lyall and Allan Peat is better or worse than the fishing opposite the land possessed by James Blair. But this I do know, that of all the fishing, whether opposite the sunny half or the shady half of the lands, and whether opposite Lyall's possession or Blair's possession, the just and equal half is by this title conveyed. No boundaries of the fishings are specified, nor is any possession referred to, nor any occupant

mentioned. Therefore the peculiar marks by which divided property may be distinguished and preserved from confusion are set forth in the description of lands and are withheld in the description of the fishings; and the words selected for describing and conveying the fishings are those which have been used appropriately for conveying the just and equal half of the mill *pro indiviso*, and are not those which have been used appropriately for conveying the separate, just, and equal half of the lands. It is quite true that the mill is a subject which may be viewed as naturally indivisible, and which could not be conveyed in separate parts, and therefore the use of the words of conveyance *pro indiviso*, as applicable to the mill, cannot afford much aid in construing the words of conveyance of the fishings. Nor do I rest my opinion chiefly on that circumstance. I rather view the conveyance of the mill as stopping the current of the style used in the previous part of the deed, and so making manifest the change. It is on resuming its flow after the conveyance of the mill that we perceive in the title this peculiarity, that the words of description which prevented the conveyance of the land from being construed as conferring a *pro indiviso* right, have been omitted. If in Lady Gray's title the sunny half had not been mentioned, and if the occupancy or possession by persons named had not been stated, the words of the title to the lands might have been otherwise construed, and might have imported a conveyance of a just and equal *pro indiviso* half of the lands. It is because of the peculiarity of the description that this construction cannot be adopted. But the style is changed in regard to the fishings. The peculiar words which gave a character of separate distinctiveness to the description of the halves of the land are omitted in the description of the fishings, and I think that the import and effect of the conveyance of the fishings, and of the pursuer's title built on that conveyance, is therefore different.

The terms of the defender Mrs Fleming's title to the other half of the lands of Inchyra, are so similar as regards description that it seems scarcely necessary for me to advert to them particularly. These defenders have a title to two quarters, making the other half of Inchyra. Their half is not indeed called the sunny half. That pleasant description is confined to the pursuer's half. But the absence of the word by which the pursuer's half is so attractively described is of itself an indication of a natural distinction between the two, and a natural feature in both, the one being the sunny half and the other the half that is not the sunny half. The occupancy of the lands of the defenders is stated to be by James Blair, but a *pro indiviso* right cannot be well described by stating the occupancy of a part. Then the just and equal half of the mill is conveyed in the same terms as in the pursuer's title, terms expressive of a *pro indiviso* half, and then the just and equal half of the fishings of Inchyra is conveyed—not the salmon fishings of half the lands—but the just and equal half of the salmon fishings of the whole lands—the equal division attaching to every part of the salmon fishings opposite every portion of the lands on the river. It may, however, be noticed here that the lands appear to have been again sub-divided, so that while one half is conveyed to the pursuer, two separate quarters, making between them the other half, were acquired by the defenders. The fishings, on the other hand, are conveyed to the pursuer and to the defenders as in each case "the just and equal half." I think that at the time when the submission and award were adopted as a means of adjustment and division there does not appear to have been any sub-division of the halves of the fishings. Each title sustains throughout, until the arbitration procedure commenced, a right to a just and equal half of the whole fishings of the whole lands.

These observations tend to confirm my view that in the title of both the parties the just and equal half of the fishings was conveyed to Lady Gray and to Mrs Fleming respectively as a *pro indiviso* right. It was so originally on the construction of the title, and it remained so until in some manner divided.

But a division was possible, and indeed probable. I think indeed that our law, though it acknowledges, yet does not favour, the permanent maintenance of *pro indiviso* rights. I can scarcely doubt that the proprietors of the two halves of the fishings of Inchyra on *pro indiviso* right could legally and effectually obtain, either judicially by process of division, or by arbitration and award, or by mutual arrangement and contract, if sufficiently instructed, the division and adjustment of their *pro indiviso* rights for their mutual satisfaction and convenience. Indeed I think that facilities for division are afforded by law, and that evidence of such adjustment and division of joint rights of fishing of which the permanent maintenance must be inconvenient, should be carefully and even favourably considered by the Court.

The result of my consideration of the evidence adduced to instruct the adjustment and division of the fishings is, that they have been divided, and that the *pro indiviso* rights of fishing have now ceased, and been succeeded and superseded by separate and exclusive rights.

Now we have here important precedure in submissions between the respective authors of the pursuer and the defenders Fleming. I do not think that the pleadings by one or other of the parties to these arbitrations, or the adjusted admissions of both these parties in combination, or even the award or decree issued by the arbiters, can be held as directly affecting the rights of Sir John Richardson, the other defender. In regard to him, the whole of these proceedings were *res inter alios acta*,—what either party said in these proceedings while in contest with each other cannot be evidence against Sir John. Nor can what both parties agreed to accept as a fact in their contest be held as a proof of the fact in a question with him. The concurrence of both is no more binding on him than the act of either. There is a view, to which I shall afterwards advert, on which the issue of the arbitration, if it be found to be a division of the rights of fishing, may indirectly affect the interest of Sir John. But in the meantime I think we must deal with the proceedings in the submission as affecting the rights of Lady Gray on the one hand and Mr and Mrs Fleming on the other hand.

