the trust-estate. The trustees were doubtful whether they were not bound by the trust-deed to invest at least one-half of each son's share in an alimentary annuity. A Special Case was consequently laid before the Court, in which it was stated that the trustees were satisfied that payment of his whole share would be of great advantage to Mr Ewen Tod, but that, in consequence of the manner in which the fourth purpose of the trust-deed was expressed, they were advised that it was doubtful whether they were entitled to make such payment.

The questions submitted to the Court were—

'1. Whether the trustees are bound to convey to Mr Ewen Menteith Tod the remaining capital of his share of his father's trust-estate?

"2. Whether (supposing the first question answered in the negative) the trustees are entitled and in safety, if they consider it prudent and proper, to make payment to Mr Ewen Menteith Tod of the said remaining capital?"

GILLESPIE, for General Tod's trustees, argued, that the direction of the truster to invest at least one-half of each son's share in an alimentary annuity, was imperative.

LEES, for Mr Tod, argued—No one except Mr Tod has any interest in the manner in which his share is dealt with. If he died, his children would be entitled to the uninvested funds; and the terms of the deed are not sufficient to protect the produce of the funds from being arrested by his creditors. He could sell the annuity, and so defeat the purpose of the trust; and in the principles of English Law and the analogy of the Cluny Entail case, he is therefore entitled to have the trustees restrained from implementing directions which he can defeat. As there is no destination over, no one could have any interest to challenge a conveyance of the capital by the trustees, if he gave them a formal discharge. A trust can always be terminated where fiar and liferenter concur, and are the only parties interested. Even if the trustees are not bound to convey, it is a matter for their discretion. They may never think it necessary to purchase an annuity, nor would they do so with propriety if the annuitant were ill of a mortal sickness. The terms of the trust-deed do not entitle them to retain the annuity in their own charge. Trustees are only justified in keeping up a trust where it is for the protection of some person's interest. Authorities—*Nisbet* v. *Tod*, 15 Jan. 1848; *Wood* v. *Begbie*, 7 June 1850; *Gordon* v. *Gordon*, 2 March 1866; *Stokes* v. *Cheek*, 2 July 1860, 29 L. J. (Ch. R.) 922; *Browne*, 29 July 1859, 27 Beavan's Rep. 324.

At advising—

The LORD JUSTICE CLERK—The question in this case is in regard to the bequest of residue, whether the trustees under the settlement of General Tod are entitled to hand over Mr Ewen Tod's share in money, or are bound to invest it in an annuity. The trustees substantially say, that as far as they have any discretion in the matter, they do not consider that it would be for the advantage of Mr Ewen Tod to risk his share in an annuity. I am of opinion, in the first place, that there is no distinct injunction on the trustees to purchase an annuity, and secondly, if there was, it is an injunction which could be defeated, and in fact by following out the words of the deed, the trustees would not accomplish the object of the truster. I am inclined to rest my opinion on the first point. The direction is to divide the residue between his sons, no doubt qualified by the words "in manner following." But there is no time fixed for making the investment. If the trustees came to the conclusion that at no time it would be prudent to purchase an annuity, I think there is nothing in the words to prevent their acting on that conclusion. I think that Mr Ewen Tod could have tested on his share, provided it had not been previously sunk in an annuity. If the trustees thought it desirable to purchase an annuity, they were entitled to do so. But it would have been necessary to create a second trust. Merely declaring an annuity not assignable would not have the desired effect. I am therefore of opinion that the second question is to be answered in the affirmative.

LORD BENHOLME—I concur. As an additional ground in support of your Lordship's opinion, I may adduce the principle laid down in the case of *Burnet* v. *Craigie*, 17 June 1837, 15 S. 1157, where it was held that a mother and son, who concentrated in themselves the whole interests in a certain property, were entitled to deal with it as they pleased. Mr Ewen Tod here concentrates the whole interest in one half of the residue, and therefore it appears to me that, as the fund is appropriated to his advantage, he is entitled to a large share in determining the form which the fund is to take. In the case of *Burnet* v. *Craigie*, the Court disregarded the contingency of the son dying, and the mother having another heir. The contingent interests in such a case are held to be merged in the existing interests. The trustees in this case have acted wisely in geting the extent of their powers ascertained.

