[12*th April* 1834.]

No. 15. The MAGISTRATES of DINGWALL, and Mrs. MUNRO or ROSE, now Ross, Appellants. — *Lord Advocate (Jeffrey)—Rutherfurd.*

The Honourable Mrs. HAY M'KENZIE of Cromarty, and CAPTAIN MUNRO, Respondents. — *Attorney General (Campbell)—Robertson.*

Et é contra.

Res Judicata — Fishing. — Circumstances under which it was held (affirming the judgment of the Court of Session), that a decree in 1725, and another in 1778, constituted res judicata as to a right of fishing in the river Conon: And, in interpreting these decrees, certain boundaries laid down as marking the extent within which the parties had a right of fishing.

1ST DIVISION.

Lds. Corehouse and Newton.

TWO questions were brought under review by this appeal, the one being, whether a decree in 1725 and another in 1778 formed res judicata; and the other being, where a line of march mentioned in the latter decree was truly situated. The question as to the situation of the march gave rise to very voluminous proceedings: And being of a special nature, it is not necessary to report them in detail. The circumstances out of which these questions arose were the following:—

The river Conon in the county of Ross takes its rise in Strathconon, and, after passing through various districts

of the country, empties itself into that part of the sea called the Cromarty Frith, a little below the town of Dingwall. Although now generally called, throughout its course, the Conon, a part of it, extending upwards from its junction with the sea to a point which was not precisely ascertained, was anciently called the Staffack or Stavack. The family of Seaforth, who possessed property on the banks, held right to the fishings in the Conon; and these having been adjudged, Charles II., on the 30th of September 1678, granted a charter of novodamus under the great seal, by which he gave to the adjudging creditors "superiores et inferiores "salmonum piscarias de Conon, cum piscariis lie cruive "fishings ejusdem aquæ de Conon." This charter was ratified by parliament, and infeftment taken. After certain intermediate transmissions, the right came to be vested in the Earl of Cromarty, who made up titles by charter of resignation in 1722. The Earl having been engaged in the rebellion of 1745, his estates were forfeited, and vested in commissioners. Thereafter they were restored to the heir male of the family of Cromarty, and ultimately were acquired by the respondent, Mrs. Hay M'Kenzie, who obtained a crown charter in 1819, on which she was infeft. In 1825 she granted a tack of the fishings to the other respondent Hugh Munro.

On the other hand, the Magistrates of Dingwall, in 1587, obtained from James the Sixth a charter of confirmation and novodamus of certain subjects, "nec non "cum salmonum piscatione in aqua de Stavack et suis "pertinen.," &c. In 1618 the Magistrates granted to Ronald Bain "totam et integram piscationem dimidii "unius cimbi aquæ de Stavack communitate dicti "burgi." This and two other similar rights, after cer-

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tain intermediate transmissions, were acquired in 1720 by Colonel Munro, and flowed from him by a series of titles to the appellant Miss Munro, afterwards Mrs. Rose, now Mrs. Ross.

In 1725 Colonel Munro raised an action of declarator and molestation against the Earl of Cromarty and his tenants, stating that they had taken violent possession of that part of the fishing belonging to him, and therefore concluding to have his right declared, the possession restored, and these parties interdicted from troubling him in future, and found liable in damages. In defence, they pleaded that they had a preferable right to the fishings claimed by Colonel Munro; and a day having been assigned to them for producing their title, they failed to do so, whereupon the term was circumduced against them, and decree of declarator pronounced in terms of the libel, which was extracted.

Again, in 1762, an action of declarator, molestation, and damages was brought by the commissioners on the forfeited estates of the Earl of Cromarty, and the Lord Advocate on behalf of the Crown, setting forth that although, under the titles vested in the Earl of Cromarty, they had right to the whole fishings in the Conon, yet the Magistrates of Dingwall had presumed to "fish "salmon in the said water of Conon, and in the sea "opposite to the mouth of the said water, whereby the "shoals of fish were broken, and prevented from "coming up to the water as usual." "And albeit "it be of verity that the said defenders, the Magis- "trates and town council of the burgh of Dingwall, "have no right of fishing upon the said water of "Conon, and that the pursuers have suffered great "damage by their so doing, and are put to con-

