

[29th July 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 26.) The MAGISTRATES and TOWN COUNCIL of DINGWALL, Mrs. C. M. ROSS of Cromarty and Husband, and JOHN C. STEAVENSON, their Tacksman, Appellants.

[*Dr. Iushington — Sandford.*]

HUGH MUNRO, Tacksman, and the Hon. Mrs. M. HAY MACKENZIE of Cromarty, Respondents.

[*Attorney General (Campbell) — H. J. Robertson.*]

Bonâ fide Possession — Salmon Fishing. — During the dependence of proceedings in court to determine a disputed right of salmon fishing, one of the parties was allowed for several years to possess the fishings in dispute, subject to an express order of Court to keep and preserve an account of the number of salmon caught by such party or his fishermen, which was accordingly kept till the question of right was determined; and the adverse party having established his right to said salmon fishings:—In an action by the party who had so established his right, to recover from his opponents the free proceeds of said salmon during the period of possession thus illegally retained,—Held (affirming the interlocutor of the Court of Session) that a plea of bonâ fide possession set up for the defenders was not well founded.

Jury Trial.—Observed, per L. C., (in reference to the circumstances aforesaid,)—that as this was a subject of account arising out of a right as established in a previous suit, there appeared to be no ground whatever for sending the cause in the first instance to a jury.

THIS was a branch of a long-pending litigation between the same parties relative to a right of salmon fishing in a part of the river Conon. This litigation commenced in 1825, by a summons of declarator and damages, at the instance of the respondents, under which the question came to be, whether two valuable pools in the above river, called Pool Oure and Pool Breakenord, belonged to the appellants or to the respondents? It was ultimately decided by the Court of Session, on 11th July 1832, and by the House of Lords, 12th April 1834, that these pools belonged to the respondents, and they have since then been in their possession. For the greater part of the period, during which this question continued in dependence, these pools were allowed to be possessed by the appellants, under an order of court which enjoined them to keep an account of the number of salmon caught till the final issue of the cause. In consequence of the judgment above mentioned in 1834, the respondents raised an action, concluding that the value of the fish caught by the appellants beyond their own boundary as ultimately established during the dependence of the litigation should be accounted for and paid to Captain Munro, the tacksman of the fishings.

To this action the appellants in their four first pleas pleaded, that on a true construction of the judgments pronounced, the pools had actually been adjudged to belong to them and not to the respondents; and to aid the appellants in this plea, they raised two successive actions of declarator to have it so found and declared, but which were both dismissed with expenses; and the defence rested on this plea was thereupon abandoned.

The appellants however further contended that they

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were protected against any accounting, by the plea of bonâ fide possession, and the determination of this point formed the remaining subject of contention between the parties.

The Lord Ordinary (11th March 1837) pronounced the following interlocutor:—"The Lord Ordinary, "having heard counsel for the parties, repels the first "four pleas in law for the defenders, reserving full "effect to all the defences, in so far as they are founded "on the defenders alleged bonâ fide possession of the "fishings in question; and on the same defence of "bonâ fide possession appoints the party to prepare "and lodge mutual minutes of debate by the second "box-day in the ensuing vacation, to be seen and "interchanged, and lodged revised by the third sede- "runt-day in May next."

Upon advising minutes of debate the Lord Ordinary (30th June 1837) pronounced the following interlocutor:—"The Lord Ordinary having considered the "revised minutes of debate for the parties, appoints "them respectively to box the same, and that within "eight days, with the view of reporting to the First "Division of the Court." "Note.—The circumstance "of the defenders being ordered to keep an account of "the fish caught while they were allowed to continue "the possession, does not, with absolute certainty, "imply that they were bound to account for the pro- "ceeds, now that the case has been decided against "them. But looking at the whole course of procedure¹

¹ The following is a sketch of the proceedings so far as necessary to explain the above judgments. The predecessors of the respondents (the Commissioners of Forfeited Estates) raised an action against the predecessors of the appellants, to determine their respective boundaries, in which the

“ there does appear to the Lord Ordinary strong ground
 “ to presume that that liability was contemplated both

