same footing." There is another document in process which shows that Mackenzie, too, must have regarded this as a case of joint-adventure, viz., a memorandum from Mackenzie to Moodie & Co. running thus—

"*Dundee, 17th Oct.* 1874.

"Lockhart has sent on our joint a/c 3072 sps. 3½-lbs. tow, which I have instructed the railway company to deliver to you."

Thus you have Moodie's books recording that joint-adventure, and then you have this memorandum, which shows that Mackenzie, the other joint-adventurer, believed this transaction to be a joint-adventure. That goes strongly to show that it really was so. The result of the evidence as to the conversations between parties is, that the transaction was settled before the purchase was made, and that appears too from the correspondence.

You have the circumstance of the extra ¼d. paid by Mackenzie, which seems to have led the Sheriffs to a conclusion differing from the result I have arrived at. That just comes to this, that Mackenzie saw he could not get the yarn under this price, and he thought it was worth his while to pay it for the sake of the joint-adventure. The result of that is, however, that Messrs Lockhart are not entitled to get decree for more than what Mackenzie was authorised to pay as agent for an undisclosed principal. On the whole the joint-adventure appears to me to be made out, and therefore Moodie & Co. must pay.

Lord President—There is no doubt as to the law, but the question of fact here is attended with difficulty. I have, after serious consideration, come to be of the same opinion as the majority of your Lordships. The question is, whether there were two sales here or one? The idea of Mackenzie having put in this yarn as his contribution is out of the question. If Mackenzie in dealing with Lockhart was acting for the joint-adventure, the pursuer is entitled to prevail. The result of the evidence is, that the arrangement as to joint-adventure was made between Moodie and Mackenzie before Mackenzie approached Lockhart, and that Mackenzie received instructions to buy yarns at the limited price of 1s. 11d. I think the fair result of the evidence is that Mackenzie was to act as agent for the joint-adventure in making the purchase, and I don't think that the circumstance that he agreed to give ¼d. more than he was authorised to give affects him. If an agent exceeds his instructions, that does not alter the character of the transaction. He may not bind his principal in a question with third parties, but he will not make himself anything but an agent. That is an immaterial point, although the Sheriffs make it the sole ground of their judgment.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively the 30th May and the 7th August 1876: Find that the yarns, the price of which is sued for in this action, were purchased by the defender Robert Mackenzie (against whom decree has been pronounced in absence) from the pursuers (appellants), at the rate specified in the account libelled, viz., 1s. 11¼d. per spindle: Find that the said purchase was made by the said Robert Mackenzie for behoof of a joint-adventure previously arranged between the Robert Mackenzie and the other defenders, D. Moodie & Co.; that the said yarns formed the sole subject of the joint-adventure; and that they were subsequently used by the defenders for the purpose of the joint-adventure: Find that the said Robert Mackenzie was authorised by his co-adventurers, D. Moodie & Co., to pay 1s. 11d. per spindle for the said yarns, but was not authorised to pay more, and the said Robert Mackenzie contracted to pay the pursuers at the rate of 1s. 11¼d. per spindle without the knowledge or consent of the defenders D. Moodie & Co.: But find that the said Robert Mackenzie did not disclose to the pursuers either that he was purchasing for behoof of a joint-adventure or that he was restrained by the instructions of his co-adventurers from paying more than 1s. 11d. per spindle for the said yarns: Find that in these circumstances the defenders are in law liable to the pursuers in the price of the said yarns; but find, of consent of the pursuers, that the same is limited to the rate of 1s. 11d. per spindle: Therefore decern against the defenders D. Moodie & Co. for payment to the pursuers of the sum of £981, 6s. 8d. sterling, being the price of the yarns in question at the said rate, together with interest on the said sum at the rate of 5 per centum per annum from the date of citation till payment: Find the pursuers entitled to expenses in both the Inferior Court and this Court; allow accounts thereof to be given in; and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer — M'Laren — Johnstone. Agents—Macara & Clark, W.S.

Counsel for Defender—Trayner—M'Kechnie. Agent—Wm. Archibald, S.S.C.

Saturday, May 26.

SECOND DIVISION.

[Lord Young, Ordinary.

DUKE OF SUTHERLAND *v.* SIR CHARLES ROSS.

Fishing—Salmon-Fishing—Obstruction to passage of Salmon.