" siderable expense in defending their just right against " the illegal intrusion and encroachments of the de- " fenders, and that the pursuers have often desired and " required the defenders to desist from fishing on the " said water, and to have made payment to them of the " damages and expenses sustained by them as aforesaid; " yet they refuse so to do, and still persist to vindicate a " pretended right to the said fishing, without any " foundation in law or equity: Therefore it ought and " should be found and declared, by decreet of our " Lords of Council and Session, that the pursuers, as " commissioners and trustees foresaid, and their tacks- " men, have the only good and undoubted right to all " and whole the salmon fishings of the said water of " Conon, with the cruives, corfehouse, and whole parts, " pendicles, and privileges thereunto belonging; and " that the magistrates and town council of Dingwall " have no right or title to fish upon the said water of " Conon, or in the sea opposite to the mouth of the " said water, by drag and stell-nets, or by cruives, yairs, " or in any other manner of way whatsoever: And it " being so found and declared, the said magistrates and " town council of Dingwall, and their successors in " office, for themselves, and as representing the com- " munity of the said burgh, ought and should be " prohibited and discharged from troubling and molest- " ing the pursuers and their tenants in the quiet and " peaceable possession of the said salmon fishing in all " time coming."

To this action defences were lodged by the magistrates, who contended that they had right to that part of the fishings in the Conon called the Stavack; and, after some procedure, they brought a counter action

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of reduction and declarator against the commissioners and certain parties deriving right from them, in which they concluded for reduction of any titles held by these parties in that part of the Conon called Stavack, and that it should be found and declared "that the said "pursuers, and their successors in office, for themselves, "and as representing the community of our said burgh "of Dingwall by virtue of their rights above mentioned, "have the only good, undoubted, and exclusive right "of salmon fishing with their own proper boats or "cobbles and nets, and all other fishings on the said "water of Stavack, and whole parts, pendicles, and "privileges thereunto belonging; and that the said "defenders, nor none of them, have any right or title "to fish upon the said water, or any part or portion "thereof, or in the sea opposite to the mouth of the "said water, in any manner of way whatsoever; and "ought to be decerned, by decreet foresaid, to desist "and cease from usurping any such right, and from "troubling and molesting the said pursuers, or their "successors in office, in the peaceable possession, "bruiking, and enjoying thereof, or any part thereof, in "all time coming."

In defence, the commissioners denied that the magistrates had any right to fish in the Conon, or that the Stavack formed a part of that river. The process of reduction was remitted to the action of declarator at the instance of the commissioners; but although it was repeatedly mentioned in the pleadings that they had been conjoined, no interlocutor to that effect could be found. The cases then came to depend before Lord Auchinleck, who, on the 24th of February 1763, found "that the limits of the fishings to which the contending

" parties have right require a further proof than has
" been hitherto brought, before judgment can be given
" upon them; and therefore allowed either party to
" prove what they shall think may be of use in the
" determining the matters in dispute between them."
A proof was accordingly taken and reported, on which memorials were ordered. The processes then fell asleep; but, in 1770, a summons of wakening was executed by the commissioners in relation to the action at their instance, and it was wakened accordingly. But it did not appear that any summons of wakening was brought as to the reduction at the instance of the magistrates. After the processes had again fallen asleep, the commissioners wakened their action; but there was no evidence that this was done by the Magistrates. The whole case was then reported to the Court on informations, which were drawn on the assumption that both actions were before the Court.

On advising these informations, their Lordships, on the 24th of January 1778, pronounced this interlocutor:

" The lords find that the commissioners of the
" annexed estates have not produced a sufficient title
" to the whole fishings of the river Conon; but find
" that the magistrates and town council of Dingwall
" have produced a sufficient title to the fishings in the
" said river opposite to their property, from the march
" at Breakenord down to the sea; therefore not only
" assoilzie the said magistrates and council from the
" action brought against them by the said commissioners,
" but decern to the effect foresaid in the action at their
" instance against the said commissioners, and declare
" accordingly." This interlocutor became final, but was not extracted.

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On the 19th of April 1825 Mrs. Hay M'Kenzie and Captain Hugh Munro, her tenant in the fishings in the river Conon, raised an action of molestation, declarator, and damages against the appellants, and their joint tenant John Stevenson, setting forth that the appellants had taken upon themselves, not only to fish in the river Conon, "and encroach upon the rights of the pur-
" suers, as proprietrix and tacksman foresaid, by fishing
" with net and cobble in the said river Conon, and par-
" ticularly in that part called the new pool, opposite the
" lands of Breakenord, but have violently obstructed and
" prevented the pursuer, the said Hugh Munro, and
" the fishermen employed by him, from exercising their
" just right of fishing in the said river and pool; that
" the said John Stevenson has moreover lately been in
" the practice of making use of stationary nets stretched
" across the bed of the said river, and of having re-
" course to other novel and illegal modes of fishing for
" the purpose of obstructing salmon and other fish in
" their passage up the river, wherein the said Honour-
" able Mrs. Maria Hay M'Kenzie, and the said Hugh
" Munro, as her tacksman, have, as above mentioned,
" the sole and exclusive right of fishing." They therefore concluded to have it found that they "have the
" only just and legal right of fishing with net and coble,
" and in every other way and manner competent by
" law, in the river Conon;" and that the appellants
" have no right or title to fish for salmon in the said
" river Conon with net or coble, or in any other way;"
and also that they "have no right of fishing in the said
" river Conon;" and "have no right to fish or make
" use of stationary nets stretched across the bed of the
" said river, or any other illegal mode of fishing calcu-

