

he was the Lord Ordinary before whom the cause first depended, the Court had power under the Act to remit either to one of themselves or to any other of the Lords Ordinary. He therefore feared that his powers were simply ministerial, and suggested that the application made to him should be renewed in the Inner House. The Court, after consulting with the other judges, expressed an opinion that the Lord Ordinary was right in the view which he had taken of the extent of his powers. The Court granted the motion, with a recommendation that in future, with the view of avoiding such questions and making it unnecessary to come back to the Court, parties should, when the remit is made to the Lord Ordinary, state whether they would require a commissioner to recover documents or to take the depositions of aged persons or witnesses going abroad. When this was done, the Court would, when remitting to the Lord Ordinary, confer upon him the necessary powers.

Counsel for Pursuers—Mr Watson. Agent—J. Henry, S.S.C.

Counsel for Defenders—Mr Millar. Agent—James Webster, S.S.C.

OUTER HOUSE.

(Before Lord Kinloch.)

PATTEN'S TRUSTEES v. CAMPBELL'S EXECUTORS.

Expenses—Taxation—Fees to Counsel. Held by Lord Kinloch that agents are entitled to exercise a certain discretion in regard to the amount of counsel's fees, and that the auditor should interfere only when that discretion was abused.

In taxing the pursuers' account of expenses in this case, the auditor of Court deducted £1, 1s. from a fee of £3, 3s. paid to counsel to revise summons; £1, 1s. from a fee of £3, 3s. paid to revise contumaciousness; £1, 1s. from a fee of £2, 2s. paid to adjust record; £1, 1s. from a fee of £4, 4s. paid to debate; and £2, 2s. from a fee of £6, 6s. paid to senior counsel to debate.

The pursuers objected to the auditor's report, and the Lord Ordinary sustained the objections. His Lordship observed that agents were entitled to exercise a certain discretion as to the fees to be paid to counsel in each particular case, and it was only when that discretion was abused that it was the province of the auditor to interfere. That was not the case in the present instance.

Counsel for Pursuers—Mr N. C. Campbell. Agent—John Forrester, W.S.

Counsel for Defenders—Mr Adam. Agents—Adam, Kirk, & Robertson, W.S.

Friday, Jan. 25.

FIRST DIVISION.

DUKE OF RICHMOND v. WHARTON DUFF.

Clause—Reservation—Construction—Usage. A disponent of salmon fishings reserved to himself and his successors in the estate "the privilege of fishing with the rod for our amusement only." Held (aff. Lord Barcaple, dub. Lord Deas), that the privilege so reserved was personal, and could not be communicated by the disponent or his successors to their family or friends, there being no allegation of a practice inconsistent with this construction.

This was a question between the Duke of Richmond and Captain Wharton Duff of Orton. In 1829 Captain Duff's predecessor disposed the fishings of Orton in the river Spey to the Duke of Gordon's trustees, in whose right the pursuer now is; and the disposition contained this reservation:—"Reserving always to me, the said Richard Wharton Duff, and my successors in the lands and estate of Orton, the privilege of fishing with the rod for our amusement only." The pursuer contended that this reservation was entirely personal to the proprietor of Orton for the time being, while Captain Duff maintained that it entitled him to fish by his friends living in his house, as well as himself. He did not plead that it entitled him to fish for profit, or even by his gamekeepers or servants.

Lord Barcaple gave effect to the pursuer's construction of the clause, adding to his interlocutor the following

"*Note.*—The question between the parties is whether the privilege of fishing reserved in the disposition of the fishings of Orton by the late Mr Wharton Duff to the Duke of Gordon in 1829 is strictly personal to the proprietors of the estate of Orton for the time being, or may be communicated by them to members of their family, or to friends residing with them at Orton. Looking only to the clause of reservation in the disposition, there do not appear to be *termini habiles* for the more extensive construction contended for by the defender. It is in these terms:—"Reserving always to me, the said Richard Wharton Duff, and my successors in the said lands and estate of Orton, the privilege of fishing with the rod for our amusement only." This is, in expression at least, the constitution of an individual and personal privilege. If it is not to be so construed, there is nothing in the words of the clause to limit the right in the way proposed by the defender himself, so that it shall only be communicated to friends residing at Orton. Being expressly reserved for amusement only, it could not be exercised by gamekeepers or other hired servants, nor could it be let to sportsmen for a rent. But if the proprietor of Orton may, in the exercise of the privilege, grant permission to others to fish for amusement, it does not appear on what ground his right to do so is to be limited to friends residing at Orton. The defender founded on the case of the Earl of Aboyne v. Innes, House of Lords, 10th July 1819, 6 Paton 444, as supporting his contention. But the judgment in that case goes too far for his argument, Mr Innes being found entitled to exercise the privilege of fowling by his gamekeeper, or by any qualified friends. It is not easy to ascertain from the report on what precise ground the decision was rested, but the Lord Ordinary is disposed to think that prescriptive possession was an essential element in the case. As the disposition makes express reference to the lease of the fishings existing at its date, the Lord Ordinary thought it right to have it produced, in order that it might appear whether it affords any light for construing the clause in question. It contains a somewhat similar clause, reserving to Mr Wharton Duff, the landlord, and his successors, 'and to any of their friends that may be at Orton, and have liberty from them, the privilege of fishing with the rod at all legal times during the continuance of this lease, and of appropriating to themselves such fish as they may catch therewith,' accounting to the tacksmen for their value at a certain rate. The Lord Ordinary thinks the larger terms of this clause cannot, upon admissible