count thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Black and Others—Solicitor-General (Clark) and M'Laren. Agents—Millar, Allardice, & Robson, W.S.

Counsel for Tramways Company—Lord Advocate (Young) and Mansfield. Agents—Lindsay, Paterson, & Hall, W.S.

Wednesday, February 26.

FIRST DIVISION.

STEUART *v.* PADWICK.

(*Ante*, p. 197.)

Expenses—Consultation—Skilled Witnesses.

In a case which involved difficult and voluminous evidence, fees for consultation before hearing in the Inner House *allowed.*

Remuneration for skilled medical witnesses fixed at ten guineas a-day.

Circumstances in which medical witnesses who were called to speak to facts, but were also examined upon matters of scientific opinion, were allowed ten guineas a-day.

When the Auditor's report upon the account of expenses came before the Court in this case, certain objections were taken thereto. In the first place, the Auditor had disallowed the charge of fees to counsel for consultation before hearing in the Inner House. It was argued for the defender that this charge should be allowed on account (1) of the length of time (more than six months) between the hearing before the Lord Ordinary and before the Inner House; and (2) because on account of the unusual difficulty and delicacy of the evidence. It was argued for the pursuer that it was unusual to allow a fee for consultation before hearing in the Inner House.

Lord President—I think that we should allow the fee for consultation before hearing in the Inner House. Sometimes we have inconsistent arguments by counsel on the same side, which would have been avoided had there been a consultation. Of course there are many cases in which a consultation before hearing in the Inner House is not necessary; but in a case like this it is of the greatest consequence that counsel should arrange in what way they are to present the case to the Court, and for that purpose a consultation is necessary,

The other Judges concurred.

Another point which came up was in reference to the remuneration of the medical witnesses. Drs Grainger Stewart and Watson had been called as experts, and gave their opinions on the whole evidence led. The fees charged in account were £126 to each of these gentlemen. The Auditor disallowed this charge, and allowed a fee of ten guineas a-day for five days to each. The defenders maintained that such an allowance was quite insufficient remuneration for medical skilled witnesses.

Professor Spence and Dr Gillespie had also been examined. They had been examined as to their observations in a *post mortem* examination of the body of Sir W. D. Steuart, but their examination was not limited to matter of fact, but extended to scientific questions and matters of opinion. The Auditor treated these gentlemen as merely witnesses of fact, and limited their fee to the usual rate of two guineas per day. Objections to this finding were also submitted to the Court.

Lord President—Mr Grainger Stewart and Mr Watson were called merely as experts, and I do not think it safe to exceed the allowance fixed by the Auditor. There is no doubt that the highest class of evidence cannot be got at this rate, and in a case of such importance as this is, parties will have the best evidence; and it is desirable that it should be so. But is the winning party entitled to charge the whole of his expenses against the loser? It is against the spirit and practice of the Court that he should. If we exceed the sum paid by the Auditor, I do not see where we are to find a limit to such charges. The only safe course is to adhere to the rule of the Auditor.

As to Drs Spence and Gillespie, theirs is a very exceptional case. I do not remember a similar case. For they were called to speak to a matter of fact, but a matter entirely of medical fact, observed by themselves, and valuable chiefly on account of their skill as observers of such facts. They were also examined as experts. Now it is difficult to see any good ground for making a difference between the remuneration of these gentlemen and that allowed to Drs Grainger Stewart and Watson. No doubt they might have been compelled to attend as witnesses to fact; but the facts to which they were called to speak were their observations in the *post mortem* examination; and they went voluntarily to conduct this examination, and were sent to conduct it as being highly skilled men. So I am of opinion that they should be allowed the same remuneration as Drs Grainger Stewart and Watson—that is, ten guineas a-day.

The other Judges concurred.

Counsel for Pursuer—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Defender—Watson. Agents—Tods Murray, & Jamieson, W.S.

Wednesday, February 26.

SECOND DIVISION.

[Lord Jerviswoode, Ordinary.

EARL OF ZETLAND *v.* TENNENT'S TRUSTEES.

Salmon-fishing—Prescription—Medium filum.

