

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

right, and for which they never paid any rent, but the respondents refuse to comply with this request, and threaten to retain possession of the subjects, by which the present application has become necessary.

“ May it therefore please your Lordship to appoint a copy of this petition, with the deliverance to follow hereon, to be served on the said Janet M'Callum, Susan M'Callum, William Craig, Elizabeth M'Callum or Craig, and the said William Craig, her husband, for his interest, Maggie or Margaret M'Callum, and William M'Callum, and upon the tutors and curators of the said Maggie or Margaret M'Callum and William M'Callum, if they any have, for their interest; and, thereafter, to grant warrant to summarily eject and remove the respondents, their wives, bairns, families, dependants, goods, and gear, and all other effects belonging to them, furth and from their possession of the said hut or tent at Creggan aforesaid, and from the said lands of Creggan themselves, and to desist and cease therefrom, and to make the same void and redd to the petitioner; and on the respondents being so removed, to interdict and prohibit them from returning to, or squatting on, or intruding themselves, or their foresaids, on the said lands of Creggan or Gareletter, or on any other lands belonging to the petitioner; and to find the respondents liable in expenses, and to decern therefor; or to do otherwise in the premises as to your Lordship may seem proper, and to decern.”

The defence was—“(1) That the respondent Janet M'Callum, and her co-respondents, Susan, Margaret, and William M'Callum, are employed in fishing, and for that purpose have a boat, nets, fishing-lines, and other instruments for plying their business as fishers. They reside in the wooden hut at Creggan, from which they are sought by the present action to be ejected. The hut was built in May 1858 by the said Janet M'Callum, under the highest high water mark of the sea at Creggan, and she has, along with the other respondents abovementioned, continued to reside in it ever since without interruption. (2) The respondents occupy the hut which they have erected on the sea-shore for the purpose of carrying on their occupation as fishers, and that in virtue of the second section of the Act, 29 George II., cap. 23, intitled ‘An Act for Encouraging the Fisheries in Scotland.’ (3) That the petitioner has no right to the shores upon which the said wooden hut is erected, and is liable to a penalty of £100, in terms of the said Act, 29 George II., cap. 23, for interfering with the respondents in their calling as fishers.”

The Sheriff-substitute (CUNNINGHAM GRAHAM) pronounced the following interlocutor:—“The Sheriff-substitute having heard parties' procurators, and considered the closed record and whole process, repels the defences stated, and grants warrant to summarily eject and remove the respondents, their wives, bairns, families, dependants, goods and gear, furth and from their possession from the hut or tent at Creggan, mentioned in the petition, and from the said lands of Creggan themselves, as prayed for, on a charge of forty-eight hours in common form; and on the respondents being so removed,

interdicts and prohibits them from returning to, or squatting on, or intruding themselves or their foresaids on the said lands of Creggan or Gareletter, or others belonging to the petitioner: Finds the defenders liable to the pursuer in expenses, appoints an account thereof to be given in, and remits to the auditor to tax the same when lodged, and to report.

“*Note.*—The defenders show no good title,—not even a colourable title,—to their being allowed to remain where they are. Their first plea seems to demand, as it were, a sort of possessory judgment; but in the absence of a single line of written title preceding or recognising lawful possession, this cannot be allowed. The Sheriff-substitute, however, deals with a portion of this plea, and with some of the others, with very great diffidence in his own judgment, for the question raised is one upon which older and wiser lawyers are entirely at variance. The ground in question is below high-water mark, and the Sheriff-substitute rather leans to the view that the public have a certain right over it. It is difficult to say whether such land belongs to the proprietor *ex adverso*, or to the Crown absolutely, or to the Crown merely in trust for its subjects, and for their free use of it. But by ‘free use’ it is not meant to imply the selfish and exclusive use of it, by building a house upon it, and thus taking a portion of public property for one's own. The defenders have no right to do so in any view. The Sheriff-substitute must honestly confess that he has great difficulty in assigning clearly his reasons for the foregoing judgment; but, describing them roughly, they come to this, that the petitioner has some show of a title, while the respondents have none.

