

he was the Lord Ordinary before whom the cause first depended, the Court had power under the Act to remit either to one of themselves or to any other of the Lords Ordinary. He therefore feared that his powers were simply ministerial, and suggested that the application made to him should be renewed in the Inner House. The Court, after consulting with the other judges, expressed an opinion that the Lord Ordinary was right in the view which he had taken of the extent of his powers. The Court granted the motion, with a recommendation that in future, with the view of avoiding such questions and making it unnecessary to come back to the Court, parties should, when the remit is made to the Lord Ordinary, state whether they would require a commissioner to recover documents or to take the depositions of aged persons or witnesses going abroad. When this was done, the Court would, when remitting to the Lord Ordinary, confer upon him the necessary powers.

Counsel for Pursuers—Mr Watson. Agent—J. Henry, S.S.C.

Counsel for Defenders—Mr Millar. Agent—James Webster, S.S.C.

OUTER HOUSE.

(Before Lord Kinloch.)

PATTEN'S TRUSTEES v. CAMPBELL'S EXECUTORS.

Expenses—Taxation—Fees to Counsel. Held by Lord Kinloch that agents are entitled to exercise a certain discretion in regard to the amount of counsel's fees, and that the auditor should interfere only when that discretion was abused.

In taxing the pursuers' account of expenses in this case, the auditor of Court deducted £1, 1s. from a fee of £3, 3s. paid to counsel to revise summons; £1, 1s. from a fee of £3, 3s. paid to revise contumaciousness; £1, 1s. from a fee of £2, 2s. paid to adjust record; £1, 1s. from a fee of £4, 4s. paid to debate; and £2, 2s. from a fee of £6, 6s. paid to senior counsel to debate.

The pursuers objected to the auditor's report, and the Lord Ordinary sustained the objections. His Lordship observed that agents were entitled to exercise a certain discretion as to the fees to be paid to counsel in each particular case, and it was only when that discretion was abused that it was the province of the auditor to interfere. That was not the case in the present instance.

Counsel for Pursuers—Mr N. C. Campbell. Agent—John Forrester, W.S.

Counsel for Defenders—Mr Adam. Agents—Adam, Kirk, & Robertson, W.S.

Friday, Jan. 25.

FIRST DIVISION.

DUKE OF RICHMOND v. WHARTON DUFF.

Clause—Reservation—Construction—Usage. A disponent of salmon fishings reserved to himself and his successors in the estate "the privilege of fishing with the rod for our amusement only." Held (aff. Lord Barcaple, dub. Lord Deas), that the privilege so reserved was personal, and could not be communicated by the disponent or his successors to their family or friends, there being no allegation of a practice inconsistent with this construction.

This was a question between the Duke of Richmond and Captain Wharton Duff of Orton. In 1829 Captain Duff's predecessor disposed the fishings of Orton in the river Spey to the Duke of Gordon's trustees, in whose right the pursuer now is; and the disposition contained this reservation:—"Reserving always to me, the said Richard Wharton Duff, and my successors in the lands and estate of Orton, the privilege of fishing with the rod for our amusement only." The pursuer contended that this reservation was entirely personal to the proprietor of Orton for the time being, while Captain Duff maintained that it entitled him to fish by his friends living in his house, as well as himself. He did not plead that it entitled him to fish for profit, or even by his gamekeepers or servants.

Lord Barcaple gave effect to the pursuer's construction of the clause, adding to his interlocutor the following