Upon a title to "the salmon-fishings pertaining to lands" which were washed by a river: Exclusive possession for the prescriptive period exercised at stations or banks *ex adverso* of said lands, and beyond the *medium filum* of the stream, *held* to give right to the salmon-fishings at these stations.

The summons in this suit, at the instance of the Earl of Zetland against the trustees of the late Hugh Tennent, Esquire, of Errol, concludes that "it ought and should be found and declared that the pursuer has good and undoubted right to the salmon-fishings in the river Tay between Corbieden, on the east, and the Pow of Lindores, on the west, and that from the south shore as far as the middle line of the said river, and including the

exclusive right to fish for salmon, and other fish of the salmon kind, in the South Deep or South Channel of the said river, so far as opposite to the said estate of Easter Errol belonging to the defenders, and particularly from and upon the banks or fishing-stations called "Lower Peesweep," "Haggis," and south side of "Hobby Horse;" and it ought and should be found and declared that the defenders and their successors in the said lands and estate of Easter Errol have no right or title to fish for salmon, or other fish of the salmon kind, to the south of the middle line of the said river, and in particular from the said banks or fishing-stations, or in any other part of the South Deep or South Channel of the river Tay *ex adverso* of the said estate of Easter Errol; and further, the defenders ought and should be prohibited and interdicted from molesting or interfering with the pursuer in the exercise of his said rights, and particularly from fishing by themselves, their tenants, or others, from the said banks or fishing-stations, or in any other part of the said South Deep or South Channel *ex adverso* of the said estate of Easter Errol.

The pursuer set forth that he is proprietor of and infeft in the lands and estate of Ballmbriech in the county of Fife, and lying on the south side of the firth or estuary of the river Tay, with the fishings attached thereto, conform to Instrument of Sasine dated 14th May, and recorded in the General Register of Sasines on 4th June 1839, proceeding on a precept from Chancery in his favour dated 13th May 1839. The lands in his title are described as follows:—"Totas et integras illas partes et portiones terrarum et baroniæ de Ballinbreich, viz., terras dominicales de Ballinbreich, terras de Heighams, terras de Logie, terras de Flisk, *easter and wester*, terras de Fliskmillan, terras de Balhelvie, terras de Pittachope, jacen. in vicecomitatu de Fife, cum piscariis dict. Baroniæ super aqua de Tay, et cymbis portatoriis dict. aquæ inter Corbieden et fontes aquæ de Earne prout medium flumen dict. aquæ currit, quatenus Joannes Comes de Rothes et Patricius Crawfurd de Auchinames armiger, sicut deriven. jus a dict. Comite de Rothes, habent jus ad dict. piscationes, . . . et similiter terras seu insulas vulgo vocat. Red Inch et Know Inch, bondat. inter pratum (portum) seu lie Haven ex occiden., aquam de Tay ex boreali, et orien. pratum et terras de Parkhill ex australi et orien. partibus, necnon salmonum piscationes aliasq. piscationes super aqua de Tay inter terras de Mugdrum et orien. finem prædict. insularum," and extend along the south side of the river Tay from Corbieden westward for about six miles, as far as the Pow of Lindores. The pursuer avers that he and his predecessors have, for greatly more than forty years, been in the uninterrupted possession of the right of fishing for salmon by net and coble and otherwise in the river Tay from Corbieden on the east to the Pow of Lindores, which is the westmost point of the pursuer's estate.