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following was the judgment:—“ 24th Jan. 1778. On the report of
 “ the Lord Auchinleck, and having advised the informations, hinc inde,
 “ the Lords find that the commissioners of the annexed estates have
 “ not produced a sufficient title to the fishings of the river Conon;
 “ but find that the magistrates and town council of Dingwall have
 “ produced a sufficient title to the fishings in the said river opposite
 “ to their property from the march at Breakenord down to the sea;
 “ therefore, not only assoilzie the said magistrates and council from the
 “ action against them brought by the said commissioners, but decern to
 “ the effect foresaid in the action at their instance against the said com-
 “ missioners, and declare accordingly.”—The point at issue in the
 action, which gave rise to the present dispute, was the precise position
 of the march at Breakenord; and in this action the following interlocutors
 were pronounced:—“ 9th March 1826, the Lord Ordinary, having heard
 “ parties procurators, ordains the defenders to keep and preserve an
 “ account of the number of salmon to be hereafter caught by them or
 “ their fishermen in the river Conon, all as craved in the foregoing minute,
 “ reserving all questions touching the expenses of clerks or otherwise, in
 “ consequence of carrying this order into effect. *J. Clerk.*”——“ 3d June
 “ 1826. The Lord Ordinary, at desire of the procurator for the pursuer,
 “ ordains the defenders to keep and preserve an account of the number of
 “ salmon caught by them or their fishermen in that part of the river Conon
 “ called the New Pool, (further up the river than Pool Breakenord) and that
 “ in place of the account ordered to be kept by them by the interlocutor of
 “ the 9th of March last; reserving all questions touching the expenses of
 “ clerks or otherwise, in consequence of carrying this order into effect.
 “ *J. Clerk.*”——“ 14th June 1827. Ordains the defenders instantly to
 “ produce in the clerk’s hands the account of the number of salmon
 “ caught by them or their fishermen in that part of the river Conon
 “ called the New Pool, and ordered to be kept by them by the inter-
 “ locutor of the 3d of June 1826. *J. Clerk.*”——“ 24th November 1827.
 “ The Lords having resumed the consideration of this note, and heard
 “ the counsel for the parties, they recal the interlocutors of Lord Eldin,
 “ Ordinary, complained of, and remit to Lord Corehouse, Ordinary, in
 “ place of Lord Eldin, to proceed in the cause as to his Lordship shall
 “ seem proper, reserving all questions of expenses until the issue of the
 “ case. *C. Hope, I.P.D.*”——“ 11th March 1828. The Lord Ordinary
 “ having heard counsel for the parties upon the whole cause, and in particular
 “ upon the demand now made for an interdict against the defenders to
 “ fish above the march between the lands of Balblair and Breakenord, in
 “ respect it is averred that the defenders have been fishing above the said
 “ march, which, by their admissions on the record, they are not entitled
 “ to do, in the meantime prohibits, interdicts, and discharges the said
 “ defenders, or any of them, their tenants, servants, fishers, or dependents,
 “ from fishing or killing salmon in any part of the river Conon above the

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“ by the parties and the Court. In particular, it
“ would be difficult to attach any other meaning to

