

May 19, 1826. parties had definitely altered the relative situation in which they stood; and which, according to their original contract between them, entitled each party to one-third interest in the concern. Therefore I should propose to your Lordships in this case to declare, that Robert Barr ought to be held to have had an interest in this concern to the extent of one-third, and consequently to be liable to that extent for any losses that may have been sustained therein; and that your Lordships should order that the case be remitted back to the Court of Session, with such a declaration.

SPOTTISWOODE and ROBERTSON—Solicitors.

No. 18.

MURDO M'KENZIE, Appellant.—*Adam—Robertson.*
GEORGE SUTHERLAND, Respondent.—*Keay—Murray.*

Possessory Judgment—Salmon Fishing.—Two opposite heritors on the banks of a river, having each right to one half of the salmon fishing, and having exercised it for more than seven years by one and the same tenant, Held (affirming the judgment of the Court of Session), that a tenant who had so enjoyed that possession by virtue of a joint lease, was entitled to the benefit of a possessory judgment after the one heritor had let his one-half share to another tenant.

May 19, 1826.
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1st DIVISION.
Lord Eldin.

THE water of Cassley falls, at almost right angles, into the Kyle of Oykell, or upper extremity of the Dornoch Frith. On the west lie the lands of Inner Cassley, belonging to Sir Charles Ross, Bart. of Balnagown, whose title-deeds give him a right to one-half of the salmon-fishings in the Cassley, and to the whole of the salmon-fishing in the Oykell. On the east bank of the Cassley lies the estate of Rosehall, liferented by Lady Ashburton, whose titles give her one half of the salmon-fishings in the river Cassley, but do not convey to her any right of fishing in the Oykell. On Lady Ashburton's side of the river, Sir Charles Ross is proprietor of two pendicles of ground, (which are afterwards referred to as Nos. 1 and 5 of a plan,) the one of which extends a considerable way along the bank of the river, and the other, although of smaller dimensions, holds a similar position. He is besides proprietor of two small islands situated at the mouth of the Cassley, and at its junction with the Oykell. These are denominated by the Nos. 2 and 3. From the nature of the banks it was scarcely possible to fish in the Cassley on Lady Ashburton's side, except on these pendicles of ground and islands, so that the proprietors had found it necessary to let the fishings to one and the same tenant. Accordingly, the tenant had been in the practice for upwards of forty years of exercising the right of fishing indiscriminately on both sides of the river, and parti-

cularly on the pendicles belonging to Sir Charles Ross, and on the islands at the mouth of the river, and he paid one half of his rent to each of the proprietors. May 19, 1826.

In 1814, Sutherland became tacksman of these fishings on the Cassley, and continued to fish in the same manner as his predecessors had done. He remained tacksman until 1820, when M'Kenzie, who had acquired the salmon-fishings in the Kyle of Oykell and in the river Oykell, in tack from Sir Charles Ross, also obtained from him a lease of his one-half salmon-fishing in the Cassley.

This separation led to disputes as to the extent of the respective rights of the tenants. Sutherland, as before, drew his nets upon the west side,—on the pendicles on the east side belonging to Sir Charles Ross,—and on the islands. This proceeding M'Kenzie challenged by a petition to the Sheriff of the county of Sutherland, and prayed the Sheriff 'to interdict, prohibit, and discharge the said George Sutherland, and all others on his account, or for his behoof, from fishing, drawing, or fixing nets in any part of the estate of Balnagown along the waters of Cassley and Oykell, or other rivers on the said estate.' After some procedure, the Sheriff, 'in respect it is admitted by the respondent, George Sutherland, that previous to the year 1820, he possessed the Rosehall and Balnagown fishings in the river Cassley jointly, and that it was only since said period that he has had a separate possession of the Rosehall fishings, distinct from Balnagown, found, that he is not entitled to a possessory judgment in virtue of his said possession of the Rosehall fishings; and therefore granted the interdict as craved against fishing or drawing nets on the Balnagown grounds, and prohibited and discharged the said George Sutherland and all others concerned accordingly: reserving to the parties interested to ascertain and establish their respective rights of fishing on the said river Cassley before the competent Court, as accords.'