I do not dwell on the earlier submissions, because we have no authentic and probative award before us. I proceed at once to the sub-

mission in 1794 between William Lord Gray on the one part, proprietor of half of the lands of Inchyra, and John Anderson, W.S., as proprietor of the other half, and representing the interest now in the defender Mrs Fleming. That was a submission to Mr Proctor of Glamis and Mr Hunter of Glencarse. It is true that the division of the fishings *ex adverso* of the lands of Inchyra was not committed to the decision of the arbiters by the deed of submission. There was a reservation in the following terms:—"Reserving always to both parties the right of the salmon fishings in the river Tay respectively belonging to them according to their present boundaries, and which boundaries are not to be affected by any division that may be made in consequence thereof, but that the said arbiters after such division shall have power to put in march stones in the ground belonging to either party to ascertain the boundaries of the salmon fishings belonging to the parties respectively, which are not to be affected by the said division." Even under this submission with the reservation in it, it is plain that the arbiters were expected, and indeed desired, to put in march stones to ascertain the boundaries of the salmon-fishings, a proceeding scarcely necessary or even intelligible if the fishings of both parties were held on *pro indiviso* right, and were to continue undivided. There can be no boundaries defining the mutual rights of *pro indiviso* proprietors, as each possesses the half of all. But further, I think that the parties to this submission of 1794 could enlarge the apparent scope of the submission by bringing within it still more clearly and more effectually, for the practical purpose of division, the question of boundary of the fishings and the proceeding of setting up march stones to denote the boundaries. Accordingly, it appears that the parties did bring the subject specially under the notice of the arbiters. The authors of Mr and Mrs Fleming alleged throughout the pleadings in this submission, not a joint right to all the fishings, but a separate and exclusive right to certain fishings, and in particular, to an important and valuable fishing known as the "Hen" fishing. This assertion of exclusive and separate right is quite inconsistent with the plea urged at the bar in favour of a *pro indiviso* right. The pleading, as I have already noticed, has not been consistent on this point. The defenders Fleming have not in this record alleged a *pro indiviso* right, and their pleas in law as well as their statements of fact are at variance with such an argument. Besides, they concurred in seeking specification and division by the setting down of march stones to denote the boundaries of the fishings, and that was done.

Then we have the extract registered decree-arbitral, dated 2d and recorded 7th November 1795, in which the arbiters state, that while reserving to the parties submitters the salmon-fishing respectively belonging to them "according to their present boundaries, wherein we have fixed march stones in the ground," proceed to give a series of distinct findings in regard to the fishings of both parties respectively, as indicated by the march stones unfixed by them for the purpose. I think, as Lord Deas does, that the arbiters had power to pronounce this award, and have effectually pronounced it. Now, this decision was recognised and accepted and acted on by both parties, and I agree entirely with Lord Deas on the importance of this arbitration and award. I think it was a division effectually carried out by award and the fixing of marches. I have really no doubt that whatever possession has taken place since 1795 has been, not on the footing of *pro indiviso* rights of fishing, but on the footing of separate rights to separate halves of the fishings of Inchyra, as ascertained and divided by the march stones set down by the arbiters for the purpose of such division. The defenders Fleming possessing the "Hen" fishing and other fishings as separate rights under this proceeding, whereby the boundaries were ascertained, cannot possibly plead that the rights of the proprietors of the two halves are *pro indiviso*. To them at least the award which they craved, and which they accepted, and in accordance with which they have possessed, in so far as they have possessed at all, must be conclusive.

The lands of Meadowpow had been given by Lady Gray in excambion to Mr Hay of Pitfour, but the salmon-fishing *ex adverso* of Meadowpow was not included in the excambion. It remained a portion, and the eastmost portion, of the fishings of Lady Gray, though the land had been conveyed and had ceased to be a portion of her estate. It is just the fishing opposite that piece of ground which forms the subject of the present action. In my view the fishing opposite this piece of ground, not having been conveyed with the land to Hay of Pitfour, remained the property of Lady Gray, who, as proprietor of the land and the fishing, had disponed the land, but retained the fishing.

In regard to the march stones, I think that the old stone with an I on the one side and a P on the other must be held as one of the march stones placed by directions of the arbiters, and that it is a fishing boundary, the I standing for Inchyra on the west side of the stone, and the P standing for Pitfour on the east side of the stone. The letters A B C indicate the remaining line of the boundary, which is according to the contention of Lady Gray.

An attempt was made by the defenders Fleming to prove possession further up the river beyond and contrary to this boundary. I concur with the Lord Ordinary in thinking that this attempt has not been successful, and that the preponderance of evidence back for more than forty years, and as near as it can be brought to the award of 1795, is in favour of the pursuer. I think, as the Lord Ordinary does, that the testimony of the witnesses for the pursuer is the most distinct and reliable, though I do not doubt the honesty of the witnesses on either side.

Accordingly, viewing this case as between the pursuer and the defenders Fleming, I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and that the pursuer is entitled to decree of declarator conform to the second or alternative conclusion of the summons.

In regard to the case against Sir John Richardson, I am of opinion (1) that Sir John has instructed right to the salmon-fishings in the Tay situated *ex adverso* of his property as far west or up the river as a line drawn through the points indicated by the three stones A B C to the centre of the river. To that extent he is entitled to *absolvitor*. Beyond this and to the west of this I do not think that Sir John can on the merits

and on the proof resist the alternative conclusions of this action at the instance of Lady Gray. On the effect of the usage and understanding of the fishers on the Tay in regard to the sweep of the net from the western point of Sir John's Cairnie property I express no opinion, except that we have no sufficient proof of such usage, but that I think usage, when ascertained, should be respected.

His title to the lands of Cairnie, with the salmon-fishings belonging thereto, is not sufficient of itself to sustain his defence against the conclusions of the pursuer's action, and I am not able to perceive that he has instructed such possession of fishings above the line A B C as can, with reference to his Cairnie title, support his claim. The pursuer's right appears to me to be clear on the titles, and not to have been parted with, and Sir John's opposing right is not supported by sufficient proof of possession contrary to hers.

A recent title from the Crown has been obtained by Sir John in 1873, but that title from the Crown is granted under the declaration and express stipulation that the conveyance should in no way prejudice the rights of any person who may claim right to the salmon-fishing, provided such person shall produce a valid and effectual title thereto complete anterior to the grant. If Lady Gray's title be, as I think it is, valid and effectual, it cannot be prejudiced by this recent grant from the Crown.

