

fall under the application of article 138, but fell under the application of article 8, these shareholders would be losers. They cannot blow hot and cold on the articles. If, as they say, the amount of profits earned but undeclared for the period between 30th September 1914 and 6th January 1916 falls to be set aside out of the realised value of the assets in the liquidation, and treated distinctively as such profits, then the residual amount of them, after meeting their present claim, would under article 8 fall to the ordinary shareholders before article 138 began to apply.

"In my opinion, however, article 138 on its own terms excludes the claim of the preference shareholders. I shall accordingly pronounce judgment by answering in the negative the first question submitted by the liquidator in his note, and finding it unnecessary to deal with the second question."

On February 16, 1917, his Lordship issued an interlocutor answering the question in the negative.

Counsel for the Liquidator—Macmillan, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Preference Shareholders—Hon. W. Watson, K.C.—MacRobert. Agents—Boyd, Jameson, & Young, W.S. And the Solicitor-General (Morison, K.C.)—Morton. Agents—W. & F. Haldane, W.S.

Tuesday, November 6.

## SECOND DIVISION.

(COURT OF SEVEN JUDGES.)

### DISTRICT BOARD OF RIVER DON *v.* BURNETT.

*Fishings—Rates and Assessments—Valuation Roll—Entry of "Fishings" Averred to Rejer to Trout and not Salmon Fishings—Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97), sec. 23—Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. cap. 123), sec. 5.*

A Salmon Fisheries District Board assessed a proprietor on a rental of £100, being the annual value of various "fishings" as entered in the valuation roll. The proprietor, who had a title to salmon fishing, objected on the ground that the salmon fishings were only of a nominal value, and that the entry in the valuation roll was for trout fishings.

*Held* in a Court of Seven Judges (*dis.* the Lord Justice-Clerk and Lord Guthrie) that the Board were entitled to treat the entries in the valuation roll of "fishings" as referring to the salmon fishings, and to assess the proprietor accordingly.

The Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97) enacts—Section 2— "The following words and expressions in this Act shall have the meanings hereby assigned to them unless such meaning be repugnant to or inconsistent with the context. . . . 'Fisheries' and 'Fishery' shall

mean Salmon Fisheries." Section 23—"The district board shall have power to impose an assessment for the purposes of this Act, to be called the fishery assessment, on the several fisheries in each district, according to the yearly rent or yearly value of such fisheries as entered in the valuation roll . . . and such fishery assessments may be imposed, collected, and recovered by the district board in the same manner as police assessments may be imposed, collected, and recovered by the commissioners of supply. . . ."

The Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. cap. 123) enacts—Section 5—"Where any fishery is not entered in the valuation roll, or where any fishery is entered in the valuation roll along with or as a part of other subjects, the county assessor shall, on being required by the clerk to the district board, value and enter such fishery in the valuation roll, separately from other subjects. . . ."

The District Board of the District of the River Don, *pursuers*, brought an action against John Alexander Burnett of Kemnay, Kemnay House, Aberdeenshire, *defender*, whereby they sought to recover with interest the sum of £30, to which sum the fishery assessments laid by the pursuers on the defender's fishings for the years 1915 and 1916 amounted.

The pursuers averred—" (Cond. 2.) The defender is the proprietor of the estate of Kemnay in the parish of Kemnay and county of Aberdeen, and, *inter alia*, of the following, as per the valuation roll of the county of Aberdeen, namely, 'Fishings Middle Water,' 'Fishings Upper Water,' 'Fishings Lower Water,' these being valued at the annual rent or value of £40, £30, and £30 respectively. *These fishings are ex adverso of the defender's said estate and he is the proprietor of the salmon fishings thereof.* The defender's explanations so far as not coinciding herewith are denied, and are irrelevant. During the protracted correspondence which took place between the pursuers' clerk and the defender's agents, the latter were repeatedly invited—prior to the making up of the valuation roll for the current year—to get the assessor to split up the entries regarding the defender's fishings, if in point of fact there were any distinction—which is not admitted—but this the defender neglected or failed to do."

The defender averred—" (Ans. 2) Admitted that the defender is the proprietor of the estate of Kemnay, which includes certain fishings or fisheries in the river Don, and that these fishings are entered in the valuation roll at the values stated. *Quoad ultra* denied. Explained and averred that these fishings are not salmon fisheries in the sense of the statutes condescended on, and that the defender was not entered in the valuation roll as the owner of 'salmon fisheries' during the period in question. Explained that the defender has the right of fishing for salmon in the Don *ex adverso* of his estate, but that the value of the right is and was during the period in question only a negligible amount. The whole value of the defender's fishings is and

