number and four-fifths in value of the creditors present. Mr M'Alister objected to the whole votes of his opponents, on the ground that the whole of the creditors voting had discharged the bankrupt under a private trust in 1862, and therefore could not act as creditors in the present sequestration. The appellant's averments on this head were shortly as follows:—That in 1862 he granted a trust-deed for behoof of his creditors; that an arrangement was then made by which he should be discharged on payment of a composition of £700; that the composition had been paid, and a deed of discharge prepared and duly delivered to him; that the discharge had shortly after been fraudulently obtained from him, and the signatures scored out. Various objections in detail were stated by the appellant to the votes of his opponents. The latter denied the statements of the appellant, and objected to the debts in virtue of which he claimed to vote.

The Lord Ordinary (GIFFORD) dismissed the appeal, with expenses.

M'Alister reclaimed.

M'KECHNIE, for him, argued that if he could show that the whole votes of the respondents were null in consequence of their having granted a discharge in 1862, the appellant would be entitled to succeed if he had any good votes at all. For this purpose he asked a proof by writ or oath, and particularly a diligence for the recovery of documents to instruct payment by the bankrupt of the £700 mentioned above.

J. M. DUNCAN, for the respondents, was not called on.

At advising—

LORD PRESIDENT—I am quite satisfied with the Lord Ordinary's interlocutor. The appellant seeks to open up the question by a demand for a recovery of documents. His object is to show that he was discharged in 1862 by the creditors who voted against him. Now it is in evidence that a deed of discharge was prepared at that time. If it had been delivered it would have had the effect of discharging the bankrupt. But the deed is cancelled, and in the hands of the granters. What the appellant proposes to do is to show that this deed was to be granted on payment of £700. He proposes to prove that the £700 has been paid by him, and, therefore, that the deed of discharge ought to have been delivered. The payment he proposes to instruct by writ or oath. But what kind of writ? Not by receipts in his own hands, which constitute the proper evidence of payment, but by writings in the hands of other parties, which he seeks to recover. But unless this recovery is itself to operate as delivery, it would be no verification of his allegation, but the reverse. The fact that the receipts, if there are such, are still in the hands of the creditors, would rather show that the payment had not been made.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—This is simply an attempt to falsify affidavits of creditors, ostensibly by means of a diligence to recover writs. But no diligence would be of any avail without parole evidence. The recovery of the writs would prove nothing in the appellant's favour.

The Court adhered, with additional expenses.

Agent for Appellant—John A. Gillespie, S.S.C.

Agents for Respondents—Goldie & Dove, W.S.

Friday, May 19.

THE LORD ADVOCATE *v.* SIR JOHN ANDREW CATHCART AND OTHERS.

Salmon-fishing—Barony—Prescription—River—Sea. A barony, the titles of which contained no express grant of salmon-fishings, consisted of certain lands on the banks of two rivers, and of certain other lands on the sea at a distance of several miles from the former. *Held* that the proprietor, having proved prescriptive possession of the salmon-fishings in the rivers, but not of those in the sea, had right to the salmon-fishings in the rivers, but not to those in the sea, the maxim *Tantum præscriptum quantum possessum* ruling the case.

The barony of Carleton, in Ayrshire, belonging to Sir John Andrew Cathcart and his trustees, consists of various parcels of land, some of which are situated on the banks of the river Girvan, others on the river Stinchar, and others adjoining the sea. The lands last mentioned are detached, and at a distance of several miles from any of the other lands in the barony. The charter of erection contains no express grant of salmon-fishing, but certain of the lands are granted *cum piscationibus.*

The Lord Advocate, acting on behalf of the Commissioners of Woods and Forests, raised the present action against Sir John Cathcart and his trustees, to have it declared that the salmon-fishings both in the river and in the sea *ex adverso* of the lands and barony of Carleton, belong exclusively to the Crown. The defenders pleaded prescriptive possession on the barony titles. A proof having been taken, the Lord Ordinary (ORMIDALE) found it proved that for upwards of forty years the defenders and their predecessors had fished for salmon by net and coble and other lawful means in the rivers Girvan and Stinchar, and that without interruption from the Crown or any other party; but that the defenders had failed to prove prescriptive possession of salmon-fishings in the sea *ex adverso* of their lands. His Lordship accordingly found for the pursuer as regards the sea fishings, and for the defenders as regards the river fishings, and found the defenders entitled to one-half of their expenses.

