

died; and they contended that the effect of his death was to put an end to the proceedings. The pursuer, on the other hand, stated that he had since his father's death been himself served heir-in-general to Mrs Barrowman, and moved that he be allowed to sist himself to the action in that character accordingly. The Court, however, refused to do so, and pronounced an interlocutor in the following terms, viz. :—" In respect it is admitted that James Ferrier, the pursuer's author, is dead, find that the title of the pursuer to maintain this action cannot now be supported; find it unnecessary to determine the other pleas of the parties stated on the record; therefore recall the interlocutor reclaimed against, reserving to either of the parties to maintain in any other action the plea determined in the said interlocutor; dismiss the action, and decern; find the defenders entitled to expenses, and remit to the auditor to tax and report."

Agent for Pursuer—A. Hill, W.S.

Agents for Defenders—Duncan, Dewar, & Black, W.S.

Friday, November 20.

MAXWELL v. COPLAND.

*Landlord and Tenant—Agricultural Lease—Trout-Fishing.* Held that a right of trout-fishing in a private stream is an incident of the proprietor's right, and that it is not communicated to the tenant of an agricultural lease, unless that is done expressly.

The petitioner Maxwell, who is landlord of the farms of Mainshead and Prospecthall in Dumfriesshire, presented a petition to the Sheriff craving that the respondent, his tenant for fifteen years under an agricultural lease, be interdicted from fishing for trout in a pond situated on the farm, and into which there flowed three small streams. Thereafter the petitioner presented a second application to interdict the respondent from molesting the petitioner while fishing there. Both petitions having been advocated, they were conjoined by the Lord Ordinary (BARCAPLE) and a proof allowed to the parties of their averments. The legal question raised in the first petition was, whether an agricultural tenant is entitled to fish for trout in a pond on the farm, there being no stipulation on the matter in the lease? The question of fact in the second petition was, whether the respondent interfered with the petitioner or one of his friends to prevent him fishing? The following pleas in law were maintained by the parties.

Pleaded for the petitioner:—"1. The petitioner being the proprietor of the said pond or reservoir, and having made and stocked the same for his own use, possesses the exclusive right of fishing therein. 2. The right of fishing in the said pond not having been let to the respondent, it was *ex lege* reserved to the petitioner. 3. The farm having been let purely as an agricultural subject, the respondent is not entitled to exercise the right of fishing in the said pond, and the petitioner is entitled to interdict against him so fishing. 3. The respondent is not entitled to prevent the petitioner or those authorised by him from entering upon the lands of the said farm for the purpose of fishing in the said pond; and the respondent having attempted to prevent the petitioner and those authorised by him from entering on the said lands for the said pur-

pose, the petitioner is entitled to interdict as craved for."

Pleaded for the respondent:—"1. The respondent having become tenant of Mainshead and Prospecthall, including the small pond in question, the advocator is not entitled to prevent him possessing the same as he has hitherto done. 2. The respondent having become tenant of Mainshead and Prospecthall, including the small pond in question, and having possessed and used the same from the date of his entry, he cannot be prevented from possessing and using the same. 3. The respondent never having prevented the advocator fishing in or coming to said pond, the petition should be refused."

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor and note:—

"*Edinburgh, 28th February 1868.*—The Lord Ordinary having heard counsel for the parties, and considered the closed record, proof, and whole conjoined process—advocates the causes: Finds that, by the contract of lease under which Mr John Copland, the respondent in the Inferior Court, became tenant of the farm and lands of Mainshead and Prospecthall, belonging to the Honourable Marquess Duke of Buccleugh, the petitioner, there was no express or implied exclusion of any right which the said respondent would otherwise have had at common law, as tenant under said lease, to fish for trout with the rod in the pond referred to in the petitions: Finds that, as tenant under said lease, the said respondent has at common law right to fish for trout with the rod in said pond held in lease by him: Finds that it is not proved that said respondent interfered with and prevented from fishing in said pond any of the said petitioner's family or relations whom the petitioner had authorised to fish therein; sustains the pleas in law stated for the said respondent, John Copland; recalls the interim interdict granted under the first of the petitions advocated; dismisses both petitions, and decerns: finds the said petitioner liable in expenses, both in the Inferior Court and in this Court; allows accounts thereof to be given in, and when lodged, remits the same to the auditor to tax and report.

