

penses; Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Pursuer—Campbell Smith and Rhind. Agent—P. H. Cameron, S.S.C.

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R., Clerk.

Friday, June 13.

FIRST DIVISION.

[Lord Ormisdale, Ordinary.

LORD ADVOCATE *v.* M'DOUALL.

Salmon Fishing—Barony Title—Prescription.

In a case where the possessors of an estate under a barony title had been in use to give leave "to fish" in the sea *ex adverso* of their lands, on condition of receiving the salmon and the choice white fish—held that this was not salmon fishing properly so called, and was not sufficient to found a plea of prescription.

This was an action of declarator, at the instance of the Lord Advocate on behalf of the Crown, against Mr M'Douall of Logan, who holds his estate under a barony title, and its object was to have it found that the defender had not acquired any prescriptive right to the salmon-fishing in the sea *ex adverso* of his lands. The defender's barony title being quite sufficient if supplemented by possession for the period of prescription to found a right of salmon-fishing, the case turned mainly on the proof of possession.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 16th January 1873.*—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds it has been sufficiently proved that the defender and his predecessors have for more than forty years, or for time immemorial, prior to the institution of this action, enjoyed and exercised, under and in virtue of good and habile titles, the exclusive right of fishing for salmon, grilse, and salmon trout in the sea *ex adverso* of the following lands belonging to them, mentioned in the conclusions of the summons, viz.: All and Whole the lands forming or embraced in the barony of Logan, situated in the parish of Kirkmaiden and county of Wigtown, bounded by the sea, extending, the coast of the said barony, on the Irish Channel or western side, from Drumbredan Bay on the north to Crummag Head on the south, and on the Bay of Luce or eastern side from Chapel Rossan on the north to Kilstay or Palwhinrick Burn on the south, and the five merk lands of Crichen, and the five merk lands of Carrachtree, also lying within the said parish of Kirkmaiden and county of Wigtown: Therefore, *quoad* the right of fishing for salmon, grilse, and salmon trout in the sea *ex adverso* of said lands, assolizies the defender from the conclusions of the summons, and decerns; and in respect the defender does not claim, and has not attempted to prove, a right to fish for salmon, grilse, or salmon trout in the sea *ex adverso* of the following lands, mentioned in the conclusions of the summons, viz., the five merk lands of old extent of Mool, the croft of land commonly called Croft Gregnan, the croft of land called

Cove Croft in Mool, the five merk lands of old extent of Altown, now commonly called Maryport, the five merk lands of Corgie, all lying in the parish of Kirkmaiden and county of Wigtown: the twenty shillings land of Genoch, five merk lands of Nether Torrys, forty-six shillings and eight-penny lands of Over Torrys, and twenty shilling lands of Whytecrook and Croftling, lying within the parish of Old Luce and Sheriffdom of Wigtown: Therefore, *quoad* these last-mentioned lands, Finds, decerns, and declares in terms of the conclusions of the summons: Finds that the other lands mentioned in the conclusions of the summons are not to any extent bounded by the sea: Therefore, *quoad* these other lands, assolizies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, allows an account thereof to be lodged, and remits it, when lodged, to the Auditor to tax and report.

"*Note.*—The Lord Ordinary does not think that to the extent to which *absolvitor* has now been pronounced any serious difficulty can be entertained on the proof; and in regard to that part of the conclusions of the summons for which decree has been pronounced in favour of the pursuer, there could of course be no difficulty, as no dispute was raised in relation to it.

"All the lands *ex adverso* of which the defender has now been found to have proved a prescriptive right to the salmon fishing are admittedly component parts of the barony of Logan, with the exception of the lands of Crichen and Carrachtree, about which it is said to be not quite clear whether they form parts of the barony or not. This matter, however, is of no practical importance, because, whether they are to be held as forming part of the barony or not, they are held under Crown charters *cum piscationibus*, which is sufficient to found a right by possession for the prescriptive period to salmon fishings; and as a barony title is sufficient for the same purpose, there can be no question, and none was raised, as to the defender's titles, *quoad* the whole lands in regard to which he has been found successful, being good and habile, if fortified by possession for the prescriptive period, to give him a right to salmon fishings. *Nicol and Others (Milne's Trustees) v. Lord Advocate*, 1 July 1868, 6 Macph. p. 972.

