

pened is, that the power of fishing from the south bank, which was never exercised *de facto*, cannot now for the future be exercised at all.

The effect of the shutting up of the branch of the river would seem to be to extinguish these particular fishings, and, it may be, to rear up questions of compensation for their loss. I do not see how the loss of a right to fish along the south shore of the south branch can have the effect of conferring a right to the north end of the new embankment. The case seems to be that the fish used to pass by this channel, and that they will now pass by the main channel, and that a party who had the right in one channel may now fish in the other. If it were so, then the right to fish along the south shore of the island, opposite to the shore in question, into that same channel, must *a pari ratione* be transferred to the south of the embankment, and consequently the Magistrates would have a right as well as the suspender to fish from it. He could not interdict them from fishing from an embankment to which their right rested upon precisely the same ground as his own. Further, Lord Wemyss' right of salmon-fishings, as claimed, are fishings off the Mains of Grange of Elcho. The respondents do not, as I understand, dispute his right to fishings along the land margin of the south channel. Such a question in the state of the title before us might perhaps have been raised; but unless we hold that the shore opposite the old south channel is in part or wholly the twenty-four acres of cotland of Elcho, which is not shown and is almost incredible, the title is one by prescriptive possession only. It is said that the prescriptive possession of one portion of the shore will acquire right to the whole salmon-fishings of the shore, the entire estate which has a general right to fishings by possession. It may be so, but the measure of right being the measure of possession, no right disconnected with these special lands can be acquired. When the fishings so acquired cannot be exercised by reason of any physical cause they must cease.

It seems to me, therefore, that Lord Wemyss has not instructed, on his part, any right of property in the embankment, or any right to fish on its northern portion, and that might be enough to dispose of the case. This is not a case of alleged interruption of possession. Lord Wemyss has not fished on the north part of the embankment. It is by virtue of the force of his title alone that he can prevail in the question.

Now, there seems to me not only the want of a clear title in Lord Wemyss, but also something like an express title in the respondents to the fishings in the portion of the river *ex adverso* of the embankment from Z. to B. They have a title of a most comprehensive kind. They have right by charter to the fishings, and a decree of this Court in 1787 affirms their right.

Surely this right conveyed to them the salmon-fishings in the water round the island, not the mere right of dragging nets on the island. Could they not fish with rod in these waters, and fish there exclusively? Suppose a small subsidiary island had sprung up on a portion of the ground which the embankment now occupies near the island, can there be a doubt that under their titles they could have fished from such an island? How could Lord Wemyss have interfered? By what right could he have left his own bank and come to fish at a spot near the island? The locality is described, and if ground coming there naturally would be fished from in terms of the grant, as I think would have

been in accordance with its express words, ground formed, artificially formed, in that very place seems to fall under the same condition. If so the statute says that the rights of proprietors of fishings are to be reserved so far as not limited. The effect of the success of Lord Wemyss' contention would be that the Magistrates have lost their right, and he acquired it through the effect of an operation which is expressly declared to have no effect in altering whatever upon subsisting rights.

LORD COWAN concurred, but desired to place his judgment on a somewhat more limited ground. The respondents had right to the fishings from the island which would sweep the ground where the eastern half of the embankment stood. Notwithstanding, if the Earl established a right of property in the embankment, it was possible he might exclude the Magistrates. To do so, however, he required to bring a declarator, calling the Statutory Commissioners. The present was a possessory question, in which the right of property could not be decided.

The other Judges concurred.

Agents for Suspender—Tods, Murray, & Jameson, W.S.

Agents for Respondents—Hill, Reid & Drummond, W.S.

Friday, May 31.

M'MASTER v. JAMES LINTON.

Sale — Reference — Valuation. Circumstances in which held that the documents embodying a reference to arbiters to value a crop, &c., and their delivrance thereon were sufficiently explicit, and that the valuation was binding on the parties.

This was an advocacy from the Sheriff-court of Inverness-shire, in the following circumstances:—M'Master, a coach-driver and fletcher at Fort William, rented a croft on the Lochiel estate, and being about to give it up at Whitsunday 1863, with a view to going abroad, he entered into an agreement with the incoming tenant, Linton, tenant of a considerable farm in the neighbourhood, by which the latter was to take the stock and crop at a valuation, each party naming an arbiter for the purpose, and the arbiters an oversman, in case of dispute. A written minute of agreement to that effect, in the usual terms, was subscribed by the parties, and the valuation of both stock and crop took place on 28th July 1863. Linton had objected to the valuation being made so early in the season, but afterwards he signed the agreement, and consented to going in. Next day the valuers drew up and signed a document, headed "Valuation of Duncan M'Master's Crop, &c., 29th July 1863," the first two items in which were—"560 stooks, at 1s. 9d., £49; 80 barrels potatoes, at 3s. 6d., £14." The total of the valuation was £121, 18s., and there followed these words:—"The above compromise is according to our best skill and judgment. Signed," &c. M'Master took no further charge of the crop, which was raised by Linton. The latter, however, declined to pay M'Master the sum at which it had been valued, on the ground that it had yielded only 284 stooks, instead of 560, and 44 barrels of potatoes, instead of 80, making a difference of £32 on the total valuation. He maintained that the intention of the valuers was, that their estimate should be afterwards so corrected by