"*Note.*—The Lord Ordinary does not think that any common law right which would otherwise have been in the tenant to fish for trout in the pond in question, can be held to have been excluded by the terms of the lease, or the mutual understanding of parties in entering into it. It is not said that the tenant was informed that the exclusive use of the pond for fishing was reserved to the landlord. The lands were let as possessed by the previous tenants, but it is not thought that that general reference to the previous possession can be held to apply to such a matter as that now in question. There might be many legitimate uses of the tenancy which the previous tenants had not chosen to take, from which a new tenant entering to a lease of the lands, as they had been possessed by them, would not be debarred. The Lord Ordinary, therefore, thinks that there is no specialty in the case from the terms of the lease, or from anything that is proved to have passed when it was entered into.

"In such a question the pond itself may be of a kind to create a conclusive specialty. A pond which is obviously, by being enclosed or otherwise, intended as a private fish preserve, may by presumable implication be excluded from the lease of a farm on which it is situated. But the Lord Ordinary thinks that there is not ground in the present case for an implication of that sort. The pond,

which is quite unenclosed, was made as a dam or reservoir to supply water power to a tile-work. It is situated on a stream which is supplied from various sources, and flows to the water of Cargen, and so to the river Nith. The tile-work was stopped in 1862, but it does not appear that there has been any change on the use of the pond in other respects, or in its appearance since then. The proprietor had put trout in it before that, apparently more than once; and in 1853 a grating was put on the lower end to prevent the fish running down. It has also been staked to prevent netting. That is, however, a precaution constantly taken in running streams. It has been used all along for the ordinary purposes of a farm, as driving cattle from the farm sheds to water, washing carts, &c. The present tenant has used it without objection for washing his sheep, though the previous tenants did not do so, not thinking it suitable for that purpose. Such being the nature and condition of the pond, it does not appear that there was anything to lead a proposing tenant, in the absence of information to the contrary, to consider it as anything different from an ordinary dam on a stream passing through the farm. It is not alleged that he should have looked upon it as excluded from ordinary farm uses. The grating was the only thing to indicate that it was a fish-pond. But the Lord Ordinary cannot hold that, if observed by the tenant—and it is not proved that his attention was called to it—that was such an indication that the landlord was keeping in his own hands the exclusive use of the pond for fishing as to create an implication that the tenant was to be excluded from any right in that matter which he might otherwise have had under the lease.

“The case was latterly argued on the alleged right of a landlord to prevent his agricultural tenant fishing with the rod for trout in a stream running through his farm. There is not much light to be got on this question from the decisions as to the right of a proprietor to prevent mere strangers from so fishing. These authorities establish that the right of a proprietor to fish for trout is accessory to his right to the lands; or rather, that it is a right to one of the direct uses of his property. Looking to the report of the case of *Carmichael v. Colquhoun* in Hailes, 1033, and to the comments on that case by Lord Moncreiff in *Ferguson v. Shireff*, 6 D. 1363, the Lord Ordinary does not think that the case of *Carmichael*, as reported in the Faculty Collection, M. 9645, can be taken as evidence that it was the opinion of the Court that the public have right to fish in a private stream if they can get access to it without going upon the owner's ground. The case of *Ferguson* established that the existence of a public right of way along the bank of a stream does not give the public the right of angling. The principle of the decision was explained by Lord Moncreiff to be, that to hold that would be to extend and pervert the only right existing in the public—a right of access for passage—to a purpose totally foreign to its nature and object. But the weight of opinion in that case was against the existence of a right in the public to angle for trout in a private stream, wherever that can be done without going upon the proprietor's land. The case which comes nearest to the present one is the *Duke of Richmond v. Dempster*, 4 Irvine, 10. The question occurred with an agricultural tenant, and it would have been necessary to decide the question as to his right as such to angle for trout if it had not been for the construction which the Court put

upon the exception of persons having a right to fish for trout, in the Statute under which he was prosecuted for fishing with a net. It was decided that a tenant has not right to fish with a net, that being held to be the meaning of the exception; but the present question as to fishing with the rod was expressly reserved by the judgment of the Court.

