ALEXANDER MURRAY, Esq. Appellant.—*Murray—Walker.* No. 40.
EARL of SELKIRK, and MAGISTRATES of KIRKCUDBRIGHT, Respondents.—*Shadwell—Miller.*

Salmon-Fishing—Stake-Nets—Statute 1563, c. 68.—*Res Judicata.*—An action having been brought against certain parties who had rights of salmon-fishing in the river Dee, and had placed yairs within tide-mark, to have it found that they had no right to do so; and the Court of Session having found that they fell within the exception of the statute 1563, c. 68. as being situated within the water of Solway: and thereafter the same parties having erected stake-nets at the same place; and a bill of suspension and interdict against their doing so having been refused; and a declarator having then been brought to have it found that they were not entitled to fish with stake-nets; and the Court of Session having sustained a defence of res judicata, in respect of the decree in the former action and in the suspension;—the House of Lords reversed the judgment sustaining that defence, and remitted to the Court of Session to make farther inquiries as to whether the yairs were within the water of Solway or not.

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1ST DIVISION. Lords Balmuto and Gillies.

IN 1804 the trustees of the late James Murray of Broughton, father of the appellant, brought an action against the trustees of the late Thomas Earl of Selkirk, and the Magistrates of the burgh of Kirkcudbright, setting forth, that as trustees of Mr Murray they were proprietors of certain salmon-fishings in the upper part of the river Dee, in the county of Kirkcudbright; and that although it was enacted by the statute 1563, ch. 68. 'that 'all cruives and fish-dammes that ar within salt water that ebbis 'and flows bee all utterly destroyed and put down, alswell they 'that perteneis to our Soverain Lord as utheris throw all the 'realme,' 'yet the Earl of Selkirk and the Magistrates of Kirk-'cudbright thought proper to erect and use cruives and yairs, 'for the purpose of catching salmon in the lower part of the 'river Dee, where the sea ebbs and flows, whereby the pursuers 'are not only injured in their mode of salmon-fishing, by the 'salmon being prevented from getting up the river, but also the 'free navigation in several places completely interrupted, to the 'great hurt of the pursuers, who are proprietors of two harbours 'at Tongland and Tarff, farther up the river than the erections; 'and that although this was both contrary to the statute and to 'the common law, yet these parties persevered in fishing in this 'manner;' and therefore they concluded, 'that they should be 'decerned and ordained forthwith to remove and demolish the 'said fishings by cruives and yairs or any other manner erected 'by them, or under their direction, in that part of the river Dee 'where the sea ebbs and flows, and prohibited and discharged

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'from erecting any such works in time coming; and also decern-
'ed and ordained, conjunctly and severally, to make payment to
'the pursuers of the sum of L.5000 sterling, as the damages they
'have already sustained by the said illegal mode of fishing.'

In defence it was alleged, that as there was a special exception in the statute, by which it was declared, that 'this Act in no-
'ways be extended to the cruives and yairs being upon the water
'of Solway;' and as the river Dee disembogues itself into the firth or water of Solway, and the tides of the Solway ebb and flow where the yairs are placed, the respondents had a right, under the statute itself, to fish with yairs at the point where they were situated: that accordingly possession had been enjoyed of this species of fishing for more than three centuries and a half under their respective titles, which, although it might not afford a prescriptive right in opposition to the statute, yet demonstrated that this part of the Dee was considered as forming part of the water of Solway, and so within the exception: that, besides, the yairs, from a peculiarity in their construction, were not injurious to the fishings of the superior heritors, nor to the navigation of the river.

To this it was answered, that the water of Solway meant not the firth but the river Solway; and that, even supposing it should be considered as meaning the firth, yet in point of fact the Dee did not flow into that firth, but into the Irish Sea; and in support of this assertion reference was made to numerous ancient geographers, historians, and poets, from the time of Ptolemy downwards.

Lord Balmuto, on advising memorials, assoilzied the respondents; and the Court, without taking any proof as to the fact of the yairs being within the water of Solway, adhered, on the 23d May 1807, to the effect of finding that the yairs were within the exception of the statute; but remitted to the Lord Ordinary 'to
'hear parties with regard to any obstruction that may arise to
'the navigation of the river from the cruives and yairs, or other
'erections of the defenders, and to do thereanent as his Lord-
'ship shall see cause.' A proof was then taken in relation to this matter; but the action was allowed to fall asleep.