“ line delineated on the plan in process as the march between Balblair
“ and Breakenord; but in respect the defenders do not admit that the
“ said line is accurately laid down in the plan, without prejudice to the
“ parties to ascertain the exact march between Balblair and Breakenord
“ before the interdict is declared perpetual, grants diligence at the de-
“ fenders instance against havers for recovering the printed informations
“ in the case which depended between the commissioners of annexed
“ estates and the magistrates of Dingwall founded on as res judicata by
“ the defenders, or copies of these informations, and commission to the
“ sheriff depute or substitute of the bounds within which the havers may
“ be for the time to take their oaths and depositions and receive their
“ productions to the day of
“ May next; appoints the parties to prepare mutual cases upon the whole
“ cause, &c.; appoints them to print, at their joint expense, the proceed-
“ ings in the mutual actions between the commissioners of annexed estates
“ and the magistrates of Dingwall, including the said informations, if
“ recovered, and to lodge copies thereof along with their cases.
“ *Geo. Cranstoun.*”——“ 12th November 1828. The Lord Ordinary finds
“ that the words ‘ opposite to their property ’ in the judgment 1778 are
“ demonstrative, and not taxative, and therefore finds that the magis-
“ trates of Dingwall, and those in their right, have a sufficient title to the
“ fishings in the river Conon from the march at Breakenord down to the
“ sea; and to that effect assoilzies the defenders from the conclusions of
“ this action, and decerns; but in respect parties are not agreed as to the
“ march between the lands of Balblair and Breakenord, appoints the pur-
“ suers to put in a condescence, specifying what they aver to be the situa-
“ tion of the march, and allows the defenders to answer the same, and in the
“ meantime continues the interdict: farther, in respect the pursuers allege
“ that the defender Steavenson (the appellants tacksman) has been fishing
“ and is continuing to fish in an illegal manner, appoints them to put in a
“ condescence of what they aver on this point, and allows the defenders
“ to answer the same; the condescences now ordered to be lodged
“ within three weeks, and the answers by the box day in the Christmas
“ recess. *Geo. Cranstoun.*”——“ 11th July 1829. The Lords having
“ advised the petition and complaint, with the revised cases given in for
“ the parties, and heard counsel, they renew the interdict as granted by
“ the Lord Ordinary against the respondents fishing in the Pool Oure
“ and Pool Breakenord; and in the meantime direct the complainers to
“ keep an exact account of the fish caught in these two pools;” &c.—
“ 11th March 1831. The Lord Ordinary having considered the closed
“ record and whole process, and heard counsel for the parties thereon, finds
“ that by the words ‘ the march at Breakenord,’ as used in Lord Corehouse’s
“ interlocutor of 12th November 1828, is meant, as shown by the subse-
“ quent part of that interlocutor, the march betwixt the lands of Balblair

“ the passages quoted from the defenders answers to
 “ the pursuers petition for interim execution after the

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“ and Breakenord, and that it is not now competent to inquire in what sense
 “ these words were employed in the interlocutor in the former process of
 “ 24th January 1778: Finds, that as the parties are now agreed as to
 “ the precise situation of the march betwixt these lands, it is unnecessary
 “ to inquire further into this matter; and that the line so agreed upon
 “ forms, where it touches the river, the western limit of the fishings be-
 “ longing to the defenders; but in respect the march so ascertained does
 “ not correspond with the line delineated on the old plan of 1763
 “ (Sangster’s plan, on which the judgment of 1778 proceeded) as the
 “ march betwixt Balblair and Breakenord, recalls the interdict imposed by
 “ the interlocutor of 11th March 1828, and decerns; that justice, how-
 “ ever, may be done to the pursuers in case this interlocutor should be
 “ altered, ordains the defenders to keep an account of the number of
 “ salmon taken by them in the pools named Pool Oure and Pool Breake-
 “ nord, from this time till the final determination of this point in the
 “ cause: Finds the defenders entitled to the expenses incurred by them
 “ subsequent to the interlocutor of the Court of 20th January 1829.
 “ *Alex. Irving.*”——“ 17th June 1831. The Lords having advised this
 “ reclaiming note, and heard the counsel for the parties, they recal the
 “ interlocutor reclaimed against (except in so far as it recalls the interdict),
 “ and find that it is competent to inquire in what sense the words ‘ the
 “ ‘ march at Breakenord’ were used in the decree 1778. For that pur-
 “ pose, allow the parties to give in cases on the import of the evidence in
 “ process, so far as concerns this point, and in particular on the import of
 “ the proof led, the pleadings and other proceedings in the cause on
 “ which the decree 1778 proceeded; said cases to be lodged on the
 “ second box-day in the ensuing vacation, and appoint said cases to be
 “ revised, printed, and boxed by the third sederunt day in November
 “ next, reserving all questions of expenses. *C. Hope, I. P. D.*”