The defenders reclaimed.

ADAM and MARSHALL, for them, argued—(1) That in point of fact Sir J. Cathcart and his predecessors had for upwards of forty years fished for salmon in the sea by the best means possible in the locality and known at the time; (2) Even if this were not so, prescriptive possession of the salmon-fishings in the rivers was sufficient to give the defenders right to the whole salmon-fishings of the barony. Prescriptive possession of salmon-fishings entitles the proprietor of a barony to read an express grant of salmon-fishings in his titles. It is not necessary to prove that every part of the waters have been fished. Possession is the badge but not the measure of the right, and the fact that the different parcels of land are discontiguous does not alter the case, for a charter of barony confers the same rights on the detached parcels of which it consists, as if they had been physically united. Erskine, ii, 6, 18; Stair, ii, 3, 45; *Milne's Trustees*, July 1, 1868, 6 Macph. 772, 5 Sc. L. Rep. 620.

The SOLICITOR-GENERAL and IVORY, for the respondent—To test the argument of the defenders,

suppose the Crown had made an express grant of the salmon-fishings on the sea to another, could the baron by forty years' possession of the river fishings exclude the holder of an express grant from fishing on that part of the coast? No one can be deprived of a right which has been expressly granted except by possession adverse to him, *i.e.*, possession which he could have stopped but did not. Again, the defenders say that possession of a part is possession of the whole of the barony fishings. They argue as if the barony fishings were a known definite subject. But how in this case, can it be determined whether any fishing belongs to the barony except by possession of that particular fishing?

At advising—

LORD PRESIDENT—The Lord Ordinary has found in favour of the Crown as regards the sea-fishing, but he has found that Sir John Cathcart and his predecessors having a barony title have possessed the river-fishings for upwards of the prescriptive period. As regards the last part of the judgment, it is not seriously complained of; and I need only say that I entirely concur with the Lord Ordinary. As regards the salmon-fishing in the sea, there are two questions—one of fact, whether there has been prescriptive possession, the other of law, but with regard to which there are certain important findings in fact by the Lord Ordinary which have not been challenged. His Lordship finds that the lands consist of various parcels on different waters. The sea-fishings in question are *ex adverso* of lands which are at a distance of several miles from any other lands in the barony. The question, whether the defenders have possessed the sea-fishings for forty years, depends for the earlier part of the period entirely on the evidence of one old man named Shiels. I regard the evidence as insufficient. It is greatly wanting in precision; but, independently, the kind of possession had by this man was not proper possession of salmon-fishings, but an experimental and occasional possession. Such possession is not legal possession necessary to constitute a prescriptive title. Sir John Cathcart further contends that as his title is a barony title, and as he has undoubtedly possessed some salmon-fishings—those in the Girvan and Stinchar—that is sufficient to give him a good right to all the fishings of the barony, *i.e.*, all the salmon-fishings within the limits of the barony. This is an important general proposition in law, and it must be considered in relation to the legal effects of a barony title. These effects are well settled in our law. A general conveyance of a barony carries all parcels which belong to the barony, or have been prescriptively possessed, without the necessity of special enumeration. Then, if the charter of erection gives right to any of the regalia, these will be transmitted by a conveyance of the barony without special mention. But the mere erection of a barony does not convey any of the regalia. A barony title, without mention of salmon-fishing or of fishing at all, is a good title to prescribe salmon-fishing. This is laid down by our institutional writers, and confirmed by the case of *Milne's Trustees*, 1 July 1868. A barony title *cum piscationibus* is, in a question of salmon-fishing, no better than a barony title without the clause; *Duke of Richmond* v. *Earl of Seafield*, 16th Feb. 1870. There is one other privilege of a barony which perhaps bears nearest on the present question. Possession of a part of a barony is equivalent to possession of the whole, in this sense, that if it can be shown from the original charter of erection, or other authentic writs, that a certain parcel of land, of which the baron has had no possession, belongs to the barony, the possession of the other parts will be as effectual as if he had possessed that part. But the plea of the defenders goes much further. They maintain that a barony title, followed by prescriptive possession of salmon-fishing in the rivers, will give the baron right to all salmon-fishing within the limits of the barony, including that in the sea *ex adverso* of lands entirely disconnected with the lands in which the fishing has been enjoyed. This proposition seems to be entirely unsupported, and to be based on a misconception of the meaning of the rule, that possession of a part of a barony is possession of the whole. That rule applies only to cases where it can be shown otherwise than by possession, that the part claimed belongs to the barony. In the present case the only possible way of showing that any salmon-fishing belongs to the barony is by possession of that particular fishing. The maxim applies, *Tantum prœscriptum quantum possessum.* Accordingly, I agree with the Lord Ordinary.