“The Fishery Act quoted does not apply.”

The Sheriff, having at a previous stage of the case made a remit to an architect to inspect the hut referred to and to report, adhered in the following interlocutor:—“The Sheriff having heard parties' procurators, and considered the appeal for the defenders and whole process, adheres to the interlocutor appealed against, and dismisses the appeal; Finds the defenders liable in additional expenses as these may be taxed, and decerns.

“*Note.*—The Sheriff-substitute is in error in saying the hut in question here is below high water mark, for Mr Mitchell in his report says that the grass is growing six feet out from the gable next the sea, and that it is only in extraordinary high tides the water comes up to it. Now it is clearly laid down that the sea-shore is that ground which is covered by the sea between high and low water mark of ordinary tides. The Sheriff, therefore, considered this to be a hut not on the sea-shore, but above ordinary high water mark. It is, therefore, unquestionably on the pursuer's land; although, even if it had been on the shore, the Sheriff is inclined to think the adjacent proprietor is entitled to prevent persons squatting or erecting houses on the beach.

“The Sheriff, as he formerly indicated, thinks the Statute of Geo. II. does not form a good defence where the erection is not of a temporary character, and merely for the purpose of fishing. It is avowedly, and, according to the report, intended for a dwelling, and if one such house is authorised by the Statute, whole villages might be erected on waste land above high water mark, without any rent paid to the proprietor or any leave asked from him. Looking at the context, and that the word ‘huts’ comes between ‘tents and stages,’

it cannot be held that the Statute contemplated houses for continuous residence."

The respondent in the Inferior Court now brought a reduction of these judgments, mainly relying upon the grounds pleaded on the merits in the Inferior Court.

The Lord Ordinary (KINLOCH) pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the process, repels the reasons of reduction:—Assolzie the defender from the conclusions of the action, and decerns: Finds the pursuer liable to the defender in the expenses of process; allows an account thereof to be lodged, and remits to the auditor to tax the same, and to report.

Note.—It appears to the Lord Ordinary that the Sheriff acted judiciously in ascertaining the character and situation of the hut in question, by the simple and inexpensive proceeding of the remit to Mr Mitchell.

"Mr Mitchell's report seems to the Lord Ordinary to establish that the hut is not on the shore, but strictly within the lands of the defender. Mr Mitchell reports that 'the grass is growing round the gable next the road, and round the back, and for six feet out from the gable next the sea;' and the sea, he states, only comes up to the house 'at extraordinary high tides.' He marks 'the height of spring tides' some feet below the hut.

"Even if the hut had been within high water mark, the Lord Ordinary would not have held that the defender was not entitled to have it removed, if placed there without any title. Whatever difficulties may have occurred in regard to the legal right to the sea-shore, it appears to the Lord Ordinary undoubted that the adjoining landowner has such an interest in the shore *ex adverso* of his property as to entitle him to prevent any individual from interposing, for his own private benefit, such an erection between his lands and the sea. The Court has interfered to prohibit a much less material encroachment; *Nicol v. Blaikie*, 23d December 1859, D. 22,335.

"This being so, and the defender having in the estimation of the Lord Ordinary a clear right to remove the occupants of the hut if not possessed of a legal right of occupancy, it further appears to him established that no such right belongs to the pursuer. The only right claimed by her is alleged to arise out of the British Fishery Act, 29 Geo. II., cap. 23, which, she argues, gives all engaged in fishing a right to have a tent either below the highest high water mark, 'or for the space of 100 yards on any waste or uncultivated land beyond such mark.' But the Lord Ordinary concurs entirely with the Sheriff in holding that this right is given solely for fishing purposes, not for that of permanent residence. The preamble of the Act bears it to be expedient that those engaged in the fisheries should 'have the full use of all ports, harbours, forelands, and others, for bringing in, pickling, drying, unloading, and loading' the fish. And on this preamble right is given to use uncultivated land within 100 yards of the shore, 'for landing their nets, casks, and other materials, utensils, and stores, and for erecting tents, huts, and stages, and for the landing, pickling, curing, drying, and reloading the fish.' The context here shows that the tents and huts permitted to be erected are for what may be called trade purposes, not for that of permanent residence. Any other view would very manifestly sanction the erection and maintenance

