have an opportunity of observing upon, was, I think, a very prudent step to take in reference to such a case as this. But that is not necessary to the decision of the point now before us, which really turns upon the competency of this appeal, and I have no doubt, that the appeal is incompetent.

Mr. Moncreiff.—My Lords, there are two appeals before your Lordships' House. Of course your Lordships' judgment will apply to both.

LORD CHANCELLOR.—Yes.

Appeals dismissed as incompetent, with costs.

Appellants' Agents, Morton, Whitehead, and Greig, W.S.; Loch and MacLaurin, Westminster. —*Respondents' Agents*, James Webster, S.S.C.; John Graham, Westminster.

JUNE 7, 1867.

THE LORD ADVOCATE, on behalf of COMMISSIONERS OF WOODS AND FORESTS, *Appellant*, *v.* JAMES SINCLAIR, Esq. of Forss, *Respondent*.

Salmon Fishing—Prescription—Part and Pertinent—Tenendas Clause explaining Dispositive Clause—*S. had been in immemorial possession of salmon fishings, and on a view of his titles, it was proved, that S. and his predecessors had exercised the right as far back as* 1700, *when there was a disposition of "lands and fishings." From* 1700 *to* 1761 *the lands were held in base blench tenure, and the dispositions mentioned "fishings." A Crown charter of* 1761, *which was followed by infeftment, mentioned "lands and pertinents" only in the dispositive clause, but mentioned "fishings" in the* tenendas *clause.*

HELD (affirming judgment), *That, though the* tenendas *clause is not a conveying clause, yet it may be used to explain the meaning of the dispositive clause, and as the charter of* 1761 *in the* quæquidem *clause connected the subject matter of the charter with the former titles, the charter impliedly included "fishings."* [1]

This was an appeal from two interlocutors of the First Division. An action of declarator was raised by the Lord Advocate for the Crown against Mr. Sinclair of Forss, concluding to have it declared, that he had no right or title to fish for salmon *ex adverso* of the lands of Holburnhead, or on any part of the Bay of Scrabster, or the sea coast adjoining. The Lord Ordinary (Mackenzie) found, that the defender had no right or title to the salmon fishings, but the First Division altered the interlocutor, and assoilzied the defenders from the conclusions of the action. The Lord Advocate appealed against the interlocutors of the First Division.

The appellant in his *printed case* stated the following reasons for reversing the interlocutors :— 1. Because fishings are not included among the subjects disponed by John Sinclair of Brims to his third son James by the disposition of 1712, and therefore the respondent, who is confessedly in right of such subjects only as were conveyed by that deed of 1712, has no base title on which a right to salmon fishings could be acquired by possession for any length of time. 2. Because, even supposing that the respondent's grandfather had, at the time he applied for the Crown charter of 1761, a base right to "fishings" under his titles, that right was then resigned by him into the hands of the Crown, and so was extinguished, and the Crown charter of 1761 became thenceforth the sole measure of the rights of all claiming title under it. 3. Because the charter of 1761, which is the earliest Crown charter on which the respondent founds as giving a title on which to prescribe salmon fishings, does not contain in its dispositive clause a grant of salmon fishings or even of "fishings," but simply a grant of "pertinents," and because their charter is therefore not a *habile* Crown title on which a right of salmon fishing could be prescribed. 4. Because it being clear from the titles, that John Sinclair of Dunbeath, who granted the disposition and assignation of 30th November 1700, had no right in himself to the salmon fishings in question, no possession had on the grant of fishings contained in that deed by James Sinclair of Brims, the disponee, or by any one claiming through him on a mere base title, could operate to deprive the Crown of the salmon fishings in question which is never granted out.

The respondent in his *printed case* stated the following reasons for affirming the interlocutors :— 1. That the respondent and his predecessors, for time immemorial by themselves and others

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[1] See previous reports 3 Macph. 981; 37 Sc. Jur. 530. S. C. L. R. 1 Sc. Ap. 174; 5 Macph. H. L. 97; 39 Sc. Jur. 459.

deriving right from them, have fished for salmon by virtue of titles habile, and sufficient by the law of Scotland for the constitution of such a right *ex adverso* of his lands of Holburnhead in the Bay of Scrabster, and that the challenge, on the part of the appellant, of the continued exercise of that right is consequently unfounded. 2. Because even before the date of the disposition, by which as aforesaid the lands of Holburnhead, Outersquoy, and Sandiquoy, with the fishings pertaining thereto, were conveyed by John Sinclair, son and heir of William Sinclair of Dunbeath, to John Sinclair of Brims, the fishings in the Bay of Scrabster of which Holburnhead are a part, had been the subjects of grants, and never had been reacquired by the Crown.