LORD NEAVES—It is quite plain that the beneficial interest in the residue belongs to General Tod's two sons. Perhaps the words of actual bequest are not so explicit as they would otherwise have been from the fact that they were the truster's next of kin. The trustees have a certain discretion, but I am not prepared to say that they would have been entitled to purchase an annuity in all cases. If one of the sons had a wife and family, and was dying, it would not have been proper for the trustees to benefit an insurance office, by purchasing an annuity for him. I concur.

LORD COWAN absent.

The Court answered the second question in the affirmative, and in the circumstances found it unnecessary to decide the first.

Agents for Mr Tod—Gillespie & Paterson, W.S

Agents for General Tod's Trustees—Dalgleish & Bell, W.S.

Friday, March 18.

SPECIAL CASE—FLEEMING *v.* BAIRD.

Lease—Minerals—Sterility—Break. The minerals in certain lands were let under a lease which entitled the lessees to work the minerals for two years on trial, and thereafter, if they decided upon proceeding with the workings, the rent for the minerals was specified, and the lease was to endure for thirty years, with breaks in favour of the tenant every five years. The trial period was extended till four years, and thereafter the tenants possessed the lands and continued working the minerals until a period after the date of the first break in their favour, when they renunciated the lease on the ground that the minerals were not workable to profit.—*Held* that, notwithstanding the failure

of the minerals, the lease endured until the specified break in favour of the tenant.

This Special Case was presented by the Hon. Cornwallis Fleeming, of Biggar and Cumbernauld, on the one part, and Messrs Baird & Co., of Gartsherrie ironworks, on the other. The following were the circumstances out of which the case arose:—

"On 26th January 1859 conditions of lease were entered into between George Dunlop, as commissioner for John Fleeming, Esq., of Biggar and Cumbernauld, afterwards fourteenth Lord Elphinstone, and William Baird, James Baird, and George Baird, in trust for William Baird & Co., of the ironstone and iron ore of every description in certain portions of the Cumbernauld estate, known by the general name of Duntiblae. The lease, if ironstone was found, was to endure for thirty years from Whitsunday 1859, with breaks in favour of the tenants at the expiry of every five years, reckoning from the first term of Whitsunday after a proper winning of the ironstone should have been made, and they had fairly tried to work the ironstone. By the conditions of lease the tenants were, *inter alia*, bound, at their sole expense, to search, by boring or otherwise, for workable ironstone, in which they should expend not less than £300; and the result, whether workable ironstone was thereby proved, should be decided by the tenants at the end of two years from Whitsunday 1859, and royalties were to be paid on any ironstone that might have been found and worked during said trial period, but no fixed rent. If the trials turned out satisfactory, the tenants were bound immediately to proceed to win the ironstone in manner pointed out in the conditions of lease; and for the three years ending respectively Whitsunday 1862, Whitsunday 1863, and Whitsunday 1864, to pay a yearly fixed rent of £250, and thereafter a yearly fixed rent of £500, beginning the first payment at Martinmas 1861 for the half-year preceding; or, in the proprietor's option, the lordships therein mentioned. John fourteenth Lord Elphinstone died on 13th January 1861. Upon 26th March 1861 the rents, issues, and profits of the lands and estates of Wigtoun, Biggar, and Cumbernauld, situated in the counties of Lanark, Dumbarton, &c., falling due from and after the 13th day of January 1861, being the date of the death of John fourteenth Lord Elphinstone, were sequestrated by this Court, and William Moncreiff, Esq., accountant in Edinburgh, was appointed judicial factor thereon; and he immediately thereafter entered upon the duties of his office. On 8th May 1861 the tenants wrote to Mr Moncreiff, C.A., who had been appointed judicial factor on the estates of the late Lord Elphinstone, that they had bored the field very extensively, but without any satisfactory result; that they had found no workable ironstone, and that the bores had proved the position of the ironstone to be much deeper than expected and overlaid by whinstone of great thickness, so that it was greatly more expensive to prove and win; and that one very deep bore, then in progress, would not be got finished before Whitsunday 1861, the expiry of the trial period. And they stated that they were willing, provided the terms of the lease were a little altered, to complete this bore, and to explore the field still further; and with that view they proposed—(1) That the trial period should be extended for two years, the fixed rents remaining the same in respective amounts—that is, that there should be three years at £250 from entering upon the lease, but postponed as above proposed; and (2) That the lordship on calcined blackband ironstone should be reduced from two shillings to one shilling and sixpence. A report on the trials made by the tenants was, at the request of Mr Moncreiff, made by Mr John Geddes, mining engineer, Edinburgh, who recommended the terms proposed by the tenants to be accepted. Thereafter Mr Moncreiff applied to the Court for, and obtained special powers to enter into a lease, containing modifications on said conditions, in the terms of a draft lease, which had been prepared by him and approved of by Mr Geddes, and had also been revised and approved of on the part of the said trustees of William Baird & Co., and was produced with his application.