was during the period in question in respect of the trout fishing. *The said fishings are let as trout fishings for short periods during the year, and it is in respect of the revenue derived from these seasonal lets of the trout fishings that the entries in question appear in the valuation roll. In the year 1916 the two upper beats of the fishings were let to Mr C. M. Duncan, London, for the month of May, at a rent of £45. The said let was constituted by letter from the defender's factors, Messrs James Meston & Co., to him, dated 14th March 1916, in the following terms:—'In place of sending you formal receipt we acknowledge now that this sum of £45 is for the rent of the trout fishing on the Don, the two upper beats, for the month of May, in accordance with our letter to Mr Nicolson of Messrs Davidson & Garden. . . . These were the only beats which were let by missive for that year. The other beats on the river were let for various periods during that year to persons resident in Aberdeen, and these lets were arranged verbally through Mr Robb, of Messrs Playfair & Co., gunmakers and sporting agents, Aberdeen, and in each case trout fishings only were let. These lets were as follows:—Beat No. 3, William Grieve, Aberdeen, 15th May to 30th June, £18; Beat No. 3, William Grieve, Aberdeen, 15th May to 30th June, £15; Beat No. 4, John Bruce, Aberdeen, 20th May to end of season, £25; Beat No. 2, Captain Oxley, Gordon Highlanders, June, £10; Beat Nos. 1 and 2, Mr Glen, August, September, and October, £24. The rents so obtained included the services of a keeper, whose wages fall to be deducted in order to find the rent for the fishings alone. The fishings for various periods of the year 1915 were let by the proprietor himself, who is now serving with the French Red Cross in France, and the factors are unaware of the terms of the lets or the rents. The mansion-house is at present shut up, and the agents have no means of obtaining information regarding the lets in 1915. During the year 1917 the fishings have also been let for short periods during the season, and in each case as trout fishings only. No salmon are ever caught in the defender's water until the month of October, near the end of the season, and then only very occasionally. In some years one salmon has been caught, in others two or three, and in some years none at all. Without prejudice, however, to his pleas, the defender is willing to state the annual value of his whole salmon fishings at £10, and he is willing and hereby offers, also without prejudice, to pay £3, being the amount of the assessments sued for applicable to that value.'* [The parts printed in italics were added by amendment in the Court of Session.]

The pursuers pleaded, *inter alia*—"1. The pursuers having, in virtue of the statutory powers, imposed upon the defender the assessments sued for, they are entitled to decree therefor, with expenses, as craved."

The defender pleaded—"1. The action is incompetent and irrelevant, and should be dismissed with expenses. 2. The defender not having been entered in the valuation roll as the owner of salmon fisheries for

the period in respect of which the assessments sued for were imposed, he is not liable for such assessments, and should be assoilzied, with expenses. 3. In any event, the annual value of the salmon fishings belonging to the defender being not more than £10, he is not liable in assessments on a value beyond that sum, and he having offered without prejudice to his pleas to pay such assessments, decree should be pronounced for £3 only, with expenses to the defender."

On 26th April 1916 the Sheriff-Substitute (LAING) granted decree as craved.

The defender appealed to the Sheriff (CAMPBELL LORIMER), who on 22nd July 1916 recalled the interlocutor of the Sheriff-Substitute and dismissed the action.

The pursuers appealed to the Second Division of the Court of Session, who, after hearing the case on 13th July 1917, appointed it to be argued before a Court of Seven Judges.

The following authorities were referred to—*Assessor for Kincardineshire v. Heritors of St Cyrus*, 1915 S.C. 823, 52 S.L.R. 268; *Assessor for Aberdeenshire v. Lady Cowdray*, 1911 S.C. 970, 48 S.L.R. 395; *Maxwell Scott's Trustees v. Assessor for Roxburghshire*, (1902) 4 F. 536, 39 S.L.R. 852; *Maxwell Scott v. Assessor for Roxburghshire*, (1890) 17 R. 833, 27 S.L.R. 606; *Lord Herries*, (1883) 11 R. 397, 21 S.L.R. 539; *Baird*, 1861, 24 D. 1450; *Fergusson v. Shirreff*, (1844) 6 D. 1363; Bell's Principles, sec. 747; Stewart on Fishings, p. 281; Dowell on Income Tax, p. 18.

At advising—

LORD PRESIDENT—My view in this case is susceptible of being compressed within very narrow compass. The defender is proprietor of certain salmon fishings in the Don. Salmon fishings constitute a separate estate in land, and the annual value must enter the valuation roll. If the fishings are let they are entered at the rent which they fetch; if they are unlet then they are entered at the rent which they might reasonably be expected to fetch. So it was decided more than half a century ago in the case of *Baird*, 24 D. 1456, which has been followed ever since. The defender's fishings are entered in the valuation roll at the annual value of £100, and the District Board proposed to assess them upon that annual value. I think they were entitled to do so, because they must take the valuation roll as their guide, and they were entitled to assume that the "fishings" as appearing in the roll meant "salmon fishings."

