admitted on the one side or the other who had a right, and now that the question is fairly raised at last we have to determine what the limits of both these parties upon this water were.

It seems to be assumed that the evidence in 1843 proved exclusive possession on the part of the town. I am very clearly of the opposite opinion. I think the evidence in 1843 proved that there was not exclusive possession and that there could not be. I think so upon one very simple ground. That ground is, that for a great many years, for twenty years prior to that time, the fishings had been in the same hands, I mean that the same man was tacksman of the town of Inverness, and of the fishings belonging to the defender, and the fishings were held together and worked together. This made it quite impossible that the possession under such a state of matters could become exclusive. The evidence is quite distinct that while Mr Stevenson, who for certainly three quarters of the time held the fishings of Holme and the fishings of the town, worked the fishings, they did not observe any marches whatever. That is proved by Mr Hutchison. He says that "Mr Stevenson still continued the tenant of the Holme fishings. That the crews below sometimes went up to the said march to fish. That Mr Stevenson got the whole fishings afterwards, and the deponent gave himself no trouble thereafter about marches." The same thing is repeated by the witness Mackenzie, who is sixty years of age, and he says that "when Stevenson got the Holme Pool he fished the river as it suited his purpose, having had the whole of it from the lower march of Lady Saltoun's fishings." There are many other passages of the same description. The real state of of the matter is, that Mr Stevenson got the town fishings in 1820 and the Holme fishings in 1821, and until 1830 he substantially held and worked them all together. He got into difficulties in 1830, and there was a year or two when Mr Stevenson had no concern with the fishings at all, but in 1833 he apparently came back, and the same thing took place until 1838 or 1839. So that it is quite clear that on the evidence in the inquiry of 1843 there could not by possibility have been established an exclusive right on the part of the town. That being the state of the matter, it is admitted that the evidence in this action does not establish an exclusive right on the part of the town. It is ambiguous, and the Lord Ordinary admits that it is so. He holds mainly that a particular limit—the limit of the town's right—is established by the original grant. But I think that was all subject to possession. On the grounds I have stated I think there has been no exclusive possession proved in favour of the town of Inverness. I do not think it necessary to go further than that.

I may say in regard to the matter of rod fishing that I do not think it is doubtful in the slightest degree that if you have a Crown grant of salmon fishings, and find it more profitable to fish with the rod than with a coble, that is as good a possession as if you found it more profitable to fish the other way. But the difficulty that was suggested was this, that where there is no grant of salmon fishings the mere use of angling will not be held sufficient to change a right "cum piscationibus," or to enlarge it into a right of salmon fishings. But that doctrine could only apply where there was no grant of salmon fishings.

After the full consideration your Lordships have given to the case, I do not think it is necessary to say more. Your Lordships alter the interlocutor and assoilzie the defender.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender with expenses.

Counsel for the Pursuers and Respondents—D.-F. Mackintosh—C. N. Johnston. Agents—Skene, Edwards, & Bilton, W.S.

Counsel for the Defender and Reclaimer—Darling — Low. Agents — Murray, Beith, & Murray, W.S.

Thursday, July 12.

SECOND DIVISION.

[Sheriff of Stirling.

DAWSON *v.* THORBURN.

Bankruptcy—Act 1621, *cap.* 18—*Conjunct and Confident*—"*Just, true, and necessary cause.*"

A daughter who had obtained from her father a disposition of household furniture, sought to interdict one of his creditors who had poinded the furniture from proceeding to sell. The defender pleaded that the disposition was challengeable under the Act 1621, cap 18, as it had been granted by an insolvent in favour of his daughter without a just price having been paid. A proof having been allowed, the pursuer deponed that she had lived with her father for fifteen years, and for that time had acted as his servant; that she had never got any wages, and had got the disposition of the furniture in lieu of wages. There was no evidence to corroborate her statement.

Held that the pursuer had failed to prove that the disposition had been granted for a just, true, and necessary cause, and that the application for interdict should therefore be *dismissed.*

This petition was presented in the Sheriff Court at Stirling by Mary Ann Dawson, daughter of and residing with William Dawson at Sunnyside House, Bridge of Allan, to have Thomas Thorburn interdicted from selling the furniture and effects in Sunnyside House which he had poinded.