“The Lord Ordinary must therefore decide this general question of law without the aid, so far as he can discover, of any authority on the point. The decision of the criminal Court just adverted to may be taken merely to establish that, even if the tenant is entitled to fish for trout, he can only do so in the way least hurtful to the right of his landlord; and especially that he is not entitled to fish in a manner which by the Statute then under consideration was treated as so injurious as to be made criminally punishable. Neither is the present case ruled by the opinions of the Judges in the case of *Ferguson*, or elsewhere, as to the right of a proprietor to prevent the public fishing in a stream which is his private property, though they may reach it without trespassing on his lands. A tenant is not, like one of the public, a stranger to the lands; he holds a real though subordinate right in them. And though the character of his tenancy may, in a case like the present, be well expressed as agricultural, it is unquestionable that he holds the subjects for many purposes, both of use and enjoyment for himself and his family, which are not directly connected with their agricultural possession. The Lord Ordinary thinks that, as to any use of the subjects as distinguished from their misuse, where the lease is silent, the question is one of presumed implication as to whether the parties understood that the right was given or was reserved. The implied reservation of the right to kill game, even where the tenant may be a qualified sportsman, and the implied right of the tenant to kill rabbits and other animals, not game, are instances of such implication resting upon the general understanding and practice of the country. The Lord Ordinary thinks that the present question must be dealt with in the same way. Landlords are clearly entitled to reserve the right of angling in a stream running through the lands let to a tenant, and in practice they often do so. But where there is no such express reservation, and nothing to indicate that it is intended to reserve the right, the Lord Ordinary is disposed to think that it is consistent with general understanding and practice to hold that the right of angling for trout was communicated to the tenant like the other ordinary uses of the subjects. He has no doubt that, in the present case, that was not the understanding of the landlord, who probably did not interfere personally in letting the farm. And it is much to be regretted that the landlord's intentions in the matter had not been communicated to the tenant, so as to have saved both parties from the annoyance of this litigation. But if the general implication is, as the Lord Ordinary is disposed to hold, in favour of the right being communicated to the tenant, any understanding by which it is to be controlled must be that of both parties.

“The question under the second application for interdict is entirely one of fact,—Whether the respondent interfered with the petitioner's nephew to prevent him fishing? The Lord Ordinary thinks that, the evidence on this point being quite conflicting, the petitioner, on whom the burden of proof lies, has failed to establish the ground of the application. The Lord Ordinary was satisfied at the

proof that both parties gave, according to their recollection and belief, a correct account of what passed. Mr Copland was evidently mistaken in supposing that the Honourable J. C. Maxwell was one of a party who had been at the pond on a former day. He appears to have spoken to him under that erroneous impression, and in some irritation, in consequence of injury which he thought had on the former occasion been done to his fences. In this state of matters it was not unnatural that the parties should misunderstand one another, and that Mr Maxwell should suppose that what was said by Mr Copland, probably in an excited manner, referred to fishing in the pond, with which alone he had had anything to do."

The petitioner reclaimed.

CLARK and LANCASTER for him.

YOUNG, SCOTT, and BRAND for respondent.

At advising—

LORD JUSTICE CLERK—There are here two applications for interdict, both at the instance of Mr Maxwell, the proprietor of the estate of Terregles, against his tenant—the first to interdict him from fishing in a pond, three parts of which are situated on his farm, and the second to interdict him from molesting parties fishing in that pond. The question, as it was debated before us, is one of general importance. In the view of the Lord Ordinary it is assumed that a tenant, in virtue of his lease, becomes entitled to fish for trout in a stream or pond on his farm unless he is excluded by intention express or implied, and on this footing his Lordship has decided in favour of the respondent, holding that here there was no intention to exclude. Now, it is necessary to discover how the matter stands as to the nature of the original right. The right of trout-fishing in private streams and ponds belongs to the proprietor as an incident of his right of property. Any party claiming that right is bound to show how the right passed to him out of the possession of the original owner. Now this right itself may be of importance, and may prove valuable. Is there then anything in the contract of lease entered into between the landlord and tenant which imports a passing of that right? The Lord Ordinary holds that in the lease there is a communication to the tenant of a sort of real right. Now, it is important in considering this question to remark the character of this lease. It is a simple agricultural lease. The subjects let no doubt include a dwelling-house, but the nature of the right conveyed is to cultivate according to the conditions of the other leases on the estate. It is stated by Stair that the contract of location in such a case is a mere personal contract, and has nothing naturally in it of a real right. So far is this the case, that the Act 1449 was required to give anything like permanency to the right of the tenant, and his Lordship explains how the operation of that Statute gives a sort of real right to the tenant. But I apprehend it can only be called real in so far as it gives permanency to the lease. If that be so, there is nothing in the nature of such a contract which gives the tenant a right to do anything except that which is necessary to the reaping of the crop. Where a right is necessary to the cultivation of the land, it will pass to the tenant; but where it is not necessary for that purpose it seems to me that there is nothing in the contract of lease *per se* which will cause it to pass. Now, it cannot be said to be necessary to an agricultural tenant that he should have a right to fish in a pond on his farm. The tenant has no doubt access to the pond, but a mere