LORD DEAS—I agree with the Lord Ordinary and with your Lordship. The defenders have proved possession of the river fishings, but not of those in the sea. What then is the effect of the possession in connection with the barony title? The charter of erection specifies a variety of lands, some with fishings, and some without. The most favourable view for the defenders, and I think the just view, is to hold, that though fishings are only mentioned in connection with some of the lands, and not with others, the effect of erection is to give the whole lands *cum piscationibus.* They are entitled to prescribe any right that a party with such a title could prescribe, and nothing more. They contend, that if they have possessed some fishings within the barony, that is possession not only of the salmon-fishings in the rivers but in the sea. That does not follow. I consider that they are in the same position as if their charter had borne "with salmon-fishings so far as they have been possessed." The effect of a barony title, or of a title *cum piscationibus*, is to give a title to salmon-fishings in so far as there has been possession. It may be that, though they had not fished every part of a river, fishing in one part of the river gives a right to fishing in the whole. But that depends on whether what was possessed is part of the larger thing they are claiming. If it could be made out that the river fishings and the sea fishings were a *unum quid*, then possession of the former might give them a right to the latter. But that is certainly not the case here.

LORD ARDMILLAN—In the state of the titles to the lands and barony of Carlton it is evident, and is indeed admitted, that Sir John Cathcart has no right of salmon fishing expressly conferred by charter; and therefore has no such right either in the river Girvan, or in the river Stinchar, or in the sea at Carlton, unless he has had possession exercised for forty years. Possession is necessary to his title. A title to lands *cum piscationibus*, but without the word "*salmonum*," may be raised to a title to lands with salmon fishing by prescriptive possession. The salmon fishing is in such a case not within the title, till introduced by force of prescriptive possession. There is no question

here as to the effect of possession of a subject within the scope and comprehensiveness of the title. The salmon fishing is not within the title. The possession is referred to here, not to explain, or confirm, or support the title, but to extend it, to bring something within the title which was not within it.

The able argument of the Solicitor-General was to my mind quite conclusive on this point. When prescriptive possession is appealed to, in order to sustain a claim to a right not enumerated, and not comprehended in the words of the title, but requiring prescription to sustain its introduction, then the prescriptive possession must be the measure of the right—the well-known and settled maxim *tantum prescriptum quantum possessum* must apply. Nor is this question affected by the fact that the lands have been created into a barony. A right to salmon-fishing is not conferred by the mere creation of a barony. If not specially mentioned, it is not a privilege of the barony. But it may be introduced by prescriptive possession, and that even though there be no grant *cum piscationibus*. A barony title is as good a foundation for a prescriptive right to salmon-fishing as is a grant *cum piscationibus*. But in both cases the possession which introduces the right of fishing into the title must be the measure of the right. The rule, *tantum prescriptum quantum possessum*, is equally applicable to both cases; and in neither case is there any authority for giving effect to possession beyond the measure of that possession. We must therefore inquire, What has been the possession here proved? On that point I am of opinion, 1*st*, that prescriptive possession of the sea-fishing at or near Carlton has *not been proved*. But I am of opinion, concurring with your Lordship and the Lord Ordinary, that prescriptive exercise and possession of salmon-fishing in the river Girvan and in the river Stinchar has been proved.

The remaining question is, Has the proprietor of Carlton, by proving prescriptive possession of the salmon-fishing in the rivers of Girvan and Stinchar, instructed the right to salmon-fishing in the sea at Carlton?