"Accordingly, the only disputed question between the parties in this case related to the import and effect of the proof;—the defender, who had undertaken the *onus probandi*, contending that it was ample and sufficient to support the right of salmon fishing claimed by him; while on the part of the pursuer it was argued, that it was not so, but, on the contrary, that it merely showed that although a few fish of the salmon kind were occasionally caught by or for the defender and his predecessors, that occurred accidentally in the course of prosecution of white or other fishing, in such a way as to be incapable of establishing a right of salmon fishing. The Lord Ordinary has been unable to give effect to this argument for the Crown. He has, indeed, had very little difficulty in giving effect to the contention of the defender.

"The proof will require to be read and considered as a whole in order to form a just and sound appreciation of it. The Lord Ordinary has, after a careful consideration of it, to observe that it appears to him to contain all the elements necessary to support the defender's case. (1) Whether the salmon fishing exercised by the defender and his pre-

decessors was of a character and description sufficient in itself, is a matter which will be immediately noticed; but that, such as it was, it extended over the requisite period, is so entirely beyond all question on the proof that it is quite unnecessary to dwell upon the point. (2) Nor does the Lord Ordinary think that the catching of salmon was merely a casual and accidental thing, occurring in the prosecution of white or other fishing. On the contrary, it appears to him to be sufficiently proved that catching fish of the salmon kind has always been considered, if not the chief, at least an important object of the fishermen, as well as of all the other parties concerned. There is abundant evidence to this effect. (3) The mode of fishing which seems to have been adopted was also suitable and appropriate for the catching of fish of the salmon kind. Net and coble were substantially the means employed. And, at any rate, having regard to the means employed as described by the witnesses, and among others by M'Craken (proof, p. 21, F G), M'Creedy (p. 30, E F G, and p. 31, F G), and James Goudie (p. 33, B C), there can be no doubt the mode or means resorted to were efficient for the purpose. (4) Not only was leave to fish almost always asked and considered to be necessary, from the defender and his predecessors, but all persons not having such leave were prevented from fishing. The proof is clearly to this effect as applicable to the whole prescriptive period. And (5) It has also been well established that for leave to fish a consideration was always exacted by the defender and his predecessors, consisting for the greater part of the prescriptive period, of the best salmon or other fish caught, and latterly of a money rent.

"If the Lord Ordinary be right in holding these to be clearly established points by the proof, it is difficult to understand how the defender's contention could well be resisted. But it seemed to be maintained on the part of the pursuer, that in no correct view could the defender's claim be sustained, except as regards some limited places *ex adverso* of his lands; but these places were not, so far as the Lord Ordinary noticed, exactly condescended on by the pursuer. He at any rate thinks that the proof is applicable alike to at least all the places *ex adverso* of which the defender's claim to the salmon fishing has now been sustained. The more important of the witnesses state very distinctly that the fishing was exercised all along both sides of the Mull of Galloway opposite the defender's lands, the Luce Bay side, and also the Irish Channel side, just as it was found suitable and convenient; and, in particular, reference on this point may be made to the testimony of the witnesses Murray (p. 11, E to G), M'Craken (p. 16, D to G, and p. 19, E to G), John Robb (p. 23, F G, and p. 24 F G), and James Robb (p. 28, F).

"These are the grounds upon which the Lord Ordinary has proceeded in giving judgment in this case."

Authorities—*Stuart v. M'Barnet*, July 21, 1868, 6 Macph. 123, H.L.; *Lord Advocate v. Cathcart*, June 14, 1871, 9 Macph. 744, 33 Jur., 500; *Duke of Sutherland v. Ross*, June 11, 1836, 14 S. 960 (*Smollet v. Colquhoun*, Note); *Lord Advocate v. Hall*, Nov. 9, 1869, 7 Scot. Law Rep. 62; *Lord Advocate v. Nicol and Others (Milne's Trustees)*, July 1, 1868, 6 Macph. 372.

The pursuer reclaimed.

At advising—

LORD ARDMILLAN—I do not think that this case

is attended with any peculiar difficulty, either in point of law or in point of fact. We are in a question between the Lord Advocate, as representing Her Majesty, and Mr M'Douall of Logan, who claims a right of salmon-fishing *ex adverso* of his lands of Logan and others in Wigtonshire. The lands of Logan are held under a barony title; and certain other lands mentioned in the record are held under a Crown grant *cum piscationibus*, but without mention of salmon.