right of access will not rear up a right to fish—otherwise the case of *Ferguson* was wrongly decided. In that case the party was found not entitled to use the bank of the stream for fishing, although he had access to it for another purpose.

If then the right of access does not confer the right of trout-fishing, and if there is no heritable right in the tenant from which this claim can flow, it must be held to arise from that general understanding on which the Lord Ordinary rests so much. Now, I find great difficulty in adopting such a principle. In the first place, if we are to import a general understanding into this contract it must be precise and definite as to the nature of the right and the mode of its exercise. What is the nature of the general understanding alleged here? Is this a right personal to the tenant? Is it a right he can communicate to his friends? Is it a right which he can sell or lease? Is it to be exercised by the landlord as well as the tenant? If so—Is the landlord entitled to sell or lease his right? All these questions occur, and it does not give me much confidence in the alleged understanding—that which the Lord Ordinary assumes—that the right to fish is to be exercised in the least burdensome mode for the landlord. At the bar it was strenuously pressed upon us that the right belonged wholly to the tenant, or at all events that the right of the landlord was so unimportant as to be of no value. I cannot but think that under any such general understanding, a right such as that here claimed by the respondent could not pass to an agricultural tenant. There might be more to say for its passing to the tenant of a house for residence, because it might be said that both the tenant and the landlord in such a case had in view the amenities which the latter was to enjoy. If an agricultural tenant has such a right, a pasture tenant would have the same right of fishing in the lochs and streams, frequently let for valuable considerations, which he might have on his farm. Now, can we hold that such a tenant, without a stipulation, can prevent his landlord conferring an exclusive right to fish in these lochs and streams? And if we concede the right here claimed by this agricultural tenant, we cannot refuse it to a pastoral tenant, however valuable his right of fishing may be. So far as I can see, there is no trace in the authorities of any such general understanding. Mr Hunter states the existence of the right of fishing in such a way as to exclude the idea of any such general understanding. And in a recent treatise, a most precise and useful treatise, in which Mr Stewart has embodied the result of his examination of the cases, he states that he has been unable to discover any such understanding. I cannot therefore concur with the Lord Ordinary that any such understanding exists.

But I differ from the conclusion to which the Lord Ordinary has come on his original assumption, and it appears to me that there are specialities in this case sufficient for its determination—(1) the landlord stocked this pond; (2) he has protected it; and (3) he has placed a grating in such a position that the egress of the fish is to a very large extent prevented. I do not go the length of Mr Clark's argument, that this pond is to be regarded as a *piscina*, and that the landlord is not only the proprietor of the pond but of the fish. Under the Acts of 1474 and 1587 abstracting fish from a *piscina* is to be treated as theft. But I do not think that abstracting fish from this pond could be treated as such. The fish are not so absolutely prevented from egress, for they can to some extent get to the

river. But though this pond cannot be looked upon as a *piscina*, I think the landlord has a right to the fish in it under his reserved right, and that the tenant has no such right.

There is this further point to be attended to. This pond is at the extremity of the respondent's farm, and the neighbouring tenant has access to about one-fourth of it. Has he a right of boating so as to reach the fish? So far, therefore, as this first interdict is concerned, I think the Lord Ordinary's interlocutor should be recalled. In regard to the other, I think it safer to adhere to the interlocutor of the Lord Ordinary. We have, no doubt, the assertion of a right on the part of the tenant, but immediately after an interview at which the right was asserted, the tenant states that he wrote a letter disclaiming it.

LORD COWAN declined to decide the general question. He arrived at the same result as the majority, but he preferred to rest his judgment on the specialities of the case. The principal of these were, that the pond had been made by the landlord himself, that he had stocked it with fish, had staked it to prevent netting, and had put on a grating at the lower end to prevent fish escaping.

LORD NEAVES concurred with the Lord Justice-Clerk.