"*Note.*—The question between the parties is whether the privilege of fishing reserved in the disposition of the fishings of Orton by the late Mr Wharton Duff to the Duke of Gordon in 1829 is strictly personal to the proprietors of the estate of Orton for the time being, or may be communicated by them to members of their family, or to friends residing with them at Orton. Looking only to the clause of reservation in the disposition, there do not appear to be *termini habiles* for the more extensive construction contended for by the defender. It is in these terms:—"Reserving always to me, the said Richard Wharton Duff, and my successors in the said lands and estate of Orton, the privilege of fishing with the rod for our amusement only." This is, in expression at least, the constitution of an individual and personal privilege. If it is not to be so construed, there is nothing in the words of the clause to limit the right in the way proposed by the defender himself, so that it shall only be communicated to friends residing at Orton. Being expressly reserved for amusement only, it could not be exercised by gamekeepers or other hired servants, nor could it be let to sportsmen for a rent. But if the proprietor of Orton may, in the exercise of the privilege, grant permission to others to fish for amusement, it does not appear on what ground his right to do so is to be limited to friends residing at Orton. The defender founded on the case of the Earl of Aboyne v. Innes, House of Lords, 10th July 1819, 6 Paton 444, as supporting his contention. But the judgment in that case goes too far for his argument, Mr Innes being found entitled to exercise the privilege of fowling by his gamekeeper, or by any qualified friends. It is not easy to ascertain from the report on what precise ground the decision was rested, but the Lord Ordinary is disposed to think that prescriptive possession was an essential element in the case. As the disposition makes express reference to the lease of the fishings existing at its date, the Lord Ordinary thought it right to have it produced, in order that it might appear whether it affords any light for construing the clause in question. It contains a somewhat similar clause, reserving to Mr Wharton Duff, the landlord, and his successors, 'and to any of their friends that may be at Orton, and have liberty from them, the privilege of fishing with the rod at all legal times during the continuance of this lease, and of appropriating to themselves such fish as they may catch therewith,' accounting to the tacksmen for their value at a certain rate. The Lord Ordinary thinks the larger terms of this clause cannot, upon admissible

principles of construction, be received to qualify or interpret the reservation in the disposition on the mere ground that the lease is referred to in describing the subjects disposed. There is a marked difference in the terms of the two clauses of reservation, and the nature of the right reserved is different in so far as the tenants were to be paid the price of the fish taken, their pecuniary interests alone being in view, while there is no such qualification of the right reserved by the disposition. E. F. M."

The defender reclaimed.

SOLICITOR-GENERAL and ADAM were heard for him.

CLARK and RUTHERFURD supported the interdictor.

At advising,

The LORD PRESIDENT—This is an action of declarator and interdict at the instance of the Duke of Richmond against Mr Wharton Duff of Orton, relative to the extent of the privilege of angling, which Mr Duff's predecessor has reserved by a disposition, dated in 1829, whereby Mr Duff conveyed to the trustees of the late Duke of Gordon, in whose right the Duke of Richmond now is, "All and whole the salmon fishings and other fishings in the river Spey belonging or attached to my lands and estate of Orton. . . . together with the haill privileges and pertinents pertaining or belonging to the said fishings, as the same are all presently held in lease by Messrs Forbes, Hogarth, & Co., merchants in Aberdeen . . . together also with all right, title, and interest which I, my predecessors, and authors had, have, or can any way claim or pretend thereto." That is, on the face of it, a conveyance of the whole right of fishing on the Spey within the boundaries of the estate of Orton. But then there is a reservation in these terms—"Reserving always to me, the said Richard Wharton Duff, and my successors in the said lands and estate of Orton, the privilege of fishing with the rod for our amusement only, and that within the bounds of the fishings hereby disposed, but which reservation is not to imply any privilege of fishing lower down the river than the former march; and reserving also to me and my successors in the said lands and estate of Orton the privilege of keeping a boat in the river for our own accommodation within the same bounds." The question which has arisen is, whether that is a reservation of a privilege applicable to Mr Duff himself and his individual successors in the estate, or whether he can extend it to members of his family and friends residing with him at Orton. The Duke maintains that it can only be exercised by Mr Duff himself and his individual successors themselves, and the conclusions of the present action are for declarator, "That the defender, and his successors in the said lands and estate of Orton, are entitled to exercise their said reserved privilege of angling or fishing with the rod in the river Spey within the bounds foresaid, only themselves personally, and are not entitled to delegate or communicate the same to any person or persons whomsoever, save and excepting with the permission asked and obtained of the pursuer and his successors, proprietors of the said fishings," and for interdict against its being exercised in any other manner. The terms of the conveyance in favour of the Duke of Gordon's trustees are very ample, and the reservation bears in itself to be one in favour of the disponent and his successors individually. Looking to the words of it alone, I do not see any ground sufficient in law to enable me to extend the application of these words be-