The Attorney General (Rolt), *Lord Advocate* (Gordon), *Dean of Faculty* (Moncreiff), *Anderson* Q.C., and *T. Ivory*, for the appellant. — The Court below relied chiefly on the disposition of 1712; and though the word "fishings" is not in that deed, the majority held, that, as a previous wadset included fishings, the deed of 1712 is to be held as including it also. But the deed of 1712 conveyed no other fishings than such as fall within the word "pertinents," and that word does not, *per se*, include salmon fishings—Stair, ii. 3, 59, 60; ii. 3, 69; Bell's Pr. § 740; Menzies' Convey. 540 (3d ed.); *Duke of Montrose* v. *Macintyre*, 10 D. 914.

There is no authority for saying, that where once salmon fishing has been made a pertinent, the word "pertinent" will, in subsequent renewals of the investiture, carry salmon fishings; no such doctrine is found in *Duke of Queensberry*, M. 14,251; Hailes, 543.

The Judges below also held, that, though salmon fishing was not mentioned in the dispositive clause of the Crown charter of 1761, yet, as it was mentioned in the *tenendas* clause, the general result was to import it into the dispositive clause. But it is well settled, that a *tenendas* clause is worthless, and cannot be looked at for the purpose of conveying a right not conveyed by the dispositive clause—Bell on Convey. 299; M. 14,251; Menzies' Convey. 540 (3d ed.).

No assistance can be derived from the wadset, for it was a mere burden, and had been discharged and extinguished in 1761.

Though it is said, that there has been immemorial possession of salmon fishings, there is no authority for saying, that a charter *a non domino* will found prescription so as to divest the Crown of one of its regalia—Ersk. iii. 7, 4. In the case of *Lord Advocate* v. *Hunt*, *ante*, p. 1423, it was held, that no length of possession, unless founded on a habile charter, will avail.

Sir R. Palmer Q.C., and *G. Young*, for the respondent.—The interlocutors of the First Division were right. It is not disputed there had been immemorial possession. And it is enough to shew, in addition, that there was the general word "fishings" in the early charters—*Forbes* v. *Udny*, M. 14,250; Stair, ii. 30, 61. It occurs in a charter of 1606 and of 1663, a disposition of 1700, the wadset of 1702, the disposition of 1721, not to mention the charter of 1761.

These general words are amply sufficient, coupled with prescriptive possession—Stair, ii. 3, 69; Ersk. ii. 6, 15; Bankt. ii. 3, 111; Duff's F.C. 66; Menzies' Convey. 529 (3d ed.); *Maxwell* v. *Portrack*, M. 10,617.

The positive prescription clearly runs against the Crown—Ersk. iii. 7, 4; iii. 7, 31; Bankt. ii. 1, 29; Duff's F. C. 66; *Forbes* v. *Udny*, M. 7812; *per* Lord Moncreiff in *Ramsay* v. *Roxburgh*, 10 D. 661, 671.

As to the omission of the word "fishings" from the dispositive clause of the Crown charter of 1761, there is nothing to prevent a reference to the *tenendas* clause to explain the word "pertinent," as it is a universal rule, that any part of a deed may be explained by the other parts.

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is an appeal from interlocutors of the First Division of the Court of Session, pronounced in an action brought by the Lord Advocate on behalf of the Commissioners of her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, against the respondent.

The action was one of declarator, by which it was sought to have it found and declared, that the salmon fishings in the Bay of Scrabster form part of the hereditary revenues of the Crown in Scotland, and that the defender has no right or title to fish for salmon, *ex adverso* of the lands of Holburnhead, or in any part of the Bay of Scrabster or the sea coast adjoining, by means of stake nets, or bag nets, or by net and coble, or in any other manner of way.

In this contest with the Crown the onus of proof lies entirely upon the defender. According to the familiar law in Scotland, salmon fishings are *inter regalia* and *primâ facie* Crown property, and a subject can only establish his right to them against the Crown by clear proof of title in himself. The defender in this case proved the exercise of the right of salmon fishing in the Bay of Scrabster, and *ex adverso* of the lands of Holburnhead, for a period beyond the memory of man; and he and his predecessors have therefore had a possession of more than forty years as a foundation for a title by prescription. But this in itself is insufficient unless the defender can, in the words of the Statute respecting prescription of heritable rights, (Statute 1617, chap. 12,) "shew and produce a charter granted to him or his predecessors, by their superiors and authors,

preceding the entry of the forty years'" possession, with the instrument of sasine following thereupon.