Agents for Petitioner—Mackenzie & Kermack, W.S.

Agent for Respondent—D. F. Bridgford, S.S.C.

Friday, November 20.

LINDSAY v. BROWN.

*Bankrupt—Mandate—Recal—Revocation.* A party granted a bond and disposition in security of a loan, and at the same time a letter by which he agreed that the lender should have power to appoint a factor to uplift the rents, but to account to the proprietor for his intrusions, after paying the interest of the loan. A factor was appointed. *Held* that this agreement was practically putting the lender in possession of the rents, and that the appointment was not recalled by the sequestration of the proprietor.

This was a suspension and interdict brought by the trustee on the sequestrated estate of William Duncan junior, S.S.C., against Matthew Brown, cabinetmaker, Edinburgh, for the purpose of interdicting the latter from collecting or interfering with the rents of certain heritable subjects belonging to the trust, due at the term of Martinmas 1867. The Lord Ordinary (MURE) granted interim-interdict, and thereafter, on the passed note, made the interdict perpetual, with expenses in favour of the complainer. The respondent reclaimed, and amongst other questions the following arose and was disposed of:—

It appeared that the bankrupt Duncan had, prior to his sequestration, borrowed £1000 from a Mr Baigrie, to whom he granted a bond and disposition in security over his heritable property, and *unico contextu* with the bond, he also granted a letter setting forth that it was part of the agreement under which the loan was granted, that, while he held the money, Baigrie should have power to appoint a factor to uplift the rents of the subjects included in the bond, such factor to account to him (Duncan) for his intrusions, after paying the interest of the loan to Baigrie. In virtue of this

arrangement, the respondent was appointed factor, his appointment being verbal, but being understood to be by Baigrie and Duncan jointly. The question now was, *inter alia*, whether this appointment fell by the sequestration of Duncan. It was contended by the trustee that it did; that the arrangement in question was one which conferred only a personal right; that it did not amount to putting the creditor in possession, as under a decree of mails and duties; that it was merely a joint-mandate, revocable (so far as Brown was concerned) by either mandant; and that the parties having chosen to rely upon an arrangement having that character, it was not for the Court to give it a higher and a different character.

SHAND and MACINTOSH for complainer.

TRAYNER and SCOTT for respondent.

The Court, however, held that the mandate, whether joint or by Baigrie alone, was for behoof of Baigrie the creditor, and was in substance a putting of Baigrie in possession of the rents so far as necessary for his interest. That being so, it was not a mandate which was revocable by Duncan, or which fell by Duncan's sequestration. Upon the merits of the case generally the Court recalled the Lord Ordinary's interlocutor, and refused the note of suspension, with modified expenses.

Agent for Complainer—William Spink, S.S.C.

Agent for Respondent—Thomas Wallace, S.S.C.

Saturday, November 21.

M'CALLUM v. PATRICK.

*Fishing—29 Geo. II., c. 23—Possession of Waste Ground—Permanent Residence—Proprietor—Hut—Title to Eject.* *Held* that the right conferred by the British Fishery Act, 29 Geo. II., c. 23, is given solely for fishing purposes, and not for permanent residence, and that the proprietor of lands upon a part of which, in exercise of the right of fishing as protected by the Statute, a hut had been erected, was entitled to a warrant to eject from it occupants who wished to apply it to the purpose of permanent residence.

This case originated in the Sheriff-Court of Argyllshire by a petition at the instance of Mr Patrick of Benmore. The petition was as follows:—"The petitioner humbly sheweth,—That he is heritable proprietor of the estates of Kilmun and Benmore, including, *inter alia*, the lands of Creggan, which is a part of the farm of Kilmun, and also of the lands of Gareletter, which is part of the farm of Blairmore.

"That the respondents trespassed and intruded themselves violently and illegally on the said lands of Creggan, part of the farm of Kilmun, where they now reside, and erected without the knowledge or consent of the petitioner a hut or tent, or other temporary dwelling-place, in or near to the said lands of Creggan. During a part of the year, the respondents erected, also without the consent or leave of the petitioner, a hut or tent, or other temporary residence, in or near the lands of Gareletter, which is part of the farm of Blairmore, which last-mentioned hut or tent is occasionally shifted about from place to place, all to the loss, injury, and damage of the petitioner.

"The petitioner has frequently desired and required the respondents to flit and remove from the said huts or tents, to which they have no legal