It is necessary to bear in mind the local position of the two rivers, and of the place where sea-fishing is claimed, and to which alone the proof of possession of sea-fishing applies. The river-fishing in the Girvan, and the river-fishing in the Stinchar, in so far as instructed by the proof, are both within the limits of the barony of Carlton, but they are divided from each other by about eight miles; other estates belonging to other proprietors being interposed. Both rivers flow into the sea (or Firth of Clyde) at points about thirteen miles separate, neither point being within the barony of Carlton, or in the property of the defender. The place where alone any possession of salmon-fishing in the sea has been instructed, and where alone it could be exercised, is not at the mouth of either river, but near the mouth of the burn of Lendal, about midway between the two rivers, and above six miles from the mouth of either. At that point the possession has not been for the period of forty years, and I am not able to apply to the claim for sea-fishing at Carlton the possession of river-fishing at either or both of the two streams, situated and separated as I have described.

The opinion of Lord Cairns in the case of *Stuart* v. *M'Barnet* has been pressed on us. But it is not in point. I do not think that Lord Cairns was dealing with such a question as is now before us. The case he was deciding was quite different. I agree with your Lordship in the chair on this point. I quite understand and appreciate the important remarks of Lord Cairns on the question then before him, arising in regard to salmon-fishing in a river, and on one side of the river only. But these remarks are not applicable here. Their authority is very high, and their soundness, even were the authority less high, is, with reference to the particular case of *Stuart* v. *M'Barnet*, beyond question. But this is a very different case. Sir John Cathcart has here no right in his titles to salmon-fishing. The erection of a barony does not create or confer such a right; but it does enable the proprietor of the barony to acquire a right to salmon-fishing by prescriptive possession.

Unless we set aside altogether in this case the maxim *tantum prescriptum quantum possessum*, we cannot avoid the conclusion that the prescriptive possession must be the measure of the right of salmon-fishing acquired. The view of the case which most impresses my mind is, that possession here was not possession of a fishing within the barony title, but beyond the limits of the barony title, and is founded on for the purpose of introducing the fishing into the title, for the purpose of extending the scope of the title. Such possession can have no effect beyond the measure of the possession.

Lord Kinloch—I agree with your Lordships and the Lord Ordinary in holding that the defender Sir John Cathcart has failed to prove any prescriptive possession of sea fishings. The legal question then arises, whether the established possession for forty years of the river fishings gives a right to the sea fishings, by application of the principle that possession of any part of a barony is equivalent to possession of the whole.

To whatever extent this principle may hold good in other questions (into which I do not feel called on to inquire), I am clearly of opinion that the principle is inapplicable in the present case.

The general rule of law is, that salmon-fishings require an express conveyance. As a qualification of this rule, it has come to be held that where a grant of lands is made *cum piscationibus*, possession of salmon-fishings for forty years will give to the right the effect of a direct conveyance of salmon-fishings, to the extent to which possession has been had, but to no greater extent. It has further come to be held that a barony title will, even without the introduction of the words *cum piscationibus*, afford the same foundation of a prescriptive right to salmon-fishings. A barony title with forty years' possession of salmon-fishings will form a good right to salmon-fishings. But exactly as in the case of a grant *cum piscationibus*, the possession had will form the measure of the right. *Tantum prescriptum, quantum possessum.*

I do not see that in this particular a barony title affords any advantage over an ordinary conveyance granted *cum piscationibus*. They are each in itself insufficient to convey any right. The right is created by the possession. But the right which is created is measured by the possession which creates it. The only benefit derived from the possession of a barony title is, that such a right does not require the express insertion of the words *cum piscationibus*. From the nature of the right *piscationes* are presumed inserted in it, as well as other presumptive rights considered to be compre-

hended in such a grant. But exactly as in the ordinary case of a grant *cum piscationibus*, there is no right thereby created unless where a forty years' possession of salmon-fishings has been had, and to the precise extent to which such possession has been held, and not beyond.

The argument which was presented to us on the part of the defenders was, that the possession in such a case did not properly constitute the right, but explained it, giving to the phrase *cum piscationibus* the same meaning as if it had run *cum salmonum piscationibus*—that possession of any part of the salmon-fishings within a barony explained the charter to contain a grant of salmon-fishings, and placed matters in the same position as if such a grant was expressly contained in it—and that so all the salmon-fishings locally situated within the barony were in law to be considered as conveyed. The argument was stated ingeniously, but is to my mind not satisfactory.