of a fishing village, overflowing with colonists, on the ground of any proprietor adjoining the sea, without payment of rent. This, it is conceived, was never intended by the Statute; and what holds in the case of an entire village will equally hold in that of a single habitation. The hut in question is used for personal residence, and not in any correct sense for fishing purposes; for which it is of no more use than the rocks which form its support. The Lord Ordinary therefore thinks that the Sheriff's judgment, removing the pursuer, proceeds on sound principle. The principle is accordant with that which was recognised in the decision of the case of *Hoyle v. M'Cann*, 10th December 1858, D. 21, 96.

"The Lord Ordinary has not had pointed out any legal objections to the charge given on the decree of removing."

The pursuer reclaimed.

BLACK for her.

ADAM for defender.

At advising—

LORD JUSTICE-CLERK.—There is nothing in the Statute, in intendment or provision, by which it was meant to establish squatting along the coast. It was not intended by the Legislature that fishermen should take possession of the shore for the purpose of residence. It appears to me that, according to the nature of the Act, no permanency of possession was secured by a party using the shore during the fishing season. He must submit to removal if ordered. If that be so, it appears to me that the judgment is well-founded; for there is nothing in the Statute to set up a good defence to a removing from such residence. Therefore, in the matter of the application, I concur with the Lord Ordinary in thinking that the reduction should be refused. But then the party here is not content with asking for a warrant to remove; he also asks that, after removal, the Sheriff shall "interdict and prohibit them from returning to or squatting on, or intruding themselves or their foresaids on the said lands of Creggan or Gareletter, or on any of the lands belonging to the petitioner." Now I could understand an application for interdict against squatting; but this is broader, it is interdict against their returning, and it is not applicable to the particular lands in question, but to the whole property, in regard to which we have no more information than as to the usurpation attempted. There is no proof that these persons meant to take similar possession of other lands. Upon the second part of the application, I think we must alter.

LORD COWAN—I concur generally with the views stated in regard to the occupation and possession of the tent as a place of residence. It seems to me that the pursuers had no title whatever to occupy; and although, having occupied with the sanction of the proprietor, it may seem harsh to remove them, he has an undoubted right to do so. He has a right of property. What we require to guard against, in asserting this right of the proprietor to remove from his lands persons who have no title, is that the judgment of the Court shall be so expressed as not to interfere with the rights of the fishing community along the coast. The extent of these rights does not come before the Court for the first time. In a case reported in 20 D., p. 42, Lord Neaves in his interlocutor, and the then Lord Justice-Clerk, fully explained the rights of the fishermen of the coast under that Statute. Probation was allowed in that case, and it was disposed of by final interlocutor, and then came under the re-

view of the Court. In these cases a reservation was carefully made of all the rights of the fishermen competent to them under that Act, and when the case was finally disposed of the following interlocutor was pronounced (*reads from report*). I apprehend that what we require to do here is just to insert that very careful reservation that these parties may be able to vindicate their rights in common with the other fishermen of Scotland. I particularly recommend the parties to carefully consider the judgments of the Court in these two reports. I concur in the views expressed there by Lord Justice-Clerk Inglis.

LORD NEAVES—I concur in the opinion. I think this interdict is partly right and partly wrong—partly right, in so far as to the claim for removing, because the party had no right otherwise or under the Statute to have a residence there; partly wrong, in going so far as regards future acts of interdict. To interdict a party from “returning to or squatting on, or intruding, &c.” is certainly a very remarkable thing. It should be remembered, in regard to interdicts that they require to be prepared with great accuracy and precision, because breach of interdict infers punishment for contempt of Court. An interdict should both be carefully sought and carefully weighed by the Judge who grants it. This is an interdict that no judge should ever have granted in the circumstances of this case. I don’t know what squatting is; it is not a *nomen juris* here whatever it may be in some of the colonies. An interdict in such broad terms would be no interdict at all, because the question of the right or the wrong of the intrusion would still remain behind. The interdict is much too wide. It looks as if it would cover even putting a foot on the ground for fishing. We must cut it down.