It was said by the Lord Advocate, that there is no authority, that the Crown can be divested of its right by a title from a subject, followed by forty years' possession; but the Statute is express, that, after persons have possessed for forty years continually following and ensuing their infeftments, they shall "never be troubled, pursued, nor inquieted in the heritable right and property of their lands and heritages by his Majesty or others, their superiors and authors." It is said by Erskine (iii. 7, 4), "as prescription cuts off all grounds of preference, which, if insisted on before the expiration of the forty years, would have excluded the prescriber, a charter, though granted *a non domino* by one who himself had no right, is a good title of prescription." So that if the title be a fair genuine writing, and proper for the transmission of property, the possessor is, after the years of prescription, secure by the Statute, which admits no ground of challenge, except falsehood—the length of time standing in the place of all other requisites. The words of the Statute make this passage as applicable to the Crown as to a subject.

In considering the question, whether the defender has shewn a sufficient title with which his possession of salmon fishing can be connected, it must be borne in mind, that it is not necessary for him to shew a charter containing a grant of salmon fishing *eo nomine*.

If the grant is of fishings generally, followed by forty years' possession of salmon fishing, the word will be construed to have that meaning. But he must shew a grant either of "salmon fishing," or of "fishings" generally, followed by the exercise of the right of salmon fishings; for being *inter regalia* and a separate tenement, it will not pass under the word "pertinents."

It must be expressly conveyed in the manner above mentioned, not only in the grant from the Crown, but also in a conveyance from the Crown's grantee, in the dispositive clause of the grant or conveyance.

Some early charters were referred to in the course of the respondent's arguments in favour of the Earls of Caithness and Sutherland, and a tack by the Earl of Caithness in 1659, "of the salmon fishing upon the waters of Thurso, from the head of Lochmore to Holburnhead, in the sea." The object of producing these instruments was to shew, that the Crown had parted with the salmon fishings *ex adverso* of the respondent's lands to a subject, so as to make them transferable by words, which would not be sufficient for the purpose in a Crown charter. In a charter of *novodamus* to the Earl of Sutherland in 1601, "piscariis" is mentioned among the pertinents; and it was argued, that it therefore became afterwards a competent expression for salmon fishings in subsequent deeds; and that the Crown charter of 1606 having created a barony of Scrabster, with fishings annexed, when the charter of confirmation and *novodamus* in 1663, from the Bishop of Caithness, in favour of John Shilthomas and Margaret his spouse, contained the words, "a vertice lie Bancks usque ad litora maris cum omnibus et singulis earund. pendiculis annexis connexis ac justis suis pertinen. quibuscunque jacen. in Baronia nra. de Scrabster," the words "pendiculis annexis et connexis," with possession, would carry the salmon fishing. But there is no apparent connexion between the titles of the Earls of Sutherland and Caithness and that of Shilthomas; and it does not clearly appear, that the earlier charters relate to the salmon fishings in question; and even if they do, I cannot think, that they gave any such effect to the word "pertinents" as is contended for. It is quite true, that in the charter of *novodamus* of 1601 the word "piscariis" is found amongst the general words descriptive of the pertinents; but it cannot refer to salmon fishings, because they are in terms one of the subjects of the grant. It was most likely intended to apply to "white fishings," which may be transferred as a pertinent; and I find no authority (but the contrary) for saying, that salmon fishings can, under any circumstances, pass from the Crown, or from a subject, by the word "pertinent."

I think that all the arguments derived from the earlier charters must be laid aside, and that the prescriptive title of the respondent cannot be drawn from a higher source than the disposition in the year 1700, by John Sinclair of Dunbeath, in favour of John Sinclair of Brims. By that disposition, upon which sasine in 1703 proceeded, the lands of Holburnhead, Outersquoy, and Sandiquoy, with anchorage of the road of Scrabster, were conveyed,—and there is in the dispositive clause an express grant of fishings. It is not denied, that the proprietors of these lands, the respondent's predecessors, exercised the right of salmon fishing for forty years after this deed. Even if John Sinclair of Dunbeath had no title to salmon fishing *ex adverso* of his lands at the time of this disposition, yet forty years' possession of salmon fishing afterwards by the disponee and his successors, not only gave an interpretation to the word "fishings," but made the title unquestionable under the Prescription Statute of 1617.