Judgment of the House of Lords in the first petition and complaint:—

“ Die Lunæ, 11^o Julii 1831. After hearing counsel, &c., it is declared by
 “ the lords spiritual and temporal in parliament assembled, that the mention
 “ of Pool Oure and Pool Breakenord in the said interlocutors complained
 “ of shall not prejudice, bind, or at all affect the question touching the
 “ course of the boundary line, nor decide whether the said line runs below
 “ or above the said two pools; and that, with the above declaration, it is
 “ ordered and adjudged that the interlocutors complained of in the said
 “ appeal be and the same are hereby affirmed; and it is further ordered,
 “ that the cause be remitted back to the Court of Session in Scotland to
 “ proceed therein as shall be just, and consistent with this judgment.
 “ (Signed) *W. Courtenay*, Dep. Cler. Parliamentor.”

After several years litigation this question was finally settled, by the
 judgment of the First Division, in these terms:—“ The Lords (11th July
 “ 1832) having resumed consideration of this reclaiming note, with the

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“ final judgment of 11th July 1832. But as frequent
“ reference is made by both parties to the views of the
“ Court in altering or continuing the state of possession
“ at different stages of the procedure, and as those views,
“ on which the Lord Ordinary possesses no certain
“ information, may materially affect the question now in
“ dispute, he has thought it best to report the case.”

Thereafter, the revised minutes of debate having
been boxed, the following judgment was pronounced by
the First Division of the Court (6th July 1837):—“ The
“ Lords having advised this case upon the report of
“ Lord Fullerton, and heard counsel for the parties,
“ repel the plea of bonâ fide possession set up for the

Judgment
of Court,
6th July 1837.

“ revised cases and interlocutor of this Court, 17th June 1831, and plan
“ and report by James Jardine, civil engineer, dated the 9th day of
“ March last, and proof on which the decree of 1778 proceeded, and
“ heard the counsel for the parties, they of new recal the interlocutor of
“ Lord Newton, 11th March 1831, and find that ‘ the march at Breake-
“ ‘ nord’ used in the decree 1778 is the Fishers Lodge on the south side
“ of the river Conon, or on Island More, and the letter P at the bend
“ eastward of the burn of Ousie on the north side; and the said James Jar-
“ dine having, by the direction of the Court, drawn a red line from the
“ point denoting ‘ Ruins of Fishers Lodge’ on the plan in process made
“ by him across the water of Conon to the letter P aforesaid, they find
“ and declare the said red line to be the march in respect to the right of
“ fishing salmon in said water betwixt the pursuers and the defenders, and
“ that the defenders have no right of salmon fishing higher up than the
“ said line, and the pursuers no right below it; and the Lord President,
“ and Adam Rolland, principal clerk of session, have, with reference to
“ this judgment, certified the said line on Jardine’s plan in process, by
“ putting their names along it, and decern: Find the defenders liable in
“ the pursuers expenses since the date of the remit to the said James
“ Jardine, and in his charge for survey, plan, and report; and remit the
“ account thereof to the auditor of court, to tax, and to report; and
“ further, the Lords remit to Lord Fullerton, in place of Lord Newton,
“ deceased, to hear parties on the account of the number of salmon taken
“ by the defenders beyond the line of march as hereby adjusted referred
“ to in the Lord Ordinary’s interlocutor of 11th March 1831, and all
“ objections thereto, and to do therewith, and with any other points in
“ the cause not disposed of, as shall be just.” This judgment was
affirmed on appeal 12th April 1834.

“ defenders; find that they are bound to account in
 “ terms of the conclusion of the libel, and decern accor-
 “ dingly; find the defenders liable in expenses, appoint
 “ an account thereof to be given in, and remit the same
 “ to the auditor to tax and report. Quoad ultra, remit
 “ to the Lord Ordinary to proceed with the case.
 “ Signed 7th July.”

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The defenders appealed.

Appellants.—Possession of the disputed subjects for at least thirty years does in law raise the defence of bonâ fide possession, and is a conclusive answer to the claim for bygone fruits. In the leading case of Agnew¹, some of the opinions delivered, particularly the opinion of Lord Glenlee, afford valuable authority as to the general nature and foundation of the defence of bonâ fide possession. As the respondents are, in the present case, claiming restoration of the bygone fruits or issues of the property which have been reaped and consumed, it lies, of course, upon them to prove that there was mala fides on the part of the appellants, who were in the occupancy and possession of the subjects.