Between that period and 1817 the respondents erected stake-nets on the Dee, also within the tide-mark, against which the appellant, and the trustees of his father, presented a bill of suspension and interdict, on the ground that the respondents had no right to fish in this manner.

On the other hand, the respondents maintained, that the ques-

tion of right had been decided by the judgment of the 23d May 1807; and accordingly the bill was refused, with expenses. June 9. 1824.

The trustees of the late Mr Murray having then divested themselves in favour of the appellant, he raised an action of declarator against the respondents, in which he stated, that 'by 'the common law of this realm, as well as by various Acts 'of Parliament, the proprietors of salmon-fisheries are not at 'liberty to exercise the same, or to take salmon in rivers or 'firths where the tide ebbs and flows, otherwise than by net and 'coble, or in such other ways as may have been sanctioned by 'immemorial usage: That nevertheless the Right Honourable 'Thomas Earl of Selkirk, and the provost, magistrates, and 'councillors of Kirkcudbright, as representing the community 'of said burgh, have, by themselves, their tenants, or servants 'employed or authorized by them, within these last few years 'erected a number of stake-nets, and other fixed machinery, for 'the purpose of catching salmon, not formerly used in the river, 'upon the sands adjoining to the river Dee, and in the river 'itself, opposite to their respective lands within the stewartry of 'Kirkcudbright, and thereby taken great quantities of salmon, 'contrary to law, and to the great hurt and prejudice of the 'pursuer, the said Alexander Murray, and the other proprietors 'of salmon-fisheries in the higher parts of the said river Dee, and 'also very much to the prejudice and injury of the navigation 'of said river;' and therefore concluding, 'that it ought and 'should be found and declared, that the said defenders have 'no right, by themselves, or others employed or authorized by 'them, to erect stake-nets or other machinery for catching salmon 'not formerly used within the river Dee, either in that river or 'on the sands adjoining thereto, between high and low water 'marks;' and therefore concluding for decree of removal and interdict, and for damages.

In defence against this action the respondents maintained, that as the former summons concluded to have it found that they had no right to fish by means of cruives and yairs, 'or in any 'other manner whereby the fishings of the pursuers may be in 'any way injured, or the free navigation of the river interrupted;' and as the Court had, by the judgment of 23d May 1807, assoilzied them from the conclusion so far as it regarded the mode of fishing, and had allowed a proof as to the interruption of the navigation, and had subsequently refused a bill of suspension in regard to the point of right, the new action was barred by the defence of res judicata and lis pendens: that, farther,

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stake-nets were merely an improved species of yairs; and therefore, if the question were open, they were entitled, under the exception in the statute, to fish by means of them. This case came before Lord Gillies, who reported it to the Inner-House, 'in 'respect that the defenders found on certain judgments of the 'Inner-House, as affording them the defence of res judicata 'against the present action;' and accordingly their Lordships, on the 19th November 1818, sustained the defence of res judicata, assoilzied the respondents, and found them entitled to expenses, 'in respect of the decrees pronounced in the former process of 'suspension between the same parties who are parties to the 'present process.' Thereafter the original action having been wakened, and the proof having been reported to the Inner-House, their Lordships, upon the 6th July 1821, assoilzied the respondents, and found them entitled to expenses.*

Against the judgments, both in the first action, and against the judgment in the second sustaining the defence of res judicata, the appellant entered separate appeals, and maintained that they were erroneous,—

1. Because yairs and stake-nets erected in the channel of a river, or on the sands of a river covered by the tide at high water, are illegal, and the yairs and stake-nets of the respondents were placed in such a situation. In support of this proposition, it was contended, 1*st*, That by various statutes the employment of cruives and yairs on the sands and rivers within the tide-way of the sea, had, previous to 1563, been prohibited without any exception: That by the statute of that year it was not only not intended to admit of any exception to this general prohibition, but, on the contrary, it was enacted, that if the officers to whom the execution of the Acts was committed should be negligent in performing it, they should be liable for the penalties of the statutes: That, however, as the river Solway formed the boundary between Scotland and England, and these countries were then frequently engaged in hostilities, and as the officers might not be able to perform their duty on that river, it was considered unreasonable that they should be responsible for the erection of yairs on the Solway; and therefore it was provided, 'that this 'Act in no ways be extended to the cruives and yairs being upon 'the water of Solway;' thereby meaning, that it was only the provisions of this special Act, and not those previously passed prohibiting cruives and yairs generally, which were to be excepted