The respondent therefore is enabled to found his defence to the claim of the Crown upon this title, unless it was subsequently displaced.

In 1702 Sinclair of Brims granted a wadset of the lands and fishings to James Sinclair. The wadset continued to exist until the year 1761, when it was redeemed by Sinclair of Forss, who had in the previous year purchased the reversion of the lands. This reversion was originally granted by John Sinclair to his own son James on the 26th March 1712. The disposition, after

reciting the wadset, disponed to James Sinclair and his heirs male "all and haill the ground, right, property, and reversion of all and sundry the town and lands of Houpburnhead, Outersquoy, and Sandequoy, with the parsonage teinds and pertinents of the foresaid lands, parts, pendicles, and universal pertinents as is contained and particularly expressed in the foresaid contract of wadset above narrated, and more particularly as is at length contained in the original rights and progressive securities conceaved in favour of me, my authors, and predecessors of, upon, and concerning the samen lands."

It was argued on behalf of the Crown, that this deed contained no express grant of the fishings; that they were not included in the words "parts, pendicles, and universal pertinents," and that a clause of conveyance must contain a description of the property in itself, and not by reference, and therefore, that though the deed of 1700 contained a grant of the fishings, they were dropped out of the titles in the conveyance of 1712.

I cannot adopt this argument. I agree that the word "pertinents" would not be sufficient to pass the fishings to the disponee, but as it was clearly the intention of John Sinclair to convey to his son the reversion of everything which was contained in the wadset, I cannot understand upon what principle it can be contended, that as between the parties to the disposition the reference to what was "contained and particularly exprest in the contract of wadset" was not effectual to pass all the subjects, including the fishings which are particularly expressed. The disposition by James Sinclair in favour of Robert Sinclair in 1728 contains no express reference to the contents of the wadset like that in the deed of 1712, but it recites the wadset and the disposition of the reversion in that deed, and is a conveyance of that reversion and consequently of all that it included. But in that disposition of the reversion from George Sinclair to James Sinclair by the deed of 27th March 1760, "fishings" are expressly mentioned. And on the renunciation of the wadset in the following year 1761, in favour of James Sinclair, the purchaser of the reversion, the fishings are again expressly mentioned and renounced. I therefore think, that it may be properly said, that all the titles from 1700 down to 1760 contained fishings in the dispositive clause.

But then it is contended on the part of the Crown, that, suppose a base title to the fishings to be thus established in 1761, the owner of the fishings under this title returned the subjects which he held, including the fishings, into the hands of the Crown, and took back a grant from which the fishings were excluded.

In considering this question, it is necessary to bear in mind, that this charter proceeded upon a resignation *in favorem*, the object of which was to convert the base title of James Sinclair into a public title. The presumption therefore is, that whatever was resigned to the Crown for this purpose would be regranted. It is certainly true, that in the dispositive clause of the charter there is no mention of fishings, but I see no reason on that account to adopt the strong expression of the Lord Advocate, that the Crown struck out the word "fishings," and refused to grant them. The fishings were either intended to be resigned into the hands of the Crown for the purpose of being re-granted, or they were not. If they were, why should the same words by which they were resigned not be sufficient for their re-grant, and if they were not included in the resignation, then the respondent may fall back on his base title founded upon the deed of 1700, and the subsequent possession of salmon fishing *ex adverso* his lands. The word "*piscationibus*" is found in this Crown charter, but it is in the *tenendas* clause. Now I quite agree that this clause will not have the effect of conveying any right not conveyed by the dispositive clause, but I do not see why, if a question arises as to what was re-granted upon the construction of the charter as a whole, any clause may not be resorted to in aid of this construction, and the *tenendas* clause amongst the rest. The word "*piscationibus*" thus found in the *tenendas* clause renders the charter in some degree ambiguous, and if so, and we are called upon at the distance of 100 years to construe it, I presume that the rule of evidence which prevails in England would be applicable for the same purpose of construction in Scotland. That rule is, that ancient instruments of every description may, in the event of their containing ambiguous language, be interpreted by what is called contemporaneous and continuous usage under them—that is, by evidence of the mode by which property dealt with by them has been held and enjoyed. Now, from the time of the charter of 1761, by which the vassal is supposed to have resigned the fishing and not to have obtained a re-grant of it, he continues to exercise his right of salmon fishing as before, and the same has been enjoyed by his successors down to the respondent himself, and the respondent's right to the salmon fishings *ex adverso* of his lands was acknowledged on the part of the Crown in the disposition and procuratory of resignation *ad remanentiam* of the 16th January 1839, by which, in consideration of a sum of £700 paid to him by the Commissioners of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings on behalf of Her Majesty, the respondent sold and disponed to and on behalf of Her Majesty, "All and whole the lands of Sandiquoy, with the whole houses thereon, the seashore adjoining the same, and the fishings thereof."