" lated and intended to intercept and prevent the pass-
" age of the fish up the river at any time, or to employ
" persons to disturb the said fishings by such illegal
" and unwarrantable operations, or to obstruct the
" fishermen employed by the said pursuers, or either
" of them." They further concluded for damages, and for interdict to the above effect.

In defence, the appellants pleaded that the right of fishing, and salmon fishing in the Conon particularly, below the march between Balblair and Breakenord, belonged to the town of Dingwall, in virtue of the charter granted by James the Sixth in 1587, confirming two prior charters in 1497 and 1226; that the town, its tenants and feuars, had always exercised the right of fishing, and salmon fishing in the Conon; that the appellant Mrs. Ross had right thereto as a feuar from the town; that her right had been confirmed by the decree in 1725; and that of the town, as well as hers, by the decree pronounced in 1778; and therefore the subject matter of this action was res judicata.

To this it was answered, 1. That the judgment in 1725 went by default, and, being a decree in absence, could not be founded upon as decisive of the merits; and, 2. That the judgment in 1778 was incompetent, because the commissioners had no proper title to pursue, in respect that the Crown could only be represented by the officers of state; that it had been pronounced in a process which was asleep, and had not been conjoined with the other process; and at all events it limited the right of the magistrates to fish in those parts only of the river which were "opposite their property," whereas they insisted for a much more extensive right.

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After the record was closed * the respondents made a motion to the Lord Ordinary for an interdict to prohibit the appellants from fishing above the march between the lands of Balblair and Breakenord; whereupon the Lord Ordinary pronounced this interlocutor:—

"11th March 1828.—The Lord Ordinary having heard "counsel for the parties upon the whole cause, and in "particular upon the demand now made for an inter-"dict against the defenders to fish above the march "between the lands of Balblair and Breakenord, in "respect it is averred that the defenders have been "fishing above the said march, which, by their admis-"sions on the record, they are not entitled to do,—in "the meantime prohibits, interdicts, and discharges "the said defenders, or any of them, their tenants, "servants, fishers, or dependents, from fishing or killing "salmon in any part of the river Conon above the line "delineated on the plan in process as the march be-"tween Balblair and Breakenord; but, in respect the "defenders do not admit the said line is accurately "laid down in the plan, without prejudice to the par-"ties, to ascertain the exact march between Balblair "and Breakenord before the interdict is declared per-"petual."

Both parties reclaimed against this interlocutor; but neither having the record attached to their notes, the Court, (31st May 1828,) refused both notes, as being incompetent.†

The case then returned to the Lord Ordinary; and

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* See a question arising in preparing the record, 5 S. & D., 399. (new ed. 314.)

† 6 S. & D., 899; and see p. 1105, and 7 S. & D., 899, and 5 W. & S., 351, as to the question of breach of interdict.

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on advising pleadings as to the defence of res judicata, his Lordship, on the 12th of November 1828, pronounced this interlocutor: — "The Lord Ordinary "having considered the revised cases for the parties, "productions, and whole process, finds that the extracted decree in 1725, and the final judgment of "the Court in 1778, mentioned in the pleadings in "this case, form a res judicata between the parties in "the actions to which they relate, their representatives, "and those in their right; finds that the decree in "1725, though pronounced upon a circumduction for "not satisfying the production ordered by the Court, "cannot competently be opened up in this action; "finds that the final judgment in 1778 applies both to "the declarator at the instance of the commissioners "for managing the forfeited estates, and the Lord "Advocate, against the Magistrates of Dingwall, and "the counter declarator at the instance of the Magi-"strates of Dingwall against those commissioners, the "officers of state, and others; finds that the pursuers "in the present action are not now entitled to plead "that the declarator at the instance of the magistrates "was asleep at the time the judgment in 1778 was "pronounced, or that the two declarators had not been "conjoined, in respect that the evidence of wakening "and conjunction depends upon warrants which, after "the lapse of twenty years from the date of the judg-"ment, it is not necessary to produce; finds that the "words 'opposite to their property,' in the judgment "1778, are demónstrative, and not taxative; and there-"fore finds that the magistrates of Dingwall, and those "in their right, have a sufficient title to the fishings in "the river Conon from the march at Breakenord down