"A formal tack, in the terms of the draft so adjusted, was afterwards executed between Mr Moncrieff, as judicial factor, on the one part, and the Messrs Baird on the other, of all and whole the ironstone of every kind, and all ores of ironstone of every description, under and within all and whole the lands, portions of Cumbernauld estate, of which the property or *dominium utile* belonged to the said deceased Lord Elphinstone. The sequestration and judicial factory were recalled over certain portions of the Cumbernauld estate in March 1869, and Mr Cornwallis Fleeming has completed his title thereto, and is now in right and possession thereof, with right to the minerals in question, and to enforce the conditions and stipulations ot the said lease. In the course of their possession during the four years allowed for trial, and under the lease, the tenants made eight bores into the mineral field. They afterwards sunk two deep pits, and from the former of these pits, in terms of a clause in the lease allowing this to be done, they extended their workings into the mineral field forming the subject of the lease, and wrought a portion of the iron ores in the lands of Duntiblae comprehended in the lease. These workings continued until the middle of April 1869. On the 16th of that month the tenants intimated to the landlord that he was at liberty to enter on possession of the whole subjects, and that they were prepared to execute a renunciation in any form he might wish. On the 14th May 1869 the tenants intimated that they had removed from possession of the mineral field. The tenants have expended large sums in the sinking of the bores, and in working the pits above mentioned. The ironstone which they have obtained in the lands comprehended in the lease has been of comparatively trifling amount. The ironstone has not yielded, and it does not appear that, if further wrought, it would yield sufficient to pay the expenses of working. Mr Fleeming and his administrator-at-law are satisfied that the borings and workings have sufficiently ascertained the character of the ironstone, and they do not desire any further borings or workings to be made.

"The tenants, without waiting to take advantage of the break in their favour at Whitsunday 1837, having refused to pay the fixed rent due by the lease at Martinmas 1869, or any subsequent rent, the following questions were laid before the Court:—

"Whether the tenants are bound to make payment of the fixed rents falling due under said tack, as at Martinmas 1869 and subsequent terms? or,

"Whether the tenants were or are entitled to refuse payment of rent from and after the term of Whitsunday 1869?"

PATTISON and ASHER quoted *Gowans* v. *Christie*, 8th Feb. 1871, Scot. Law Rep. viii, 371.

SOLICITOR-GENERAL (CLARK) and WATSON, for the second parties, relied on Ersk. 2, 6, 41; *Wilson*, M. 10,125; *Shaw*, 7 Shaw, 404.