The facts out of which the case arose, as stated by the Sheriff in his note, were these:—The pursuer's father William Dawson was proprietor of a house at Bridge of Allan, on which he had borrowed £975—£850 (in two different sums) from the trustees of a Mr Baird and £125 from the defender. Baird's trustees held dispositions in security; the defender had an *ex facie* absolute disposition qualified by a back-letter. The interest on their bonds having fallen into arrear Baird's trustees in February 1886 initiated proceedings for realising their securities, and on 10th June 1886 obtained decree of poinding of

the ground, so as to secure a preference over Dawson's furniture, in case the price obtained for the house should be insufficient to cover their claim.

After two unsuccessful exposures, the house, on 11th December 1886, was sold to the pursuer Miss Dawson for £855, and a disposition in her favour, to which the defender was a party, was executed on 14th January 1887. In the interval, viz., on 6th January 1887, William Dawson formally disponed to the pursuer all the furniture, &c., in the house that had just been sold to her, and which had been attached by the poinding of the ground at the instance of Baird's trustees. This was followed on 19th March by an assignation to her by Baird's trustees of the decree in their favour, with all that had followed thereon, the consideration being the payment by her to them of £19, 17s. 8d., the balance due them by her father over and above the £855 for which the house had been sold.

So standing matters, the defender raised an action against Mr Dawson, the pursuer's father, for repayment of the aforesaid sum of £125 with interest and expenses, and obtained decree in absence on 3rd May 1887. On this decree a charge was given, and a poinding of the furniture in the pursuer's house followed, on the footing that it still belonged to her father, the debtor in the decree.

The pursuer then presented this petition for interdict, and pleaded—"(1) The pursuer having obtained right to the said summons of poinding the ground and decree following thereon, she has acquired a real and preferable right to the said furniture and other effects, and the said defender is not entitled to poind and sell the same. (2) The said disposition having conveyed and made over to pursuer the said furniture and other effects, the said defender was not entitled to poind them for a debt alleged to be due by the said William Dawson, and his doing so was most illegal and unwarrantable."

The defender pleaded—"(1) As the said poinding of the ground creates a preference over the furniture to the extent only of the balance due under the bonds, and as the defender has already admitted a preference in favour of the pursuer to that extent, the petition for interdict, so far as founded on the poinding of the ground, is unnecessary, and ought to be dismissed. (2) The disposition produced having been granted by Mr Dawson, when he was insolvent, in favour of a conjunct and confident person, 'without just, and true, and necessary causes, and without a just price really paid,' is struck at by the Act 1621, cap. 18, is liable to exception in this process, and the pursuer founding on it is not entitled to interdict."

The Sheriff-Substitute (Buntine) granted interim interdict and allowed a proof, in the course of which the pursuer, who was thirty-one years of age, deponed—"My father William Dawson lives with me at Bridge of Allan. He is a very old man, about eighty years of age. He is unable to be here to-day. I produce a doctor's certificate of his inability to attend. He was a master joiner in Bridge of Allan, and was in business about forty years. He retired about five years ago, and since then I have kept lodgers and my father has stayed with me. . . . I have acted as servant in my father's house for the last fifteen years. For the last five years I have managed the house. My mother was taken ill about three years ago and removed to an asylum. She had been unable to do anything for about two years previous to that. I never got any wages at any time, and in lieu of wages my father granted me the disposition of the furniture of the house. I consider the value of the furniture to be about £50. . . . *Cross-examined*—I have lived in family with my father all my life. My sister lived with us until she married ten years ago. My brother, who is in infirm health and not able to do any work, lives with us still. I acted as cook or kitchen maid at first, assisting my mother. My sister was housemaid at that time. We had no paid servant. When my sister married, I did the housemaid's work as well, except in the busy season for six months in the spring when we engaged a servant to help us. When my mother was taken ill five years ago, I got a girl to assist me regularly. Latterly I have managed the house myself except in the busy season. We have kept the house as a lodging-house during all these fifteen years. There was no bargain or engagement with my father that I was to get wages. I got from my parents money to buy dresses, &c. My sister got no wages either, but she got a good education. I consider I am entitled to the £100 claimed by me for fifteen years' service. . . . In December 1886 it was arranged between my father and myself and some of our friends that I should purchase the house and carry it on as a lodging-house, the condition being that my father should make over the furniture to me so far as it was not carried away by the decree of poinding of the ground. I got money from a Mrs M'Gowan and two of my father's sisters for the purpose of making the purchase of the house, and my father granted an assignation on the 7th January 1887, in pursuance of this arrangement which I have explained, and I afterwards paid the sum of £19, 17s. 8d. in order to obtain a right to the assignation."