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" to the sea, and to that effect assoilzies the defenders " from the conclusions of this action, and decerns; but " in respect parties are not agreed as to the march " between the lands of Balblair and Breakenord, ap- " points the pursuers to put in a condescendence, " specifying what they aver to be the situation of the " march, and allows the defenders to answer the same, " and in the meantime continues the interdict: Farther, " in respect the pursuers allege that the defender " Stevenson has been fishing, and is continuing to fish, " in an illegal manner, appoints them to put in a con- " descendence of what they aver on this point, and " allows the defender to answer the same;—the conde- " scendence now ordered to be lodged within three " weeks, and the answers by the box-day in the " Christmas recess."

Both parties again reclaimed; the respondents praying the Court to alter the interlocutor, and decern in terms of the libel; and the appellants, to limit the interdict, and find them entitled to expenses. The Court, on the 20th of January 1829, refused both notes without saying any thing as to the matter of expenses.* When the case returned to the Lord Ordinary the appellants moved his Lordship to award to them the expenses which had been incurred prior to the date of his interlocutor of the 12th November 1828. But his Lordship having doubts as to whether he had power to do so, the appellants presented a note to the Court, praying for a remit to the Lord Ordinary to hear parties as to these expenses; but their Lordships, on the 10th of February 1829, refused the note as incompetent.*

* 7 S. & D., p. 383.

The case then came before Lord Newton (in the absence of Lord Corehouse); and after a good deal of intermediate procedure, his Lordship, on the 10th of July 1830, pronounced this interlocutor: — "Remits "the cause to the Jury Court, in order to ascertain the "point where the march betwixt the lands of Balblair "and Breakenord touches the river Conon."

The respondents reclaimed against this interlocutor; and the Court having required the parties to specify in a minute and answers their respective averments as to the situation of the march, their Lordships, on the 5th of March 1831, "in respect of what is contained "in this minute and answer, recal the Lord Ordinary's "interlocutor of 10th July 1830, and remit to his "Lordship to proceed accordingly."

Lord Newton, on the 11th of March 1831, pronounced this interlocutor: — "The Lord Ordinary "having, in terms of the remit by the Court of 5th "March current, considered the closed record and "whole process, and heard counsel for the parties "thereon, finds, that by the words 'the march at "'Breakenord,' as used in Lord Corehouse's interlo-"cutor of 12th November 1828, is meant, as shown by "the subsequent part of that interlocutor, the march "betwixt the lands of Balblair and Breakenord, and "that it is not now competent to inquire in what sense "these words were employed in the interlocutor in the "former process of 24th January 1778: Finds that as "the parties are now agreed as to the precise situation "of the march betwixt these lands, it is unnecessary to "inquire further into this matter; and that the line so "agreed upon forms, where it touches the river, the "western limit of the fishings belonging to the defen-

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" ders; but, in respect the march so ascertained does " not correspond with the line delineated in the old " plan of 1763 as the march betwixt Balblair and " Breakenord, recals the interdict imposed by the in- " terlocutor of 11th March 1828, and decerns: That " justice, however, may be done to the pursuers, in " case this interlocutor should be altered, ordains the " defenders to keep an account of the number of salmon " taken by them in the pools named Pool Oure and " Pool Breakenord, from this time till the final de- " termination of this point in the cause: Finds the " defenders entitled to the expenses incurred by them " subsequent to the interlocutor of the Court of " 20th January 1829; allows an account thereof to be " given in, and remits to the auditor to tax the same, " and to report; reserving consideration of the previous " expenses until the final issue of the cause."

" *Note.* — The Lord Ordinary, conceiving that any " ambiguity which there may be in the final interlo- " cutor of 12th November 1828 is removed by the " subsequent part of that interlocutor, and that the " meaning of Lord Corehouse, or of the Court, in " adhering, can admit of no doubt, holds himself pre- " cluded from considering what was the march intended " by the Court in their interlocutor of 24th January " 1778; but were it competent to him to entertain " this question, he is of opinion, on an attentive con- " sideration of the proof taken in the former process, " that the sense in which Lord Corehouse has under- " stood the interlocutor is the just and correct one. " As to expenses, the Lord Ordinary thinks the defen- " ders clearly entitled to those incurred in the inquiry " into the true situation of the march betwixt Balblair

" and Breakenord, as to which their averments have " turned out to be correct. He has reserved consider- " ation of the previous expenses, as involving a question " of competency, on which counsel were not prepared " to speak."