Against this judgment Sutherland presented a bill of suspension to the Court of Session; and the Lord Ordinary remitted to the Sheriff of Sutherland 'with instructions to recall his interlocutors against the complainer, and to find that the complainer is entitled to a possessory judgment, and to assoilzie him from all the conclusions of the respondent's petition.

M'Kenzie then reclaimed, and contended that there were no termini habiles for a possessory judgment, seeing that it was not pretended that the possession of any part of Sir Charles Ross's lands had been held otherways than by virtue of a lease from him, which was now at an end. On the other hand, it was contended by Sutherland, that as the proprietors had by themselves

May 19, 1826. or their tenants exercised a joint possession for upwards of forty years, he was entitled to the benefit of a possessory judgment.

The Court, on the 5th February 1825, remitted to the Lord Ordinary to remit to the Sheriff of Sutherland, with instructions to find the suspender entitled to a possessory judgment as to the fishings on the Cassley, at the points No. 1 and 5 of the plan (the two pendicles belonging to Sir Charles Ross, on the east side), and on Sir Charles Ross's lands on both sides of the river—also on the islands No. 2 and 3,—and on the banks on the north side of those islands; and thereafter adhered.*

Lord Balgray.—The proper question here is, what possession are these parties in the circumstances of the case entitled to? In point of law, mere possession of itself is not sufficient; there must also be a sort of title. Here there was a joint tacksman for a long time, but there is no evidence as to what the nature of the possession was prior to that time. I think that a proof should have been allowed, so as to have ascertained this; and that Sutherland should draw his nets on his own side only, till that is investigated.

Lord Hermand.—We have nothing to do with the prior rights of these parties. We have to judge of a possessory question. There was a long possession on a joint tack, which I apprehend is a good title in this question. Sufficient has been already established to show that the respondent is entitled to a possessory right.

Lord Gillies.—There are here distinct and separate titles, giving to each of the parties a right to one half of the fishing. The question is, How is that right to be exercised? I apprehend that this must be decided by the state of the possession, and that we must be regulated by the possession which was held under the joint tack. If so, then the interlocutor is clearly right.

The other Judges concurred.

Mackenzie appealed.

Appellant.—Possession, while the same tenant had both fishings, was no ground for a possessory judgment. Sutherland could not ascribe his possession to the lease of the Rosehall half of the fishings, more than to the Balnagown half; for, assuming that he and his predecessors used both banks of the river, as he and they were in right of both fishings, no prescription could run in favour of one and against the other fishing. Each proprietor could only draw on his own land.

* See 4 Shaw and Dunlop, No. 230.

May 19, 1826.

Respondent.—The subject the respondent possesses, and formerly possessed, is the joint and promiscuous right of fishing in the Cassley with the family of Balnagown; and having so possessed for more than seven years, he is entitled to a possessory judgment. There was no intermission that can affect this privilege; and even if the possession had not endured for seven years, *melior est conditio possidentis*. As the whole land on both sides, at the only points where the water can be fished, belonged to one proprietor, the tacksman was entitled to draw on them, though the tacksman only of the other proprietor; and, accordingly he had constantly and exclusively drawn on the west side. He pretended to no right to fish in the Oykell or any of the ‘other rivers;’ but the islands at both the north and south points were in the Cassley, and, as such, had been fished round and drawn upon by the Rosehall tenants for more than seven years.

The House of Lords ordered and adjudged that the Interlocutors complained of be affirmed.