It was said on the part of the Crown, that, although this purchase from the respondent was an admission of his right to the fishings *ex adverso* of the lands of Sandiquoy, it could not be carried further, and that it did not follow, that he was entitled to the fishings beyond these particular

lands. But the respondent's claim to the fishings is precisely the same throughout the whole extent of his lands, and when his right depending upon this common title is admitted in one part, it is scarcely possible to resist the applications of the admission to the rest.

I think that the respondent successfully established his defence to the claim of the Crown of the right to fish for salmon *ex adverso* his lands, and that the interlocutors appealed from ought to be affirmed.

LORD CRANWORTH.—My Lords, I will, in the first place, very shortly state the nature of the title on which the argument of the respondent is founded.

By the bishop's charter of adjudication of 25th March 1687, William Sinclair of Dunbeath obtained the lands of Howburnhead to him and his heirs, to be holden of the bishop. Under the word "Howburnhead" I include all the lands to which the writs and documents before us relate. The grant did not, in the dispositive part, mention fishings, but it contained the usual precept of seisin, and we may presume that seisin regularly passed, though there is no instrument of seisin in proof.

The bishop's superiority was transferred to the Crown shortly after the date of this charter, when Episcopacy was abolished in Scotland.

William Sinclair of Dunbeath died seised, and his eldest son, John Sinclair, was duly retoured his heir.

In 1700 this John sold and disponed to John Sinclair of Brims and his heirs the lands of Howburnhead with (*inter alia*) the fishings, and the deed contained a procuratory of resignation and a precept of seisin. On that precept John of Brims was duly infeft in the fishings as well as the lands in April 1703.

John of Brims made a wadset of these lands and fishings in 1702, but I do not feel called on to say more as to this wadset except that it included the fishings by name, and passed through various persons till it was finally discharged in 1761.

In 1712 John Sinclair of Brims sold and conveyed the reversion to his third son James and his heirs, of all which had been conveyed by the wadset, and this certainly included the fishings, though they are not mentioned by name, for the reversion was the reversion of all contained in the wadset. The deed contained a procuratory of resignation and a precept of seisin.

James, in 1728, sold and disponed the reversion, which would include the fishings, to Robert Sinclair and his heirs.

Robert died, and his son James, in 1760, sold and disponed the reversion, expressly including fishings, to James Sinclair of Forss, with procuratory of resignation and precept of seisin, and in the following year, (3d March 1761,) James Sinclair of Forss obtained a charter of resignation and confirmation from the Crown. The grant does not, in the dispositive part, mention fishings, but only "totas et intregras terras de Howburnhead, &c., cum (*inter alia*) pendiculis et pertinentiis earundem," and in the *habendum* the words are added "cum (*inter alia*) piscationibus."

It is admitted, that the present respondent has succeeded to all the rights which passed under that charter to James Sinclair of Forss. And the question therefore is, what those rights were. The respondent claims in two distinct rights. He says, that James Sinclair of Forss acquired, under the charter of 1761, the fishings as well as the lands. But if that is not so, then he relies on a base title to the fishings acquired under the disposition by John, son of William of Dunbeath, to John of Brims in 1700.

It is clearly established in proof, that the respondent and his predecessors have enjoyed the fishings in controversy, (which are salmon fishings,) for a period greatly exceeding forty years before the present action was brought, in fact, as far back as living memory or tradition can go.

This is sufficient to entitle him to salmon fishings if he has any habile title on which the enjoyment can rest, for the word "fishings" may be construed to mean salmon fishing, if, under a title to fishings, salmon have always been taken.

Now in considering the validity of the claim of the respondent resting on the Crown title, I would observe, in the first place, that the evidence of the enjoyment must be taken as proving his predecessors in title exercised the right of fishing for salmon as far back as the year 1700, and so that the fishings mentioned in the disposition to John of Brims, and the seisin had thereon in 1703, were salmon fishings. Though under the terms of the disposition of 1700, John of Brims might have obtained a charter to hold of the Crown, yet he did not take that course; he was content to hold by a blench holding under John, the son of William of Dunbeath. He obtained no grant or charter from the Crown. If, however, John of Brims and those who, from time to time, were successively in the seisin by virtue of this base tenure from 1700 to 1761, exercised uninterruptedly the right of salmon fishing, I take it to be certain that at that latter date they had acquired under the Statute of 1617 a prescriptive title to it as well against the Crown as against all other persons.