Appellants
Argument.

The appellants were so far from being in the situation of reaping the fruits of the subject under a conscientia rei alienæ, that the Court itself, at one time, determined the matter in their favour. They refer to the interlocutor of Lord Newton, Ordinary, of 11th March 1831, by which they were restored to the possession of the disputed pools, and the respondents subjected in a

¹ Agnew v. Earl of Stair, 22d July 1828, Wilson and Shaw's Appeal Cases, vol. iii. p. 296.

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Appellants
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large proportion of the costs. It is true that interlocutor was afterwards altered by the Court, which is just an example of that vacillation of judgment which Lord Pitmilley observes, in the above case of Agnew, had been expressly laid down by this House as one circumstance which prevents the conscientia rei alienæ from attaching till final judgment. But even in the end, the Court, in deciding the case unfavourably for the appellants, only subjected them in a small part of the costs; and this House ultimately, in affirming the judgment, refused to award to the opposite party the costs of the appeal; and yet, in a case where the respondents have been refused their costs, both in this House and in the Court below, they have succeeded in the latter in obtaining judgment against the appellants for damages on the footing of a fraudulent and malâ fide possession by them. But if the slightest ground had existed for considering the case as one of that description, it is impossible to doubt that the very least thing that could have been done would have been to award to the respondents the full costs of the litigation. The circumstance that only a small part of the respondents costs was allowed in the Court below, and none at all in this House, conclusively shows that though the appellants were held to be wrong in the claims which they were maintaining, there was nothing improper in the manner in which they had maintained them, and nothing dishonest or fraudulent in their possession, which was fairly referable to their titles as they stood interpreted by the judgment of 1778. This is plainly the view of these matters taken by Lord Denman, who moved the judgment of affirmance in 1834, adding the following important statement:—
“ And I apprehend that as these matters have all arisen

“ from the carelessness of the pursuers (respondents),
 “ the defenders in the former action, and as very great
 “ doubts have arisen in consequence of the ignorance
 “ of the parties as to the real extent of their rights,
 “ that ought to be done (the affirmance of the judg-
 “ ment) without any costs.”

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Respondents.—The judicial challenge in 1825, and the orders of the Court thereupon, that an account of the number of fish should be kept, put the appellants in malâ fide in consuming the fruits of their illegal possession.

Respondents
 Argument.

The principles by which the defence of bonâ fide possession are regulated have been clearly laid down by the institutional writers.¹

The defence of bonâ fide possession can never be sustained, where, after a judicial challenge of the party's right has been brought he has been ordered by the judge to keep an account of the whole proceeds of the subject, with a view to an ultimate accounting, in case his antagonist should be successful. From that time forward he cannot, in reason or common sense, consider these proceeds as his own. He is, in truth, possessing for the benefit of both parties, and not for his own exclusive benefit. Accordingly, there is no case to be found in which, notwithstanding such an order and such a course of possession, the defence of bonâ fide possession has been sustained to the exclusive benefit of the party possessor.

Such a doctrine, indeed, would be altogether inconsistent with the almost invariable practice of the Court in similar questions in making such orders upon one or

¹ Stair, b. ii. tit. 1. sect. 23. ; Ersk. b. ii. tit. 1. sect. 25., end.

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other of the parties, rather than granting an interdict in favour of either, by which the proceeds of the subjects in dispute might be entirely lost to both of them. See the case of the Earl of Fife v. the Magistrates of Banff, 27th November 1829¹, and the course there followed.

Further, and independently of the order to keep an account, it is impossible that the defenders could be allowed the benefit of bonâ fide possession ; for, no sooner was the record closed, than Lord Corehouse, upon the statement of the defenders themselves, interdicted them from fishing above the line upon Sangster's plan, which interdict was renewed and explained by the Court to embrace the two pools in question. The defenders case was, primâ facie, so desperate, that, before any discussion on the merits, it was held that they were not entitled to the benefit of the interim possession.