The defenders set forth that they are proprietors, and thus infeft in the lands of Easter Errol, situated on the north side of the river Tay, and separated from the pursuer's property by that river, including therein "all and whole the lands of Dallalie, Easter and Wester Randerstone," &c., "together with the salmon fishings and other fishings pertaining to the said lands of Randerstone and Dallalie, all lying within the parish of Errol and sheriffdom of Perth." The said lands and estate and others were erected into a haill and free barony and burgh of barony, conform to a charter and infeftment thereon under the Great Seal, of date 21st July 1662, made and granted in favour of John Earl of Northesk, and his heirs male. The grant of said lands and barony and others was renewed in favour of David Earl of Northesk, by charter of resignation, dated 25th April 1707 The said Charter conveys, *inter alia*, to the Earl and his heirs male, as parts of the lands and barony of Errol:—"Totas et integras terras de Dallalie, Easter and Wester Randerstounes domus," &c., "Una cum salmonum piscaria aliis piscariis ad dict. terras de Easter Randerstoun et Dallalie pertinent." The island of Mugdrum, situated about a mile further up the river than the western extremity of the defenders' land, is, at high water, about a mile long and less than a quarter of a mile in breadth, and divides the Tay into two channels called North and South Deep. At low water, however, the shore of the island extends down the river a considerable distance *ex adverso* of both the pursuer's and defender's lands. The salmon fishings claimed by the defender as pertaining to his lands, consist of three stations, called Peesweep, Haggis, and Hobby Horse, all on the south side of the shore of said island, and all lying directly *ex adverso* of pursuer's and defenders' lands, with the exception of the Hobby Horse station, which lies a little to the east side of the defenders' lands.

The defenders state that in virtue of their title to the salmon-fishings above set forth, "the defenders and their predecessors in the said lands have from time immemorial, and for much more than forty years prior to July 1870, possessed the salmon-fishings in the river Tay from the said bank or banks *ex adverso* of the said lands; and in particular, they have possessed for the period foresaid the foresaid salmon-fishings, called the Lower Peesweep, South Haggis bank, and South Higham or Hobby Horse bank fishings. This they have done by fishing for salmon with net and coble from the said fishing stations and bank or banks *ex adverso* of their said lands, southwards into the stream of the river, and by hauling their nets on the said bank or banks, and that without challenge or interruption; and that neither the pursuer nor any of his predecessors ever by themselves or their tenants fished at the said fishing stations or from any part of the said banks, nor until July 1870 did they ever allege any right to do so, or state any objection whatever to the defenders' exclusive possession thereof. The pursuer has no title to the salmon-fishings in any part of the river opposite the defenders' lands, and in particular the salmon fishings specified in the second article of the condescendence are not within the said part of the river."

The pleas in law for the pursuer are—"(1) In virtue of his title founded on, the pursuer has the exclusive right to the salmon fishings in the river Tay between Corbieden and the Pow of Lindores, to the south of the middle line of the river. (2) In virtue of his title founded on, and of the possession which has followed thereon, the pursuer has the exclusive right to fish for salmon and other fish of the salmon kind in the river Tay between Corbieden and the Pow of Lindores, to the south of the middle line of the river. (3) The banks or fishing stations called Lower Peesweep, Haggis,

and south side of Hobby Horse, being situated between Corbieden and the Pow of Lindores, and to the south of the middle of the river, the pursuer has the exclusive right to fish for salmon at the said stations. (4) The South Channel or South Deep of the river Tay between the places above mentioned being wholly to the south of the middle line of the river, the pursuer has the exclusive right to the salmon fishings therein. (5) The defenders have no right or title to fish for salmon, or other fish of the salmon kind, from the said banks or fishing stations, or in any other part of the South Channel or South Deep of the river Tay between the places above mentioned. (6) The titles founded on by the defenders having reference to lands and fishings in the county of Perth only, can confer no right to the fishing stations in dispute, which are situate within the county of Fife. (7) In the circumstances stated, the pursuer is entitled to decree in the terms concluded for."

The pleas in law for the defenders are—"(1) The pursuer having no title to the salmon fishings from the bank or banks referred to in the condescendence, or at the said fishing stations called Lower Peesweep, Haggis, and south side of Hobby Horse, his claim thereto falls to be repelled. (2) The right of the pursuer to salmon fishings cannot be extended beyond his previous possession thereof, and neither he nor his predecessors having ever possessed the said fishings, his claim thereto cannot be maintained. (3) The defenders being in right of the said fishings in respect of their title thereto above set forth, are entitled to absolvitor, with expenses. (4) In respect of the defenders' title to the said salmon fishings, and of the immemorial and exclusive possession thereof of them and of their predecessors, the defenders are entitled to absolvitor, with expenses."