On 5th November 1887 the Sheriff-Substitute (Buntine) pronounced this interlocutor:—"Finds in fact, under reference to the subjoined note, that the assignation in question was not a gratuitous alienation, but was granted for an onerous consideration: Therefore repels the second plea stated for the defender: Declares the interim interdict formerly granted perpetual: Finds the pursuer entitled to the expenses of process, &c.

"*Note.*—The pursuer asks interdict against the sale under a poinding of the furniture contained in her house in Bridge of Allan. That furniture has been poinded in virtue of a decree in absence in an action at the instance of the defender against pursuer's father, who was formerly owner of the house and furniture.

"The pursuer pleads (1) that the furniture belongs to her in virtue of a disposition by her father dated 7th January last. (2) That the furniture has been already poinded under a decree of poinding of the ground, to which she has acquired right by an assignation dated in March last. The defender admits that the pursuer has a preferable claim to the extent of £19, 17s. 8d. over the value of the furniture in virtue of the decree of poinding the ground.

"He further pleads *ope exceptionis* that the assig-

nation produced is reducible under the Act 1621, cap. 18, as being granted by an insolvent to a conjunct and confident person, without just and true and necessary causes, and without a just price really paid.

"There can be no doubt that the pursuer was conjunct and confident with her father, and therefore the *onus* lies upon her to show either that on 7th January last her father was not insolvent, or that the assignation was granted for an onerous consideration.

"After a careful consideration of the proof the Sheriff-Substitute has come to the conclusion that the pursuer has succeeded in establishing that the assignation in question was granted for an onerous consideration.

"It appears that in December 1886 the pursuer's father was proprietor of a house and furniture in Bridge of Allan, and that he was debtor in various heritable bonds, secured upon the house, amounting to about £900.

"The parties in right of these heritable bonds were pressing for payment, and had advertised the house for sale under the bonds, and attached the furniture by a poinding of the ground.

"The house was used as a lodging-house, and the pursuer for the last fifteen years had acted as a domestic servant to her father, and recently as manager of the house, and had received no wages from him for these services. Undoubtedly he was thus due a considerable sum to her as wages for her services during these years.

"It is true that there was no prior bargain proved by which pursuer was to be entitled to a certain sum of annual wage, but it is equally clear that the service was not gratuitous or given altogether *ex pietate*.

"In circumstances like the present there is no doubt in the opinion of the Sheriff-Substitute that in December last the pursuer had a valid claim for wages against her father, which she might have vindicated by an action in the event of his disputing it. The amount of that claim was unascertained, but was fixed on 7th January at the value of the furniture in this house.

"It appears from the evidence further that the pursuer in December entered into an arrangement with her father and some relations and friends under which it was decided that their relatives and friends should advance money to the pursuer, to enable her to buy the house and release the furniture from the *nexus* of the poinding of the ground, and that in consideration of this the pursuer's father should give her an assignation to the furniture.

"This bargain was duly carried out, and the present defender was a party to the pursuer's purchase of the house and obtaining an assignation to the furniture.

"In these circumstances in the opinion of the Sheriff-Substitute the conveyance of the furniture to his daughter by the insolvent on 17th January last was not a gratuitous alienation.

"On the other hand, there was ample onerous consideration. (1) In the first place, the furniture may be said to have been worth about £75, after deducting the sum received under the poinding of the ground, afterwards found to be £19, 17s. 8d, and the furniture which actually belonged to the pursuer. This represents about £5 a-year for pursuer's wages. (2) The agreement with pursuer and the insolvent's other relatives constituted a prior legal obligation.

"In the whole circumstances the Sheriff-Substitute thinks that neither at common law nor under the statute is this deed challengeable."