At advising—

LORD JUSTICE-CLERK—The claim which is made by the Messrs Baird, the tenants under the lease founded on in this case, is that they shall be liberated from all future rents, and that in respect of the sterility of the subject let. It is maintained for the landlord that that doctrine of sterility does not apply to a mineral lease, but that, at all events, under the authority of the case of *Gowans* v. *Christie*, decided very recently in the First Division, the stipulations of this particular lease exclude any claim of that kind. We had the case very ably argued to us, and I must fairly own that I was greatly impressed with the argument on the part of the tenant. But I have come to a very clear opinion that the case of *Gowans* v. *Christie* must rule the present case, and consequently, that judgment must go for the landlord. On the general question as was expressed by the Judges in the case of *Gowans* v. *Christie*, I think there is great difficulty in principle in applying strictly the rules of an ordinary agricultural lease to a contract of this kind, because, excepting in an imperfect and inaccurate sense, a mineral lease is not a contract of location. In so far as relates to the minerals taken, it is truly more of the nature of a contract of sale, for the property passes, and as regards the minerals not taken, even the use of them is not transferred or enjoyed. The subject of the contract has no fruits, and any benefit which the tenant takes, if tenant he is to be called, is a benefit derived from the property, and not from the use of the minerals which he takes. In that view the doctrine of sterility is inapplicable, for sterility imports a failure to yield or produce expected fruits, that failure being caused by unanticipated causes. But a contract which does not relate to fruits, but to stock or to substance, can plainly not be affected, at least except by analogy, by a principle of that kind; and the true nature of a mineral lease seems to me rather to be a grant of a temporary privilege,—a privilege, during a period, of removing and appropriating so much of the substance of the minerals within a certain area as the grantee may be able or may choose to excavate, and that for a consideration or price calculated according either to the duration of the privilege or the amount appropriated. That seems to be a definition of the right transferred by what is called a mineral lease, and in this view the subject of the lease is not the minerals which are taken which are truly sold, nor the unworked mineral field, but the incorporeal privilege; and in that view, no doubt, it may be said that the fruit or profits of the privilege fails when the minerals are exhausted; but it is manifest that it is only the application of similar or analogous principles of equity to such a contract which can take place in the view that has been suggested. But then, even in that view, it is not sterility in the proper sense which is pleaded here; for the substance which was to be the source of the profit of the tenant remains exactly the same as it was when the lease was entered into. The case of *Duff* v. *Fleming* was quoted as being a case where the tenant got relief because the subject had perished. But the subject here is exactly what it was. It has not perished. Doubtless if the mine had been flooded or had been swallowed up by an earthquake—*res perit domino*, and the subject of the contract is gone. But in this case it is not that the subject of the contract is gone, for nothing has been changed in that respect. It is that the expected profit has not been yielded. I think these views are material when we come to consider the nature of the contract which we have before us, in which the parties most carefully provide for every contingency that they thought it necessary to provide for. And this is even a stronger case than the case of *Gowans* in that respect. In the first place, it is a most elaborate and well considered document between persons very well able to look after their own interests, and very well understanding what it was. They first take four years of trial before the lease is entered into, under conditions, and then at the end of four years of trial they entered into the regular lease in 1863, and they provide that for the first five years there shall be only half rent paid, viz., £250, and then after that that the rent shall be raised to £500; but with this provision, that at every period of five years from 1863 the tenant shall be at liberty to stop the currency of this lease. Now, certainly it is very difficult to say, as the Solicitor-General argued with great ability, that with all these provisions, and with a lease which has lasted from 1859 till now, there never was anything to be the subject of a contract at all. I think it is impossible to hold this. The cases that were quoted were truly cases of that nature where there was no coal to work, and where the whole field had failed. But in this case, although there may never have been profitable working, there has at least been enough of substance in the contract itself to induce the tenants to go on for ten years. Now, the conclusion that I have arrived at is the same as that which the Lord Justice-General arrived at in the case of *Gowans*. I think that these breaks at the distance of five years which were given to the tenant, without assigning any reason, were intended to cover all the risk which he undertook. I cannot read the contract in any other sense, and I think there is a general principle that when parties reduce their obligations to writing in the careful manner which has been followed here, you are not to import common law principles, except in very clear and very specific cases. In this case the common law principle may be doubtful enough, but I am satisfied that whatever it was, it was excluded and provided against by the provision in regard to breaks. And therefore, on the whole matter, I think judgment must be for the landlord.