By the action of stream and tide in the estuary of a river, part of a salmon fishery district, a long narrow stripe of land had gradually been separated from the mainland by a channel which was dry at low tide, except when the river was in flood. From the seaward end of this island there extended a long low bank dry at low water, which confined the river in its main channel at low tide as in a canal, and prevented it spreading into an adjacent bay. By operations on the opposite side of the estuary, performed thirty years before the date of action, a larger body of water was thrown on to this bank, which was thus broken through, so that a new channel was made for the river into the bay. The proprietor of the adjacent

land, and of the fishings *ex adverso* thereof, embanked the outside of the island so as to preserve it, and restored the bank by an artificial erection, which he ultimately raised to 16 inches above the natural level of the bank, to enable it to resist the force of the stream. He held on a barony title, and this erection was on his foreshore. It had the effect of preserving the bank, but at the same time considerably improving his fishings. He also connected the upper end of the island with the mainland by an embankment 4 feet in height, there having previously been a lower bank there. *Held* that the latter erection was an illegal obstruction to the passage of salmon, but that the proprietor was entitled to preserve the island in the way described, although the effect of so doing was to improve his fishing.

This was an action of declarator, brought by the Duke of Sutherland against Sir Charles Ross of Balnagown, and Charles Powrie and George Pitcaithley, tenants of Sir Charles in the Bonar Bridge salmon fishings, for the purpose of having it declared that "the following erections, made or materially enlarged and maintained by the defenders in the river or estuary of the river Oykell, at or near Bonar Bridge foresaid, viz.—(1) A bulwark erected in an oblique direction across the west channel of the river Oykell, joining the upper end of a small island therein to the mainland, measuring said erection 58 yards in length or thereby and 4 feet 4 inches in average height, and consisting of a row of piles of round fir trees 5 inches or thereby in diameter driven in closely together, and supported on both sides by quarried stones, or rock and field stones; and (2), a jetty or embankment for taking shots and hauling nets, extending from the lower end of the island foresaid in a southerly or south-easterly direction for 280 yards or thereby into the said river or estuary thereof, consisting of a raised pathway generally about 4 feet wide, formed of piles and planting filled within with turf, and made up on the top and on the east side with stones, and on the west side with back-stays or cross-ties of timber and a longitudinal tie along the outside, the intervals between the cross-ties being filled up with hand-laid stones, both in the parish of Kincardine and county of Ross, are fixed obstructions to the passage of salmon and other fish of the salmon kind, and are situated within the limits of the river Oykell and its tributary streams, including the estuary thereof; or otherwise, that the same are erections made or materially enlarged and maintained by the defenders, with the view of unduly facilitating the capture of salmon by them at their fishing stations at or near Bonar Bridge, to the prejudice of the said Duke and Earl of Sutherland, pursuer, and other parties possessing salmon fishings in the said river Oykell and its tributaries above Bonar Bridge;" and in any case for declarator that the obstructions were illegal, and should be removed by the defenders, and the channel of the Oykell restored to its former state; and in the event of the defenders failing to remove the obstructions, for warrant to the pursuer to do so at the defender's expense.

The whole of the alleged obstructions lay in the Kyle of Oykell, within the district of the river Oykell and its tributaries, as fixed by the Commissioners under the "Salmon Fisheries (Scotland) Act 1862." The pursuer being infeft in the salmon fishings of the river Shinn, and Linn of the same, which falls into the Oykell several miles above Bonar Bridge, had a material interest to insist on the removal of all obstructions lower down the water calculated to keep back salmon from coming up stream, and all erections permitting lower heritors to catch more salmon than they could catch without such erections. The defender Sir Charles Ross was the heir of entail in possession of the estate of Balnagown, including the salmon fishings in the estuary of the Oykell immediately below Bonar Bridge.

The pursuer averred (Cond. viii.) that the defender and his tenants had during the last four or five years constructed the erections mentioned in the summons for the purpose of obstructing the passage of salmon to the upper waters, and also for the purpose of capturing more salmon than they would otherwise have done, by increasing by artificial erections the number of places at which they could shoot and draw their nets. The effect of the first erection set forth in the summons was alleged to be that salmon coming up the river and into the bay of Kincardine, instead of passing up the west channel into the Oykell close to Bonar Bridge, were compelled to turn back and ascend the main channel, and thus run the gauntlet of the salmon-nets of the defenders, and also of the salmon-nets on the north or Skibo side of the Kyle of Oykell, which were also in the hands of the defenders Powrie and Pitcaithley. The defenders thus captured a larger number of salmon than they would if the channel were not obstructed. The defenders had also constructed the jetty or embankment second mentioned in the summons, the effect of which was alleged to be that salmon coming up the Kyle were turned aside into the bay of Kincardine, and thereafter, being stopped by the first-mentioned obstruction, were compelled to turn back and ascend the main channel where *ex adverso* if the said jetty they were exposed to capture by the nets on both sides of the water, as above explained. The jetty enabled the defenders to take two additional shots for salmon where without such an erection no shot could be taken, or only a shorter and less effectual shot. It was further averred that these erections were illegal under the Acts 1424, cap. 11; 1427, cap. 6; 1469, cap. 38; 1477, cap. 73; 1488, cap. 16; 1489, cap. 15; 1563, cap. 68; 1579, cap. 89; 1581, cap. 3; 1685, cap. 20; 1705, cap. 2; and the said Act of 1862, and also at common law.