The defender alleges that the roll is erroneous and ought to be corrected, and that if and when it is corrected his fishings will be entered as of the value of £10 and not of the value of £100. So I gather from his statement on record. I assume that this will be so, and, if so, then the only question for our consideration is, who is to make the correction? I am of opinion that it is no part of the duty of the District Board to rectify an erroneous valuation roll, but that it is the duty of the defender to take appropriate steps to that end, for

he and he alone has the requisite information.

If these views be sound, the fifth section of the statute of 1868 has no application to this case, for by that section certain powers are conferred on the clerk of the district board, first, where the fishings are not entered in the roll, or second, where there is an entry in the roll of fishings along with other subjects. Neither is the case here. I propose, therefore, to your Lordships that we should revert to the interlocutor of the Sheriff-Substitute.

LORD JUSTICE-CLERK—[After referring to the amendments made on the record]—The position of trout fishing with regard to the valuation roll has been thus stated—“Trout fishings are seldom of much commercial value and are usually let along with shootings, the annual value being included in the shooting rental. If a proprietor, however, keeps valuable trout fishing in his own hands and preserves it, it will be separately entered in the valuation roll”—Armour on Valuation for Rating (2nd ed.), p. 76—and I think this is accurate. In *Lady Cowdray's* case, 1911 S.C. 970, Lord Johnston said—“There may be cases—and Loch Leven is a notorious example—in which fishings must be separately entered. In such case, however, it is the fishing in the loch and not the loch itself which falls to be valued and entered in the roll;” and Lord Cullen said—“If there were fishings of value in the loch it would be the duty of the assessor to put them in the roll at their proper rent or annual value. Fishings are expressly enumerated in the 1854 Act as a subject of valuation.” There was no question of salmon fishing in that loch, the only fish in it being apparently trout and pike.

In my opinion the trout fishings in question being of value, and being actually let so as to be a source of revenue to the proprietor, were properly entered in the valuation roll. That the assessor might so enter them cannot, I think, be disputed. The defender explains and avers that he “was not entered in the valuation roll as the owner of salmon fisheries during the period in question,” and that the whole value of the defender’s fishings is and was during the period “in question in respect of the trout fishing,” and that the value of his right of fishing for salmon “is and was during the period in question only a negligible amount.” These explanations the pursuers deny. The defender further avers “that the said fishings are let as trout fishings for short periods during the year, and it is in respect of the revenue derived from these seasonal rents of the trout fishings that the entries in question appear in the valuation roll.”

There is thus, it appears to me, a pure question of fact raised. The pursuers, indeed, had a plea to relevancy thus stated—“The defences are irrelevant and should be repelled,” but the pursuers’ counsel, on being invited from the Bench to support this plea, stated that he did not do so as he wished what was called the general question to be decided.

The pursuers’ right to assess is conferred

by section 23 of the Salmon Fisheries (Scotland) Act 1862, which, read along with the interpretation clause of the Act, provides that the Board shall have power to impose an assessment on “the several (salmon) fisheries in each district according to the yearly rent or yearly value of such (salmon) fisheries as entered in the valuation roll.”

The Valuation Act draws no distinction between salmon fishings and other fishings. “The expression ‘lands and heritages,’” it provides, “shall extend to and include all . . . fishings.”

Here no salmon fishings are entered *per expressum* in the valuation roll. This is not a question of value, but a question what fishings were in point of fact included in the word “fishings” in the valuation roll. As to this question of fact the parties are at issue, and I think as the record now stands it should be cleared up by a proof in the ordinary mode—Lord Johnston in the *Kin-cardine* case, 1915 S.C. 823. I know of no presumption as to the meaning of the word “fishings” in the valuation roll, still less of any presumption *juris et de jure*.

The relations between salmon fishing and trout fishing have been judicially considered more than once, and the result, I think, is that both may coexist in the same stretch of water but with separate owners. So long ago as 1787, in the case of *Carmichael v. Colquhoun*, M. 9645, which related to fishings in the river Leven, and which is reported by Lord Braxfield—“The Court seemed unanimous in the opinion that the right of trout fishing in a river, though naturally inherent in the property of the adjacent banks so as to accompany lands as part and pertinent, might yet be reserved from the grant or transferred to a third party either expressly or by prescription”; and at a later stage the Court pronounced this interlocutor—“In respect that Sir James Colquhoun’s right to the salmon fishing is not disputed in this cause, find he has right to the salmon fishing in the river Leven . . . Find the pursuers have a right to fish trouts opposite to their respective properties with trout-rods or hand-nets, but not with net and coble, or in any other way that may be prejudicial to the salmon fishing belonging to Sir James Colquhoun.” The qualification was subsequently thus stated in *Mackenzie v. Rose*, 8 S. 816—The defender and respondent “has right to fish trouts in the river Shinn so far as his property extends along the said river, with trout-rods, but not with net and coble, or in any way that may be prejudicial to the salmon fishings belonging to the said pursuer;” and later still, in *Somerville v. Smith*, 22 D. 279, where it was held that a proprietor of salmon fishings was not entitled to interdict against a person fishing for trout from the opposite bank, “it not being alleged that he was fishing in an illegal manner, or making a pretence of fishing for trout for the purpose of disturbing the trout, and so injuring the proprietor’s rights.”