On appeal the Sheriff (MUIRHEAD) on 12th December 1887 pronounced this interlocutor—"Finds in fact (1) that the pursuer gave her domestic services to her father, the deceased William Dawson, for fifteen years, receiving board and lodging and money to buy dresses, &c., but no wages; (2) that the disposition of household furniture, &c., of 6th January 1887, by the said William Dawson to the pursuer, was in consideration of said unwaged service: Finds in law that said disposition was granted for a just cause in the sense of the Act 1621, cap. 18: In respect of these findings, recals the finding on the merits in the interlocutor appealed against; *quoad ultra* adheres to said interlocutor, and of new declares the interdict perpetual: Finds the pursuer entitled to additional expenses, and decerns."

"*Note.*—[*After stating the facts as above narrated*]—The reasons stated by the pursuer in support of her application are (1) that the defender before raising his action against Mr Dawson had renounced any claim he had against that gentleman; (2) that the decree of poinding of the ground assigned to her by Baird's trustees excludes the personal poinding at the instance of the defender; and (3) that the poinded furniture, at the time of the commencement of the defender's diligence, belonged not to her father, against whom the defender's decree had been obtained, but to herself, in virtue of her father's disposition of it to her of 6th January 1887.

"The first of those reasons is not formally pleaded, but it was imported into the proof, and was insisted on at the debate. The defender's agent in his evidence admitted that at one time his client would have been content to settle for £25 or £30. Beyond that there is nothing to support the pursuer's contention. But even if there were I could not deal with it. The defender holds a decree for a sum of £125, with interest and expenses; and in face of it I cannot listen to the suggestion that his claim was not a good one.

"The second reason formulated by the pursuer, both in her original and additional plea-in-law, seems to me untenable, at least to its full extent. It is trite law that a proprietor cannot sue for or obtain directly a decree of poinding of his own ground: Can he take advantage of such a decree when acquired by him indirectly by assignation from a creditor either of his own or a predecessor in the subjects? The pursuer is in this position, and I understand her to maintain that by the assignation in her favour she has acquired a preference over all the furniture, &c., which was in her house at the time the decree of poinding of the ground was obtained, which will enable her in all time coming to defeat the diligence of any other person attempting to attach it. Such a contention seems to me altogether too extravagant. A decree of poinding of the ground is just a judicial security which evanishes with the extinction of the debt whose payment it is intended to assure. In the present case the conveyance of his furniture, &c., by Mr

Dawson to the pursuer did not disturb the *nexus* imposed upon it by Baird's trustees' decree. She took it subject to their claims. On adjustment it turned out that these claims amounted to no more than £19, 17s. 8d. That sum was paid to the trustees by Miss Dawson. Had it been paid by a third party, who owned neither the house nor the furniture, an assignation of the decree to him would have been effectual, but only as a security for £19, 17s. 8d., the amount of the debt he had paid for Mr Dawson. How can the right of the pursuer be put higher? There is, I think, some room for question whether in her hands the assigned decree is of any avail at all. But certainly it cannot secure her a preference for more than £19, 17s. 8d., and as the defender recognises her preference to this extent it is unnecessary to consider the matter further.

"The third ground upon which interdict is craved by the pursuer is, that the furniture, &c., in question is hers, and cannot be sold by the defender in execution of the decree obtained by him against her father. To this the defender replies that the conveyance of it to her is struck at by the Act 1621, cap. 18, that she is conjunct, that it was without true, just, and necessary cause, and that her father was insolvent at the date of granting. There can be no question that the pursuer was conjunct with her father, and the Sheriff-Substitute seems to have been of opinion that Mr Dawson on 6th January 1887, though not notour bankrupt, was nevertheless insolvent. In this I agree with him. I have more hesitation in concurring in his opinion that the consideration for the conveyance was sufficient to exclude the operation of the statute. It is thus set forth in the deed—'That my daughter Mary Ann Dawson, residing with me, has for the last fifteen years acted as my housekeeper, and otherwise assisted me and her mother, without any remuneration being hitherto paid to her, and which I estimate at the sum of £100." It is proved that Mr Dawson, at one time a joiner, but latterly disabled by old age, had for many years occupied the house now belonging to the pursuer, and had been in the practice during the season of letting part of it to lodgers. It was only during the season that he hired a domestic; during the rest of the year, and at all times before he began to let rooms, the household service was done by his wife and two daughters. Neither of the latter ever made any bargain for wages, and never got any—only 'money to buy dresses, &c.' The elder sister married about ten years ago, and it is not said that her father then gave her anything in recognition of her services. The mother has been laid aside for about five years, and for the last three been in an asylum, and the pursuer has for that time had the management of the house. She has worked in it altogether for fifteen years, *i.e.*, since she was sixteen years old, but latterly, according to her own account, it has been as mistress of the establishment. For she says in her evidence—'My father retired about five years ago, and since then I have kept lodgers, and my father has stayed with me.'