I have already stated as the clear result of the evidence, that they did so exercise this right. The consequence is, that in 1761 the Crown had no power to disturb James Sinclair, the person then in the enjoyment of the right, though he did not hold directly as a vassal of the Crown as his immediate superior.

It appears that this James Sinclair, who was in possession in 1761 as well of the fishings as of the land by clear progress of title from John of Brims, the disponee in 1700, was minded to become an immediate vassal of the Crown, and accordingly he procured a charter of resignation and confirmation, dated the 23d of February 1761, whereby the Crown granted to him and his heirs the lands of Howburnhead, to be holden by the said James Sinclair and his heirs immediately of the Crown, with the pertinents (enumerating them), and expressly including fishings in the *tenendas* clause, though it had not been mentioned in the dispositive clause.

I do not question the general proposition, that nothing which is not mentioned in the dispositive clause can be held to pass, merely because it is included in the *tenendas* clause. I will assume further, that the word "pertinents" cannot *primâ facie* be taken to include fishings. But in construing Crown charters as well as all other written instruments, common sense suggests, that we must look to the whole context of the instrument before we can say with certainty what is the true meaning of any particular clause in it, and, acting on that principle, I come to the conclusion that salmon fishings must be held to have been granted by the Crown charter of 1761, and in those which have followed. I will state shortly the grounds on which this opinion is founded.

In the first place, fishings were in terms included in the disposition by John of Dunbeath to John of Brims in 1700, and in the seisin following on that disposition 1703.

Fishings were expressly included in the wadset of 1702, and though in the subsequent dispositions of 1712 and 1728, under which George Sinclair of Geise became, subject to the wadset, entitled in 1760, fishings were not mentioned in express terms, yet they were implied, because the dispositive clause in both those deeds was clearly meant to embrace everything which had been included in the wadset. George Sinclair of Geise, having thus become entitled to the fishings as well as to the land, sold and disponed both land and fishings to James of Forss, by the disposition of the 27th March 1760.

At that time, therefore, James of Forss had acquired an absolute title to the salmon fishings against the Crown -- and against all the world under the Statute of 1617, for the parole evidence must be taken to shew immemorial enjoyment, and there was clearly a good title to fishings under all the dispositions from the year 1700, though not by holding under the Crown.

In this state of things James of Forss expede the Crown charter of 1761, and the question is, whether the Crown thereby granted the fishings to which James of Forss has undoubtedly acquired a good title by a base holding under the heirs of John of Dunbeath?

I cannot doubt that the fishings must be treated as included in the grant. It is true that fishings are not specifically mentioned in the dispositive clause of the charter, but after granting the land with its pertinents, the charter by the *quæquidem* clause connects the subject matter of the grant with that which was formerly held by John Sinclair of Brims, and in a subsequent clause it expressly ratifies and confirms the disposition by John of Dunbeath in 1700, in favour of John of Brims, which ratification and confirmation, it is there declared, should have the same force as if the disposition of 1700, and the instrument of seisin following thereon, had been therein engrossed *verbatim*, and as if the confirmation had been made in the lifetime of John of Dunbeath and John of Brims. In that disposition and instrument of seisin fishings are expressly included. It was thus made plain on the face of the charter of 1761, not only that James Sinclair, upon whose resignation the new grant was made, was then entitled to the fishings as well as the land, but further, that the Crown ratified and confirmed that. When, therefore, the Crown accepted from James Sinclair the resignation of that which had formerly been held by John of Brims, in order that a new grant might be made to him, and when the Crown made a new grant accordingly, describing the subject matters of the grant as the lands of Howburnhead, &c., with their pendicles and pertinents, it must have been understood, that those words would sufficiently describe what had been surrendered, *i. e.* all which had been formerly holden by John Sinclair of Brims, and it appeared on the face of the grant, that this included the fishings. Thus explained, the charter would correctly include as it did fishings in the *tenendas* clause, for though not expressly mentioned, they were, as I have endeavoured to explain, looking to the whole of the charter, impliedly included in the new grant.