yond Mr Duff and his successors. In their own plain meaning and sense they are so limited. We had some speculation in the argument as to whether in certain circumstances the right might come to be exercised by more than one person at a time—such as heirs portioners or in the case of a subdivision of the property. That question may afterwards be raised, but in the meantime the question is whether this privilege can be communicated by Mr Wharton Duff. Now, I see nothing in the reservation which admits of that construction. There is no reference whatever to members of his family or his friends. It is a limited privilege on the face of the deed. Then are there any circumstances disclosed which can give to that limited reservation a more extensive meaning? It does not seem that there has been any practice following on the deed which might amount to an extension of the privilege by reason of mutual construction of the clause. In this respect the case differs from the one referred to by the Lord Ordinary in his note. And out of the deed itself I cannot construe anything which will extend the application of the privilege to the defender's family and friends. I know of no such rule of construction. Then is there anything else which tends to suggest a different construction? There is a reference in the disposition to a lease which was current at its date, but that is quite a usual part of a descriptive clause. On looking into the lease I find it contains certain conditions, and the question is whether similar conditions are imported, by the reference to the lease, into this conveyance. It was said, and I think prudently, by Mr Duff's counsel, that they did not found much on this lease. It is a two-edged weapon, and I think the sharper edge is against him. There is a clause in it "reserving to the said Richard Wharton Duff and his foresaids, and to any of their friends that may be at Orton, and have liberty from them, the privilege of fishing," &c. Now this was a lease by which the fishings were let to tenants at a certain rent, and the privilege of fishing is reserved for Mr Duff and his friends also. I don't see how it can be said that the disposition imported this clause because it contains one in altogether different terms. Then there is a clause in the lease that Mr Duff and his friends were to be entitled to appropriate the fish caught by them, paying a certain price for each to the tenants; but this matter was not out of view either when the conveyance was granted, for in it there is a stipulation that for the remainder of the lease, Mr Duff, was to be accommodated with fish for his own table at the rate of 6d. per pound. Therefore, it would appear that this lease, if we are to deduce anything at all from it, was under consideration of the parties when they entered into the disposition. I hold that under the clauses of the disposition Mr Duff and his successors are entitled to angle, and are not bound to account for the fish as Mr Duff and his friends were bound to do under the lease. It was argued to us that the omission of Mr Duff's family and friends was an oversight in the preparation of the conveyance. I see no ground for thinking so. This was a money transaction and the fishings had a money value. In the transaction they were valued at £3000, although the rent was only £100 a year. The Duke of Gordon's trustees thus appear, to have paid a very full price, and it is very probable that the fishings were acquired by them in order that they might have a more complete control of the fishings lower down. It may also have been in

their view that the new proprietor might wish to enjoy the right of angling as well as the old. But, farther, it might have been meant to let the fishings, and a tenant might not have been got who would be induced to concede the right as now claimed. On the whole, therefore, I see no room for holding that I have any stable ground for extending this privilege as has been contended for.

Lord CURRIEHILL.—I concur.