Ld. Chancellor's
Speech.

LORD CHANCELLOR.—This appeal is part, and it is to be hoped the last part, of a contest which commenced in 1763. The town of Dingwall and the proprietors of the estate now possessed by the respondents claimed right of fishing in the river Conon, the limits of which it was supposed had been finally ascertained and fixed by an interlocutor of 1778, by which it was declared, that “ the magistrates and town council had produced a sufficient title to the fishings in the river opposite to their property, from the march of Breakenord down to the sea.”

It may be assumed, that at this period the position of the march at Breakenord was well known ; but as, for many years after this time, the rights of fishing of both

¹ 8 S., D., & B., 137.

parties were let to the same lessee, evidence of their boundary was not preserved.

In 1825 the respondents commenced a suit, complaining of the appellants fishing in pools of the river beyond their limits, and particularly in Pool Oure or New Pool. The respondents insisted upon their rights to fish thus, under the interlocutor of 1778, contending that the march at Breakenord, described in the interlocutor of 1778, was above and not below the place in dispute. By an interlocutor of Lord Corehouse, of the 12th November 1828, affirmed by the Court 20th January 1829, it was declared, “ that the words ‘ opposite to their pro-
 “ perty,’ in the judgment of 1778, were demonstrative
 “ and not taxative, and therefore the Court found that
 “ the magistrates of Dingwall (in the words of the
 “ judgment) have a sufficient title to the fishings in the
 “ river Conon from the march at Breakenord down to
 “ the sea; but, in respect parties are not agreed as to
 “ the march between the lands of Balblair and Breake-
 “ nord, appoint the pursuers to put in a condescendence
 “ upon that point.”

The introduction of the new term, “ the march be-
 “ tween the lands of Balblair and Breakenord,” sup-
 posed at the time to be synonymous with the term
 “ the march of Breakenord,” gave rise to new diffi-
 culties. At last, after an appeal to this House, the
 interlocutor of the 11th July 1832 was pronounced,
 which finally fixed the position of the march of Breake-
 nord as being between Pool Oure or New Pool and
 Pool Breakenord, and thereby decided the boundary in
 favour of the respondents, and this interlocutor was
 affirmed in this House on the 12th April 1834.

It having been held, that it was not competent for

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the respondents to claim compensation in that suit in which those proceedings took place, for the invasion of their ascertained rights during the dependence of the action, the present suit was instituted for that purpose. The appellants, in their defences, attempted to open the question of boundary, and also insisted that should the question of right be otherwise, they, having been bonâ fide possessors, were not therefore liable to account for damages. By an interlocutor of the 11th March 1837 all the defences, except the last, were repelled, and this interlocutor not having been appealed from is conclusive. By an interlocutor of the 6th of July 1837 the defence of bonâ fide possession was also repelled, and the appellants were ordered to account in terms of the libel. From this interlocutor the appeal is now brought. The question therefore is, whether the appellants are bound to account for the profits of the fishings in this part of the river, to which it has been decided that they are not entitled, or whether they are to be protected from such account by the rule in the law of Scotland as to bonâ fide possession.

In considering this question it is necessary to attend particularly to several proceedings in the former suit, to which I have not before adverted. By an interlocutor of the 9th March 1826 the appellants were ordered to keep and preserve accounts of the number of salmon caught by them in the river generally; but this was, in June following, altered, and confined to that part of the river called New Pool. On the 11th March 1828 the appellants were interdicted from fishing in any part of the river above the black line in Sangster's plan; but it being disputed what part of the river the black line represented, another interlocutor of the 11th of July 1829 was pro-

nounced, by which the interdict was renewed, prohibiting the appellants from fishing in Pool Oure and Pool Breakenord, and directing the respondents to keep an exact account of the fish caught in these two pools, which assumes that these two pools were considered as being protected by the interlocutor of the 11th of March 1828. Upon this, the respondents obtained possession of those two pools, and kept possession till March 1831. By another interlocutor possession of those pools was again delivered to the appellants but (in the terms of that interlocutor), that justice might be done to the respondents in case that interlocutor should be altered, the appellants were ordained to keep an account of the number of salmon taken by them in Pool Oure and Pool Breakenord.