I do not think that in the result of my opinion I differ from Lord Deas, for I also hold that the lands have never been held *pro indiviso* since the charters of 1662, and that the fishings are not now held *pro indiviso*, and have not been so held since the decree, and the acceptance of the decree, of 1795.

It is right that I should advert to a point of form in reference to the conclusion against Sir John Richardson.

The action is laid on the footing of the right of the pursuer to the fishing being separate and exclusive.

On the titles produced, read without reference to the arbitration, the right to the fishing is *pro indiviso*, though the right to the land is separate and exclusive. The arbitration proceedings and award are equivalent to an adjustment and division and ascertainment of boundaries, and such is their effect in this action as in a question with the defenders Fleming. It is settled that one *pro indiviso* proprietor cannot pursue alone an action of declarator with reference to the common property. A defender is entitled to protection against such an action. Here the pursuer has called as a defender the other *pro indiviso* proprietor, who has appeared and defended. The pursuer has, in my view, instructed a division of the property, so that her right is now separate and exclusive. It is not therefore against the pursuer as a *pro indiviso* proprietor, but against the pursuer as a separate and exclusive proprietor that the defender Sir John Richardson is now called on to defend his claim to the salmon-fishing. The effect of calling Fleming as a defender, and the effect of the decision against the defender Fleming, is to put an end to the plea otherwise competent to Sir John, that one of two *pro indiviso* proprietors could not alone sue such an action as this. In my view this point, which is technical, could now have no other effect than to delay proceedings and protract litigation; and therefore I disregard it. I think the plea might otherwise have been competent to Sir John. But I think that, in respect of the decree against the defenders Fleming the pursuer's right is now separate and not *pro indiviso*, and the plea may be fairly set aside as inapplicable.

The result is that, in my opinion, the pursuer is entitled to decree of declarator as concluded for to the extent I have already explained, except in so far as regards Sir John Richardson's right to salmon-fishings *ex adverso* of his lands as far west as a line through the points indicated by the stones A B C.

Lord Mure—I concur in the result which your Lordships have arrived at, and as you have fully explained the state of the titles in this case, and also the actings of the parties under these titles, I shall content myself with stating as shortly as I can the grounds on which I have arrived at that conclusion. I cannot concur with the Lord Ordinary that the title of these parties is a *pro indiviso* title. It is plainly not a *pro indiviso* title to the lands in the ordinary sense of that word. For it is not a *pro indiviso* conveyance *per expressum*, nor is it a conveyance of an equal half of the whole subject; but it is a conveyance of one-half as possessed by particular parties, thereby showing that at the date of these titles, in 1655, the conveyance to each of the parties was of a separate and distinct portion of the whole. The title to the fishings, looking to the express words of the deeds, is somewhat different. It is more like the usual phraseology of a conveyance *pro indiviso;* and if called upon to construe it at the time it was granted I should have had difficulty in holding that it was not a *pro indiviso* title to the fishings. But the language is peculiar, and as it occurs in a part of the deed where there are conveyances of various subjects other than the fishings or the lands, and is so worded as in some respects to be ambiguous, it may, I think, admit of being cleared up by the possession and the actings of the parties under it. For I have no doubt that in construing a title of this description we are entitled to take into consideration the possession and the actings of the parties following upon it. That I apprehend to be a well known rule of law in disposing of questions of this sort. It was so laid down by Lord Wynford in the case of *Macdonald* against *Heriot's Hospital*, in the House of Lords, in which he said:—"Old writings might be expounded by contemporaneous usage, and there can be no means of getting at the meaning of old instruments so satisfactorily as that of seeing how the parties acted under them at the time they were made, and have since continued to act." Lord Brougham expresses a similar opinion with reference to the construction of Acts of Parliament in the case of the *Magistrates of Dunbar*, 1 Shaw and M'Lean, 134; and with reference to the rules adopted in England there is the opinion of Lord St Leonards in the case of the *Attorney-General* v. *Drummond*, 1 Drury and Warren, p. 368, in which his Lordship says:—"One of the most settled rules of law for the construction of ambiguities in ancient documents is that you must resort to contemporaneous usage to ascertain the