The respondents having reclaimed, the Court, on the 17th of June 1831, pronounced this interlocutor: — " Recall the interlocutor reclaimed against (except in " so far as it recalls the interdict), and find that it is " competent to inquire in what sense the words 'the " 'march at Breakenord' were used in the decree " 1778; for that purpose allow the parties to give in " Cases on the import of the evidence in process, so " far as concerns this point, and in particular on the " import of the proof led, the pleadings and other " proceedings in the cause on which the decree 1778 " proceeded." *

Cases having been prepared accordingly their Lordships, on the 16th of February 1832, pronounced this interlocutor:—" The Lords, considering it material to " ascertain the exact situation of the Fishers Lodge, " before answer, remit to James Jardine, whom failing, " Robert Stevenson, engineers, to prepare a plan of " the water of Conon and adjoining banks, from the " upper end of the island Baen to the sea, and to de- " lineate thereon the situation of the Fishers Lodge, in " reference to its real situation, and to the situation " as marked upon Sangster's plan, and also to delineate " such other objects as shall appear to him to be of " importance to the question at issue." Mr. Jardine having made a plan and report, the Court, on the

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* 9 S. & D., p. 761.

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6th July 1832, "remitted to Mr. Jardine to describe on "his plan a line corresponding as nearly as possible with "the black line described on Sangster's plan as the "fishings and the march at Breakenord." The case was put out for final advising on the 11th of July 1832, whereupon the appellants lodged a minute, stating that they were "informed that Mr. Jardine had actually laid "down a line on his plan, intersecting the river near "the top of Pool Oure, but that subsequently, in "consequence of some communication with their Lord-"ships in the robing room, another line had been laid "down in a totally different situation, without the "defenders having had any opportunity of knowing the "grounds on which this result has been arrived at;" and praying that Mr. Jardine should be ordained to lodge a report in terms of the remit, and that the appellants might be allowed to object to it if they saw cause. The Court ordered "this minute to be with-"drawn as incompetent, and as not containing an "accurate statement of the facts;" and at the same time they pronounced the following interlocutor:—

"The Lords having resumed consideration of this "reclaiming note, with the revised cases, and interlocu-"tor of this Court 17th June 1831, and plan and "report by James Jardine, civil engineer, dated the "9th day of March last, and proof on which the de-"cree 1778 proceeded, and heard the counsel for the "parties,—they of new recall the interlocutor of "Lord Newton, of 11th March 1831, and find that "the 'march at Breakenord,' used in the decree "1778, is the Fisher's Lodge on the south side of the "river Conon, or on Island More, and the letter P at "the bend eastward of the burn Ousie on the north

" side: And the said James Jardine having, by the " direction of the Court, drawn a red line from the " point denoting 'Ruins of Fisher's Lodge,' on the " plan in process made by him across the water of " Conon to the letter P aforesaid, they find and declare " the said red line to be the march, in respect to the " right of fishing salmon in said water, betwixt the " pursuers and defenders, and that the defenders have " no right of salmon fishing higher up than the said " line, and the pursuers no right below it; and the " Lord President and Adam Rolland, principal Clerk " of Session, have, with reference to this judgment, " certified the said line on Jardine's plan in process, by " putting their names along it, and decern: Find the " defenders liable in the pursuers expenses since the " date of the remit to the said James Jardine, and in " his charge for survey, plan, and report, and remit " the account thereof to the auditor of Court, to tax " and report: And farther, the Lords remit to Lord " Fullerton, in place of Lord Newton, deceased, to hear " parties on the account of the number of salmon taken " by the defenders beyond the line of march, as hereby " adjusted, referred to in the Lord Ordinary's inter- " locutor of 11th March 1831, and all objections " thereto, and to do therewith, and with any other " points in the cause not disposed of, as shall be " just."

The Magistrates of Dingwall and Mrs. Rose appealed against the interlocutor of the 11th of March 1828, in as far as it granted interdict; of that of the 31st of May 1828, refusing their reclaiming note as incompetent; the interlocutor of 12th November 1828, containing the interdict, and that of the 20th adhering thereto;

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the interlocutor of the 10th of February 1829, refusing their note relative to expenses; also certain subsequent interlocutors relating to matters of form; that of the 17th of June 1831, recalling the remit to the Jury Court; and the interlocutors of the Court dated 16th February and 6th and 11th July 1832. On the other hand, the respondents appealed against the interlocutor of the 11th of March 1828, in regard to a statement of certain facts contained in it; the interlocutor of the 31st of May 1828, refusing their reclaiming note as incompetent; the interlocutor of the 12th of November 1828, sustaining the plea of res judicata; and the interlocutor of 20th January 1829, adhering thereto.*