The defender Sir Charles Ross explained that for a long period of time the action by the stream and tide in the Kyle had had the effect of separating a long narrow stripe of ground from his lands of Bonar, which formed the mainland on the right or west side of the Kyle. About thirty years ago the then Duke of Sutherland, at that time tenant of the Skibo fishings on the opposite side of the Kyle, erected there a bulwark of stones extending obliquely into the Kyle, which threw the water over on the Bonar shore. The effect of this had been to reduce the said stripe of ground to one-third of its former size, and to break what remained into several pieces. The channel separating the stripe from the Bonar shore was now really 50 yards in breadth, but was in no sense a channel of the river Oykell,

being still dry at the fall of neap tides. This stripe of ground had been part of the farm of Bonar, and was grazed as such, and was used for hauling and drying nets. Accordingly, between 1862 and 1868, to defend his property against the water, the defender caused the outer bank of the said stripe to be faced with piles and boarding, and the detached pieces to be joined together by a narrow embankment which was extended from the lower end of the stripe in a direction parallel to the main channel. This extension constituted the second obstruction complained of. The defender's tenants had also in 1870 erected the obstruction first complained of, because they found that to reunite the upper end of the stripe with the mainland would diminish the effect of the stream and tide upon the stripe, and thus lessen the cost of repair. This was on the site of a much lower embankment, erected more than forty years before. Both erections were necessary to prevent the waters of the Kyle being driven from their natural channel, and to preserve the defender's fishings. They were not obstructions in the sense of the statute, as they did not prevent the free run of salmon up and down the Kyle.

The pleas in law for the pursuer were—"(1) The obstructions or enclosures complained of being of the character of obstructions prohibited by the statutes, and being within a river and its estuary, and in a locality falling within the prohibitions of the statutes, are illegal, and ought to be removed. (2) *Separatim*, the said structures or erections are illegal, and ought to be removed, in respect that they are fitted and designed unduly and by artificial means to facilitate the capture of salmon by the defender and his tenants."

A proof was led, the import of which sufficiently appears from the opinions of the Judges.

The Lord Ordinary pronounced the following interlocutor:—

"22*d December* 1876.—The Lord Ordinary having heard the counsel for the parties, and considered the record, with the proof adduced, and whole proceedings—Finds that the bulwark erected, first mentioned in the summons, at or near Bonar Bridge, is a fixed obstruction to the passage of salmon and other fish of the salmon kind, and is situated within the limits of the river Oykell and its tributary streams, including the estuary thereof, and is illegal, and ought to be removed: And decerns and ordains the defenders to remove the same accordingly within the space of six months from the date hereof: *Quoad ultra* assoilzies the defenders from the conclusions of the action, and decerns; and finds neither party entitled to expenses."

In this interlocutor the defender acquiesced, but the pursuer reclaimed.

Argued for him—The stripe of ground has always been an island, separated in ordinary floods by a fresh water channel from the mainland. The lower erection, which is much more than restoration, influences the natural run of salmon towards the defender's fishings, which have largely increased. Under the statutes, as interpreted by decision, whatever is fixed in the body of the stream and obstructs the run of fish is illegal, no matter with what intention constructed—*Hay* v. *Magistrates of Perth* (Lord Westbury's opinion), 4 M'Q. App. 535; *Forbes* v. *Smith*, 2 Sh. 721, and 1 Wil. and Sh. App. 583; *Duke of Queensberry* v. *Marquis of Annandale*, Mor. 14,279; *Dirom* v. *Little*, Mor. 14,282; *Cunningham* v. *Taylor*, March 18, 1804, Hume 715; *Copland* v. *Maxwell*, June 13, 1810, F.C.; *Grant* v. *M'William*, in a note 10 D. 666 (Lord Corehouse's opinion). The obstruction need not be for the purpose, directly or indirectly, of catching the fish—*Lord Kinnoull* v. *Hunter*, Mor. 14,301, 4 Paton 561; *Bichett* v. *Morris*, May 20, 1864, 2 Macph. 1082, L.R., 1 Sc. and Div. App. 47; *Colquhoun* v. *Orr Ewing*, 14 Scot. Law Rep. 260; *Cowan* v. *Lord Kinnaird*, December 15, 1865, 4 Macph. 236.