If these views be correct I see no room whatever for any presumption adverse to the defender’s contention.

It is said that salmon fishing is *separatum*

*tenementum*, but I do not think that affects the question.

In *Fergusson v. Shirreff*, 6 D. 1363, at p. 1374, Lord Cockburn said—"Trout fishing as a subject of property is familiar to the law and often of great patrimonial value, and liable to be sold as a distinct estate;" and Professor Bell in his *Principles*, sec. 747, says—"Trout fishing in a private river is a pertinent of the lands, but may be reserved or even transferred to a stranger."

As to section 5 of the 1868 Act the pursuers from their averments in condensation 2 appear to think (and I think rightly) that the section applied. But if so the result is that the extra duty thereby imposed on the County Assessor could only be required to be discharged by the Clerk to the District Board, who is expressly named in the section as the person entitled to require the County Assessor to act in the matter.

I do not think the defender's contention is that the roll is erroneous, but that it is ambiguous, and that the ambiguity should be cleared up in the proper way by proof.

**LORD DUNDAS**—In this action the District Board of the District of the River Don sue Mr Burnett of Kemnay for payment of certain assessments which they imposed upon him in the exercise (as they allege) of their statutory powers under the Salmon Fisheries (Scotland) Acts, 1862 and 1868, for the years 1914-15 and 1915-16 respectively.

After the case came into this Court both parties amended their pleadings. We have to determine whether or not the defender has stated any relevant answer to the pursuers' demand, even after the very considerable amendments now made upon his record. In my opinion the defences were and are irrelevant.

The entries in the valuation roll, in respect of which the pursuers' assessments were made, are "Fishings, Middle Water, £40; Fishings, Upper Water, £30; Fishings, Lower Water, £30." The Don is admittedly a salmon river; and the defender admits he has the right of salmon fishing in the Don *ex adverso* of his estate, but he avers that the annual value of his fishings consists in the trout fishing, the value of the salmon fishing in his waters being a negligible quantity, which (without prejudice to his pleas) he is willing to state at £10 per annum. Salmon fishings stand, of course, in the eye of the law in a very different position from trout fishings. Salmon fishings are a separate legal estate in heritage, and must as such be entered in the valuation roll, though their annual value be small or even merely nominal. This depends not on any statutory enactment but upon the heritable quality of the right of salmon fishing. Trout fishing, on the other hand, is not an estate in land, but an incident of the ownership of land. It may have a separable annual value, but it is a question of circumstances whether that value ought in any given case to be separately entered in the valuation roll, or merely go to increase *pro tanto* the assessable value of the heritage. The latter course is, I apprehend, more usually adopted in practice,

but instances of the former may be found, e.g., as I understand, in the case of Loch Leven.

The question upon which the decision of this case seems to me to depend turns upon the construction to be placed upon the language of section 5 of the Act of 1868. The defender maintains that it was the duty of the pursuers, if they desired to assess him in respect of salmon fishings, to require the assessor to value and enter these fishings in the roll separately from his trout fishings. The learned Sheriff gives effect to this contention, and considers that it is vain for "the pursuers" to try to throw that duty on the "proprietor." This view proceeds, in my judgment, upon a misconstruction of the section referred to. It applies only "where any fishery is not entered in the valuation roll, or where any fishery is entered in the valuation roll along with and as part of other subjects." I do not think that either of these cases is here present. The defender's counsel admitted that the first is not. Nor, in my judgment, is the second. It was, I apprehend, intended to meet the contingency of a mixed entry, e.g., of shootings and fishings with a *cumulo* valuation, and has no application at all to the circumstances of the present case. I do not see that the pursuers had any duty to institute inquiries into the respective values of the defender's salmon and trout fishings respectively. On the contrary, it seems to me that the defender's remedy lay in his own hands. It was for him to make a return to the assessor, and in doing so to differentiate expressly (if he so desired) between the annual value (say £10) of his salmon fishing on the one hand, and that (say £90) of his trout fishing on the other hand. I think the defender has only himself to blame if, owing to his failure to adopt this easy and obvious course during the years in question, he may be found liable for rather more than his proper assessment in these years as proprietor of salmon fishings.

If the view I have expressed is sound, it is conclusive of the case, and I do not desire to express any opinion upon other topics which were the subject of argument before us, but which do not, in my judgment, enter into the matter.