meaning of a deed. Tell me what you have done under such a deed, and I will tell you what it means." Now, applying these rules to the circumstances of the present case, I think it quite clear, upon the evidence afforded by the various documents that have been founded upon on both sides, to which Lord Deas has referred, that these fishings have never been possessed *pro ndiviso;* that with the exception of what is called the Hurlcarle fishing, which in all the proceedings seems to have been dealt with differently from the rest, there is, in so far as we can see, no evidence of any other portion of the fishing ever having been possessed *pro indiviso.* In the submission relative to them, which took place in 1756, and to which the scroll of the decree-arbitral applies, they are spoken of as separate and divided rights; and I find it stated, in the answer for Mr and Mrs Fleming to the third article of the condescendence for the pursuer, that "the proprietors of the two half lands of Inchyra, and salmon-fishings thereto belonging, had each of them a distinct and divided right and possession of the salmon-fishings belonging to them, and that this was found by a decree-arbitral pronounced in 1757, in a submission between the parties to Lord President Craigie and Lord Prestongrange." Now these words "distinct and divided right and possession of the salmon-fishings belonging to them," are the very words of the decree-arbitral, and from that date down to 1795, when the second submission was entered into, the same distinct and divided right and possession appears to have been continued. The arbiters under the decree-arbitral of 1795 were not to settle the rights of parties as respects the fishings, but they were to fix the boundaries of the fishings as at that date; and, in my opinion, it is impossible to read the terms of that decree-arbitral without coming to the conclusion that the portion of the river Tay here in dispute was assumed, and expressly declared at that time, to belong to and to have for long belonged to Lord Gray. It is described as the eastmost fishing, that is, to the east of the Hen fishing, now belonging to Mrs Fleming, and as belonging to Lord Gray, "and altogether opposite the lands of Pitfour, being bounded to the west by the old march stone between the lands of Pitfour and Inchyra, which we ordered to be marked number one." And when we now find a march stone at the march between the estates of Inchyra and Pitfour, at about the very place where the arbiters appointed it to be placed, I think we may assume that that is the march stone which they put there, and that the stone a hundred yards down the river, which is founded on by the defenders in this case as that march stone, cannot be held to be the march stone of the Hen fishing as fixed by the decree-arbitral of 1795. I agree with the Lord Ordinary in his observations on this point, and, looking to the terms of the decree-arbitral, I think that we are bound to hold that the march stone at the boundary of the estate is the march stone which is the boundary of the original Hen fishing. Now, that being the case, I can see no grounds on which the defenders can successfully maintain that Lady Gray is not the owner of the fishings in the portion of the river Tay in question which are opposite the Meadowpow, and which her title, as explained by these proceedings, gives her an express right to, because her grant is an express grant of salmon-fishing, and the portion of the fishing that belongs to her has been assumed as fixed by that decree-arbitral in 1795 in a question with the predecessors of the defenders. It is said by Mrs Fleming, as I understand, that she has acquired by prescription a right to extend the boundary of her fishing called the Laying Hen, and that she has established a prescriptive right down to the line A B C, which is in question here. Now, I cannot help looking on that decree-arbitral of 1795 as a document which is so worded as to make it very difficult to hold that a party who founds on it as explaining where her share of the fishings in the river were, can be allowed to found upon it to that extent, and yet not to be bound by it in other respects. That decree-arbitral is the proof of who the party is to whom the Hen fishing belongs. It was founded upon by Mrs Fleming as showing the nature of her right in the action between her and Sir John Richardson, decided in 1871; and it was referred to by the Judges in that case as showing that Mrs Fleming was in the position of having a separate right to certain portions of the fishings in the river, and she founds upon it to the same effect in this action. Now, if it is necessary for her to found on that deed, and I think it is, in order to show what her portion of this divided fishing is, it is very difficult to say that she can be entitled to maintain that she can go beyond the boundary fixed by that deed as the boundary of her fishing. It comes very much within the principle of the rules applicable to prescription in the case of a bounding charter, and it is in that view an attempt to prescribe against her own title. Even in such a case as this, where it is not on the deed itself that the question is raised, but on that deed coupled with a decree-arbitral acted on by the parties, I should not, as at present advised, be prepared to hold that one of these parties could in the face of such a title acquire by prescription any extension of boundary in a question with the party holding the coterminous property. But without proceeding on that strict ground, I concur with the Lord Ordinary, and also with Lord Deas and Lord Ardmillan, that there is no such evidence of exclusive possession by Mrs Fleming of the portion of the water to the east of the march boundary fixed in 1795 as can enable her to maintain that she had acquired by prescription a right to go beyond that line. If that be so, then Lady Gray's title, as explained by what has followed upon it, gives her an express grant of the salmon-fishings of the portion of the river Tay opposite the Meadowpow; and that being so, I think the Lord Ordinary's interlocutor ought to be recalled as regards the question between Lady Gray and Mrs Fleming; and that Lady Gray is entitled to prevail on that part of the case—not to the full extent that she claims in the first conclusion of her summons, but to the extent which the Lord Ordinary points at in his interlocutor under the alternative conclusion. The summons concludes for 120 yards, but there is some evidence to the effect that in the old action the question in dispute was 86 yards. But to the extent of one or other of these lines she is entitled to have decree.

The case of Sir John Richardson as laid

on record is, that the action is unfounded in respect that the defender, in virtue of his titles to the lands of Cairnie, and the salmon-fishings and others aforesaid, and, *separatim*, in respect of his possession under the said titles, has the sole and exclusive right to the salmon-fishings at that place. Now, I think Sir John Richardson is entitled to the exclusive right of the salmon-fishings *ex adverso* of the portion of the river where the island of Cairnie was. As I understand the line which the Lord Ordinary refers to, the line A B C, it is somewhat to the westward of the westmost point of Cairnie island at low-water, and in that way. by the line now given to Lady Gray, Sir John Richardson gets right to fish as far up the river as he would have fished if the island of Cairnie had not been joined to the mainland as it is now. Looking to the plan, it appears to me that the line now fixed with Lady Gray is about the same line as that of the original Cairnie fishing, and to the east of that line I think he is entitled to exclusive possession, subject, it may be, to the custom of the Tay as to the swing of the net beyond that line. I do not know whether the conclusions of this action point to leaving that open; but that is a matter of detail to be considered in dealing with the terms of the decree. In the recent case of *Hay* v. *The Town of Perth* this Division of the Court qualified a line fixed by them, making it subject to the custom of the Tay, and it is for your Lordships' consideration whether for safety's sake some such words should not be inserted in the decree disposing of this case. But I think Sir John Richardson's right to any other portion of the fishing claimed under his first plea in law in respect of possession was disposed of in the former action. It is the very plea maintained in the question raised between him and Mrs Fleming in this Court and in the House of Lords. But since the date of that decision a new title has been got from the Crown, with an express grant. And the case now raised by Sir John, as I understand it, is that under this deed he has acquired an express grant from the Crown. But this express grant is qualified by the important words to be found in the print (page 67 E.) by which he only gets the right if there is no one else who can shew that they hold a prior grant to the salmon-fishings at that particular place. Now, in the view I take of the case, Lady Gray has that prior right, because it has been now held, as between Lady Gray and Mrs Fleming, that Lady Gray has right to the salmon-fishings at that particular portion of the lands of Meadowpow which are immediately to the east of the Hen fishing, and that she holds them under an express grant of salmon-fishing. This was disputed on the part of Sir John Richardson, on the ground that the Meadowpow was a part, not of the estate of Inchyra, to which the express grant of salmon-fishings applied, but of another estate called Priorlands, belonging to the Gray family, which had no right of fishing; and it was contended that there never was any right of fishing belonging to the Gray family opposite the lands of Meadowpow—Meadowpow being part of Priorlands. But after having carefully considered the argument adduced in support of this plea, and examined the whole of the titles, and looked at the different plans, the conclusion I come to is the same as that arrived at by the Lord Ordinary and your Lordships, viz., that there is nothing in these deeds, or in the situation of the lands, that can be held to lead to the inference that this water was not held under the Inchyra title but under the title of Priorlands. I think that in this respect Sir John Richardson has failed, and that the pursuer is entitled to prevail in a question with him, excepting as to that part of the river which is immediately *ex adverso* of what was known as the Cairnie island, before that island was joined to the north bank of the river.