Argued for defender—The purpose of the erection was for legitimate protection of fishing rights. The authorities cited did not apply. In the *Queensberry* case there was a fixed rope hung with horses' bones to frighten the fish. In *Dirom* there was an arrangement of nets. *Kinnoull* was a case of stake-nets and bag-nets. In *Copland's* case there was a device for keeping the fish in a pool below the mill-cauld. *Cunningham's* case was that of a dam expressly built to form a salmon-pool. The same observations apply to the other cases.

At advising—

LORD JUSTICE-CLERK—This case raises some interesting questions as to the law applicable to the rights of proprietors of salmon-fishings. As originally presented, it was a case of very considerable difficulty; but now that the parties have agreed that one of the two alleged obstructions shall be removed, it does not appear to me that the question in regard to the lower obstruction is really, when it is looked at with attention, attended with much perplexity or doubt. I need not go into a long detail of the locality, which is familiar to your Lordships and the parties. It seems that this ground of Sir Charles Ross' is opposite property belonging, or which did belong, to Mr Dempster of Skibo. It is situated upon the river Oykell, and the salmon-fishing there, as is well known, is a very valuable property. It is below Bonar Bridge. The Duke of Sutherland has the salmon-fishing some miles up, and is entitled of course to all the rights of a proprietor of salmon-fishing in respect of his property above; but he is not a riparian *ex adverso* proprietor, and any right which he has therefore, apart altogether from any direct injury which he can qualify, is the right of a proprietor of salmon-fishing, and therefore having an interest in the free passage of the salmon as far as the law provides for and protects it. What he says is substantially this—that there is a bit of the channel of the Oykell which breaks into two channels, one going round the west side of a small island in the river, and the main channel going up on the east or north side along the Skibo bank; and he complains of two thing—first, that at the upper end of the island Sir Charles Ross, or those acting for him, had made a barrier preventing the salmon from getting through by the end of the island up to the main channel of the Oykell, and thereby the fish were scared or turned back, not having that ordinary mode of access to the channel. Then he says that in order to make that effectual, Sir Charles Ross had also carried a barrier along the sandbank at the lower end of the island, which had the effect that at a certain period of the tide

