Saturday, March 18.

OUTER HOUSE.

(Before Lord Jerviswoode.)

RANKING AND SALE OF ECCLES.

Prescription—Interlocutor—Ranking and Sale. Held that an interlocutor, pronounced in 1825 in an action of ranking and sale, ordering a claim to be lodged, had not prescribed in 1871.

In this case, which has been depending in Court since 1818, a singular and important point of practice arose. In 1822 an interlocutor was pronounced by Lord Alloway, granting decree of certification *contra non producta*. In 1825 Captain Barton presented a reclaiming note to the First Division, setting forth that he was a creditor of the common debtor to the extent of £500, contained in a bill, and craving to be reponed against said decree of certification. Their Lordships of the First Division reponed the claimant, and remitted the case to the Lord Ordinary to receive his claim and grounds of debt. Thereafter an inventory of interest was duly lodged by the Clerk of the Inner House, but in consequence of some oversight it was not transmitted to the Clerk of the Outer House process. No farther proceedings took place in the process until 1864. The original claimant died, and in 1871 his brother lodged a minute, craving to be sisted as a party in room of his deceased brother, and to be allowed to lodge in process the inventory of interest, in terms of the Inner House interlocutor of 1825. The common agent in the Ranking, Mr Martin, W.S., objected to the claim being received, on the ground that more than forty years had elapsed since the interlocutor of the Inner House, and that it and the claim then made were both prescribed, and that the claim could not now be received into process without the authority of the Court. It was, on the other hand, maintained that the action must be held to have originally depended before the Court, and that the interlocutor of the Inner House being an interlocutor in the cause, prescription could not apply. The Lord Ordinary repelled the plea of prescription, and admitted the claim.

Agent for the Common Agent—Mr Martin, W.S.
Agent for the Claimant—Mr Kennedy, W.S.

HOUSE OF LORDS.

Tuesday, February 28.

JOHN COPLAND *v.* HON. M. C. MAXWELL.

(*Ante*, vol. vi, p. 122.)

Landlord and Tenant—Agricultural Lease—Trout Fishing. Held (affirming judgment of Second Division of Court of Session) 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 under an agricultural lease, unless that is done expressly.

This was an appeal from a decision of the Second Division of the Court of Session as to the right of farmers to fish for trout in streams passing through their farms. The respondent, Mr Maxwell, is proprietor of the estate of Terregles in Kirkcudbrightshire, and in 1863 he let a farm on that estate, called Mainshead or Prospect Hall, to the appellant for nineteen years. On the edge of the farm there is an artificial pond lying between the farm and other lands of the respondent. The pond had been made in 1849 to supply a tile-work, which had since been discontinued; and the respondent had stocked it with fish, chiefly trout, but there were also some parr and salmon. The pond is a mile from Mr Maxwell's residence. In the record the respondent set forth that he and his family had been in the habit of fishing in this pond, and that when he let the farm to the appellant for agricultural purposes only, he did not intend to include the use of the fishing of the pond to the tenant. But recently the tenant had begun to fish in the pond, and asserted his right to do so, and attempted to exclude the respondent and his friends from the fishing. On the other hand, the tenant, in his part of the record, stated that he had retired from business, and when he offered to take the said farm a plan of the lands then shown to him showed that the pond was part of the farm, that the lease contained certain exceptions and reservations, but did not reserve the pond or the fishings therein to the landlord; that he had, since he became tenant, constantly washed his sheep in the pond, and fished for the brown trout that frequented the pond; and the previous tenants had done so also. When he took the farm he had in view an agreeable residence, as well as an agricultural use of the lands; that the landlord cannot get to the pond without trespassing on the tenant's land; and therefore that the right of fishing belonged to the tenant. The proceedings commenced in the Sheriff Court with a petition of the respondent to interdict the tenant from fishing in the pond. The Sheriff-Substitute granted interim interdict. The Sheriff, however, on appeal, altered this order, and granted a proof of the averments. Another petition having been presented, there was an advocation. Lord Barcaple, after proof, pronounced judgment in favour of the tenant, holding that, as the lease did not specially except the fishing, the tenant had at common law the right to fish for trout with the rod in the pond. On appeal, the Second Division, consisting of Lord Justice-Clerk Patton, Lords Cowan and Neaves, reversed the interlocutor, holding that where such a lease is silent the right of catching trout in the streams belongs to the landlord, and not to the tenant. The tenant now appealed against the judgment.

The Lord Advocate (Young), for the appellant, said that the pond in question was only half-an-acre in extent. The evidence showed that the tenant had fished in this pond since his lease was granted, and he did not even profess to prevent the landlord from fishing if he did so without getting over and injuring the fences. There was no direct authority in the law of Scotland on the subject. It is true the law of Scotland gave the game to the landlord where the lease is silent; but that arose out of an old Scotch Statute forbidding all persons to take game who had not a ploughgate of land. But there was no such exception as to fishing or catching birds, or digging for worms, or taking any other benefit out of the land. The Lord Ordinary said the common law was in favour of the tenant, while the Inner House said it was in favour of the landlord. But nothing definite was known or decided one way or the other, and the most consistent doctrine was to assume that the tenant had the full use of the land for all lawful