Lord President—I understand your Lordships are all of opinion that Lady Gray, the pursuer of the action, is entitled to a decree of declarator to the effect that she has the sole and exclusive right to the salmon-fishing in the Tay *ex adverso* of the westmost portion of the Meadowpow, being that portion which lay to the westward of the westmost point of Cairnie Island before it was embanked and added to the land opposite it; and also that she is entitled to judgment in terms of the other auxiliary conclusion of the summons to a corresponding extent. In the proposed judgment I concur; but as I have experienced considerable difficulty in reaching this result, and as my opinion is perhaps founded upon slightly different grounds from those at least of some of your Lordships, I think I should hardly be discharging my duty if I did not endeavour to express briefly what the precise grounds of my opinion are. I may say, at the outset, that as regards the pretensions of Sir John Richardson to the fishings *ex adverso* of the portion of Meadowpow which I have endeavoured to describe, I think these are not well founded. I think he has not shown by words or otherwise that these fishings are within his Cairnie title, and I think that his recent grant from the Crown affords him no title to these fishings, because a valid and effectual grant of the same fishings had been long ago made along with the lands of Inchyra, whatever may be the nature of the title under which these fishings are held by proprietors of Inchyra. But then the question raised—at least the chief question raised—by the interlocutor of the Lord Ordinary, comes to be a question of title. His Lordship holds that the title which Lady Gray has to the fishings *ex adverso* of the portion of Meadowpow which I have already specified is a *pro indiviso* title merely, and therefore that she is not entitled to prevail in a conclusion of declarator of the sole and exclusive right either against the other *pro indiviso* proprietor Mrs Fleming or against her neighbour to the east, Sir John Richardson. The history of this estate of Inchyra is somewhat peculiar, but it is not necessary to go back—and indeed we have not the means of going back—further than the year 1647, at which time we find that it was held under a Crown charter in favour of Sir Thomas Blair of Balthayock along with a variety of other lands therein contained. The description of Inchyra on that charter is as follows:—"Totas et integras terras de Inchirref cum molendino earundem terris molendinariis multaris et sequelis solit et consuet cum piscaris salmoarii et aliis piscariis diet terrarum de Inchirreff domibus edificus." And the *Quequidem* to these lands is thus—"Quequidem terre de Inchirreff cum pertinen earundem supra mentionat proprius at Gilbertum conutem de Errol heredi-

tarie pertinuerunt." Now, it is quite clear that Sir Thomas Blair possessed the entire estate of Inchyra and the entire salmon-fishings of the estate of Inchyra, by which must be meant, in the absence of any evidence showing the contrary, the entire salmon-fishings in the water of Tay opposite to the lands of Inchyra. It also appears that the estate with its fishings had been held as an undivided estate at an earlier period by the Earl of Erroll, and therefore it does not appear to me that there is any reason to suppose that the division of this estate into kavels, as we find it afterwards possessed, had occurred prior to the date of this charter of 1647. There is no evidence to show that the estate ever had been divided in any way prior to 1647, in which year it is possessed as a single and undivided estate by Sir Thomas Blair. But then there is no doubt that it was divided by Sir Alexander Blair who appears, I think, to have been Sir Thomas' son, in the year 1655. There are two deeds in that year, the one of which was in favour of William Blair of Torsappie, and is dated 16th June 1655, by which Sir Alexander Blair conveys to him all and haill the just and equal sunny half of all and hail the town and lands of Inchyra, with houses, biggings, yards, orchards, tenements, &c., as the same is presently occupied and possessed by Andrew Lyell and Allan Peat, with the just and equal half of the mill of Inchyra, mill lands, multures, and sequels of the same used and wont, with the just and equal half of the salmon-fishings and other fishings of the said lands of Inchyra, and all and haill the passage upon the water of Tay with the ferry and the ferry-boat, &c., and all and whole the teind sheaves or parsonage teinds of the said haill lands of Inchyra and the parsonage teinds of a certain rigg of land in addition. Now, I do not entertain any doubt that what was conveyed by this disposition was one half of the lands of Inchyra, known as the sunny half of these lands, and the limits of which were ascertained on this disposition by the occupation of the lands at that time —at the time of granting the disposition—by two persons called Lyell and Peat. Whether these lands were the eastmost half of the lands of Inchyra, which the term sunny would rather lead one to suppose, or whether the lands had been possessed by Lyell and Peat and by certain other persons mentioned in the conveyance of the other half, in that form in which we see they were possessed afterwards, it is impossible exactly to ascertain, but there is nothing in either of the two conveyances of the year 1655 to preclude the supposition that while the title to the estate of Inchyra was an undivided title in the person of Sir Thomas Blair and his son Sir Alexander, the possession by the tenant might have been a possession by kavels; and if that were so, then the effect of this disposition in favour of William Blair of Torsappie would be to give him the alternate kavels possessed by Andrew Lyell and Allan Peat. The other disposition of the same date, or nearly of the same date—for it is upon the 2d of August of the same year—gives to Andrew Blair of Inchyra all and haill that quarter or fourth part of the town and lands of Inchyra, with houses, biggings, yards, &c., last occupied by James Blair and now by myself, lying within the sheriffdom of Perth, and all and sundry the teind sheaves, &c., and also all and haill the other quarter or fourth part of all and haill the said town and lands of Inchyra, with houses, biggings, yards, orchards, &c., with the just and equal half of the mill of Inchyra, and with the just and equal half of the salmon and other fishings in the said lands of Inchyra. There is no particular evidence at a subsequent date of any division of the estate into kavels, and I think it is not an unreasonable supposition, but probably the most reasonable supposition that can be made in the circumstances, that the division of the estate as regards title into alternate kavel, originated in a possession of that kind by tenants under the proprietor of the whole undivided estate. But whether that be so or not, I am very clearly of opinion that this estate was not given out by Sir Alexander Blair in equal undivided halves, but was given out in distinct and separate halves, and has been possessed and held ever since that time as divided halves of the estate of Inchyra. But then, as regards the fishings, they stand in a very different position. It must be observed that the sunny half of Inchyra, as possessed by certain persons named, is a half of Inchyra, which may or may not be precisely the one just and equal half; and it seems to me that when you have the words "just and equal half" of a subject, and without any other description whatever, it is almost impossible to resist the conclusion that what is intended to be conveyed is a *pro indiviso* half. If there is nothing to discriminate between one-half of an estate and the other half of an estate. as existing *in rerum natura* either by boundary or possession or in some other manner, how are you to ascertain which of the two halves is intended to be conveyed; and if in the conveyance you have no other words than these, "I give, grant, and dispone one just and equal half" of such and such a subject, I think it is very difficult indeed to interpret it in any other way than as a conveyance of half of the subject *pro indiviso*. Now, how stood the fishings ? In the first of the two dispositions they are given out in these words, "the just and equal half of the salmon fishings and other fishings of the said lands of Inchyra." If it was intended to give the fishings of the sunny half of Inchyra, most assuredly these words would have been used, or if it was intended to give one half of the fishings as distinguished from another half of the fishings by local situation or by possession, such words would have been used as are used in the very same dispositive clause with reference to the lands. But as regards the fishings, we have absolutely nothing except the use of the words "the just and equal half of the salmon fishings," and in the case of the other half of the estate it is even more remarkable to observe the difference between the two parts of the dispositive clause, for the lands are given out in two separate quarters. There is first of all that quarter of the lands occupied by James Blair and now by myself; then there is that other quarter or fourth part of the lands of Inchyra presently occupied and possessed by Gilbert Lyell; but the fishings are given not as two-fourths, not first one-fourth of the fishings and then another fourth of the fishings, but as one-half of the fishings—not the fishings of the two-fourths, not the fishings of the half of the lands of Inchyra—but the just and equal half of the fishings of Inchyra, that is, the entire estate of