the fish which came up by that channel were obstructed from getting into the main channel of the river. Now, these two things seem to be quite true. There seems no doubt at all that there would be a passage by the first of these but for the operations complained of. I may mention that apparently the whole of this portion of the river is under water at high tide. The tide flows over the whole of it. But the operations in question affect the river during certain periods of the tide, and these periods are very material for the fishing. Now, there seems no doubt at all that the first of these obstructions at A B had the effect of turning back the fish at certain periods of the tide, and the effect of that and the other barrier was to throw the fish back into a portion of the stream from which they had no access to the main stream without returning upon their path, and accordingly they were then captured by the nets of Sir Charles Ross. If the case had stood there, I do not think there is any doubt, and I concur with the Lord Ordinary entirely, that that was a device altogether contrary to the rights of the upper heritors. It was preventing the salmon from having a free run, according to the ordinary mode in which they were accustomed to reach the main channel; and, moreover, it was an obstruction directly struck at by the terms of the statutes relating to salmon-fishings, placed within the flux and reflux of the tide, which is the very locality to which these Acts of Parliament apply. But the case has been entirely altered by Sir Charles Ross undertaking to do away with the first of these barriers, and to leave the channel at the head of the island as free as it was before. And now the question is, whether that which has been constructed at the other end of the island, along the sandbank, should be allowed to remain? Now, according to Sir Charles Ross, this erection or bulwark—I suppose it is made of loose stones, in all probability—has no other object but to counteract the effect of the stream being thrown back from an embankment made many years ago upon the Skibo side. Whether that is the sole object of the erection may possibly be doubted, but there can be no question that the effect of that embankment which was made upon the Skibo side was to carry away the previous bank which had existed in the locality where this erection had been made; and Sir Charles Ross says, and says with a great deal of force, that he was entitled to prevent that operation, seeing that the *ex adverso* proprietor had no right to injure his bank—that he was entitled, as in a question with him, at all events to protect his own bank, and to raise this barrier, which should have the effect of the previous bank before it was carried away. It is said that that is not his remedy, and that he should have required the opposite proprietor to take away his embankment. Now, I greatly doubt whether the Duke of Sutherland has any interest to say that. I do not think that that is a matter with which he has any concern. If it is an illegal obstruction in the sense of the statutes, then that will be quite sufficient for his purpose, whatever the object of it was; but if, on the other hand, it is not, he is not in a position to object to a structure of this kind on any ground which might be competent to parties, either lower heritors or *ex adverso* heritors. But, in the second place, I do not think that that is sound. There was a case referred to—the case of *Marshall*, I think, and *Johnston*, where we prevented a proprietor from building an embankment in the alveus of the river, although it was for the purpose of preventing the washing away of his bank, in consequence of some operations which had taken place above; but there seems no doubt at all that this is on the foreshore. It is a construction which rests on ground on which the proprietor is entitled to build—at least, in any question with a merely upper proprietor. And therefore I hold that *prima facie* Sir Charles Ross was entitled to do what he did for the purpose of protecting his bank; and, moreover, that if he made that structure where the bank had been previously, he was entitled to do so, seeing that the bank had not proved strong enough to resist the action of the water. But then it is said that it has been raised too high—that it is a foot and a-half higher than the bank ever was, the result of which is, that as the tide only makes, I fancy, some 8 or 10 inches in the course of the hour, at least a couple of hours are added to the period when the salmon are unable to get across the barrier, and the result is that these salmon are kept waiting there, and fall a prey to the fishers of Sir Charles Ross just as they did before. That that is the effect I think we may assume; and if Sir Charles Ross made that erection with the purpose of making a better fishing station, the question is, whether he was entitled to do that? I do not think it at all unlikely that he did, but then I do not think this is an obstruction in any sense contemplated by the statute. It is an entire delusion to suppose that everything that is erected on the foreshore which may have the effect of altering the course of the salmon is an obstruction of which an upper heritor is entitled to complain. That is not the meaning of the statute. An obstruction must be something which prevents the fish from getting up. For instance, take the case of an ordinary mill-dam or weir, it is enough if a ladder is put there. The weir obstructs the fish from getting over at any other place but up the ladder, but that is thought sufficient to enable the fish to have their free course up the river; much more if all that is to be said is, if the fish have the choice of the two channels going up by the right or west bank, or the left or east bank, that there is an intermediate place where a fish might have gone across which has now been shut up by the operations of the defender. I do not think that is an obstruction. That the fish has to go two or three yards round in order to get up a stream, is certainly not an obstruction to the passage of salmon in the sense of the statute; and it is wholly immaterial whether the result is to improve the fishing, seeing that, if it be not an obstruction in the sense of the statute, the Duke of Sutherland has no title and no interest to object to what has been done; and, subject to the provisions of the statute, Sir Charles Ross is perfectly entitled, by anything he pleases to put there, to improve his own chance of catching salmon. I am therefore of opinion—first, that there was a good and reasonable ground for, at all events, a portion of the erection complained of; but, in the second place, that, as it stands, no part of it seems to me to come up to what is necessary in order to constitute an obstruction to the passage of salmon in the sense of the salmon statutes, and

that, consequently, the Duke of Sutherland has no title to complain of what has been done upon ground belonging to the defender. I do not think it of any consequence here that this was on the foreshore, if it had been an obstruction; because, as I have already said, it is to obstructions to the passage of salmon by means of artificial erections within the flux and reflux of the tide, or in estuaries, that the statutes refer; and nothing can prove that more clearly than the fact that the commissioners under the salmon Act were instructed to fix, and they have fixed, the places where the tide ebbs and flows, so as to save the necessity of the long and expensive inquiries which used to be gone on with between the proprietors of the salmon-fishings in such rivers. Now the estuary is defined from the sea, and that is the place above which no obstruction can be placed to the passage of salmon. These are the views generally which I take of this case, and they substantially coincide with those of the Lord Ordinary. I think that with the removal of the upper obstruction, this lower erection is not an obstruction in the sense of the statutes, and that Sir Charles Ross is entitled to keep it there.

Lord Ormidale—I am of opinion that the Lord Ordinary has decided rightly. It was not, indeed, disputed by the defenders that to some, if not the whole, of its extent, the bulwark A B was erected by them, and that it operated as an obstruction to the passage of salmon as complained of by the pursuer; and ultimately they did not object to the removal of that obstruction. The mode of removal and the extent to which it ought to be carried, may, I think, be safely left to the man of skill to be appointed by the Court.