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After the first decision of the right in 1832, the respondents applied for interim execution and possession of the pool, but it was by consent, on the 17th January 1833, ordered that the application should be refused, the appellants being still obliged to keep an account of the number of salmon taken by them in those two pools, till the final determination of the cause. It has been suggested, as the reason for leaving the appellants in possession subject to account, that they, having no right of fishing higher up the river, were interested in obtaining all the fish they could from those places; whereas if the respondents were put in possession subject to account, they might neglect the fishings in those places altogether, trusting to catch the fish higher up. It is obvious that in making these several orders as to keeping accounts, the Court contemplated having the means of giving to the respondents, if their right should

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be established, compensation for the loss sustained by having been kept out of possession. If, after such order, the Court has not the power of directing such compensation, this arrangement of leaving one party in possession subject to account can never be beneficially resorted to.

The appellants also must have known that such was the object of the Court, as the order for them to keep an account would otherwise be useless; and in their resistance to the application for interim possession in 1833, they do not dispute such to have been the object of these interlocutors. If, therefore, the rule of law were in their favour, it would be to be considered whether they were not in this case precluded from availing themselves of it.

It is however to be considered what is the rule of law as to bonâ fide possession. Lord Stair, book ii. title i. section 23, and Erskine, book ii. title 1. sec. 25, put this rule upon the only rational ground, that is, that a party in possession, supposing his title to be good, consumes the goods without any expectation of being called upon to account for the value of them. It would therefore be a great hardship to compel him to do so in favour of the successful party, who by not asserting his title earlier had led the possessor into this confidence. But Lord Stair says "else" that is, if they had no reason to trust to their title, "they are presumed to preserve the fruits, or employ them profitably for restitution." Now in this case the judgment of 1778 informed the defenders that they had no title to fish upon the march at Breakenord; and the plan of 1763, upon which they rely, places a march, therein described as "march between Balblair and Breakenord," above Breakenord, the place mentioned

in the judgment of 1778, and below Pool Breakenord, and beyond all question below Pool Oure. The appellants must have known that they had no title above the march at Breakenord; what point was intended to be included in that description was one that became doubtful, but it was a mere question of fact. Upon that doubt as to the fact they assumed the right of fishing in Pool Oure and Pool Breakenord, above both the line marked in Sangster's plan, and the place called Breakenord, an assumption inconsistent with any assignable position of the march at Breakenord. Besides which, the confusion of boundary, so far as it existed, appears to have arisen from the town having let their fishings to the same person who was lessee of the fishings immediately above and contiguous to these, for it appears that the lease from the proprietors of the respondents lands was of an earlier date than that from the town. Whether under such circumstances the principle of bonâ fide possession could be pleaded, is important only to those periods and to those parts of the river as to which the direction to keep account did not apply, which is but a small part of the case. No authority has been cited to show that it can be set up in such a case. The Court of Session has decided that it cannot. It would, I think, be most unjust that it should, and I therefore cannot think that your Lordships will lay down any such rule.

As to those parts of the case which are included in the direction to keep accounts, it would be a fraud upon the pursuers and upon the Court to give effect to such a defence. The condition by which the Court was guided with respect to the possession was, that the party

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in possession should keep an account; this necessarily implied that the result of the account so kept should be dealt with as the Court should think fit ultimately to direct, and necessarily excludes every principle upon which the doctrine of bonâ fide possession is founded.

It was contended for the appellants that this case ought, under the Judicature Act, to have been sent in the first instance to a jury; for that I see no ground whatever; this is not a case of quasi delinquency, where the conclusion is for damages only, it is a subject of account arising out of the right as established in the former suit. There is no question of fact to be tried. This appeal appears to me to be a very unnecessary prolongation of the contest which has so long subsisted between the parties, and a very unfortunate addition to the expenses attendant upon it, and which, if successful, would be productive of great injustice.

For these reasons, and being of opinion that the judgment of the Court below is not one open to any substantial objection, I move your Lordships to affirm the interlocutors appealed from, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of

Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

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