LORD GIFFORD.—My Lords, there was a case heard before your Lordships, in which Murdo M'Kenzie, tacksman of the salmon-fishing belonging to Sir Charles Ross, Bart. is the appellant, and George Sutherland, a fisherman at Auchness, in the county of Sutherland, is the respondent. My Lords, the question in this case is, the right of salmon-fishing in one half of the fishings in the Cassley. My Lords, the estate of Rosehall, which belonged to the late Lord Ashburton, and the estate of Balnagown, which belongs to Sir Charles Ross, lie on the banks of the water of Cassley, which is a small brook, running from north to south, and falling into the Kyle of Oykell. The river Oykell runs from west to east; and not far from its mouth, in the Kyle, on the north bank, is the fishing of Lutach, belonging to Sir Charles Ross. The appellant, in this case, is the tenant of Sir Charles Ross, of his moiety of the fishing of Cassley, and the fishing in the Oykell, as well as of the fishings in the Kyle of Dornoch. The respondent is the tenant of Lady Ashburton, of her moiety of this salmon-fishing belonging to her estate of Rosehall. It appears, my Lords, that the estate of Rosehall adjoins the east bank of the river, and that Sir Charles Ross's estate of Balnagown lies chiefly on the west bank, but where, as it is alleged, the situations are most advantageous for fishing. Sir Charles Ross's estate of Balnagown is situated on both sides, and he is also the proprietor of two small islands at the mouth of the Kyle.

It appears that prior to the year 1820, and as it should seem almost as far back as memory can go, the joint proprietors of this fishing—the proprietor of the estate of Balnagown, and the proprietor of the estate of Rosehall—concurred in letting the entire fishery to the same tenant; and as they considered themselves equally interested in the fishery, the rent was always reserved payable in equal moieties to these two proprietors. During the year 1814, the respondent, Mr Sutherland, became the tenant

May 19, 1826. of the whole fishery of Sir Charles Ross's predecessor, and Lord Ashburton's; but in the year 1820, Mr M'Kenzie, the present appellant, obtained a tack of Sir Charles Ross's fishery in the Cassley, and other fisheries belonging to him.

In consequence of this separation of the interests of the salmon-fishery in the Cassley, disputes arose between the appellant and the respondent; the respondent contending, that, as tacksman of the moiety of the fishings on the water of Cassley, he had a right to draw his nets on the lands of Balnagown, which was disputed by the appellant. The consequence was, that the appellant, in the year 1822, presented a petition to the Sheriff of Sutherland, stating 'that the whole fishings belonging to the estate of Balnagown, in the waters of Oykeil, Cassley, and elsewhere, were let in lease to the petitioner (the said Murdo M'Kenzie) at the term of Martinmas 1819: from which date he has held the whole exclusive right thereto; but notwithstanding thereof, George Sutherland, tenant at Auchness, did, at various times in the course of last year, forcibly fish and draw his nets on the said lands and fishings of Balnagown, set as aforesaid to the petitioner; and the said George Sutherland further threatens to repeat his encroachment this year, 1822, unless prevented.' He therefore prayed the Sheriff to grant warrant of service, with an order for answers; 'and in the meantime to interdict, prohibit, and discharge the said George Sutherland from fishing, drawing, or fixing nets in any part of the estate of Balnagown, along the waters of Cassley and Oykeil, or other rivers on the said estate.'

My Lords, the respondent, in this case, set up no claim whatever to fish in the Oykeil, and other rivers, or to encroach on Sir Charles Ross's property; but he contended, that he had a right to draw his nets on the property of Sir Charles Ross. The Sheriff, in May 1822, pronounced an interlocutor, allowing a proof to the pursuer of the facts stated by him. It was, however, unnecessary to go into proof of the facts, because the respondent distinctly admitted that he had drawn his nets on the Balnagown property, and contended that he had a right to do so, in respect of his moiety of the fishery; and thereupon, on the 4th of October, the Sheriff pronounced an interlocutor, stating that the proof was unnecessary, and therefore recalling the interlocutor directing proof; but 'before further answer, ordains the respondent George Sutherland, specially to condescend by a writing under his hand, mentioning dates, first, on what title he at present possesses, how long, and what subject he has possessed under it, and the term of endurance; and second, whether he possessed both the Rosehall and Balnagown fishings, on the river Cassley jointly, under what titles, and for what period, and whether such possession has ceased, and when it did so.'

My Lords, in obedience to the interlocutor, a minute was given in by the respondent, and the matter coming on afterwards before the Sheriff, he, on the 28th of March 1823, pronounced an interlocutor to the following effect. (Here his Lordship read it.)