Inchyra. I am therefore of opinion that in so far as these titles are concerned, what the disponees of Sir Alexander Blair got was, each of them a *pro indiviso* half of the salmon fishings and other fishings in the water of Tay of the entire estate of Inchyra, and the terms of the titles have never varied. The pursuer of this action is to the present day infeft in the same terms, and therefore, so far as the titles are concerned, there cannot be the least doubt in my mind that the pursuer would be a *pro indiviso* proprietor of the salmon fishings to the extent of one half.

But there are a number of very instructive facts connected with the history of these fishings, constituting, I think, a contract between the two *pro indiviso* proprietors of the entire fishings, and by which both of them are bound to the present day. At an early period there seem to have occurred disputes between them as to the way in which these fishings should be possessed; and accordingly in the year 1756 there was an action brought by the Lady Gray of that day in the Court of Session against the Blairs of Inchyra and Mr Blair of Balthayock, who had then also an interest in the other half of the estate of Inchyra, concluding that it should be found and declared that the pursuers have the good and undoubted right to the half of the whole salmon fishings of the said lands of Inchyra, and that the defenders have no exclusive right to any particular fishings thereon, and that the defenders should be ordained to desist from appropriating to themselves any particular fishings of the said lands. Now, it appears to me that unless there was something to bar the pursuer of that action from insisting in that conclusion, she must have prevailed in it. But observe what took place. The process was judicially referred apparently to the Lord President and Lord Prestongrange; and the two arbiters seem to have come to a provisional conclusion, at all events as to what the rights of the parties should be, for we have a scroll decree-arbitral bearing as its date the year 1759, and by that the arbiters proposed to find that "the parties submitters, as holders of the two half lands of Inchyra and salmon fishings thereto belonging, have each of them a distinct and divided right and possession of the said salmon fishings belonging to the parties, and lying opposite to the greens adjoining to the different kavels or glebes of the said lands, and that they and their heirs and successors may continue to possess the said fishings or any other fishings to be made out by them belonging to the said lands, and to sett, use, and dispone thereon in a separate divided manner in all time coming as they have done in times past, unless the parties submitters or their heirs and successors shall find it their mutual interest, and shall agree, to alter the manner of possession; in which event the arbiters find that they may possess the same, and sett, use, and disprove thereon in a joint and divided manner if they shall think it convenient; and the arbiters further find and declare that the said Margaret Lady Gray has the only good and undoubted right to the passage or passage place of the water of Tay, called the Ferry of Inchyra, with the passage boats and privileges of the same." Now, if that decree-arbitral had been executed—if the parties had not objected to this scroll and the decree-arbitral had been executed—it would certainly have settled the possession at all events between these parties in all time coming, reserving to them, as it does, to revert, if they shall both agree to it, to the mutual and undivided manner of possession. But it is quite plain from the documents before us, independently altogether of the absence of any final decree-arbitral, that this was not acquiesced in by the parties. On the contrary, we have pleadings dated in the year 1758, from which it appears clearly enough that the parties had come to differ very seriously about one fishing called the Hurlecarle, in consequence of which, as far as we can judge, the proceedings in that submission became abortive. The position taken up by Lady Gray was this—She said that she had condescended to agree to their demand that each party shall possess the fishings opposite to the kavel of lands which belonged to them, but they contend that the fishing called the Hurlecarle, which is opposite to the kavel belonging to Lady Gray, may be adjudged to them. She says she cannot agree to that upon any consideration, and she is of opinion, she says, that considering the concession that they—meaning herself and her husband—"have made to the Miss Blairs, they should not make any opposition with regard to this fishing of the Hurlecarle; if they should still insist upon its being common, the memorialists must be excused to adhere to their first claim, viz., that the whole fishings be in common, and that each party draw their equal shares of the profits thereof in terms of their rights and infeftments." And the Miss Blairs, on the other hand, expressed a hope that the arbiters would find and declare that not only the other fishings are to continue to be possessed as the separate property belonging to the parties submitters, but also that the Hurlecarle was to be declared a joint property. The evidence regarding this submission there comes to an end, and, as I have said before, I think the natural conclusion is that the whole affair became abortive. But then a period of nearly forty years elapses before we hear any more of these fishings or their owners; and it is very important, if possible, to ascertain what is the state of the matter during that period of forty years. Did they possess these fishings in their character of *pro indiviso* owners of them, or had they come to any arrangement by which a separate possession had been established, or without any arrangement had they acted upon the suggestion contained in the scroll decree-arbitral? Now, we have a great deal of most important light on that question, derived from the submission and decree-arbitral of 1795. No doubt the matter of the fishing is excluded from the division which is intended to be made by that decree-arbitral. The lands are to be divided, that is to say, the possession by kavels is to be brought to an end, and Inchyra is to be divided into two separate and compact estates. That is what the parties then desired, and they resort to arbiters for the purpose of having this done justly and equally. But they do not give the arbiters power to divide the fishings; but, on the contrary, introduce into their submission a very important reservation concerning these fishings, "Reserving always to both parties a right of the salmon fishings in the river Tay respectively belonging to them according to their present boundaries, and which boundaries are not to be affected by any division that