In regard to the other alleged obstruction, the defender made no concession. But the removal which is to take place of the obstruction A B has a very material bearing upon the question whether the pursuer is entitled to prevail in regard to the second obstruction F G H, for the latter obstruction operated to his prejudice chiefly in consequence of the obstruction A B, so that if the latter is removed the injurious consequences will be in a great measure, if not entirely, obviated. In accordance with this view, the pursuer says—[*his Lordship read from article* 8 *of the pursuer's condescendence.*] It thus appears, on the showing of the pursuer himself, that the injurious effects of the second of the alleged obstructions depend very much upon the first.

But it is true that the pursuer, after the statements which have now been quoted from article 8 of his condescendence, goes on to say—"Further, the said jetty supplies, and was intended to supply, means for the said Messrs Powrie and Pitcaithley taking two additional shots for salmon at a place where without such artificial erection no shot could be taken for salmon at all; or, at all events, such shots could not be taken so effectually, or for so long a period at each tide." I doubt, however, whether this is an averment sufficiently relevant to sustain the pursuer's conclusions against the defenders. It will not do for the pursuer merely to say that the defenders have improved the banks of their own property so as to be better able to catch the salmon in passing, or, in the pursuer's own words, to give them the additional shots, it not being alleged that their mode of fishing is in itself illegal or objectionable. I can therefore very well understand how the pursuer should, before bringing his action, have allowed a period of fourteen years to elapse since the greater part of the second of the alleged obstructions was erected by the defenders, and that it was only after the effect of the obstructions came to be observed and felt that it occurred to him to insist for removal of the second. In this view I should have little or no hesitation in thinking, with the Lord Ordinary, that after the lapse of time which the pursuer allowed to occur before raising the present or any action, his conclusions as regards the second alleged obstruction cannot be sustained, especially as it is not even said or proved that any complaint was in any form made on the subject until the present action was raised. It would be unfair for the defenders now to compel them to restore matters to the condition in which they were before their operations commenced. The defenders were entitled to believe that what they did in regard to the second alleged obstruction was not objectionable, or, at any rate, was not so objectionable as to call for any action or complaint on the part of the pursuer. They may, accordingly, on this belief have entered into contracts and engagements, not only as between themselves, but with others, against the consequences of which they could not now be restored. It would be inequitable, therefore, and unfair to the defenders in such circumstances, to sustain the action so far as the second of the alleged obstructions is concerned.

Nor am I satisfied on the proof that, independently of these considerations, the pursuer has succeeded in establishing his grounds of action in regard to the second alleged obstruction. The proof is certainly not conclusively in his favour, whether the defenders' object in extending the embankment F G H, or the alleged injurious effect of it on the pursuer's salmon-fishing is considered. It rather appears to me that the proof goes to show that the object of the defenders was to preserve their banks and fishing-station from being destroyed by the action of the sea, aggravated by the operations on the Skibo side, rather than any desire or illegal attempt to interrupt the passage of the salmon; and if so, I am not prepared to say that this was an object which the defenders were not entitled to carry into effect, the more especially as the pursuer did not interfere to prevent them, or, so far as appears, give any intimation of his disapproval. It must not be overlooked that while the pursuer had a right to salmon-fishing in the upper water, the defenders had not only a similar right at the place in question—that is, the place where the second of the alleged obstructions was erected by them—but also, and this, as it appears to me, is a very important consideration, a right of property to some extent in the *solum* or ground upon which the obstruction was erected. And it was expressly admitted at the debate that the erection was in the foreshore and not in the alveus of the river. It may be true that when the erection of the alleged second obstruction was commenced in 1862, the sea had encroached on and partly submerged the ground, but that was no reason, but the contrary, why the defenders should not recover their property and protect it from further dilapidation. That the defenders did no more

than this is, I think, sufficiently established by the proof, and I would refer in particular to the evidence of the defenders' witnesses, Mr Adie, Mr Lipscomb, John Ross, and George Pitcaithley; and to the pursuer's own witnesses, Donald and John Urquhart. Having regard to the statements made by these witnesses, as well as to the other evidence in the case, I must take it to be proved in point of fact that the second alleged obstruction is substantially nothing more than a restoration *de recenti* of the *status quo*, and a necessary protection against future inroads of the sea. And if this be so, I cannot doubt that in point of law the defenders did not exceed their legitimate rights, as illustrated by the cases of the *Town of Nairn* v. *Lord Lyon*, *Forbes* v. *Smith*, and *Mather and Young* v. *Macbraire*.