I agree in the result at which the Sheriff-Substitute arrived, though not with all of the views expressed in his note. Accordingly I am for sustaining the appeal, recalling the interlocutor of the learned Sheriff, and reverting to that of the Sheriff-Substitute.

**LORD JOHNSTON**—This case does not help to determine what are, in a question with the Fishery Board of the district, the true rights and obligations of the defender as proprietor of lands on the banks of the Don, but raises merely the question whether it is the defender's business to take the steps, which are readily and simply open to him, to get the valuation roll altered according to his rights, or whether he is entitled to sit still till somebody else steps in and saves him this trouble. The Sheriff-Substitute

has, I think, come to the right conclusion, and I find nothing to traverse in his judgment, until he comes to the end of his note. He there says—"If the defender feels aggrieved by the assessments in question there is no reason why he should not, through the medium of the Clerk to the District Board, ask the County Assessor to differentiate between the entries as to salmon and trout fishing, if in point of fact there is such a distinction—see section 5 of the Salmon Fisheries (Scotland) Act 1868." This, as regards the Sheriff-Substitute, is only by the way. But it is upon his interpretation of this provision that the Sheriff has chiefly founded a contrary judgment. The defender and both Sheriffs have, in my opinion, wholly misconstrued and misapplied the enactment.

The Salmon Fisheries Act 1862 set up district boards with certain duties, in the interest of the salmon fishery proprietors in Scotland, and with a power of assessment, to enable them to pay the expenses incurred in performing these duties. This assessment can hardly be called a tax, but is rather a contribution for joint interest and account. The district board is empowered (section 23) to impose a "fishery assessment" on the several fisheries in each district "according to the yearly rent or yearly value of such fisheries as entered in the valuation roll." This, I think, implies that the term "fisheries" in the Salmon Fisheries Act 1862, section 23, and "fishings" in the Valuation Act 1854, section 42, are synonymous. The entry of "fisheries" in the valuation roll is thus made the criterion of assessability, and by "fisheries" is meant salmon fisheries. Accordingly two things are essential to the due and equable imposition of the fishery assessment—(First) that all such fisheries shall appear in the valuation roll, and (second) that the valuation of such fisheries shall be separately entered and not slumped with that of other subjects, as is often the case, *e.g.*, with shootings, or with mansion-house and shootings, because it is only with the salmon fishing and its valuation that the district board are concerned. It follows that it is essential to the due administration of the Act that the value of the salmon fishings shall not be enhanced by any addition in respect of brown trout fishing, assuming the latter to have any money value. To meet these two requirements section 5 of the Salmon Fisheries Act 1868 was passed.

The body of proprietors as represented by the district clerk are interested in bringing all proprietors into the roll made up by him for the fishery assessment, and that roll itself is to be based upon the current valuation roll, and to be made up out of a number of entries excerpted from it. The clerk can take nothing but the entries he finds in the valuation roll. Hence the provision of the section in question that (first) where a salmon fishing is not entered in the valuation roll, or (second) where it is entered in that roll along with and as part of other subjects "the county assessor shall, on being required by the clerk to the

district board, value and enter such fishing in the valuation roll separately from other subjects." The district clerk owes a duty to the body of proprietors, and if he finds a salmon fishing not entered, or patently stamped with something else, as with a shooting, it is his duty, in order to bring all salmon fishings in his district under assessment, to take the necessary steps to obtain the segregation. But he must do so with due attention to the provisions of the Valuation Acts for making up the roll for the year current. On the other hand, he has no duty to attend to the special interests of any individual proprietor, who, if he thinks himself aggrieved by any entry in the valuation roll, has an easy remedy supplied to him. To provide and secure this the 5th section of the Act of 1868 was not required. It is impossible to extract from it the conclusion that the only remedy of the proprietor is to move the district clerk to move the assessor to make the severance of an entry. The defender has not even done this much. He has only refused to move in his own interest, when told by the district clerk that if he has any grievance he should carry it to the assessor and ask him to put it right, in which case the district clerk, who may very possibly not accede to the proprietor's contention, has an opportunity of meeting and opposing him in accordance with the provisions of the valuation roll. The defender seems to think that the assessor has complete power over the valuation roll, and is entitled to alter it in his own discretion.

It is therefore desirable to look shortly at the Lands Valuation Acts. Though certain changes have been made, as to dates and otherwise, by subsequent legislation, it is sufficient to take the original Act of 1854. By that statute the valuation authority—the commissioners of supply, now the county councils and the magistrates of burghs—are charged with the duty of making up a valuation roll annually. But in doing so the assessor is their hand, and merely their hand. The assessor is to do the primary assessing and valuing and to prepare and make ready his valuation of all lands and heritages within his district by the 15th August of each year. Prior to 25th August he is directed to cause to be transmitted to every proprietor and tenant a copy of the proposed entry pertaining to him, with a notice that if he considers himself aggrieved by the valuation he may appeal to the valuation authority, or without such appeal may satisfy the assessor himself on or before the 8th September that he has good ground of complaint. After 8th September the assessor is *functus* and powerless. His roll is then ready for the valuation authority. If anyone is aggrieved or complains, his remedy is to go to the valuation authority, who are bound to open their Appeal Court before 15th September and adjust the roll before 30th September in each year, when, subject to such appeal as is allowed to the Valuation Appeal Court, it becomes final for the year. It is obvious that it is only prior to 8th September that the district clerk can apply