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* See 1. Shaw and Ballantine, No. 132.

as to the Solway, and not that it should be lawful to erect cruives and yairs on that river: That, at all events, and supposing that it had been intended to allow cruives and yairs to be placed on the 'water of Solway,' this exception from the general rule must have been made by the Legislature on the footing that, as the fishings on the English side were free, it would be unjust towards the Scotch to prevent them fishing on their own side; therefore it was plain, that the Legislature could not have meant to extend the exception to the firth, and to all the adjacent rivers, seeing that the reason of the enactment could not apply to them, but only to the river Solway, and consequently not to the Dee. And, 2*d*, That assuming that by the 'water of 'Solway' was meant the firth, still it was proved by the various authors, ancient and modern, which had been referred to in the Court of Session, that both before and after, but especially about the period of the Act 1563, the Firth of Solway was held to terminate either at Bowness or at Skinburness, points which were about 25 miles south-east from the mouth of the Dee; and consequently that river did not flow into the Solway Firth, but into the Irish Sea, and could not fall within the exception of the statute.

2. Because stake-nets were different in species and effect from cruives and yairs, and consequently could not be protected by the exception in the statute. In reference to this point it was stated, that although a yair in its external appearance somewhat resembles a stake-net, in so far as each of them is formed with wings made of stakes and wicker-work, or with nets extended on the stakes, yet the mode in which the fish were caught was essentially different; because it was necessary, where a yair was employed, that a fisherman should be stationed with a moveable instrument connected with a bag, in which he could not take more than one salmon at a time, whereas a stake-net was a fixed machine, not requiring the intervention of human agency to its operation, and which was quite sufficient of itself to catch the salmon in numbers which could only be limited by the extent of the chambers or traps.

3. Because the plea of res judicata was untenable, seeing that the first action had reference merely to the right of the respondents to fish with yairs, (there being at that time no stake-nets erected); and consequently the decision in that action could not afford any plea of res judicata against the action relative to the stake-nets; and the refusal of the bill of suspension and interdict was merely a judgment on the question of posses-

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sion, which could not prevent the appellant from bringing an action of declarator to have the point of right ascertained. And,

4. Because the proof which had been taken established that the yairs and stake-nets were injurious to the navigation of the river.

On the other hand the respondents maintained,—

1. That there was no foundation for the construction attempted to be put upon the statute by the appellant; and that, as the words were in themselves free of all ambiguity, it followed, that if the yairs were de facto situated within the water of Solway, they were not liable to be removed, seeing that it was expressly declared that the prohibition should not apply to them.

2. That it was proved by various ancient and modern writers, that in the Scottish language the word water was often made use of synonymously with firth; that the Solway Firth extended to the Dee, and that the yairs were placed within the influence of its tides.

3. That the general question as to the right of fishing had been raised under the original action; and therefore, if the judgment in that case was affirmed, the second action would of necessity be excluded. And,

4. That the proof established that the erections were not injurious to the navigation of the river.

The House of Lords, in the appeal relative to the question of res judicata, 'found, That the defence of res judicata is 'not sustainable; and therefore it is ordered, that the said in-'terlocutors complained of in the said appeal be, and the same 'are hereby reversed; and it is further ordered, that the cause 'be remitted back to the Court of Session in Scotland, to do 'farther therein as is consistent with this finding, and as is just:' And in the original action their Lordships 'ordered, that the 'cause be remitted back to the Court of Session, to inquire, in 'such manner as to them shall seem meet, whether the cruives 'and yairs complained of are situated upon the water of Solway, 'and protected by the proviso in the statute 1563, c. 68.? And 'it is further ordered, that, with this direction, the said Court 'do review the several interlocutors complained of, and proceed 'upon such review as to the Court shall seem just and meet.'