There is no doubt some evidence to the effect that the height of the jetty or bulwark founded on by the pursuer as forming the second of the alleged obstructions complained of by him is about 18 or 20 inches higher than the old weir, but I cannot hold this to be, in the circumstances, a sufficient reason for now interfering with it. The pursuer has not proved, and there is nothing in the proof to indicate, that these 18 or 20 inches are in themselves injurious to the pursuer, and I do not think they can be so. Besides, it is to be presumed that it was necessary, in order to render the bulwark efficient and capable of resisting the inroads of the sea, to make it, especially at first, somewhat higher than it originally was. It has in all probability consolidated and subsided so much as to remove all ground of complaint now on the score of its undue height, if indeed it could have previously been made the subject of complaint.

Lord Gifford—I have come to be of the same opinion. I think the judgment of the Lord Ordinary is right, and ought to be adhered to; and I shall state the ground of my opinion in one or two sentences. The pursuer of the action, his Grace the Duke of Sutherland, is proprietor of certain salmon-fishings in the upper parts of the river Oykell, a good many miles from the sea. The defender is proprietor of salmon-fishings at the mouth of the Oykell, *ex adverso* of his lands on the Kyle of Sutherland or Kyle of Oykell, which is the same as the estuary of the river. The tide flows several miles above Bonar Bridge. The pursuer complains that the defender has made two embankments, which he says illegally obstruct the passage of salmon up and down the Oykell to and from the sea. The first of these is described on the plan as the bulwark A B, and it connects the shore or mainland with the north end of a tidal island in the estuary of the Oykell. The effect of that embankment is to convert the island into a peninsula or long strip of land running down the estuary seawards, and it is said that that is an obstruction, because when fish ascend on the left hand of the island, in going up instead of getting up the river they find themselves met by the embankment, and being obstructed in ascending they have to return, and are exposed to the nets of Sir Charles Ross' fishermen, and thus captured. The second embankment, which, however, must be taken as having a mutual relation and mutual action with the first, is at the other end of the island, and extends in the direction of the island down towards the sea. It is described on the plan as the embankment F H. Now, these two embankments, although they have a mutual relation and a mutual action, must, I think, be taken separately. The Lord Ordinary has done so, and has found that the first, the embankment A B, is illegal, and must be removed, but that the second embankment, F H, is not illegal, and that the defender is entitled to maintain it. I agree with that result. I need say very little as to the first, because the finding of the Lord Ordinary in favour of the pursuer has been acquiesced in by the defender, and that first embankment is to be removed and matters restored to their original condition at the sight of a man of skill to be named by the Court, and the result of that will be that what was formerly an island will be restored to its insular position, and will be an island in the estuary, upon both sides of which the tide will flow. That removes the objection that fish coming up between the island and the mainland will be met and prevented from reaching the river to a greater extent than they were by the natural inequality of the bottom or natural ridge which always existed there. And that brings me to the second question, whether the embankment at the south end of the island, stretching down the estuary, is or is not, in the sense of the statutes, as they have been interpreted by decision, an illegal obstruction to the passage of salmon? Now, I am of opinion that that second embankment, the first being removed, is not an illegal obstruction. In the first place, I think, upon the evidence and upon the common sense of the thing, it is not an obstruction. The island was always there, and, to some extent of course, the island is an obstruction, for the fish must take either the right hand or the left, and go round the island in order to ascend the river; but the lengthening of the island, which is practically done by building this embankment on the foreshore at the south end of it, does not make the island a greater obstruction to their ascending than it was before. The amount of water that flows up or down with the tide is exactly the same; the breadth of passage which the fish have to swin in on the right hand or left is exactly the same. The only difference is that they have to pass a somewhat longer island in ascending, and I do not think that an obstruction to the passage of fish. As many fish may pass up the river with the island lengthened as could pass on either side of the island shortened; and if Sir Charles Ross had not the salmon-fishings, or if no salmon-fishings existed at the mouth of the river, it would have been impossible for the Duke of Sutherland to say that the mere lengthening of the estuary island kept salmon from ascending to the higher reaches of the river. But then it is said that although it would not prevent salmon from swimming up on either side, it virtually gives Sir Charles Ross an additional shot, or, in another view, two additional shots, at the salmon as they pass, and that is true; and that brings me to consider whether the mere arranging the foreshore or arranging the estuary land so as to have better or more shots than before, is an illegal obstruction in the sense of the statutes. Now, I do not think it is. Suppose that the foreshore of Sir Charles Ross' land had been so rough—so covered with rocks or boulders—as to prevent nets from being possibly