The grounds on which I have formed this opinion, leave untouched the doctrine, that the word "pertinents" does not *vi termini* include fishings, and also the rule of law, that subjects not included in the dispositive clause do not pass, merely because they are mentioned in the *tenendas* clause. But there cannot be any principle which prevents us from discovering the true meaning of every part of an instrument by a fair examination of the whole.

I do not think it necessary to say anything as to the subsequent charters and instruments. It is clear, that they must be taken to include whatever was granted by the charter of 1761.

My opinion, therefore, is clearly, that the respondent has a good title under the Crown charters. But I also concur in the argument, that even if that were not so, still he had a good title under the base holding created in 1700. If the resignation for a new infeftment in 1761 included the fishings, then, as I have already explained, the Crown must be taken to have regranted them. If the resignation did not extend to the fishings, then James Sinclair of Forss, and those deriving title under him, have all along been holding by the base tenure created in 1700.

In any view of the case the claim of the Crown is unfounded.

LORD COLONSAY.—My Lords, when this case was before the Court below I fully stated my opinion in regard to it; and as the parties are in possession of those views, I do not think it necessary to enter much into the case now, as I have not heard anything that leads me to alter the opinion I then expressed. But there are some elementary matters which have been dwelt on in the argument, to which I will shortly advert.

In the first place, it is perfectly clear as matter of law, that salmon fishings are *inter regalia.* It is also perfectly clear, that they are of that class of regalia which the Crown may give away. It is equally clear, that a "grant of fishing" is not a grant of salmon fishing. And it is clear also, that a grant of fishing, if followed by possession, may be converted into a grant of salmon fishing, or may be explained as being a grant of salmon fishing; but it is also clear, that it requires possession for a length of time in order to do that. I hold it also to be a clear proposition, that by positive prescription, the rights of parties are protected against the challenge of the Crown. All these things are equally clear.

Now on the face of the documents and evidence which we have here, there are some things which I think are plain. In the first place, I think it is beyond the possibility of reasonable question, that the defender in this case and his predecessors have been in actual possession and enjoyment of these salmon fishings beyond the memory of man. I think another fact appears clear, that at a very early period, in 1606, the Crown had granted away the right of salmon fishings to the family of Caithness, who were in possession of these salmon fishings for a length of time, because there is a tack granted by them more than fifty years after the date of that prior grant. Now at this distance of time, it is difficult to see what more clear evidence of possession there could be than the exercise of the right of property, which is involved in granting tacks of the property. And that very tack is not the first, but it is one of a succession of tacks which were granted by the owner of the fishings at that time. That fact is of importance in this case, in this respect, that we are not to look at the case as one in which the Crown is to be assumed never to have made a grant of the fishing. Throughout the case it has been argued very much, on the part of the Crown, as if that were the stand point from which it was to be regarded, but that is clearly a mistaken view of the case. When we find that the Crown parted with the right of fishings at an early period, and we find no evidence whatever of its being reconveyed or reassumed by the Crown, (unless it is in 1761,) the assumption, that they are to be held as never having been given out of the Crown is excluded from the case, and the main foundation for the argument on the part of the Crown is most materially shaken by that state of facts.

Then again we have seen, that for a long period, from 1790 downwards, there has been a title on which prescriptive right could have been sustained on the part of this gentleman and his predecessors. I do not think it necessary to go through the intervening titles, some of which indicate the presence of the right of salmon fishing directly, and some more indirectly. But we have in 1700, a long way back, a clear conveyance of a right of fishing, which could be converted into a right of salmon fishing; and we have immemorial possession under that right.

I think, that the argument for the Crown consisted very much of criticisms on the rights and titles of the defender, as if everything was to be presumed against him, and everything in favour of this right having still rested in the Crown, and never having been given out. As for instance, when the right of wadset was given, and when it came to be redeemed, it is said, that the reversion did not expressly mention "fishings." But the right of wadset did give the fishings. That right of wadset is, in the first place, a clear proof of the exercise of the right of property in the party who granted the wadset, and then, when the creditor who had obtained possession, (which, in this case, was of the nature of what is called a proper wadset,) renounced the right in respect of having obtained satisfaction of his debt from his debtor, and the debtor came to redeem his right, the natural and reasonable construction of the grant of the reversion is, that it replaced the debtor in possession of all that which he had previously given to his creditor.

Then again when we come to the Crown charter of 1761, which is the only point at which it can be said, that the Crown had re-acquired the right of fishing, what is that but a charter by progress in which the party is completing or making up his own title? It is not a resignation by him for the purpose of making over his right to the Crown, but a resignation by him with the view of getting a new right in his own favour.