Mrs. Mackenzie and Mr. Munro, Appellants. — *Res Judicata.*—There are two decrees founded on as separately constituting a res judicata. The first is that of 1725, but it was not of the proper nature of a decree. It was not pronounced causâ cognitâ, and though the defenders appeared, yet they afterwards passed from their appearance before any proper litis-contestation. The interlocutor was pronounced in absence, and was a mere certification for not implementing an order of Court, or at the utmost was only a sentence of circumduction for not producing documents. It was an echo of the conclusions of the summons, which, in the absence of the defenders, the Court was bound implicitly to adopt. But such a decree does not constitute res judicata.† Neither can the other decree of 1778 support a plea of res judicata. There were two actions,

* It is unnecessary to go into a detail as to all these points, and therefore this report is confined to the questions of res judicata and the boundary.

† Malcolm v. Henderson, 27th Nov. 1807, A. B., 19th May 1815. Fac. Coll.

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one of declarator by the Commissioners against the Magistrates of Dingwall, and a counter action of reduction and declarator by the magistrates against the commissioners. These processes were never conjoined, and the one at the instance of the magistrates fell asleep. Notwithstanding this a decree was pronounced in their favour, on the erroneous supposition that their action was before the Court; and besides that decree was never extracted. It has been said that this objection resolves into an objection to the grounds and warrants, and that as twenty years have elapsed it is not competent to make any such objection; but the doctrine as to the effect of lapse of time on grounds and warrants applies only where the decree has been extracted. Independent of this, the decree is merely declaratory of the import of the title then before the Court, and it therefore cannot affect any other title, or be carried beyond the specific title to which alone it refers. But other and more important titles have been produced in this action. The plea of competent and omitted cannot exclude the respondents from founding on these titles, because such a plea does not apply to pursuers.

Answered.—The proceedings which terminated in the decrees of 1725 and 1778 are final, and have not been attempted to be opened up by reduction or otherwise. They must therefore receive full effect in the present question; for whether in absence or in foro they must necessarily stand until overturned, and it is only after this has been done that it is competent to resume the merits of the question.*

It is not true that the decree of 1725 was in absence.

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* Maule v. Maule, 31st Jan. 1827, 5 S. & D., 256 (new ed. 238.); Erskine, b. iv. tit. 3. sec. 3.; Erskine, b. iv. tit. 1. sec. 22.

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Both parties appeared, and it was maintained by the defenders that the pursuers had not a sufficient title, and that, even if they had, the defenders offered to prove a preferable title. The Court sustained the pursuers title, but allowed the defenders till 1st June to produce a preferable title. An act was extracted, but no such title was produced; and on the 20th June the term was circumduced, and decree of declarator pronounced. That decree has stood unchallenged for upwards of a century, and its validity was recognized in the subsequent proceedings. The decree in 1778 was the result of a long and anxious litigation. There were mutual declarators, in which each party claimed right to certain fishings. Although the interlocutor of conjunction has disappeared, it is stated in the pleadings that in point of fact the actions were conjoined, and as it is admitted that the action, at the instance of the commissioners, was not asleep, the other process must have been in the same position when the decree was pronounced. But it is incompetent to aver, after the lapse of so many years, either that the processes were asleep or partly asleep; and the presumption is, that as one interlocutor disposed of both they had been conjoined, and were not asleep. Besides, no competent process has been brought for setting the decree aside.

Magistrates of Dingwall and Mrs. Ross, Appellants. —*Boundary.*—On this matter the statements of the parties were of a very special nature, and incapable of being made intelligible without reference to a plan. It was however maintained by the appellants, that the line of march had been finally fixed by the interlocutors of the 12th of November 1828, and 20th of January 1829; that the procedure in regard to the report of Mr. Jardine

was irregular and incompetent; and that the line drawn by direction of the Judges, and fixed by the interlocutor of the 11th July 1832, was inconsistent with that fixed by the interlocutor of 20th January 1829, and irreconcileable with the true meaning of the decree of 1778, and did not correspond with the line laid down in Sangster's plan.

Answered.—The interlocutor of the 11th July 1832 is correct; the Judges were as much entitled to direct Mr. Jardine to draw the proper line of the march on the plan as they were to direct the clerk of Court to write out their judgment.