may be made in consequence thereof, but that the said arbiters, after such division, shall have power to put in march stones in the ground belonging to either party to ascertain the boundaries of the salmon fishings belonging to the parties respectively, which are not to be affected by the said division." Now, this is a deed executed by the predecessors of the parties before us. I am speaking now of the two parties who own the lands of Inchyra between them—Lady Gray on the one hand, and Mrs Fleming on the other. Their predecessors declare in this contract that their fishings are marked out by boundaries, and that the fishings defined by these boundaries belong to them in property respectively. And they desire that this division, ascertained by such boundaries, shall stand and remain in all time coming, and shall not be altered or affected by anything to be done by the arbiters in making the division of lands. In short, their agreement is that when the estate of Inchyra is divided into two separate compact estates, each of the proprietors shall not have the fishings *ex adverso* of his estate for the future, but shall continue to possess the fishings which they had possessed, and which had been defined by boundaries before this submission was entered into. And, accordingly, the arbiters in disposing of this matter of the fishings, act entirely in the spirit of this reservation, and give it full effect. But the manner in which they do give effect to it throws a great light upon what was the meaning of the parties in making the reservation, because they find that the lowest or eastmost fishing belongs to Lady Gray, and is altogether opposite to the lands of Pitfour, being bounded to the west by the old march stone "between the lands of Pitfour and Inchyra which we ordered to be marked No. 1;" and then they declare that the several fishings between the different stones that they have laid down belong alternately to the one party and the other, with the exception of one, and that is the Hurlcarle, which is the joint property of Lord Gray and Mr Anderson, Mr Anderson being then the owner of the other half of Inchyra. "And in terms of said submission (they go on) we do hereby declare that the said fishings respectively belonging to each of the said parties shall not be hurt or affected by the division now made of the lands, but that the said fishings shall be enjoyed and possessed according to rights, customs, and usages heretofore observed by the said parties, their authors and predecessors." Now, there cannot be the slightest doubt in point of law that these joint owners of the fishings of Inchyra were quite entitled to divide them if they chose to do so. Nobody can dispute that. What right one of them might have by a process of law to force a division of the fishings is another affair; but that they could by agreement divide these fishings I do not entertain the smallest doubt, and it is impossible, I think, to read this probative instrument—the submission to arbiters in 1794—without coming to the conclusion that although they do not by that deed make a division, they declare in so many words that such a division has been made, and that in virtue of that division the fishings of Inchyra are held and possessed by them, not *pro indiviso*, but, on the contrary, in a divided form, with the single exception of the fishing called the Hurlcarle.

Now, in a question between the pursuer and the defender Mrs Fleming, it appears to me that after that decree-arbitral, and more particularly after the lapse of nearly eighty years since that decree-arbitral was pronounced without any alteration being made on the boundaries or anything being done to undo what was then declared to be the state of possession and the rights of the parties, Mrs Fleming is altogether precluded from maintaining that Lady Gray is not entitled to the sole and exclusive property and possession of the lowest fishing, which is altogether opposite to the lands of Pitfour. But then these proceedings are no doubt directly binding on Sir John Richardson, and it is necessary to ascertain whether he is not entitled to maintain that Lady Gray cannot pursue this action as against him; because she had no title to sue a declarator of sale and exclusive right. I observe, however, that Sir John Richardson has not pleaded as an objection to Lady Gray's title to sue, and indeed I don't think that he has pleaded it as an objection to her title at all. His objections to her title are entirely different, and it might perhaps be enough for the present judgment to say that, there being no challenge of this title of Lady Gray upon either of these views of it, Sir John Richardson has no defence against the declarator unless he can make out some right in himself, and that defence I have already disposed of. But I am not desirous to rest my opinion upon any mere technicality in the way of pleading, because I think there is another very good ground upon which Lady Gray is entitled in respect of this matter to prevail against Sir John Richardson. Supposing there are two *pro indiviso* proprietors of a certain subject, it is very true that the one cannot sue a declarator of right without the other, but supposing that one of them insists that he is not a *pro indiviso* proprietor, but that in respect of transactions with the other co-proprietor he has become a separate and independent proprietor of a particular part of the subject, what is he to do then? He must of course sue the other proprietor to have that established, if it be disputed, and I have said that having sued Mrs Fleming to that effect, I think Lady Gray has proved her case and is entitled to prevail against Mrs Fleming, and having prevailed against Mrs Fleming, and having established in a question with her that she (Lady Gray) is the exclusive proprietor of this portion of the Inchyra fishings by virtue of her title, she is then in a position to go against any stranger in the character of sole and exclusive proprietor, and to maintain her possession and her right against those strangers just as effectually as she did against her co-proprietor. The only person having an interest to maintain that her right is *pro indiviso* merely, having been put to silence, I apprehend that nobody else can come forward to maintain that such is the state of the title. Now the only peculiarity here is that the stranger, if I may so call Sir John Richardson, or neighbour, is convened in the same action with the co-proprietor as a defender, but I don't think that introduces any difficulty. I think it comes exactly to the same thing as if Lady Gray had first brought her action against Mrs Fleming to put her to silence, and establish, as against her, that she (Lady Gray) is entitled to deal with these