to the assessor for severance of an entry if it is his interest to do so. But it is equally obvious that prior to that date, and not later, any proprietor can present to the assessor his claim for a similar severance or other readjustment of the roll. If he has not done so, *sibi imputet*. No such request was preferred to the assessor, and no appeal was taken, and accordingly the valuation roll for both the years in question simply bears to include, and to value, in the defender's case, "fishings."

That entry implies, in my opinion, "salmon fishings," and does not contain any ambiguity which, for the purposes of the Salmon Fisheries Acts, renders it nugatory and requires it to be discarded altogether for the year of valuation. I have already indicated that in valuing salmon fishings the assessor ought not to pray in aid the value of the right of trout fishing. But if he thinks that he has done so, it is the owner's business to see that the correction is duly made. The defender allowed himself to be entered in the valuation roll as proprietor of fishings, which imports for the purposes of the fishery assessments salmon fishings, and these have been valued, and the valuation is final for the year. The District Clerk had no alternative but to take the entry in the valuation roll, which, when transferred to the fishery assessment roll, fixed the defender for the year with a certain valuation which he cannot gainsay. Whether through his own laches or through bad advice the defender suffers we cannot here inquire. There is no getting behind the combination of the two statutes, or escaping the consequence of the statutory entries for the year in question. The defender has the remedy pointed out to him and possibly others for another year. But he must condescend to look after his own interests.

This is enough for the disposal of the present case, and I desire to reserve my opinion on the question whether the term "fishings" in the Valuation Act of 1854 can be applied to trout fishings as a separate heritage. I do not find that that question has been determined by the Court as yet, but I do not in the least traverse the view of the Lord Justice-Clerk that salmon fishings and the right of trout fishing may coexist in the same water and belong to different proprietors. That, however, does not place the right of trout fishing on the same footing as salmon fishings. It was, I think, argued that the matter had been determined, not indeed directly but incidentally, in the case of the Solway fishings, but when that case is examined I think it will be found that the argument based on it was derived more from the catch-words in the rubric of the report than from what was actually decided in the case, because the question there was not as to fishings which were let. It was a question as to ground let for the purpose of setting up stake-nets, and the privilege of fixing stake-nets was what was paid for. The case is therefore *in pari passu* with one which occurred not very long ago in which the fixing of two poles to support an advertising hoarding was found to

give an heritable right which had to be valued.

I had the impression when giving judgment in *Lady Cowdray's* case, 1911 S.C. 970, that the question had been decided in connection with Loch Leven, and I understand my learned brother Lord Dundas thinks so too, but I am entirely unable to find that it ever really did come *sub judice*. If it did arise I can hardly conceive that these fishings could be said to exist by themselves and independently of some heritable right, and not merely as an adjunct or pertinent of such a right. I desire therefore to reserve my opinion on this question should it ever occur, as it may, in the Valuation Court.

LORD SALVESEN—This is an action to recover the amount of certain assessments authorised by the Salmon Fisheries (Scotland) Acts 1862 to 1868. The defender is proprietor of the estate of Kemnay in the county of Aberdeen, which estate is partly bounded by the river Don. It is admitted that he has the right of fishing for salmon in the Don *ex adverso* of his estate, and he appears in the valuation roll for the years 1914-15 and 1915-16 as the proprietor and occupier of three fishings valued at £40, £30, and £30 respectively. The valuation roll is the basis of the assessments which the pursuers are entitled to impose and levy on the owners of salmon fishings in the Don, and there is no question as to the amount assessed if the pursuers are otherwise entitled to recover.

The defence is that the value of the salmon fishings is only nominal, and that the revenue which the defender derives by seasonal lets of the fishings in question is due to the fact that the waters afford good sport for trout, and that the value of trout fishings is not assessable by the pursuers. It is conceded that if the entries in the valuation roll on which the assessment is laid had been trout fishings instead of simply "fishings," and the rolls had become final, the pursuers would have had no warrant to assess the defender at all. The question thus narrows itself down to this, whether as the word "fishings" alone appears in the valuation roll that term is to be construed as meaning salmon fishings, or whether the defender is to escape assessment altogether because the term is habile to include the right to fish for trout as well as the right to fish for salmon.