drawn there, it would be quite within his power, and perfectly legal for him, to remove these rocks or boulders from his own foreshore, and to dress the foreshore so as to make it possible to draw salmon nets upon it, with net and coble, in the usual way. There would be no obstruction to fish by removing the rocks, though the effect would be that more shots were made and more fish caught, and in that sense obstructed, because you cannot obstruct fish more effectually than by catching them; but then catching fish by the net is a legal mode of obstructing, so that this is not an obstruction in the sense of the statute. But, secondly, supposing it were an obstruction, I am of opinion that it is proved on the evidence that substantially it is nothing more than a restoration of an old bank that was there before; and I cannot help attaching great importance to the real evidence, for such it appears to me, of the levels of the tide and ground here. It is not disputed that Kincardine Bay is at a lower level than the proper channels of the river Oykell, so that in the flow and ebb of the tide there will always be a tendency for the water to flow, if it can get an estuary at all, into the lower level of Kincardine Bay. And thus there will necessarily be a tendency to eat away, so to speak, the long bank which forms the tail of this tidal island. I think that presumption, which we can reach by the nature of the ground, is corroborated by the witnesses to whom Lord Ormidale has referred. But still further, I think it is proved that that tendency is increased by what is called the Skibo embankment on the other side; and, on the whole, I have very little doubt that during a good many years back there has been a gradual tendency of the tide and of the water of the river to get over this ridge, which originally kept it in its main channel, and to divide it more and more between that main channel and Kincardine Bay. Now, I take it to be quite legal for a proprietor of the foreshore, in circumstances of this kind, to restore timeously a bank that is in the course of being eaten away, and the eating away of which is to his detriment. On the evidence, I think Sir Charles Ross has not done more than fairly to restore to that extent. I agree with Lord Ormidale that the excess of 18 inches at part —for that only applies to part—is not more than may be fairly said to strengthen the bank against a force which was found too strong for it. But then, in the third place, even though there had been no bank there before, I am of opinion that it is a legal operation of a defender with an island of this kind to lengthen it seawards upon the foreshore. It is his own property. The embankment F H is all, I think, within the proper foreshore. It is all marked as uncovered at dead low-water. Now, I think it is legal for him to do that. Even if it were in the *alveus*, I agree with your Lordship in the chair that the Duke of Sutherland, who is not an *ex adverso* proprietor, but at some considerable distance up the river, would not have any title to challenge it. But we are freed from any delicacy as to operations *in alveo*, for the operations are on the foreshore. Now, why should not the proprietor of the foreshore, and this is a barony, gain land from his own foreshore? I do not see any reason why he may not, excepting that it is alleged that so gaining land will give him an additional shot as a salmon-fishing proprietor. But what does that matter? A man may get as many shots as he can by an erection on his own land if he does not obstruct the passage of the fish or infringe any of the laws enacted for the preservation of salmon. And therefore, on all these grounds, I think the embankment F H is a legal embankment. As the Lord Ordinary puts it, it is little more than giving him additional standing ground to draw his nets upon, and I see nothing illegal in smoothing the ground or making it fit for standing upon when the net is being drawn. And therefore, on these three main grounds, I think the embankment F H is legal, and that it is not an illegal obstruction in terms of the statutes. These statutes have been interpreted very widely in favour of salmon rights, and things have been held to be obstructions which could hardly be considered as such—the rattling of bones under a bridge, for instance,—but I do not think they apply to a case like the present.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Darling. Agents—Mackenzie & Black, W.S.

Counsel for Defenders (Respondents)—Asher—H. Johnston. Agents—Maclachlan & Rodger, W.S.

Saturday, June 9.

FIRST DIVISION.

[Bill-Chamber.

JOHNSTONE *v.* THOMSON.

Landlord and Tenant—Removing—Process—Suspension and Interdict.

A suspension and interdict is not a competent process for removing a tenant—the term of whose lease has expired, but to whom no formal warning has been given, although there may have been such correspondence between the landlord's agent and the tenant as to constitute an obligation on the latter to remove.

Observed per Lord President (INGLIS) that suspension and interdict is only appropriate if the tenant is not in possession.

This was a note of suspension and interdict, presented by Sir Frederick Johnstone of Westerhall, against John Thomson, tenant in Solwaybank, asking the Court to interdict, prohibit, and discharge the said John Thomson from ploughing, sowing, manuring, labouring, or in any way interfering with the said farm of Solwaybank, or any of the fields thereof; and further, to interdict, prohibit, and discharge the said John Thomson from preventing or in any way interfering with the complainer, or any one authorised by him, entering upon and ploughing, sowing, manuring, labouring, and cultivating the said farm of Solwaybank, or any of the arable fields thereof, and also having such use of the farm-steading as may be necessary for the stabling and lodging of the animals employed by them in such cultivation. The respondent was tenant of the farm of Solwaybank, under a lease which expired, as to the arable land, Candlemas 1877; as to the meadow ground, 1st April follow-