that when she returned to her father's house she presented a humiliating and deplorable spectacle. Owing to the injuries she thus received she was disabled from going out to service during the half-year following Whitsunday 1876; and although in the succeeding half-year she was able to enter upon a period of service, her prospects in life have been very materially damaged by the defender's treatment.

The pursuer further stated that the defender confined her closely to the house even on Sundays, and that he prevented her from writing to her father and from associating with anyone in Keith; in consequence of which, taken along with the helpless physical and mental condition to which she was reduced, she was unable to make known her state to her family or to anyone outside the defender's house.

The pursuer had duly received her wages when she left the defender's service in May 1876, but she averred that her father had reserved on her behalf all her other claims against the defender.

The Sheriff-Substitute (SCOTT MONCRIEFF) and the Sheriff (BELL) each allowed the pursuer a proof.

The pursuer appealed under the Judicature Act (6 Geo. IV. cap. 120), for jury trial to the Court of Session.

At advising—

LORD PRESIDENT—It must not be supposed that in allowing an issue in this case the Court intend to lay down any general rule as to the right of a servant to sue his master for damages. As a general rule, a servant is not entitled to remain in service and at the end sue the master for damages of this nature. It is entirely on account of the peculiar circumstances which are averred in the record, but which it is not necessary to set forth in the issue, that we allow it. The pursuer was a young girl, sixteen years of age, far from the place of her residence, and with no money to carry her home. The treatment which she is alleged to have suffered was such as seriously to affect her energy at least, if not her mental capacity. In these circumstances I am of opinion that we should allow the issue.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The following was the issue:—"Whether the pursuer was a domestic servant in the employment of the defender from Martinmas 1875 (old style) till on or about the 25th May 1876; and whether during the whole or part of that period the defender, in breach of his obligation as the pursuer's master, failed to supply the pursuer properly and sufficiently with bed and board, and subjected her to cruel treatment, to her loss, injury, and damage."

Counsel for Pursuer (Appellant)—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender (Respondent)—J. P. B. Robertson. Agent—Alexander Morison, S.S.C.

Saturday, February 2. *

FIRST DIVISION.

DUKE OF HAMILTON, PETITIONER *v.* BUCHANAN

Process—Appeal—House of Lords—Interim Possession—Where Decree of Removing had been pronounced.

Where an appeal had been taken to the House of Lords against a decree of removing from a certain farm and lands, on a petition being presented by the landlord for execution upon the decree, or alternatively for consignation of the rents, the Court ordered the tenant to consign the sum of rents that had become overdue.

This was the sequel to the cases reported *ante*, Jan. 26, 1877, vol. xiv. p. 253; June 8, 1877, vol. xiv. p. 545; and 4 R. 328 and 854, in which the Court decerned against the defender Andrew Buchanan in terms of the conclusions of removing, and of consent of both parties fixed the terms of removing at Martinmas 1877 for the arable land, and Whitsunday 1878 for the houses and grass, reserving to the defender all claims which might be competent to him in connection with his possession of the farm of Flemington. Thereupon the defender, having been charged to remove from the lands and farm, presented a petition of appeal to the House of Lords against the interlocutors pronounced by the Court.

The Duke of Hamilton having thereafter raised an action for payment of the half-year's rent due for the farm at Whitsunday 1877, Mr Buchanan lodged defences, in which, *inter alia*, he pleaded that the action should be sisted till the issue of the appeal in the House of Lords, and that, in the event of the judgment of the Court in the declarator case being affirmed, the rent of the farm should be reduced. The Lord Ordinary (RUTHERFURD CLARK), before whom the action depended, intimated that he would not pronounce decree of payment while the terms of the lease were still subject to interpretation in the House of Lords, but that Mr Buchanan ought either to consign the rent *in manibus curiæ*, or find caution for payment of the amount that should ultimately be found due by him. Mr Buchanan refused to make any provision for satisfying either of these requirements. The Duke of Hamilton accordingly applied to the Court under the Act 48 Geo. III. cap. 151, sec. 17, to allow execution to proceed upon the decree of removing, or to ordain Mr Buchanan to consign a year's rent (another half-year's rent having by this time fallen due) as a condition of his being allowed to remain in possession.

The Court had doubt whether it was competent to order consignation under such a petition; and the respondent intimated that he was willing to obey any order that should be pronounced, but would not consign unless ordered to do so.

Ultimately, on the authority of the cases of *Earl of Mansfield* v. *Henderson*, 2d March 1815, F.C., and *Earl of Queensberry* v. *Robert Wilkin*, there referred to, the Court ordered the respondent to consign the amount of rent that was overdue.

* Decided 29th January 1878.

Counsel for Petitioner — Gloag — Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondent—Lorimer. Agents—H. & A. Inglis, W.S.

Saturday, February 2.

SECOND DIVISION.

[Lord Craighill, Ordinary.

GILBERTSON *v.* MACKENZIE AND BEATTIE.

Property—Salmon-Fishing—Public Right of White-Fishing.