The right of salmon fishing is according to the law of Scotland "an estate in land," and every such estate (subject to certain exceptions which need not be here detailed) must enter the valuation roll. If it is of nominal value it may so be entered, and whatever value is placed upon it by the assessor that value must be taken as final whenever the roll has been completely made up. On the other hand, the right of trout fishing is a privilege incident to the ownership of land. It need not therefore enter the valuation roll as a separate subject. Where, however, trout fishings are let, or where the proprietor derives an actual revenue from them, they may enter the roll as subjects separate from the land of which they constitute an incidental privilege.

From the assessor's point of view, however, it is a matter of indifference whether they enter the roll by way of an addition to the rental derived from the land as such or whether they are put in as a separate subject. If they are let for a term of years the interest of the owner of the land is to have them so entered, as otherwise the owner would be liable in both owner's and occupier's rates, while he would escape the latter if the lessee's name was upon the roll as the actual tenant and occupier.

Such being the law, I think the pursuers were entitled to assume that when the owner of salmon fisheries in the Don makes a return of "fishings" as of a certain value, that the term applies to his salmon fishings. If the pursuers are satisfied with the value put upon the fishings they need take no action; if they are dissatisfied the statutes confer upon them the right to challenge the value, and if necessary to take an appeal to the Valuation Court. If it were otherwise it would be the duty of the pursuers to demand a separate return of the salmon fishings on the assumption, to which the entry in the roll gives no clue, that that entry may include the value of trout fishings. I am unable to adopt that view. It may be the fact, as the defender avers, that the chief value of the fishings consists in the trout which may be got in the river *ex adverso* of his estate, and it may also be true that if he were not the owner of the salmon fishing he would still as a riparian proprietor have a right to fish for trout *ex adverso* of his lands along with the owner of the salmon fishings, who it is quite settled is also entitled to catch trout. At one time there were periods in the year when the owner of the salmon fishings could not exercise the right to fish for trout during the close season for salmon, but now that there is a close season for trout as well as for salmon there is no open season of the year when the owner of the salmon fishing would not also have the right to fish for trout. I do not doubt that if the defender derives a revenue from seasonal lets of the trout fishing, in which lets the tenants were prohibited from taking salmon, he would be entitled to return the value of the trout fishing to the assessor as a separate subject of assessment. In that case, however, he would also be compelled to make a separate entry of the value of the salmon fishings, and the assessor would have to ascertain as best he could what value to put upon them. If therefore there be any hardship in the defender's case it can be rectified for the future, although if the right to fish for salmon is let along with the right to fish for trout it would be a matter of difficulty to determine what part of the value, if any, of the trout fishing belonged to the proprietor as an incident of his land, and what part belonged to him as the owner of the separate estate of salmon fishing which includes a right to catch trout. On the whole matter, therefore, I have come to be of opinion that the Sheriff-Substitute reached the correct conclusion. I am fully alive to the difficulty that the word "fishings" or "fisheries" is not defined in the Valuation Act as it is in

the Salmon Fisheries Acts as meaning "salmon fishings." The uniform practice, however, has been to treat the word "fishings" when unqualified as applicable to salmon fishings, and when the defender desired to innovate on this practice I think it was his duty to have made a return which would have clearly indicated this, and would have given the pursuers the right to challenge the value which he proposed to put on the salmon fishings.

LORD MACKENZIE concurred in the opinion of the Lord President.

LORD GUTHRIE—The Sheriff-Substitute has referred to the question of general practice, and to the question of the practice of the defender and his predecessors. I agree with the Sheriff in thinking such considerations irrelevant. The question before us is a general one, namely, whether when a district fishery board finds an entry of "fishings" in the valuation roll applicable to water within the board's district they are entitled to conclude that the entry relates to salmon fishing and to salmon fishing only, and to assess accordingly the proprietor to whose property the entry applies, and who has a grant of salmon fishings in his titles, without any right on the part of the alleged owner of salmon fishings to prove that the only fishings of assessable value possessed by him are fishings other than salmon fishings, or as the case may be, without any right on his part to prove that a part of the fishings consists of fishings other than salmon fishings? The inference is not a necessary one; in my opinion it is not one which in the circumstances it is reasonable to deduce from the statute. I take the case as if the question had arisen when the Don District Board was first constituted and obtained its statutory right of assessment.

The entry is ambiguous, for it may cover both salmon fishings and other fishings of assessable value or it may only apply to one or other of them. But for such an ambiguous entry the Valuation Roll Commissioners cannot be blamed. Their duty under section 4 of the Valuation Act of 1854 is to make up a valuation roll "specifying in each case the nature of such lands and heritages." Section 42 shows that this duty of separation is sufficiently fulfilled by an entry of "fishings" without division according to the kinds of fish that may be taken. If so, it follows that a proprietor of fishings is not bound to specify the nature of his fishings in his original return to the Valuation Roll Commissioners.