LORD COWAN—This is a very interesting case in one aspect of it, but I take the same view of the principle on which the question must be decided that your Lordship has explained. I think it is pre-eminently a case of contract, and that it must be ruled by what we shall hold to have been the intention of the parties in reference to this matter. Now the remarkable thing in this case, which seems to me to make it a stronger case than that of *Gowans*, is this, that by the conditions of the lease, which it is impossible to leave out of view, looking at the case as one of contract, we have it expressly stipulated that trials shall be made by the tenants; and then it is said, "and the result whether workable ironstone be thereby proved shall be decided by the tenants at the end of two years." And that was extended to four

years, "from Whitsunday 1859." And after having made up their minds, on a trial of four years, as to whether there was workable ironstone or not, the lease was to be entered into; and, accordingly, at the close of that time this lease was expressly entered into; and we must hold that the tenants had found from their experience of working that there was workable ironstone which made it safe for them to enter into the contract. Then, when we come to the lease, there is no clause whatever providing against the possible non-workability of the ironstone, and I am not surprised at that, considering the careful way in which the parties had arranged this pre-eminently risky contract before they entered into it. There is no such clause, but there is a clause providing for the safety of the tenants in the event of their finding it an unprofitable speculation or bargain into which they had entered, viz., the clause by which at the end of every five years they were to be entitled to abandon the lease. I think the parties, therefore, *ex contractu*, have fixed their own relative legal position, and that we must come to the determination which your Lordship has announced. We have nothing to do here with a question of sterility. But viewing the question simply as a question whether there was workable ironstone, that is the only case presented to us for judgment, and to that case it seems to me that the parties applied their minds when they entered into this contract. I do not say that absolute sterility from the very outset, even in a mineral lease, may not be a good defence, but we are not called to determine that in this case. At the same time, I may make this observation, with great deference to the Solicitor-General, acute and interesting as his argument was, that I cannot agree with him. His argument was that there was never any subject of contract, and consequently that there was never any contract; and we had Pothier quoted to tell us what we know in our own authorities as well, that there must be a subject in order that there may be a lease, and that one of the indispensable conditions of a contract is a subject. That is quite true, but how can we say that there was here no subject, when the parties covenanted in the way I have mentioned, the simple question being whether the ironstone was workable. There is ironstone there, and there may be future inventions and modes of working this mine which may make it a productive mine, or there may be such an enormous rise in the price of ironstone as to make it even in its present state not an unprofitable thing for the tenants to work. But I cannot entertain the view that there is here no subject.

Lord Benholme—My opinion is the same as that which has been expressed by your Lordship and by Lord Cowan. I cannot adopt the Solicitor-General's argument that there never was a subject here at all. If that had been the case we would have been in a totally different category. But it is in vain to say that there was no subject. There is ironstone to be found here, and that was ascertained. It is one thing to say that there is no subject, and it is a totally different thing to say that by the common law a certain amount of sterility or non-workability will enable a party to get rid of the contract. As to the amount of sterility which will entitle the party to relief at common law, I don't think we are bound to consider that. Even supposing that the common law did give relief whenever the subject would not pay expenses, still the question occurs here which was settled in the case of *Gowans*—where the parties have dealt with and apparently provided for the risks that are always involved in such a lease as this, can they invoke the common law in addition to those remedies which they have contracted for? Upon that question I think the case of *Gowans* is a binding authority; and even if the point was not settled by that precedent, I should be inclined to concur in the very able judgment of the head of the Court in that case.