"I am very far from saying that the conveyance of his furniture, &c., said to be worth £70, which Mr Dawson made to the pursuer in January 1887, was an unreasonable recognition of her prolonged and unwaged service. But I doubt very much whether she could have compelled her father to pay her £70 or any smaller sum in consideration of that service. In other words, I do not think there was any 'necessary cause' for the conveyance. The interpretation that has been put upon the statute, however, distinguishes between 'just' and 'necessary,' so that though there be no 'previous obligation, yet if the deed be granted for a true and just cause it is not reducible.'—Kilkerran's Report of *Grant* v. *Grant*, 1748, M. 952. From this point of view the question comes to be—are domestic services rendered for fifteen years by a daughter to her father, with whom she has all the time lived in family, receiving from him such money as she required for 'dresses, &c.,' but nothing in name of wages, a 'just' cause or consideration for the conveyance to her by her father of £70 worth of furniture, he being at the moment insolvent? But for the recent decision in *Hodge* v. *Morrison*, 1883, 21 S.L.R. 40, I should have some difficulty in answering it in the affirmative. In that case daughters living in family with their father, but carrying on a laundry business on their own account, contributed part of their earnings towards the support of the domestic establishment, and those contributions were held to be a sufficient consideration for a subsequent conveyance to them by their father notwithstanding his alleged insolvency. In principle I am unable to distinguish between that case and the present. Therefore, although I cannot go the length the Sheriff-Substitute does in thinking that 'the pursuer had a valid claim against her father, which she might have vindicated by an action in the event of his disputing it,' I feel constrained, in deference to the judgment in *Hodge*, to hold that the conveyance to her proceeded on a 'just' cause, and is consequently protected by the statute."

The defender appealed, and argued—There was no ground for saying that the disposition of the furniture had been granted for a "just and true and necessary" cause. The father was insolvent, the daughter had no doubt kept house for him, but the house was his, and it could not be said that in that case wages were due to a daughter from her father. If she had brought an action for wages due she could not have recovered them, and it was necessary for the pursuer to put her case as high as that. This case differed from that of *Hodge* v. *Morrison* referred to by the Sheriff, because in that case (1) the daughters had given value for the assignation in the shape of money contributed by them from their own earnings while living in family with their father; and (2) because here the person who had made over the furniture continued to enjoy the use of it as if he had never done so. There was no doubt that the daughter was a "conjunct and confident person" within the meaning of the statute, and her father had conveyed to her this furniture when he was insolvent—*Hodge* v. *Morrison*, October 26, 1883, 21 S.L.R. 40; *Taylor* v. *Jones*, January 25, 1888, 15 R. 328; Fraser on Master and Servant, pp. 44, 45; Addison on Contracts, p. 436; *North British Railway Company* v. *White and Others*, November 6, 1882, 20 S.L.R. 129.

The respondent argued—The Sheriffs were of opinion that a just claim had been made by the

daughter on her father for services rendered by her to him. It was proved that she had acted as her father's servant, and kept a lodging-house, and supported him in that way. That being so, there was no device or fraudulent intention on the part of the father, but a just, true, and necessary cause—*Shepherd* v. *Meldrum*, January 23, 1812, Hume's Decisions, 394; *Grant* v. *Grant*, November 10, 1748, M. 952; *Adam* v. *Peter*, February 3, 1842, 4 D. 599.