LORD BENHOLME absent.

Agent for Reclaimer—W. H. Muir, S.S.C.

Agents for Respondent—Adam, Kirk & Robertson, W.S.

Saturday, November 21.

FIRST DIVISION.

SPENCER v. CUMMING.

Sheriff—Debts Recovery Act, 1867—Proof—Note of Evidence—Plea of Payment. In cases under the Debts Recovery Act, where no note of evidence is taken under the 9th section, the parties cannot ask the Court to order the case to be reheard, and new or additional evidence taken under the 12th section.

Spencer brought an action, under the Debts Recovery Act 1867, 30 and 31 Vict., c. 96, against Cumming, for a sum of £28, as the balance of an account for goods furnished.

The defender pleaded—“1. The account libelled is erroneous. Most part of the goods therein charged for were neither ordered nor got by the defender; and the sum sued for is not due. 2. The defender frequently asked a correct account from the pursuer’s traveller, as well as from the pursuer’s house, but they failed to furnish it till this action was raised, and thus, in any view, no expenses can be claimed.”

After a proof, neither party requesting a note of evidence to be taken, the Sheriff-substitute (CAMPBELL) pronounced this interlocutor—“Finds it proved, in point of fact, that the goods specified in the account libelled were furnished to

the defender, and invoiced at the various times when they were received by him, at the prices charged for them in the account libelled: Therefore repels the defences, and decerns against the pursuer for the sum of £28, 6s. sterling, with £3, 16s. 7d. of expenses.”

The Sheriff (DAVIDSON) adhered.

The defender appealed.

By section 9 of the Debts Recovery Act it is enacted that, unless required by either party, it shall not be necessary for the Sheriff to take a note of the evidence, or of the facts admitted by the parties; but upon such requisition, which shall only be competently made before any parol evidence has been heard, and not afterwards, he shall take such note, setting forth the witnesses examined, and the testimony given by each, and the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection, and a note of any objections taken, with admission of evidence, oral or written, allowed to be received, &c.

Section 10 enacts that, where neither party has required the Sheriff to take such note, it shall not be competent to appeal against his judgment in so far as his findings in part are concerned, and such findings in part shall be final, and not subject to review by any Court.

Section 12 enacts that, in the event of an appeal, the Court shall hear the appeal without any written pleadings; but the Court may order the case to be reheard, and the evidence taken of new, or additional evidence to be taken, by the Sheriff or Sheriff-substitute.

GLOAG, for appellant, contended that the Sheriff had wrongly refused to allow him to enter on a certain line of proof, with the view of proving payment, and that he ought now to be allowed to enter upon it.

THOMS for respondent.

The Court held (1) that the defence stated involved no plea of payment, and was necessarily so understood by the Sheriff; and (2) that the consequence of the parties having neglected or declined to ask for a note of the evidence was, that the Court could not now inquire into the grounds of the Sheriff’s judgment. He might have admitted incompetent, or rejected competent evidence, but by the Statute the Court could now only look at the facts as they were found by him: new or additional evidence could not be allowed where there was no record of evidence at all.

Appeal dismissed.

Agents for Appellant—Wilson, Burn, & Gloag, W.S.

Agent for Respondent—L. Mackersy, W.S.

Wednesday, November 25.

MURRAY (GALBRAITH’S TRUSTEE) v.

EGLINTON IRON COMPANY AND BLAIR.

Landlord and Tenant—Mineral Lease—Agreement—Road—Illegal Use—Reparation—Surface Damage—Superior. Mineral tenants were entitled by agreement to sink a pit in a certain field, to which they were to have ish and entry by a road which led to a mansion-house, and which was the only access thereto. Held that the mineral tenants must not use the road for the purposes of their mineral traffic in a way inconsistent with the use of the road as an access