LORD GIFFORD.—My Lords, There are two cases in which Alexander Murray is the appellant, and the Earl of Selkirk and others respondents. In the first case, an action was brought in name of the trustees of the deceased James Murray against the respondents; and the summons stated, that the trustees, the pursuers in the action, were proprie-

tors of certain fishings of salmon in the upper part of the river Dee, called Tongland, which they hold by express grant from the Crown. It then set out the provisions of the Act of 1563, to which I will call your Lordships' attention presently; and then it stated, that notwithstanding the enactment of that statute, the respondents, the defenders in that action, had thought fit to erect and use cruives and yairs, for the purpose of catching salmon in the lower part of the river Dee, where the sea ebbs and flows, whereby not only the pursuers foresaid are injured in their mode of salmon-fishing, by the salmon being prevented from getting up the river, but that also the free navigation of the river was prevented. June 9. 1824.

My Lords,—Various defences were put in to this action, but the main defence was, that by the exception in the statute of 1563, the respondents were fully justified in erecting these cruives and yairs upon this part of the Dee; and they relied upon the long enjoyment of cruives and yairs in the position in which they said these cruives and yairs were placed for use.

The case came before the Lord Ordinary in the month of December 1805, and Lord Balmuto, who was the Lord Ordinary, pronounced the following interlocutor:—'Having considered the mutual memorials 'for the parties, plans produced, and whole process, assoilzies the de-'fenders simpliciter, and decerns.' My Lords, a representation against this interlocutor was afterwards refused; there was a petition to the Court, and the interlocutor of the Lord Ordinary was adhered to by an interlocutor of the 22d May 1807. My Lords, afterwards, however, on the 18th May 1808, there was a remit to the Lord Ordinary, to take proof, with respect to the injury which it was supposed these cruives and yairs caused to the navigation; and the proof was accordingly taken, under the authority of the Lord Ordinary, in the year 1810.

My Lords,—The cause then slept for a great many years, but I believe in consequence of the decision of the Tay cause, which was before your Lordships' House, the proceedings were revived; and in the year 1819 the Lord Ordinary pronounced this interlocutor, upon the proof which came before him with respect to the injury of the navigation:—'In respect the proof is in some degree contradictory, appoints 'parties' procurators to give in mutual memorials upon the question at 'issue, with the import of the proof as applicable thereto, to be seen 'and interchanged;' and then, on the 23d January 1820, the Lord Ordinary issued the following order:—'The Lord Ordinary, at the 'joint desire of the Counsel for the parties, makes avizandum with the 'cause to the Lords of the First Division of the Court; appoints the 'parties severally to prepare, print, box, and lodge informations, and 'put copies thereof into the Lords' boxes, in order to be reported, and 'that within ten days.'

On advising these informations, upon the report of Lord Balmuto, the Lords pronounced this interlocutor:—'They sustain the defences,

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'and assoilzie from the conclusions of the libel, and decern: Find the 'pursuer liable in the whole of the defenders' expenses incurred in 'this process; allow an account thereof to be lodged; and remit the 'same, when lodged, to the auditor, to tax and report.' Against this interlocutor, my Lords, the appeal is brought in the first case. It will be necessary for me just to state to your Lordships in the present stage, that in the year 1817 a second action was brought by Mr Murray against the same respondents, complaining of a great number of stake-nets and machinery, which, he complained, had been put down in this river, in prejudice of his fishery. The respondents in answer contended, that the decision of the former action was a judgment against the appellant in the same identical matter, and that that being res judicata, was decisive. I shall call your Lordships' attention to that when I have made the observations which occur to me upon the first appeal.