The Lord Ordinary, after a proof, pronounced the following interlocutor:—

"*Edinburgh*, 31*st July* 1872.—The Lord Ordinary having heard Counsel, and made avizandum, and having considered the proof, debate thereon, productions, and whole process, Finds as matter of fact that the defenders and their predecessors in the lands of Easter Errol, described in the statement of facts on their behalf, have possessed, as set forth in the sixth article of the said statement of facts, without challenge or interruption on the art of the pursuer or those in his right, the salmon shings in the river Tay from the bank or banks eferred to in the said article *ex adverso* of the said lands; and, in particular, that they have so possessed the salmon fishings called the Lower Peesweep, South Haggis Bank, and South Higham or Hobby-Horse Bank fishings: Therefore sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns; finds the pursuer liable to the defenders in expenses, of which allows an account to be lodged, and remits the same to the Auditor to tax and to report.

"*Note.*—Whatever may be the result of the renewed litigation regarding the subject-matter of the present process in its future progress, it appears to the Lord Ordinary that he cannot, consistently with former judgments, come to any conclusion here other than that to which the present interlocutor gives effect."

The pursuer reclaimed.

Authorities—*Wedderburn* v. *Paterson*, 2 Macph. 902; *Earl of Zetland*, 6 Macph. 292, aff. 8 Macph. 144; *Milne*, 13 D. 112; *Hepburn*, 2 S. 525; *Young*, M. 9636; *Macbrair*, 9 Macph. 913; *Stuart* v. *M'Burnet*, 5 Macph. 753, aff. 6 Macph. (H.L.) 123.

At advising—

Lord Justice Clerk—I am of opinion the Lord Ordinary is right in the conclusion at which he has arrived, but I think he should have introduced a reference to the defenders' title.

Lord Cowan—I concur, and I do not think the principles upon which the solution of the question depends are doubtful. The title of the pursuer is stated in the second article of the condescendence, and is to the fishings attaching to lands on south side of the Tay, and the only possession is of salmon-fishings on his lands. The title of the defender is in general words, "Along with salmon-fishings and other fishings pertaining to said land." Now, when the question is what right is given by these words, the only way to ascertain its character and extent is the possession which has followed upon it. It is not disputed, if the Lord Ordinary be correct in his findings, that it is prescriptive possession under that title. It is said the title is limited to fishings in the parish of Errol and sheriffdom of Perth, and that the *medium filum* is the boundary. I read the words as applying to the lands, not the right of fishing. It is clear in law that possession fixes the extent of the fishing. It is said that the station called the Hobby Horse has been worked for over twenty or thirty years; but then the other stations have been worked for the prescriptive period, and the mere fact of the fishing at one point having been more successful makes no difference. As to the *medium filum*, it might be of importance if no possession had followed, and in such a case between two proprietors with right of salmon fishing *ex adverso* of their lands the Court has recognised the *medium filum* as a boundary. I think the title here is supported by prescriptive possession, so as to give defender the right to the salmon-fishing in competition with the Earl of Zetland. We must find the defenders' title sufficient to support prescription, and add a finding to this effect to the Lord Ordinary's interlocutor.

Lord Benholme—I concur. I think we have here the fact of exclusive possession for the prescriptive period, which is quite sufficient to solve the question. We must insert a finding that the defenders' title is sufficient.

Lord Neaves—I concur. The first point, as in all questions of prescription, is whether the title is *habile*; and the second, Is the possession sufficient? Here there is undoubtedly a title to salmon-fishing, but it is said to be limited to a rectangle *ex adverso* of the lands up to the *medium filum*. Salmon-fishing is an incorporeal right, and the locality of its exercise must be explained by possession. Those fishings are meant in that river which under that grant the grantee has possessed for forty years. The *medium filum* has nothing to do except with the proprietor's right. and I think there is rather a tendency in our law to follow fishings. The bounding of a parish by the *medium filum* of a river I think very doubtful. I think the defenders have proved sufficient feudal title and possession to support their right to the fishing.

Counsel for Pursuer and Reclaimer—Fraser and Lancaster. Agents—H. G. & S. Dickson, W.S.

Counsel for Defenders—Solicitor-General and Gloag. Agents—Campbell & Smith, S.S.C.