Of this judgment the respondent complained to the Supreme Court by bill of suspension, which came before Lord Eldin, as Lord Ordinary on

the Bills, and his Lordship pronounced, on the 20th April 1824, the following interlocutor, finding the respondent entitled to a possessory judgment. (His Lordship then read it.) Your Lordships therefore perceive that Lord Eldin, the Lord Ordinary before whom this case originally came in the Supreme Court, differed from the opinion which had been entertained by the Sheriff, and held that, under the circumstances, the respondent was entitled to his possessory judgment. My Lords, the case then came before the Court; the appellant having given in a reclaiming petition, complaining of this judgment of my Lord Eldin, and the Court, on the 26th June 1824, pronounced an interlocutor, limiting the possessory judgment to the Cassley fishings, and lands and islands, as marked on a plan. My Lords, the islands are marked, and appear to be in that part of the river in which the Balnagown estate extends on both sides of the river.

A petition was presented against this interlocutor, by the respondent and appellant, and the Court, on hearing that petition, remitted to the Lord Ordinary, to remit to the Sheriff of Sutherland to find the respondent entitled to a possessory judgment.

My Lords, a third petition was presented against this interlocutor by the appellant, and on this third petition being advised, the Court pronounced as follows:—‘The Lords appoint this petition to be seen and answered upon the point at issue, as to throwing the nets from the south side of the islands.’ I will not trouble your Lordships with the terms of the interlocutor, but the Court finally refused the petition by an interlocutor of the 24th June 1825, by which they adhered to the interlocutor reclaimed against; and in regard to the question of expenses, reserved by the said interlocutor to the issue of the cause, they found the petitioner liable to the respondent in payment of the expenses incurred before the Court.

Then, my Lords, there was a petition presented to Lord Medwin, the Lord Ordinary on the Bills, to apply the preceding interlocutors, and remit; and an interlocutor was pronounced by Lord Medwin, on the 18th July 1825, remitting to the Sheriff.

Against those interlocutors this appeal has been brought, and the single question which has been discussed at your Lordships' bar, has been, whether, under the circumstances of this case, there has been that possession by the respondent (and those who have preceded him, in the enjoyment of this Cassley fishery) of the right to draw his nets, and fish, from the banks of the river (those banks belonging to the Balnagown estate), and at those islands in the river belonging also to the Balnagown estate—I say, my Lords, the question has been, whether or not, under the circumstances of this case; there was that possession which entitled the respondent to that possessory judgment which he has obtained in the Court of Session?

My Lords, in the argument on the part of the appellant, it was contended, that, during the time there was this joint possession of the two moieties of the fishery by the same tenant, enjoying under the respective proprietors of those moieties, no argument nor any reason can be adduced

May 19, 1826. from thence, in support of the right claimed on the part of the respondent ; because, they say, that during that joint possession, it was certainly competent for the tenant, under the grant he had from the Balnagown proprietor, to draw his nets on the banks of the river belonging to the Balnagown property ; and that, therefore, it ought not to be inferred from thence that the drawing the nets on those banks was to be limited to the right he derived under my Lord Ashburton, and those who preceded him in possession of the Rosehall estate, because it might be inferred he did it under the right he derived from the Balnagown proprietor. My Lords, in answer to this, it has been said, and I think the Lords of Session have drawn a correct conclusion in that respect, that it appears that these parties were each interested in this fishery ; each of them had an half, and that half could not be enjoyed by the Rosehall proprietor, unless he, or his tenants, had a right of drawing their nets on the Balnagown property. They say, it is quite clear, therefore, from these lettings, which took place as far back as memory can go, down to the year 1812, by the proprietors of these properties to the same tenant, reserving an equal rent in respect of each moiety, that it was considered that each proprietor had an equal and co-extensive right in this fishery, which could not be enjoyed unless the Rosehall tenant had a right to draw his nets on the Balnagown property. They refer also to the text-books upon the law of Scotland, and some cases which appear to have established that if a man has a right of fishing in a river, though he has no property in the adjacent banks, the law gives him a right to draw his nets on those adjacent banks. It is answered, however, that the law also is, that if one man has the entire bank on one side of the river, and another man the entire bank on the other, and each has a right of fishing in the stream, each man has a right to the enjoyment of the fishery on his own property, and not to go to the other. But then it is replied, here is the case of a proprietor of a moiety of the fishery in this river, whose lands were not co-extensive with those on the opposite side, for the Balnagown property extended to both sides the river, and the islands at the mouth of the river were the property of the owner of the Balnagown estate. My Lords, the Court of Session appear to have adopted the opinion, that, this being a possessory action before the Sheriff, and looking at the circumstances of this case, the rights of the respective parties being co-extensive, the respondent was entitled to that possession, which had been enjoyed by the tenant before the year 1820, referring that antecedent enjoyment to the respective rights which had been derived by the respective proprietors of the land ; and, therefore, the Court of Session have been of opinion in this case, that the respondent ought not to be disturbed in the possession which had been enjoyed by the antecedent tenants, deciding, therefore, in his favour by their judgment.