what should be ascertained to be the actual crop, and that they had *per incuriam* omitted the words, "less or more." M'Master then raised this action in the Sheriff-court of Inverness, being unable to secure the services of an agent at Fort William. Sheriff-substitute Thomson allowed the defender a proof of his averments as to the intention of the valutors, and the practice of the district in regard to such valuations, and the insertion of the words "less or more" in the valuation, with a conjunct proof to the pursuer. The proof having been led, the Sheriff-substitute found that the defender had not substantiated any of his averments, and decerned for the pursuer. On appeal against this interlocutor, Sheriff Ivory recalled it, and dismissed the action, on the ground that the minute of agreement, which constituted the basis of the pursuer's claim, had not been produced. The pursuer then brought an advocacy, and the defender a counter-advocation, to bring up all the interlocutors. The case was heard in March, when the Court granted the pursuer a diligence for recovery of the minute, which was recovered in the possession of the defender. Of this date, the Court, after hearing the respondent's counsel, without calling for reply, gave judgment unanimously for the pursuer, with expenses in both courts; being of opinion that the effect of the reference and valuation was an absolute sale and transference of the crop at the date of the valuation, and that the terms of the documents embodying the transaction were sufficiently clear to exclude any question as to their meaning. Lords Cowan and Benholme were of opinion that the allowance of proof by the Sheriff-substitute was incompetent as well as unnecessary.

Counsel for the Pursuer—Mr M'Lennan and Mr A. Nicolson.

Agent—Æneas M'Bean, W.S.

Counsel for Defender—Mr Gifford and Mr Lee.

Agents—Murray, Beith, & Murray, W.S.

HIGH COURT OF JUSTICIARY.

Saturday, June 1.

(Before a full Bench.)

SUSPENSION—HALLIDAY *v.* BATHGATE.

Suspension—Tweed Fisheries Act, 1857—Illegal Fishing—Contravention—Summary Procedure Act, 1864—Sheriff—Jurisdiction—Record of Evidence—Expenses. Held—(1) that a contravention of the Tweed Fisheries Act 1857 was competently prosecuted under the procedure appointed by the Summary Procedure Act; (2) that the Summary Procedure Act does not take away the right of appeal conferred by the 96th section of the Tweed Fisheries Act; (3) that the 16th section of the Summary Procedure Act is not to be construed as overruling the provision in the 93d section of the Tweed Fisheries Act requiring the Sheriff when called upon to keep a note of the evidence. But suspension of a conviction raised on the authority of the 27th section of the Summary Procedure Act, which provides that the jurisdiction of the Sheriff shall not be extended, refused, because it was not averred that the suspender had asked the Sheriff to keep a record of the evidence, with a view to the exercise of his right of appeal under the Tweed Fisheries Act. Ex-

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penses awarded to neither party, the case being a first and a trial one, and one attended with great difficulty.

Henry Halliday, dyer, Innerleithen, was brought up before the Sheriff-substitute of Peebles on a complaint at the instance of James Duncan Bathgate, Procurator-Fiscal of Court, charging him with a contravention of the 68th section of the Tweed Fisheries Act 1857, in so far as, on the 24th Dec. 1866, he was found on ground adjacent to the river "with intent illegally to take or kill salmon." The complaint was brought under the authority of the Summary Procedure Act. The Sheriff was not asked to note the evidence. After the examination of witnesses, the complaint was found proved, and Halliday was adjudged to pay a penalty of £5, with costs; and failing payment, it being his second offence, to be imprisoned for three months. He brought a suspension, and, among other grounds relied upon, he urged that the conviction should be set aside because the 27th section of the Summary Procedure Act provides that nothing therein contained shall extend the jurisdiction of the Sheriff, and the effect of bringing the complaint under the Summary Procedure Act was to extend the jurisdiction of the Sheriff; because, on the one hand, the 93d section of the Tweed Fisheries Act ordained the Sheriff, when a party called upon him to keep a note of the evidence, with a view to the exercise of the right of appeal conferred by the 96th section of that Act; and the 16th section of the Summary Procedure Act required that no note should be kept; and, in effect, that was to extend the jurisdiction of the Sheriff, because it rendered his judgment final. The case was before the Court on March last, when other grounds of suspension were argued; but these were not considered serious. On the plea, however, raised under the 27th section of the Summary Procedure Act, the Court desired to hear further argument, and remitted the case to a full Bench for that purpose.

Section 93 of the Tweed Fisheries Act (20 and 21 Vict., c. 148), provides:—"Any information, complaint, and proceedings before the sheriff or justice or justices before whom any person shall be complained of or proceeded against for any offence under the provisions of this Act, and the warrants, sentence, or conviction thereon, may be in the form of the schedule (B) hereunto annexed, or as near thereto as may be, and may be printed or written or partly printed and partly written, and no written record of evidence shall be necessary unless either party, before such complaint shall be heard, requires the sheriff or justice or justices to take notes of the evidence to be adduced, which such sheriff or justice or justices shall do or cause to be done, and the notes so taken shall be deemed and held in any subsequent proceedings as a sufficient record of the evidence under such complaint.

Section 96 provides:—"It shall be lawful for the complainer or for any party charged to appeal against any adjudication or conviction pronounced by any sheriff or justice or justices in Scotland, with respect to any complaint or penalty or forfeiture under the provisions of this Act, by which he thinks himself aggrieved; and in case such adjudication or conviction shall be pronounced by any sheriff, the appeal therefrom shall be made to the next Circuit Court of Justiciary in the manner and by and under the rules, limitations, conditions, and restrictions contained in the Act passed in the twentieth year of the reign of His Majesty King George the Second for taking away and abolishing

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