LORD DENMAN.—My Lords, this is an action of molestation, declarator, and damages, relating to the right of fishing in the river Conon. The respondents, who were the pursuers below, complained against the magistrates of Dingwall, for infringement upon their right to the fisheries in that river; and the magistrates have defended themselves on the ground that they possess a sole right in the water called the Stavock, which they state is part of the same river, and that they have established their right to fish in those parts where the pursuers say they have no right. The point in dispute was about four hundred yards in length, in the river Conon, including a very valuable salmon fishery. It appeared very clearly, from ancient documents, that each of those parties had established his right to some fishery in each of those waters; and I think it appeared also pretty clear that the right in the water of Stavock must be taken to be a right of fishery in the same river Conon; so that the only question was where the boundary was to be fixed, and whether the pursuers or the defenders

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were entitled to take in that part of the water with respect to which the question arose? The rights and charters upon which they relied certainly did not appear to throw any light upon this subject. There was no such description as enabled either party to say, here is my paper, with the description of my right, and by looking at that you will see at once where I have a right to come; and therefore it was absolutely necessary to inquire into the fact of usage and enjoyment, and to see how far each party had in truth exercised the right claimed. It seems that in the year 1763 another action had been commenced between the Commissioners of Forfeited Estates, including Lord Cromarty's property, (he being the author of the pursuers, and having enjoyed the right of fishing in the Conon, as to which they complain of disturbance,) and the present defenders, the magistrates of Dingwall, for the very same acts of molestation which are now complained of. The magistrates of Dingwall therefore insisted that the decision of the question upon that occasion, which assoilzied them to a certain extent, was a res judicata, which fixed the rights of the parties, and prevented the pursuers from making any complaint with regard to what was done on the present occasion. The first question was whether that could be taken as a res judicata; whether the Commissioners of the Forfeited Estates did so far represent the property as that any act of theirs could bind those who now possess it? But in the course of the argument it turned out that there was no substantial reason to doubt that they were the proper parties, and that objection therefore was done away. In that action, then, the right of the defenders was established by the Court up to a certain point, which the Court described in their judgment by a red line;

that is, up to the march of Breakenord, opposite to their own property. It was almost impossible for any words to have been used more fruitful of future litigation. There was a judicata, but as to the res, it was extremely difficult to understand what the thing was that the Court decided upon, because every part of that description is open to a great deal of doubt. It is extremely unfortunate that the Court in the year 1778, when that judgment was pronounced, did not do what the present Court of Session did in deciding this case, namely, have a plan accurately drawn, and then draw their own line, and show where the rights of the parties began and ended, because that would have made an entire end of all those questions which have arisen since; but neither did they do that, nor did they describe it by metes and bounds, or by fixed objects, so as to make it at all satisfactory as a description of the boundary. It is quite clear, that as the judgment was that the right was up to a certain point, it must be matter of evidence to ascertain what that point was; and this, in truth, ultimately became the whole question which was argued at your Lordships bar. In the course of the proceedings in the present cause Lord Corehouse directed a condescendence as to where the march began between Breakenord and Balblair? That was not following the terms of the judgment, but it was rather taking for granted that the judgment meant to describe that the boundary, that is, the march of Breakenord, was a march between Breakenord and Balblair. The respondents admitted that the line between Breakenord and Balblair was the particular line of which we have heard so much; but then they said that the march of Breakenord described in the judgment could not mean that parti-

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cular line, but another march—a march of fishings; and that that was a line derived from a certain point called the Fishers' Lodge across the river to a certain stream which is now called by the name of the Burn of Ousie. The question therefore as to where the line was drawn changed its form: the appellants said that the boundary was a march between Breakenord and Balblair; the respondents said no; the march of the fishings is a line drawn from the Fishers' Lodge across the river to the opposite point. The Court of Session had therefore that question to try, and after a great deal of investigation they have adopted the latter as the true line; and the question for your Lordships is, whether they have done wrong in coming to that decision? After having given the best attention in my power to the case, it appears to me not only that there is no ground for saying that the Court were wrong, but that there is every reason to believe that they were precisely right, and have hit the exact boundary defining the rights of the parties. There are two or three circumstances which make that appear a very probable conclusion; first of all, the fact of the fishers' lodges being erected in that spot, is a very strong proof that that was the extent to which the parties had a right to come. Why those lodges should be erected at a point which would appear to make a concession of any part of the territory one cannot very easily see. Then the evidence of a witness was taken, who was called by the defenders in the suit in the year 1778, a witness of the most unexceptionable kind — a witness of whom the defenders could by no means complain — a witness who had actually enjoyed their right of fishery, and had taken it under them, so that what he described as the right he enjoyed could hardly fail to be the very