My Lords, it has been said that there is some ambiguity in the final interlocutor of the Court of Session, and that the result of that judgment may be this : That inasmuch as it gave the tenant of the moiety of the fishery in Cassley, belonging to my Lady Ashburton, a right to fish in the islands as marked on the plan, and on the banks to the north side of

those islands, inasmuch as those islands on the south side did not join to the Cassley, but joined to another river, the Kyle—(the Cassley being said to terminate before it arrives at the southern bank of those islands), the consequence of this interlocutor would be, to give the respondent not merely a right to fish in that river Cassley on those islands, but to throw his nets on the south sides of those islands, into another stream not in dispute in this action. My Lords, I think the answer to that is, that the only right claimed in this action, is the right to fish in the Cassley; and whether he had a right to throw his nets from those islands into the Cassley. The interlocutor merely finds him entitled to a possessory judgment as to the fishings in the Cassley; and as I understand this interlocutor, it gives him no right whatever (supposing the south banks of those islands do not adjoin to the Cassley) to throw his nets into any other stream, but all it gives him is a right to fish from the islands into the Cassley. If, therefore, Mr Sutherland, the respondent, should be so ill advised as to endeavour to found his right to fish on those islands in another river, on what has passed in this place, your Lordships' judgment, affirming this interlocutor, cannot at all be pleaded by him in favour of any specific right to throw his nets from those islands in any other river but the river Cassley. I call your Lordships' attention to this at this time, in order that no impression may be taken from anything which falls from me upon this occasion, or from any judgment I can advise your Lordships to give, that the right of the respondent can be considered, as carried farther than a right to fish in the Cassley.

My Lords, looking at all the circumstances of this case, it does appear to me that the judgment of the Court of Session is right. I think the interlocutor itself carries the respondent's right to fish no farther than to fish in the water of the Cassley; and therefore, being of that opinion, I should humbly advise your Lordships to affirm this interlocutor. Upon the question of costs, it is not my intention to propose anything to the House. It is clear that the Court of Session have differed from the Sheriff. The original judgment was certainly in favour of the appellant; and the Court of Session, on this case being brought before them, have, on consideration of that judgment, thought that judgment wrong, and reversed it. Under these circumstances, I do not propose to submit to your Lordships any motion going further than an affirmance of the judgment.

Appellant's Authorities.—Duke of Queensberry, Nov. 19, 1771, and Feb. 21, 1772, (14279.) Dirom, Feb. 25, 1797, (14282.) 2 Ersk. 6. 15, and 4. 1. 50. 2 Stair, 3. 69, and 4. 22. 14. Monymusk, 15th July, and 18th Dec. 1623, (10840, and 14264.) Montgomery, 22d July 1664, (10627.) M'Lellan, 15th Feb. 1669, (10648.) Maxwell, 24th June 1673, (10628.) Maxwell, 26th March 1628, (10617.) Lady Glengarnoch, 18th July 1626, (10632.) Harrer, 25th Jan. 1672, (10623.) Chisholm, 17th June 1801, (app. v. Salmon Fishing, No. 1.)

Respondent's Authorities.—2 Ersk. 1. 4. 28, and 2. 6. 15.

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