It may be fairly said, not only in the case of fishings, but of other rights, that the possession which forms the foundation of a prescriptive title not merely constitutes but explains and defines the right; it does so unquestionably in the case where the title is expressed in general terms, and the possession serves to give to it its special applicability. But it is a fallacy to regard the possession, in such a case as the present, as merely an explanatory possession. If it were so, there is no reason why a possession of thirty-five or thirty-six years should not be as effectual as one of forty. The law requires the full measure of forty years' possession, just because it considers the possession, in connection with the title, as creating or constituting the right. When it finds what it considers a habile title, that is to say, a title which, though not express, it holds a sufficient foundation of prescription, to be followed by a forty years' possession, it does not hold to be thereby operated the explanation of a right previously existing; what it holds to be operated is the formation of a right which did not previously exist. Anterior to the termination of the forty years no right at all existed; it emerged by the completion of that period. It hence necessarily follows that the extent of the right created is measured by the extent of the possession. So it undoubtedly holds good in regard to a right of salmon-fishings resting on a grant *cum piscationibus*. And so it may be stated to hold good in regard to all rights whatever to the constitution of which a forty years' possession is indispensable. There is no ground for holding any different rule to apply to the case of salmon-fishings locally situated within a barony. The barony right is a habile title of prescription; which possession for forty years makes a good right to salmon-fishings. But the right extends no further than to the salmon-fishings actually possessed.

The argument of the defenders seemed to me to proceed to a large extent on the fallacy of begging the question. Holding the possession to be explanatory of the title, they assume the possession of the river fishings to turn into salmon-fishings the whole fishings within the barony. But this is to take for granted the very thing which is the subject of inquiry. They say that this possession stamps with its own character the whole "fishings of the barony." I doubt whether this phrase, "the fishings of the barony," is a strictly accurate one. The fishings are those of the different lands which go to form the barony. The erection into a barony is simply the union into this legal entity of these different lands with their respective pertinents. In holding the title constructively to convey fishings, nothing more is meant than that each parcel of lands has fishings conveyed along with it. The case becomes the same as if each parcel of lands was conveyed *cum piscationibus*. The effect of possessing the salmon-fishings of any one particular parcel for more than forty years is to give a valid right to the salmon-fishings of that parcel. But it does nothing more than this.

For these reasons I am of opinion that the Lord Ordinary has correctly found the possession of the river fishings to afford to the defender no right to the sea fishings brought in question, but that these belong to the Crown, by virtue of its supereminent title.

The Court adhered, with expenses to the pursuer since the date of the Lord Ordinary's interlocutor.

Agent for Pursuer—D. Beith, Solicitor Her Majesty's Woods, &c.

Agents for Defenders—A. & A. Campbell, W.S.

Friday, May 19.

SECOND DIVISION.

STEVENSON *v.* MAGISTRATES OF HAWICK.

Procurator-Fiscal—Burgh. The Procurator-Fiscal presented a petition setting forth that a mill-lade in a burgh was not properly fenced, and that it was dangerous to the lieges, and praying that it should be fenced. *Held* that this was a proper application, and that the magistrates were not entitled to oppose it.

This question arose out of a petition to the Sheriff at the instance of the Procurator-Fiscal of Roxburgh against certain proprietors of a mill-lade adjoining the Haugh of Hawick and the Magistrates of Hawick. The proprietors of the mill-lade did not oppose the petition, but the Magistrates did. The petition stated—"That the Common Haugh, being a place of public resort, especially of children and young persons, it is necessary for the public interest that the said mill-lade should be fenced off from it. That upon several occasions young children and old persons and others have fallen into said mill-lade from the south or Common Haugh side, and had assistance not been at hand they would have been drowned, and the said mill-lade is in a condition dangerous to the lieges."

The prayer of the petition was that the petitioners should be ordained to erect a sufficient fence along the side of the mill-lade where it adjoins the Common Haugh.

The Sheriff-Substitute (RUSSEL), after a proof, pronounced an interlocutor finding, *inter alia*, "That the respondents, the Town-Council of Hawick, as representing the community, have, in the circumstances, sufficient title and interest to oppose the erection of any fence on the Common Haugh, or on the wall which bounds the mill-lade on the side thereof adjoining the Common Haugh, which would abridge or interfere with the use of the waters of the mill-lade for the purposes of the washing, rinsing, and bleaching of clothes, or of bathing; and that the petitioner has failed to prove that the mill-lade in its present condition is to any considerable degree a cause of danger to