In the ordinary case no difficulty arises. Generally speaking, the only fishings which appear separately in valuation rolls as having a lettable value in their actual state from year to year are salmon fishings. It would be absurd to have hundreds of entries for trout fishings with the value blank. The difficulty arises when, as here, there are, or are alleged to be, in the same water and in the hands of the same proprietor, both salmon fishings and assessable fishings other than salmon fishings. The Legislature might not unnaturally have met the diffi-



culty by enacting in the salmon fishing Acts that the word "fishings" in the valuation roll should, when unqualified, be construed as salmon fishings, in which case they would have thrown on the fishing proprietor, who attributed the whole fishing or part of it to fishings other than salmon fishings, the burden of procuring the insertion say of "trout" before the word "fishings," or when the subject was composite, of having a separation made.

But the Legislature has enacted no such definition, and it has imposed no such burden. Curiously enough, by section 5 of the pursuers' 1868 Act it has imposed the burden of rectification in the one case, and of separation in the other, on the District Board. The ambiguous entry is sufficient for ordinary assessment purposes. If a District Board wishes to displace an allegation that the entry excludes salmon fishings, it is for them to have the entry so framed as to negative this contention, or if the allegation be that the entry is a composite one, it is for them to have a separation made and separate values attached to each subject. If they do not choose to do so, they run the risk of an allegation, as here, either that the defender's water contains no salmon fishing lettable in its actual state from year to year or that the subject is a composite one, and therefore either that no salmon fishing assessment can be imposed, or that this can only be done as the result of the proof which the defender asks.

The pursuers' answer involves two assumptions (first) that his part of the river being within their district, the defender was bound to make, and his titles containing a grant of salmon fishings must be presumed to have made, a salmon fishing entry. This does not follow. The defender may not be the owner of the salmon fishings in his part of the river, or if he is, the defender's part of the river may be in the head waters of the pursuers' district, where from natural obstacles or other cause no salmon can reach it, or although lower down it may be so continuously steep and rocky that salmon cannot be taken in it either by net or rod. The pursuers' second assumption is still more violent, namely, that it must be presumed, even although the opposite is offered to be proved, that the ambiguous word "fishings," admittedly embracing both salmon fishings and all other valuable fishings for all assessment purposes except the pursuers', is, in the case of the pursuers' assessment, limited to salmon fishings.

As I understood, the Sheriff-Substitute's ground of judgment, namely, that section 23 of the pursuers' 1862 Act authorises the District Board to treat the word "fishings" in the valuation roll as equivalent to "salmon fishery" in the Salmon Fishing Acts, was not maintained by the appellants. They argued that salmon fishings as a *separatum tenementum* must appear in the valuation roll; that the defender being a river proprietor within their district, and having the right of salmon fishing in his titles, was bound to enter his salmon fishings in the valuation roll; that trout fish-

ings only appear in the valuation roll when they have a separate lettable value; and therefore that the defender having made an entry of "fishings" it must be presumed that the entry refers to salmon fishings and nothing but salmon fishings. This proposition contains assumptions, as I think, unfounded both in fact and in law. As to the facts, salmon fishing with no lettable value in its actual state from year to year does not require to appear in a valuation roll; and it does not follow that the defender, although a river proprietor within the defenders' district and with salmon fishing rights in his titles, was bound to enter any salmon fishing in the roll, because he need not be a proprietor of salmon fishing or because his salmon fishing rights may be of no lettable value in their actual state. As to the law, I know neither principle nor authority for holding that the word "fishings" in a valuation roll, made up in terms of a Valuation Act in which the word is admittedly not so limited, is yet in reference to a salmon fishing assessment to be limited to salmon fishings only, without any authority for doing so in the Salmon Fishing Acts. In cond. 3 the pursuers say that their 1862 and 1868 Acts empower them to impose an assessment on "the several fisheries in each district." I am unable to find any warrant for this statement in Acts which define the word "fisheries" as applicable only to salmon fisheries.

The pursuers argued that on a sound construction of section 5 of the 1868 Act it did not apply in this case. If they are right in fact that the defender's salmon fishings have an appreciable letting value in their actual state, from year to year, then the first contingency, that the salmon fishings are not entered at all, would not apply. But if their view as to the defender's salmon fishings being an assessable subject is correct, and if the defender's view as to his trout fishings being also an assessable subject is correct, then I am unable to see why the second contingency, that of a composite entry requiring separation if asked by the pursuers, has not arisen. The pursuers and the Sheriff-Substitute and the majority of your Lordships, adopting the pursuers' contention, say, but without giving any reasons for the view, that it only applies where two entirely separate subjects are entered together under one head, say "shootings and fishings." I am unable to see why it should not equally apply where, as here, two distinct kinds of the same subject are lumped together in one expression.

The pursuers did not ask a proof. I therefore think the defender is entitled to absolver.

The Court recalled the interlocutor of the Sheriff and reverted to the interlocutor of the Sheriff-Substitute.

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