My Lords,—The great question in this cause is, Whether, under the statute 1563, which is admitted on all hands to be still in force, the cruives and yairs which have been set up by the defenders in this part of the river Dee were protected by the exception in that statute? It is well known to your Lordships how very careful the Legislature has been of the protection of the salmon-fishery, and a variety of Acts have been passed upon that subject. I do not feel it necessary to call your Lordships' attention to these statutes further than the statute of 1563. By that statute 'it is statuted and ordained, that all cruives and fish-'dams that are within salt waters that ebbis and flowis, bee all utterly 'destroyed and put downe, als well they that pertenis to our Soveraine 'Lord as uthers, throw all the realme; and anentis cruives in fresh 'waters, that they be made in sik largenesse, and sik dayes keeped 'as is contained in the Acts and Statutes made thereupon of before, 'with this addition.' Then it concludes with this proviso:—'Provid-'ing always, that this Act in naways be extended to the cruives and 'yairs being upon the water of Solway.' My Lords, the reason of that exception is, I think, pretty evident, that being the boundary between England and Scotland; the English catching as many salmon as they could on their side, it was thought proper to allow the Scotchmen to do the same. My Lords, the defenders say, that with respect to these cruives and yairs complained of in the year 1804 in this action, they had been in the enjoyment, and had been in the legal right of having them there, for upwards of a century. I will read to your Lordships the manner in which they state their right. It is very important to the consideration of this case. They admit that no usage will prevail against the positive terms of an Act of Parliament. 'They ex-'plicitly admit that no usage, however long and uninterrupted, is avail-'able against a public law. Their plea is, that the saving clause in 'the statute authorizes them to erect yairs on the river Dee; and they 'refer to possession and usage only as collateral evidence that they 'do not misinterpret the statute. If this plea be well founded, your 'Lordships must hold that the respondents are entitled to erect as

'many yairs, of whatever construction, as they may think proper; for 'in doing so they merely exercise a privilege which the law of the 'country has expressly bestowed upon them.' So that your Lordships perceive they do not put their defence on possession merely. They do not say, that their possession is such that it can prevail against the language of an Act of Parliament; but they say, that it is evident that the place where these cruives and yairs were erected, was part of that water of Solway so described in the exception of the Act of Parliament. June 9. 1824.

My Lords,—Then the question was as to the extent of the water of Solway; and undoubtedly a great deal of writing has been employed in the most ingenious quotations from poets and historians, and authors of all descriptions,—one to prove the extent of the Solway to include the water of Dee, and others to exclude it; but no legal evidence whatever—no proof has been adduced, either from the old writers in Scotland, or in any issue, to ascertain the extent of the water of Solway; and on what foundation the Lords of Session have found that the defendants' cruives and yairs were protected, I am unable to state to your Lordships. My Lords, undoubtedly the pursuer in this case offered to prove that the cruives and yairs were not situate on the water of the Solway: the question being raised, whether they fell under this exception or not, they offered to prove that the place where they were, was known as the river Dee—that the Dee, in fact, did not discharge itself into the water of Solway—and that cruives situate within the river Dee would not fall within the exceptions granted to cruives being upon the water of Solway. In answer to this, the respondents say, that the cruives and yairs are protected by the exception of the statute of 1563, as being upon the water of Solway, which they say extends where salt water ebbs and flows; and they say, that if they are situate on what has always been considered the river Dee, the river Dee flowing into the Solway—if they are in that part where the tide ebbs and flows, they are on the water of Solway, and so within the proviso of this Act of Parliament. But, my Lords, I must confess I have felt some difficulty on the case, as it is now presented, to say whether this place is or is not on the water of Solway. As I have stated to your Lordships, we have quotations, but we have no evidence on which we can have reliance as to that which is to be deemed and considered as the extent of the water of Solway. The defenders' case rests upon that; they admit that their usage will not do against the Act of Parliament; they say that that usage is (and it undoubtedly is) very important evidence, when you come to consider whether those cruives and yairs are on the water of Solway or not; for they being admitted to be there certainly at the time of the action brought, there is, they say, strong evidence that, in the understanding of all persons, that was to be considered as the water of Solway. It is to be recollected there are cases referred to of other rivers flowing into this water of Solway, as it is called, higher up in the junction between

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Scotland and England.[a] Cases have occurred, and it has been found that the yairs had not been lately placed. But, my Lords, in the view I have of this case, thinking, as I do, there must be a farther inquiry before we proceed to a final decision upon it, I should be very unwilling to prejudice this question by any observations upon it or the cases which have been referred to; for, in my humble judgment, it is impossible for this House to arrive at a safe conclusion upon this case, unless the question be first decided whether those yairs be or not upon the water of Solway. If they be, then their defence is sustained, that they come within the exceptions of this Act of Parliament; if they be not, it will be for the Court of Session to say whether they are protected by the terms of this Act of Parliament. I should therefore propose to your Lordships, that in this first appeal the case should be remitted to the Court of Session to inquire, in such manner as to them may seem meet, whether the cruives and yairs complained of are situate on the water of Solway, and protected by the proviso in this statute; and that, with this direction, the Court should review the interlocutor complained of in this appeal, and proceed upon that review as to them may seem just and meet. That, my Lords, will dispose of the first appeal.