Salmon-fishings are *inter Regalia*, and no one can have a valid right to salmon-fishing who cannot instruct a grant from the Crown. A barony title, where there is no grant of salmon-fishing, does not without prescriptive possession support a claim to a right of salmon-fishing. But a barony title, or a title to lands *cum piscationibus* (though not *piscationibus salmonum*), is a sufficient foundation on which a claim to salmon-fishing may be built, and a right may be acquired by prescriptive possession. In such a case possession is not a mode of indicating a title, but is a mode of acquiring it. In the present case it is not alleged that Mr M'Douall has an express title from the Crown to salmon-fishing. He has a title to the barony of Logan, and he has, in regard to two separate portions of land, a title *cum piscationibus*, but without mention of salmon. These titles, containing no Royal grant of salmon fishing, do not of themselves instruct a right to salmon-fishing, or support the claim to salmon-fishing in a question with the Crown. But a satisfactory proof of prescriptive possession of salmon-fishing by the proprietor of Logan,—a possession clear, continued, unequivocal, and exclusive,—may have the effect of extending the scope and meaning of the charter, and thus of sustaining the claim.

In a question with the Crown, the burden of proof lies entirely upon the defender; and if the proof fails in regard to any of those necessary qualities of possession to which I have adverted, the effect of such failure must be the loss of his case.

It is necessary to bear in mind the distinction between that possession which is urged merely in order to instruct the exercise of a right constituted by charter, and the possession which is urged for the purpose of extending the construction of the title, and including within it a right which has not been specially conferred. In regard to this last kind of possession, the law demands that it be of the strongest and most unequivocal character; and such a possession Mr M'Douall must instruct in the present case. This is quite settled by authority. I need only mention the case of the *Duke of Sutherland v. Ross*, 11th June 1836, and the case of the *Lord Advocate v. Sinclair*, decided in this Court on 14th June 1865, and affirmed in the House of Lords on 7th June 1867. That case of *Sinclair* was decided on the proof in favour of the proprietor; but the law was laid down, both here and in the House of Lords, in accordance with what I have now stated. The same statement of the law in regard to possession on a barony title was given in the case of the *Duke of Richmond v. Lord Seafield*, February 16th, 1870, where complete proof of possession of the character which I have described was required, though the proprietor had a barony title with a grant *cum piscationibus*. The recent case of *The Lord Advocate v. Hall*, on 9th November 1869, where the nature of the required possession was carefully considered, is a further authority; and, for my own part, I adhere to the views of the law which I expressed in that case.

The proof of possession in the present case is, in my opinion, altogether inadequate to support the claim of Mr M'Douall to a right of salmon-fishing.

The ordinary and well understood mode of fishing salmon in the sea *ex adverso* of the Logan estate was certainly introduced for the first time in 1856, about seventeen years ago. We know that such fishing was first introduced on the coast of Ayrshire a good many years before that date, I think about 1838, but not so long ago as to amount to prescriptive possession. This was ascertained in the case of *Carlton*. Therefore, unless Mr M'Douall has been able to instruct some kind of possession different from the usual and appropriate and recognised mode of fishing by net and coble, he cannot carry back his possession to a period earlier than 1856. We have here no case of salmon fishing till within twenty years, and no salmon fishing distinct from other fishing. We have, indeed, had a great deal of evidence about fishing in the sea with common draught nets, and for a long period. But that was not primarily or properly salmon-fishing. I am quite satisfied that, apart from the question of leave, to which I shall afterwards advert, this fishing with a common draught net in the sea, the fisher occasionally catching a salmon, was not a sufficient act of possession in exercise and assertion of a right of salmon-fishing. Fishing in the sea with a draught net, in the manner described by these witnesses, is not primarily and principally salmon-fishing, and does not become salmon-fishing because a salmon is occasionally caught.

I need not enlarge on this point. I think it free from doubt; and I concur in the remarks which have been made in the case of the *Duke of Sutherland v. Ross* and other cases as to requiring proof of possession by the recognised and appropriate mode of fishing.

But it is said (first) that the proprietor of Logan has instructed sufficient possession by proving that he and his servants fished for salmon with a draught net for his table and for his pond; and (secondly) that he possessed through his tenants, to whom he gave leave to fish salmon and other fish along the coast. The proof of personal possession by the proprietor and his servants, taken by itself, is so inadequate and so limited, both as regards the locality of the fishing, the time of the fishing, and the manner and purpose of the fishing, that really little weight can be given to it, apart from the proof of fishing by tenants on leave granted by the proprietor.