Now the question has been raised whether the word "pertinents" in that title can be held or construed to comprehend the salmon fishing. It is clear, that in ordinary cases it may not be so held. It will require, that it should be stated. But the position of this title was peculiar. The description had been in various steps of it by reference to former titles, and when this party came to the Crown, in order to get a renewal of his title, then it was the duty of those who were acting for the Crown to look at the right, that was in him at the time, and to see what was the character of it, and what it was that was to be renewed, and the reasonable presumption is, that whatever was then surrendered to the Crown for the purpose of being regranted to the vassal was regranted to the vassal. It has been said, that there is no mention of fishings in the dispositive or conveying clause of this charter, but that it occurs only in the *tenendas*, and we

had the remark made (clearly sound in law), that the *tenendas* is not a conveying clause, and that it is generally not enough by itself. That certainly is a doctrine which hardly required much authority; but we were referred to very high authority on that subject, and among others to a most recent authority, I mean the late Professor Menzies, whose Lectures on Conveyancing are of the highest value, in which he lays down that doctrine as he found it in all the institutional writers. But it does not follow from that, that the mention of "fishings" in the *tenendas* is of no use in any case whatever, if the fishings are not mentioned in various parts of the deed. On the contrary, in that very dissertation Professor Menzies lays down this, "At the same time, while the *tenendas* cannot transmit a right, it may in some cases raise a presumption in favour of the grantee, so as to entitle him to establish a right by evidence of possession, but it is certain, that without such possession no right is conferred." Now, that is the very position in which we are in reference to this case. I therefore hold, that the transaction of 1761 is to be regarded as one which replaced the vassal in the right which he previously had in the fishings. But if it were otherwise, it cannot be set aside by placing an inconsistent construction on the surrender of the vassal by holding, that those expressions which cover his surrender are not equally competent to cover his replacement. If there was no replacement, I think it is clear, that there was no surrender. At all events, I think he had the option, and he has now the right of ascribing his possession to that title which he may regard as most secure. And, therefore. whether the Crown insist, that the rights were then surrendered or not, I think in either view of the case, that the vassal has defended his right successfully against the challenge that is made on the part of the Crown.

Interlocutors affirmed, with costs.

Appellant's Agents, A. Murray, W.S.; Horace Watson, Westminster.—*Respondent's Agents*, G. L. Sinclair, W.S.; Grahames and Wardlaw, Westminster.

JULY 11, 1867.

MRS. ELIZABETH HONEYMAN GILLESPIE of Torbanehill, and Husband, *Appellants*, *v.* JAMES YOUNG and Others, *Respondents*.

Reparation—Slander of Title—Torbanehill Mineral—Fraud—*G., the owner of lands from which a mineral or bituminous shale was produced, raised an action of damages against Y., the patentee of a mode of extracting paraffine oil from bituminous coals, for fraudulently representing, that his patent gave him the exclusive right of obtaining such oil from the said mineral; but there was no allegation that Y. knew this mineral was not coal, nor any occasion stated when he made such alleged false representation.*

HELD (affirming judgment), *That the allegation of G. was not relevant to sustain the action.*[1]

The action was raised by Mrs. Gillespie and her husband, concluding for damages on account of certain alleged false and fraudulent representations made by Mr. Young, the respondent, with reference to an alleged patent right, whereby the value of the mineral property of the appellant was depreciated in the market, and damages sustained by them to the extent of £23,000 and upwards. The substantial ground set forth in the condescendence was, that the respondent, being the patentee of a process for extracting paraffine oil from coal, represented, that he had the exclusive right of extracting such oil from the mineral now known as the Torbanehill mineral, whereby he deterred people from buying and using such mineral, and so lessened the profits which the appellant, as owner, might have derived from its use by the public at large for distillations of similar oil. And this was alleged to have been done fraudulently by the defender to the loss of the pursuers. The defence was, that the allegations were irrelevant and insufficient to support the conclusions of the action. The Lord Ordinary held, that no relevant ground of action was set forth, and the Second Division adhered, and dismissed the action.

The pursuer now appealed against these interlocutors.

The pursuer in her *printed case* stated the following reasons for reversing the interlocutors:—1. Because the summons and pleadings contain relevant allegations of false and fraudulent misrepresentations of fact on the part of the respondents, to the appellants' loss, injury, and damage;

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[1] See previous report, 4 Macph. 715: 38 Sc. Jur. 380. S. C. 5 Macph. H. L. 106: 39 Sc. Jur. 567.