right. Now, he describes it in a manner precisely correspondent to the red line which has been drawn by the Court of Session on the present occasion; that is, beginning at the fishers' lodges, and going across to the Burn of Ousie. Then, there is another fact (and I merely select these as striking facts), namely, that the very boundary appears to have been agreed upon; that it had been actually placed there; that the fishers acting under the corporation of Dingwall and also the fishers acting under the Earl of Cromarty's family in the higher part of the river had met and agreed upon the boundary which was to define their right. Now, these are certainly facts which seem to me to be of a striking description, and appear fully to warrant and show there was evidence fully sufficient to sustain the finding of the Court of Session. In the course of the proceeding there was another document referred to which was the subject of very great discussion: it was a plan made under the direction of the pursuers in the former case; a plan by a Mr. Sangster, which exhibited a line called the line of march between Balblair and Breakenord; and it seems to me that the strongest arguments by far that have been urged on the part of the appellants in this case are founded on that document; because, certainly, it is extremely difficult to conceive how any document of that kind at that time should happen to contain the march between Breakenord and Balblair unless it was for the purpose of defining what the real boundary was. That certainly was the boundary claimed by the defenders in the course of that suit, and it is very frequently stated by their witnesses as that on which they relied as the point at which they had fished. But, at the same time, the reason for drawing that line and the authority

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under which it was drawn are points on which the House appears to me to be left in entire ignorance; and there is a great deal to be assumed before it is possible to apply it as evidence in the present case. Whether it was done by Mr. Sangster himself for his own amusement, or by the appellants, or by the respondents, or by the Court, it appears to be quite inapplicable to the case until it is distinctly proved for what purpose it was done. No reference is made to it in the judgment; no statement is made in the plan of the purpose for which it was drawn; and it appears to be left in as much obscurity as it is possible to conceive. It is not at all impossible that, with some such view as the Court of Session lately directed Mr. Jardine to draw a line coincident with their view, they may have desired Mr. Sangster to draw this line merely for the purpose of seeing whether it would correspond with what they conceived to be the real boundary, and that their inspection may have convinced them that it could not be so. If that had been their object, it would perhaps have been more natural for the Court of Session to negative that line between Breakenord and Balblair; but still it seems to leave it in a degree of doubt, which renders that document of very little value in the case when it comes to be considered. But there is one fact regarding that document which makes it almost impossible for the appellants to avail themselves of it when the whole is taken into account; because, though the line passes as the march between Balblair and Breakenord, it plainly leads to the other side of two valuable pools which are now in dispute, and places them to the west, that is, at the appellants' side of the boundary line. Even supposing that to be the line, in all respects it cannot be

correct, for it is not reconcilable or consistent in all particulars; and therefore it appears to me to be very difficult to make any use of it, so as to decide the matter between the parties. There was one other circumstance alluded to, with reference to this description, and that is, that the respondents, (who are appellants in the cross-appeal,) wish to make the description given by the Court of Session in some degree qualified, by inserting the words which appear in the former judgment, namely, the words "opposite "to their own property." It does not appear to me that those words necessarily mean any limitation of the right of fishing, but that that may be very fairly taken as one of the circumstances of description which in some degree tends to show the place that was pointed out, inasmuch as Breakenord was the property of the corporation; that they may have a right to come up to that point, and there to fish opposite to their own property. That probably is the sense in which the Court of Session in the year 1778 used those words; but it seems to me that it does not add much to the certainty of the description. There is only one other circumstance to which I need allude, which is a supposed irregularity in the Court of Session in drawing this boundary, as if they had proceeded without proper openness and publicity, and without the knowledge of the parties. But it appears to me that that which savoured in some degree of imputation at one period of the argument is most satisfactorily explained, and that nothing of an improper kind took place upon that occasion; but that inasmuch as the Judges retired into another room with the surveyor, and directed him to draw the plan, which they afterwards produced as

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explaining their own judgment, they only did that which is constantly done in every court of justice, namely, directing some one to hold the pen for them and draw their decree; and they adopted that decree afterwards, and pronounced what they had required him to draw as the line which they were disposed to pronounce as the real boundary line determined by their judgment. It appears to me, therefore, that in all respects the Court of Session have done what is right upon this subject, and my humble motion to your Lordships is that this judgment should be affirmed; and I apprehend, that as these matters have all arisen from the carelessness of the pursuers (the defenders in the former action), and as very great doubts have arisen in consequence of the ignorance of the parties as to the real extent of their right, that ought to be done without any costs.

The House of Lords ordered and adjudged, That the said original and cross appeals be and are hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON, Solicitors.