At advising—

Lord Rutherfurd Clark—This case was heard by Lord Young, Lord Craighill, and myself some time ago. The question is whether the respondent Miss Dawson is proprietor of certain articles of furniture mentioned in the prayer of the petition. She claims the property of these articles by virtue of a disposition which she received from her own father dated 6th January 1887. These articles admittedly belonged to the father before his bankruptcy, and the daughter's only claim to them is through the disposition I have referred to. The defender and appellant, on the other hand, is a creditor of the father, and he claims them as belonging to his estate, because he alleges that this assignation was granted contrary to the provisions of the Act 1621, cap. 18. It therefore comes to this issue, whether this disposition was without "just, true, and necessary cause," for it is not disputed that the father when he granted the deed was insolvent, and of course it cannot be disputed that the pursuer by her relation to him was a "conjunct and confident person." The only question therefore is a question of fact, whether there is a "just, true, and necessary cause" to sustain this disposition. The cause alleged is, that at the time of granting the disposition the father was the debtor of the daughter to the amount of £100 for services rendered by her to him in the keeping of his house. I am not going to say that that if proved would not be a perfectly good cause. It is quite possible that for such services a daughter might become the creditor of her father, but when a deed of this kind has been granted it is necessary for the person pleading the deed to give sufficient evidence of that fact, as of course that only can sustain the deed. I think that she has failed to do so. There is no evidence of it except her own testimony. The father was unfortunately not in a condition to allow of his being examined, and it is a great misfortune for her that his evidence on the subject is not available. There is some other evidence produced, but I think we must lay that aside. She is in fact the only witness who supports the view that there was a "just, true, and necessary cause." Therefore I am forced to the conclusion that there is no just, true, or necessary cause to support the deed. And therefore I think that we must assoilzie the defender, although I confess I am brought to this conclusion with some reluctance.

Lord Young—I have come to the same conclusion, and I have not much to add. I would wish to express my concurrence not only with the result at which Lord Rutherfurd Clark has arrived, but also my own regret in arriving at it. It is not because I think that the creditor has acted otherwise than properly and indeed generously. But I am sorry for this young woman, I think she is about 34, and am satisfied that she has been useful to her father for some years past. She aided him in keeping a house for lodgers, and the old gentleman was supported through her exertions. But I cannot think that the relation of debtor and creditor was thereby established between them at all. Then the case stands thus—The father was absolutely insolvent. He first borrowed the sum of £850 from one creditor upon the security of the house, and then he borrowed a sum of £125 upon the same security, upon a postponed bond of course. The house was brought to sale by the first bondholder, and realised less than was sufficient to pay off his debt. Then he poinded the ground to make up the balance of his debt, and the daughter paid the deficiency herself—£19, 17s. 8d. —and took an assignation to the poinding. The furniture was then clear, and the second bondholder poinded the furniture for his debt. I think he was quite an honest creditor. The agent for the defender states in his evidence—"In December 1886 I was wishing to compromise this claim of the defender's by any payment which I could get from Dawson's friends, and I believe it might have been settled then for £25 or £30." They would not do that, and then the father, not having a shilling in the world, makes a present of this furniture to his daughter. I am not surprised that Mr Thorburn, not getting any part of his debt paid, should have objected to this. He poinded the furniture, which I think he was entitled to do, and cannot be stopped.

Lord Young intimated that Lord Craighill, who was absent through illness, concurred in the judgment.

The Court pronounced this interlocutor:—

"Find that the pursuer has failed to prove that the disposition granted to her by William Dawson, her father, was granted for a just and necessary cause: Therefore sustain the appeal; recal the judgments of the Sheriff and Sheriff-Substitute appealed against; dismiss the petition: Find the defender entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Appellant — Gloag — Shaw. Agents—Wishart & Macnaughton, W.S.

Counsel for the Respondent—A. J. Young—Forsyth. Agent—James Forsyth, S.S.C.

Thursday, July 12.

SECOND DIVISION.

[Sheriff of Midlothian.

NORTH BRITISH PROPERTY INVESTMENT COMPANY, LIMITED, *v.* PATERSON.

Poinding of the Ground—Preference—Personal Poinding—Recovery of Poor's Assessment—Poor Law Act Amendment (Scotland) Act, 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 88.

A heritable creditor of a company which had gone into voluntary liquidation obtained decree in an action of poinding of the