Lord Neaves—There is no doubt that the questions argued here have been of very considerable interest, and of some delicacy, but I have arrived at the same opinion as your Lordships. I rather understood the Solicitor-General's argument, as to sterility, to be—that there was no contract from whatever point the sterility or non-workability developed itself; but the whole of this matter about sterility is one which is attended with very considerable difficulty. The true category is, that the contract either cannot exist because there is no subject, or that the lease which is well entered into when there is a subject, is brought to an end *rei interitu*. The question of sterility even in agricultural leases is by no means free from difficulty. When a subject becomes flooded or sanded over, and is thereby made quite different from what it formerly was, a great deal might be said, but I have some doubts in my own mind whether in agricultural leases the repeal of the corn laws would have entitled a tenant to abandon his lease on that ground. I have also considerable doubt whether every year is to be taken by itself in a continuing lease. Supposing an Egyptian in the time of Joseph had had a fourteen years' lease of land, and had got his first seven years of plenty with his barns crowded, and the years of scarcity had followed, I think it would be very hard on the landlord that the tenant should get his full measure of the harvest during the first seven years, and then pay no rent at all for the next seven. But we are quite out of that consideration here, because this is not a case of fruits. It is a case of the gradual appropriation of the subject to which the contract relates. If it were proved that there was now no subject, and that there never had been any; if it were ascertained that not a particle of ironstone is left in the subject, or that it had become inundated by the sea, so as to be inaccessible,—I do not say what would happen then, because that would be *rei interitus*. But when it just comes to this, that the profit sinks a little below zero, and that for that reason the contract is to be thrown up, I think that is quite inappropriate to a subject of this kind. A fall in the price of ironstone might produce that derangement, which must be one of the risks that the parties run. Upon these grounds, I think we must come to this result, that the case of *Gowans* is undistinguishable from the present. The law there laid down seems to be this,—that after full opportunity to consider and calculate all the chances, unless some absolute destruction of the thing occurs, it is in vain to ask any remedy except that which has been provided for here by a five years' break. It is in vain for the party to attempt to get rid of the lease on the ground that the prices have fallen or that wages have risen, and that he must get rid of what he formerly worked with profit to himself because the expense of working is now a little greater than the profit.

Agents for Pursuer—T. & R. B. Ranken, W.S.
Agent for Defender—James Webster, S.S.C.

Saturday, March 18.

OUTER HOUSE.

(Before Lord Jerviswoode.)

RANKING AND SALE OF ECCLES.

Prescription—Interlocutor—Ranking and Sale. Held that an interlocutor, pronounced in 1825 in an action of ranking and sale, ordering a claim to be lodged, had not prescribed in 1871.

In this case, which has been depending in Court since 1818, a singular and important point of practice arose. In 1822 an interlocutor was pronounced by Lord Alloway, granting decree of certification *contra non producta*. In 1825 Captain Barton presented a reclaiming note to the First Division, setting forth that he was a creditor of the common debtor to the extent of £500, contained in a bill, and craving to be reponed against said decree of certification. Their Lordships of the First Division reponed the claimant, and remitted the case to the Lord Ordinary to receive his claim and grounds of debt. Thereafter an inventory of interest was duly lodged by the Clerk of the Inner House, but in consequence of some oversight it was not transmitted to the Clerk of the Outer House process. No farther proceedings took place in the process until 1864. The original claimant died, and in 1871 his brother lodged a minute, craving to be sisted as a party in room of his deceased brother, and to be allowed to lodge in process the inventory of interest, in terms of the Inner House interlocutor of 1825. The common agent in the Ranking, Mr Martin, W.S., objected to the claim being received, on the ground that more than forty years had elapsed since the interlocutor of the Inner House, and that it and the claim then made were both prescribed, and that the claim could not now be received into process without the authority of the Court. It was, on the other hand, maintained that the action must be held to have originally depended before the Court, and that the interlocutor of the Inner House being an interlocutor in the cause, prescription could not apply. The Lord Ordinary repelled the plea of prescription, and admitted the claim.