The question raised in regard to fishing with this leave is important; and the defender's claim has been strongly maintained on that ground. I have given my best attention to the argument on this point, and I have again and again perused the proof, and I have arrived at the conclusion that there is no satisfactory evidence of leave being granted to fish salmon as distinguished from leave to fish generally. It seems that the proprietor of Logan fancied that he had a right to prohibit all fishing in the sea opposite his estate. That this notion existed on the part of the proprietor is admitted by several of the witnesses for Mr M'Douall, and at least one of them expressly says that "nobody was entitled to fish without leave from the laird, either for white fish or anything else." This was the proprietor's view. On this view he possessed. He prohibited generally, and he gave leave occa-

sionally and exceptionally. Now, either that prohibition of all draught net fishing in the sea opposite his lands was legal or illegal;—it was either a lawful exercise of right, or it was a usurpation of right.

The counsel for Mr M'Douall seemed to maintain that the general prohibition of draught-fishing in the sea was lawful; and that the laird had the right to prohibit the whole fishing on his coast. I am clearly of opinion that it was not lawful. The fishing of white fish in the sea with a draught net could not, in my opinion, be lawfully prohibited by the proprietor, even on the plea that a salmon might occasionally be caught in the net. The great authority of Lord Stair is conclusive on this point, and the authority of more recent writers might be quoted if necessary. (Stair, 1, 1, 5; Bankton, 2, 1, 1; Bell's Prin., par. 646; *Ramsay v. Kellies*, 22d November 1776, 5 Brown's Sup., 445.)

If the prohibition was unlawful, and a usurpation of right, as I hold it to be, then the leave given to a few, being an exception from that prohibition, can have no effect as an act of possession in this case. The leave was general—applicable to all fish—just as the prohibition was general. The party to whom the leave was granted had no better right than the whole fishermen would have had but for the prohibition,—no better right than the whole fishermen were entitled to have. The making the man who had the leave an exception from a prohibition enforced against others was a wrong to the remainder; and the doing of a wrong cannot be recognised as the lawful assertion of a right.

In any view, the fishing with draught-net under such a leave cannot be considered as exclusive. It was not exclusive in point of fact, for it is proved that many fished who had no leave; and it could not be exclusive in point of law, because, being simply an exception from an illegal prohibition, its exclusiveness depended on the lawfulness of the prohibition, and cannot be recognised.

But further, it is proved that the fishing with draught-net such as has been described, being white-fishing with the chance of taking an occasional salmon, has been continued since the lease of the salmon-fishing to M'Creddie, and afterwards to Glendinning. Now, both of these men were, in succession, tenants of the whole salmon-fishing. M'Creddie states that he had the exclusive right to fish salmon; and the lease to Glendinning, who succeeded him, is to the same effect. But Mr M'Douall's witnesses—M'Cracken and Robb—state that they continued after, and in knowledge of the lease to M'Creddie, fishing with the draught net under what they called leave from the proprietor. There was in the lease no reservation of any such privilege. If their fishing was inconsistent with the fishing by M'Creddie, the tenant to whom the right of salmon-fishing had been let, then it was just a trespass and a wrong; and if it was consistent with M'Creddie's fishing, then it was not proper salmon-fishing, for all proper salmon-fishing in that locality, and *ex adverso* of the Logan estate, had been let to M'Creddie. But on their own admission the character or quality of their mode of fishing, and consequently of any possession instructed by such mode of fishing, was the same after 1856 as it had previously been, and therefore it never was an exercise of a proper right of salmon-fishing.

On considering the whole proof of possession on

the part of the proprietor of Logan, with reference to the time, the manner, the instrument, and the character of the only fishing which has been proved down to 1856, I am of opinion that such possession of the right of salmon-fishing as law requires has not been instructed prior to 1856; and that is conclusive. I therefore suggest to your Lordships that we recall the interlocutor of the Lord Ordinary, and decern in terms of the conclusions of this action.

The other Judges concurred.

Counsel for Pursuers—Solicitor-General (Clark) and T. Ivory. Agent—Donald Beith, W.S.

Counsel for Defenders—Millar Q.C. and Blair. Agents—Hunter, Blair, & Cowan.

Friday, June 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

JOHNSTON (INSPECTOR OF POOR, CAMPSIE)
v. WALLACE (INSPECTOR OF POOR,
GOVAN).

Poor—Settlement—Desertion—8 and 9 Vict. c. 83,
§ 80.

Where a husband, although remaining in Scotland, concealed himself and failed to alimnt his wife—held that the conduct of the husband amounted to desertion in the sense of the Poor Law Act, notwithstanding that circumstances justified his going away.