fishings as her exclusive property, and then, having finished that process, had brought a declarator against Sir John, because the question which she has got to try with Sir John is an entirely separate and distinct question from that which she had to try with her co-proprietor. The question which she has got to try with Sir John is whether he has any title to the fishing *ex adverso* of this portion of the Pow Meadow, and in regard to the merits of that question I think she is entitled to prevail for the reasons that I have already very shortly given. Upon the whole matter, therefore, I am very clearly of opinion, with all your Lordships, on the grounds that I have now stated, that Lady Gray is entitled to prevail to the extent which I have indicated. What precise form of words may be adopted for the purpose of expressing the limits of her right to the fishing I am not prepared at this moment to suggest, but probably that may not be very difficult to adjust with the help of the counsel for the parties.

The Court pronounced the following interlocutor—

"The Lords having heard counsel on the reclaiming note for the Right Honourable Margaret Baroness Gray, against the interlocutor of the late Lord Mackenzie, dated 5th January 1875, Recal the said interlocutor: Find and declare that the pursuer has the sole and exclusive right of salmon-fishing in the river Tay *ex adverso* of that piece of ground formerly called the Meadow Pows or Powlands of Inchyra, which lies to the westward of the stone indicated by the letter C on the plan No. 79 of process; to this extent and effect repel the defences, and decern: Find that neither of the defenders have any right of salmon-fishings *ex adverso* of the said piece of ground: Interdict, prohibit, and discharge the defenders, or either of them, from fishing in the river Tay *ex adverso* of the said piece of ground, and decern: *Quoad ultra* assoilzie Sir John Richardson from the conclusions of the summons, and decern: Find the pursuer entitled to expenses against the defenders Mrs Fleming and her husband to the extent of two-thirds of the taxed amount thereof: Find the pursuer entitled to expenses against the defender Sir John Richardson to the extent of one-half of the taxed amount thereof: Allow an account or accounts of the said expenses to be lodged, and remit the same to the Auditor to tax and report."

Counsel for the Pursuer — Dean of Faculty (Watson)—Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Counsel for Sir John Richardson — Balfour — Robertson. Agents—Murray, Beith, & Murray, W.S.

Counsel for Mr and Mrs Fleming—Lee—Gloag Asher. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, January 21.

FIRST DIVISION.

[Lord Young.

ATCHISON'S TRUSTEES *v.* ATCHISON.

Writ — Notarial Subscription — Conveyancing Act, 1874 (37 *and* 38 *Vict. cap.* 94).

Held that a deed executed by a notary, the docquet of which set forth substantially all the particulars required by sec. 41 of the Conveyancing Act, 1874, was a valid deed, even though the docquet was not expressed in terms of the schedule relative to that section.

This was an action of removing by the trustees of the late Mrs Christina Atchison, brought for the purpose of having her son and his wife removed from the premises formerly occupied by her at Bothwell. The trustees were appointed by a trust-disposition and settlement dated May 19, 1874, and the defence to the conclusions of the summons was founded on a disposition by the late Mrs Atchison, dated October 10, 1874, whereby she conveyed the whole of her heritable and moveable property to the female defender. In reference to this deed the pursuers maintained as their fourth plea in law that it was *ex facie* null and void, in respect that while bearing to be notarially executed, the name and designation of the notary were not set forth in the docquet.

The Lord Ordinary on 25th June repelled the fourth plea in law for the pursuers, and on 2d July dismissed the action.

The pursuers reclaimed, and argued — The deed founded on by the defenders was not properly attested in terms of the Conveyancing Act of 1874, sec. 41, and relative schedule, in respect that there was (1) no authorisation; (2) no name or designation of the notary; (3) no statement that the witnesses subscribed the docquet in terms of schedule I; (4) no statement that the docquet was read over to the granter; (5) no distinct statement that the whole was done by authority given in the presence of the witnesses.

An Act of Parliament such as this, which gave a party the option of adopting a less cumbersome and more convenient way of doing a thing, must be construed literally and strictly. The witnesses were required to speak not only to the execution of the deed, but to the truth of that which was stated in the docquet. The section of the Act and the schedule must be read together.

Authorities—37 and 38 Vict. cap. 94, secs. 39, 41; *Johnston* v. *Pettigrew*, 16 June 1865, 3 Macph. 954; *Birrel* v. *Moffat*, M. 16,846; Bell on Deeds, iii, 17 (edit. 3d); *Sim* v. *Yuile*, 15 November 1845, 8 D. 8; *Cleland* v. *Clark*, 15 Feb. 1849, 11 D. 602, H. of L. 7 Bell, 153; *Henry* v. *Reid*, 10 Feb. 1871, 9 Macph. 503.

Argued for defender — An action of removing was not the proper form of process. The Act 37 and 38 Vict. cap. 94, did not make the form of docquet in the schedule imperative. The deed and docquet together were more than sufficient to meet all the requirements of the statute. Section 39 did not apply.

At advising—