The sea-shore between high and low water-mark is subject to the public right of taking white fish, which is likewise a right conferred by Statute 29 Geo. II. cap. 23, and in its prosecution the use of fixed engines is not illegal unless prohibited by statute.

In an action at the instance of a fisherman against the proprietor of the salmon-fishings *ex adverso* of certain lands on the Solway Firth and his tenant to have it found and declared that, as one of the public he had a right to fish for white fish with stake-nets on the shore of the said lands—*held (revg.* the Lord Ordinary, Craighill) that the pursuer had such a right, and that he could only be prevented from exercising it where the injury thereby done to the salmon-fishery was shown to be substantial and material.

Statute, Annan Fisheries Act 1841, *Exercise of Right of White-Fishing under.*

Observed (per the Lord Justice-Clerk) that the Annan Fisheries Act 1841 has no application to the legitimate exercise of the right of white-fishing, but is directed solely against wanton acts of encroachment operating an injurious effect on the salmon-fishing in that river.

One of the defenders in this action, Mr Mackenzie, was the proprietor of certain salmon-fishings in the Solway and in the river Annan, and the other defender, Mr Beattie, was the tenant of these fishings. The river fishings extended from the mouth of the Annan about three miles up the river, and the fishings in the Solway extended from Annan water-foot on the east to Lochar water-foot on the west, a distance of about five miles. The fishings had been known for centuries as the Newbie fishings, and had belonged exclusively to the proprietors of the estate of Newbie, which were possessed at the date of the action by Mr Mackenzie. He held the estate under a deed of entail executed by his brother, and was infeft conform to instrument of sasine recorded 10th April 1852. His title was completed by a Crown charter of confirmation, dated 15th December 1857, in which the "fishings of Newbie" were expressly included.

The pursuer John Gilbertson was a fisherman, residing at Powfoot, in the parish of Cummertrees, upon the Solway Firth, and in this action he sought to have it found and declared that he, as one of the public, had a right to fish for white fish, including flounders and all other kinds of fish except salmon, in the waters and along the shores of the Solway Firth, and in particular opposite to the parish of Cummertrees and that by means of stake-nets or engines fixed on the shore, and further that the defender Beattie should be ordained to remove his salmon stake-net from the "Powfoot Scaur," situated in Powfoot Bay opposite Cummertrees, and should be prohibited from erecting any net except at such places where nets were in use for catching salmon in 1861 or the four years previous.

Mr Gilbertson stated that he had been for a number of years in the habit of fishing for white fish there by means of stake-nets, and that the Solway fishermen had so fished from time immemorial. The nets were erected on the sands between high and low water-mark, being covered when the tide was full, but left dry when it had ebbed. He averred that he had some years before put up a stake-net in the "Powfoot Bay," which was within the Newbie fishings, and that he had till the year 1877 kept two or three stake-nets there. He further averred that one of these nets was placed upon Powfoot Scaur, an artificial Scaur in Powfoot Bay, made and kept up by the fishermen of white fish, and that prior to his erecting a net upon it five years previously it had been occupied by stake-nets belonging to George Graham, farmer, Netherfield, who had fished there for twenty years. The defenders denied that the scaur was artificial, and averred that Graham had never fished during the salmon season.

The pursuer in May 1876 had a stake-net on the said Powfoot scaur, which on the 22d day of that month the defender Mr Beattie removed, erecting a salmon stake-net upon the same spot. The pursuer averred that no salmon-net had ever been erected on this spot before, and that under the English Salmon Fisheries Amendment Act of 1869 (28 and 29 Vict. c. 121) the defenders were not entitled to erect any nets except on the spots where they had them in 1861 or the previous four years. This was denied by the defenders, who stated that they had frequently had nets upon the Powfoot scaur before.

The 1st, 2d, 3d, and 10th articles of the pursuer's condescendence were as follows:—"(Cond. 1) By Act of Parliament passed in the first Parliament of the reign of Queen Anne, dated September 21, 1705, entituled an 'Act for advancing and establishing the fishing trade in and about this kingdom,' 'Her Majesty, with advice and consent of the Estates of Parliament, authorises and empowers all her good subjects of this kingdom to take, buy, and cure herring and white fish in all and sundry seas, channels, bays, firths, lochs, rivers, &c., of this Her Majesty's ancient kingdom and islands thereto belonging wheresoever herring or white fish are or may be taken.' (Cond. 2) This Act was confirmed and extended by that of 29 Geo. II. cap. 23, entituled an 'Act for encouraging the fisheries in that part of Great Britain called Scotland.' This statute enacted 'that from and after the 25th day of June 1756 all persons whatsoever, inhabitants of Great Britain, shall, and they are hereby declared to have power and authority at all times and seasons, when they shall think proper, freely to take, buy from fishermen, and cure any herrings, cod, ling, or any other sort of white fish, in all and every part of the seas, channels, bays, firths, lochs, rivers, or other waters where such fish are to be found on the