This action was raised by the inspector of poor for the parish of Campsie against the inspector of poor of the parish of Govan, on 21st June 1871. It concluded for alimnt given to Mrs Carson from August 1868 to August 1871, and for alimnt given to her children from August 1868 to December 1869. It also concluded that the parish of Govan be ordained to relieve the parish of Campsie of the maintenance of Mrs Carson for the future.

Elizabeth Murphy or Carson, and Jane and Elizabeth Carson, the paupers, were the wife and children of Andrew Carson. They were discovered in a state of destitution in Campsie parish on 29th August 1868, at which date they were removed to the poor house, and on 25th September of the same year Mrs Carson, having become insane, was removed to Gartnavel Asylum, while the children remained in the poorhouse for some time, when they were removed by their father. It appeared from the proof which was led in the case that Andrew Carson originally left his wife because, as he alleged, her conduct was unbearable—that she often threatened his life, and otherwise ill treated him. Further details are contained in the interlocutor of the Sheriff (*infra*).

On 22d August 1872, the acting Sheriff-Substitute (LAWRIE) pronounced an interlocutor assailing the defenders from the conclusions of the action. In a note to his interlocutor the Sheriff-Substitute stated the ground of his decision as follows:—

“ . . . The cases of *Hay v. Skene*, 13th June 1850, 12 D. 1019; and *Carmichael v. Adamson*, 28th February 1863, 1 Macph. 452, settle that where a husband has no settlement in Scotland his desertion of his wife has the effect of reviving her maiden or birth settlement.

“ In all the reported cases in which the husband's

desertion was founded on, he had left Scotland. It has not yet been decided whether the wife's birth parish is liable when the husband remains in Scotland but conceals himself and fails to alimnt his family. The Sheriff-Substitute thinks that the desertion contemplated by the Judges who decided *Hay v. Skene*, and *Carmichael v. Adamson*, must be something more than the desertion which is punishable under the 80th section of the Poor Law Act. He has given repeated consideration to the question, and he has come to be of opinion that the only desertion which revives the wife's birth settlement is the husband's wilful absence from Scotland, coupled with failure to support his wife and family left here. In other words, that the husband must have withdrawn himself from the jurisdiction of the Courts of Law in Scotland, which, had he remained here, could either have compelled him to support his wife, or, if he himself were a pauper, could have removed them all to his native country.

“The Sheriff-Substitute is further of opinion that the *onus* of proving that the husband is abroad lies on the parish where the wife was found destitute, and that it must continue to support her until, by proof of that fact, it shifts the liability to her birth parish. If these views be correct, it is unnecessary to say more than that, in the circumstances proved, and on the authority of *M'Corrie v. Cowan*, 24 D. 723, Campsie has no claim against Govan. . . .”

The pursuer appealed, and on 7th December 1872 the Sheriff (BELL), reversing the judgment of the Sheriff-Substitute, pronounced an interlocutor containing the following findings:—“ . . . Finds that the proof instructs that Andrew Carson, the husband of the pauper Elizabeth Murphy or Carson, and the father of Jane and Elizabeth Carson, is a native of Ireland; that if he ever acquired a residential settlement in Scotland, which is uncertain, he lost it a good many years ago; that in point of fact he had no settlement in this country during any portion of the period embraced in the account of disbursements for his said wife and children annexed to the summons; and that his wife was born in the parish of Govan, which was the parish of her maiden settlement: Finds, farther, that it is proved that Carson deserted his wife and family about the end of the year 1867, and although he does not appear to have left the country, he kept his place or places of residence concealed, and contributed nothing to their support from the said date till the end of the year 1869, when he removed his children from the Govan Poorhouse, and has apparently taken charge of them since: Finds that, in consequence of said desertion, Carson's wife and children became paupers and entitled to parochial relief, and his wife was for sometime maintained in the Govan Poorhouse at the expense of the parish of Campsie, being the parish where she was residing when deserted, and where she became chargeable, and was then removed, in consequence of supervening insanity, to a lunatic asylum, where her board has been disbursed by the said parish, and the said children were boarded at the expense of the said parish in Govan Poorhouse till the end of the year 1869: Finds, in point of law, that it is settled by the cases of *Hay*, June 13, 1850, and *Carmichael*, Feb. 28, 1863, that a wife and children left destitute by the desertion of the husband and father, who is a foreigner, and has no settlement in Scotland, fall to be supported by the parish of