Lord DEAS—I think I never saw a case in which I found it more difficult to form a satisfactory opinion. That arises entirely from this, that while the question is to a great extent one of intention, the parties have not so expressed themselves as to let us know what they meant. If they had intended to prevent us understanding what they meant, I think they could not have expressed themselves better. I confess, however, that my impression is that, whatever may have been the intention of the parties, it was not to limit the right to Mr Duff personally, and to his successors personally. To that extent I have an opinion, although not a satisfactory one, but the difficulty remains, though I am right as to what they did not intend, as to what they did intend; and I am glad to be in a position which makes it not necessary for me to have an opinion in regard to that, because it would be of no practical use. My difficulty lies here. I think there are two questions involved; one is as to the nature of the right reserved, and the other is as to its extent. As to the nature of the right we must look to Mr Duff's position at the time. He was the feudal proprietor of Orton, through which the river Spey runs, and of the salmon and other fishings in that part of the river. He sells the fishings and he reserves a certain right. Now, be the extent of that right what it may, I think the nature of the right reserved was a heritable right attached to the estate. It was not a personal privilege to Mr Duff, his heirs, or singular successors. It was a right reserved for all time to the estate itself. If it was not that it was nothing at all. Our law would not otherwise recognise it. The words are, "Reserving the privilege of fishing with the rod." Suppose we stop there, it is perfectly clear that that would have been a right of angling which may be an exclusive and unlimited right, and is a heritable right which may be enjoyed separately. Then there is a limit put upon the right which otherwise would not, I think, be limited. It is this which makes the whole difficulty in my mind. The words are, "for our amusement only." Now suppose the word "our" had been omitted, I don't think it would be possible to say that the right was to be limited to Mr Duff and his successors. The only limitation would be in the purpose—namely, for amusement, not for profit or gain. That brings us to the very narrow question, whether the introduction of the word "our" limits the right to the individual proprietor. I find it very difficult to suppose that that was Mr Duff's meaning. If it was he must have been a more selfish man than I can imagine him to have been. I can't imagine a man reserving to himself alone the right of angling for a mile and a half in that splendid river, and also reserving the right to keep a boat on the river. It is a kind of desire for personal and solitary pleasure which I can't believe to have been according to his nature. The reservation of the right to have a boat was admittedly with a view to the fishing, for the river remained his property, and he could put as many boats on it as he pleased. He did not for any other purpose

than fishing require to reserve his right to have a boat on it. He was to have only one boat, so that no more were to angle from it than the boat would hold. I find it difficult to suppose that it was intended that the purchasers could send as many people to the banks of the river, and in as many boats, as they pleased, and so make Mr Duff's privilege so useless that it could not be exercised. I rather think that a right of angling was reserved to the estate, subject only to this limitation, that it was to be exercised for amusement only. Either view is attended with difficulty. I admit that the view I am suggesting is attended with difficulty as well as the other. But suppose Mr Duff died leaving six daughters, each would be entitled to angle; or suppose he were to die leaving his estate to seven sons, they could all angle; and if he divided his estate into portions for the erection of villas, it follows that the privilege would be divided also. All that leads to great embarrassment and difficulty, and I am inclined to think that the view I have suggested would lead to less. Then if you read the disposition in connection with the lease and hold the reference to the latter not merely as descriptive of the subject, but as explanatory of the right reserved, I confess that I think the introduction of it in the disposition is against your Lordship's view. It is impossible to suppose that the seller meant to give up the right which he had under the lease to angle by himself and his friends. I don't see any view in which the lease aids your Lordship's construction. It just increases the embarrassment. The result of all this is that while I have an impression as to what the right was, I have great difficulty in saying practically what its limitations were. I would have liked if we had had an opportunity of consulting with some of our brethren before deciding this case; but as all your Lordships have formed decided judicial opinions, my difficulties are no reason why they should not be given effect to.

Lord ARDMILLAN concurred with the Lord President, but said that he did so after great hesitation and with considerable difficulty. He thought, with Lord Deas, that it was eminently improbable that Mr Duff should have intended to reserve nothing but the solitary right of fishing with his own hand. But reading the deed without any allegation of any practice, during nearly forty years since its execution, inconsistent with that contended for by the pursuer, he could not give effect to the defender's plea.

Adhere, with expenses.

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

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

PETITION—MOSMAN.

Entail—Improvement Expenditure—10 Geo. III., c. 51—11 and 12 Vict., c. 36. Held that an heir of entail in possession is entitled, under 11 and 12 Vict., c. 36, to charge the entailed estate with improvement expenditure to the extent of two-thirds thereof, whatever may be the "free rent" of the estate.

This was a petition for authority to charge an entailed estate with improvement expenditure. The amount of the expenditure was £2685, and the question raised was whether the petitioner was entitled to charge the estate with two-thirds of that sum, or whether he was limited by the terms of the Montgomery and Rutherford Acts to two-thirds of the free rent of the estate, which, in this case, amounted to less than two-thirds of the sum