Agent for the Common Agent—Mr Martin, W.S.
Agent for the Claimant—Mr Kennedy, W.S.

HOUSE OF LORDS.

Tuesday, February 28.

JOHN COPLAND *v.* HON. M. C. MAXWELL.

(*Ante*, vol. vi, p. 122.)

Landlord and Tenant—Agricultural Lease—Trout Fishing. Held (affirming judgment of Second Division of Court of Session) that a right of trout fishing in a private stream is an incident of the proprietor's right, and that it is not communicated to the tenant under an agricultural lease, unless that is done expressly.

This was an appeal from a decision of the Second Division of the Court of Session as to the right of farmers to fish for trout in streams passing through their farms. The respondent, Mr Maxwell, is proprietor of the estate of Terregles in Kirkcudbrightshire, and in 1863 he let a farm on that estate, called Mainshead or Prospect Hall, to the appellant for nineteen years. On the edge of the farm there is an artificial pond lying between the farm and other lands of the respondent. The pond had been made in 1849 to supply a tile-work, which had since been discontinued; and the respondent had stocked it with fish, chiefly trout, but there were also some parr and salmon. The pond is a mile from Mr Maxwell's residence. In the record the respondent set forth that he and his family had been in the habit of fishing in this pond, and that when he let the farm to the appellant for agricultural purposes only, he did not intend to include the use of the fishing of the pond to the tenant. But recently the tenant had begun to fish in the pond, and asserted his right to do so, and attempted to exclude the respondent and his friends from the fishing. On the other hand, the tenant, in his part of the record, stated that he had retired from business, and when he offered to take the said farm a plan of the lands then shown to him showed that the pond was part of the farm, that the lease contained certain exceptions and reservations, but did not reserve the pond or the fishings therein to the landlord; that he had, since he became tenant, constantly washed his sheep in the pond, and fished for the brown trout that frequented the pond; and the previous tenants had done so also. When he took the farm he had in view an agreeable residence, as well as an agricultural use of the lands; that the landlord cannot get to the pond without trespassing on the tenant's land; and therefore that the right of fishing belonged to the tenant. The proceedings commenced in the Sheriff Court with a petition of the respondent to interdict the tenant from fishing in the pond. The Sheriff-Substitute granted interim interdict. The Sheriff, however, on appeal, altered this order, and granted a proof of the averments. Another petition having been presented, there was an advocation. Lord Barcaple, after proof, pronounced judgment in favour of the tenant, holding that, as the lease did not specially except the fishing, the tenant had at common law the right to fish for trout with the rod in the pond. On appeal, the Second Division, consisting of Lord Justice-Clerk Patton, Lords Cowan and Neaves, reversed the interlocutor, holding that where such a lease is silent the right of catching trout in the streams belongs to the landlord, and not to the tenant. The tenant now appealed against the judgment.

The Lord Advocate (YOUNG), for the appellant, said that the pond in question was only half-an-acre in extent. The evidence showed that the tenant had fished in this pond since his lease was granted, and he did not even profess to prevent the landlord from fishing if he did so without getting over and injuring the fences. There was no direct authority in the law of Scotland on the subject. It is true the law of Scotland gave the game to the landlord where the lease is silent; but that arose out of an old Scotch Statute forbidding all persons to take game who had not a ploughgate of land. But there was no such exception as to fishing or catching birds, or digging for worms, or taking any other benefit out of the land. The Lord Ordinary said the common law was in favour of the tenant, while the Inner House said it was in favour of the landlord. But nothing definite was known or decided one way or the other, and the most consistent doctrine was to assume that the tenant had the full use of the land for all lawful