My Lords,—The second appeal arises out of a second action, which had been instituted in the year 1817, complaining not of the cruives and yairs, for it seems that in the mean time other machines, the nature of which is perhaps known to your Lordships, called stake-nets, which are extremely destructive to the salmon, by enabling the parties having them to catch more salmon than they could according to the old mode of fishing, had been put down. The first summons, as I stated to your Lordships, complained expressly of cruives and yairs that the defenders had thought proper to erect, and cruives and yairs for the purpose of catching salmon in the lower part of the river Dee, where the sea ebbs and flows. The second summons complained, that they had, 'within the last five years,' before 1817, 'erected a 'number of stake-nets, and other fixed machinery, for the purpose of 'catching salmon, not formerly used in the river, upon the sands ad-'joining to the river Dee, and in the river itself, opposite to their re-'spective lands, within the stewartry of Kirkcudbright, and thereby 'taken great quantities of salmon contrary to law, and to the great 'hurt and prejudice of the pursuer the said Alexander Murray, and 'the other proprietors of salmon-fisheries in the high parts of the said 'river Dee, and also very much to the prejudice and injury of the 'navigation of said river.' My Lords, to this they pleaded, that this point was already determined by the decision in the first action I have stated to your Lordships. The defences to the present action are, 1*st*, That the 'defenders' right of fishing, not only by cruives and yairs, 'but also by stake-nets, was fully under consideration of the Court in 'the former process of declarator at the instance of the pursuer in '1804, the result of which was a final judgment that the defenders

'had such right. It is therefore a res judicata, and this defence was 'sustained by the Court in the recent decisions in the foresaid pro-'cesses of suspension and interdict.' My Lords, in this case the Lord Ordinary and the Court of Session have sustained the plea of res judicata. Now, my Lords, stake-nets may be the same (I speak in utter ignorance), they may be the same as cruives and yairs, but I find in the Dumbarton case, which occurred in the year 1813 in the Court of Session, that a person who it appeared had an immemorial right to a cruive had put down a stake-net; and though that case is said to have turned on another point, namely, that the man had a right only to the herring-fishery, yet, on reading the judgment of the Court of Session, I find that several of the learned Judges proceed on the distinction between a cruive and a stake-net, and that if a man had a right to a cruive for the salmon-fishery, it does not follow that he had a right to a stake-net, and might substitute a stake-net to the prejudice of a person higher up the river. I cannot, therefore, concur in the finding of the Lords of Session, that this point had been adjudged in the first action. For the sake of the argument, supposing your Lordships should not take the course in the first appeal which I have proposed to your Lordships, of sending back this interlocutor to the Court of Session, because a man had a right to put up cruives in the river, would it necessarily follow that he had a right to substitute a stake-net to the prejudice of a person higher up the river? It appears to me that is a question very well deserving very grave consideration—more grave than it appears to have received. I feel it to be my duty, therefore, to propose to your Lordships to reverse the interlocutor sustaining the preliminary defence, and that that action should be remitted to the Court of Scotland to proceed further therein.

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I cannot but take this opportunity of stating, that if these parties are to proceed in litigation, it appears to me they will do it most conveniently to themselves, and with a view to all the questions in the cause, in the second action; for they will in that not only try the question of the cruives, but the right of putting down stake-nets, and they will have the opportunity of inquiring whether those are on the water of Solway or are not. However, that is a matter for their consideration; whether, when these cases go back, they shall be joined, or what course they shall take on that subject, it is not for me to anticipate. But in this second action I can have no hesitation in stating, that the interlocutor sustaining the defence must be reversed. The preliminary defence being set aside, the case will then be open to further consideration.

Appellant's Authorities.—1424, c. 2.; 1427, c. 116.; 1457, c. 86.; 1478, c. 73.; 1488, c. 13.; 1563, c. 68.; 1429, c. 20. or 131.; Magistrates of Dumbarton, January 16. 1813, (F. C.); Dirom, February 25. 1797, (14,282.)

J. CHALMER— —Solicitors.

(Ap. Ca. No. 53.)