

honourably engaged in a situation of great trust, and also of great importance, both to the employers of such persons and to the public. Still she was in a situation in which it was necessary for her to earn her livelihood; and if this marriage had been accomplished, it would have placed her in a very different position in that respect, in so far as she was to receive a settlement which would have made her at all events an independent person, and that whether she survived her husband or not. He could not say that this was a matter to be thrown out of view, because there was a difference in a marriage of this sort and one that would reduce the person to poverty. There was, further, this peculiarity, that the defender informed the pursuer at a comparatively early period that he wished to be off. This, too, was not a matter that the jury could overlook. But then, on the other hand, it was for them to bear in mind that although the communication proposing to be off, and telling her in vague terms that he had felt no love towards her, came comparatively early, it still came after the arrangements had been made known to the lady's friends, and after the injury had been done. The defender did not say, "I will marry you immediately if you will marry me before the register without waiting for a contract, but I won't wait for a contract and marry you then." He made suggestions, but he did not say he would do nothing else. He took away the draft contract on the understanding that he was to get it adjusted, and that the marriage was to go on on the original footing. Passing on, it was impossible to shut out from their view that the engagement took place after the very shortest possible period. That had a great deal to do, on the one hand, with the question of injured affections, which could not be supposed to exist to such a degree under such circumstances, as in a case where such an engagement comes on more gradually. Still there was damage, because there was that injury to the feelings which must necessarily take place by an engagement when broken, short or long. There was great disparity of condition between these two persons, though there was no disparity of age. His observation of human life had led him to the conclusion that matches with great disparity of condition were very apt to turn out not so happily as when the parties were induced to marry by their natural feelings; and a woman marrying into a position above her own is often unfortunately preventing that happiness and independence, and sometimes respect, that she might have acquired had she married into her own humbler condition of life. The prudence of the arrangement was a question for the jury, as far as they had evidence about it. It was an exceedingly imprudent arrangement on the part of the man, and not one likely to be productive of much happiness or comfort. This was no excuse for what he did—for first making the engagement, and then breaking it; but it was one of the many things for a jury to take into consideration. There was also the fact of the second marriage taking place so shortly after this engagement. He did not think this was a case in which the jury could give anything less than most substantial damages. There was a wrong done—a substantial wrong; but, on the other hand, there were the circumstances both of the way in which the thing came about, and the possible crossing of happiness which such a marriage might have had. His Lordship concluded by informing the jury that a unanimous verdict was necessary.

After an absence of twenty-five minutes, the

jury returned a unanimous verdict for the pursuer—damages, £1200.

Agents for Pursuer—J. & A. Peddie, W.S., instructed by Mr W. Edwards-Wood, of Tamworth Castle and Birmingham, Solicitor.

Agents for Defenders—M'Kenzie & Kermack, W.S.

Friday, January 31.

FIRST DIVISION.

EARL OF ZETLAND *v.* GLOVER INCORPORATION OF PERTH.

Salmon-Fishing—Channel of River—Medium Filum—Bank formed in channel of river by accumulation of mud. A bank formed in a river by accumulation of sand and mud was gradually, within 40 years, carried down the channel by the action of the river, until it lay between the properties of B. and S. At high water it was covered, but at low water it was visible, part lying on each side of the *medium filum* of the stream. *Held*, that the bank, not being a permanent formation of the nature of an island, but being truly a portion of the bed of the river, its existence did not affect the rights of the owners of the properties on either side of the channel to fish for salmon from their respective banks *ad medium filum*.

The Earl of Zetland, proprietor of the lands of Balmbreich, in the county of Fife, and lying on the south side of the estuary of the Tay, brought this action against the Glover Incorporation of Perth, proprietors of the estate of Seaside, in the county of Perth, and lying on the north side of the estuary, opposite to Balmbreich, concluding to have it found "that the pursuer has good and undoubted right to fish for salmon and other fish in the river Tay *ex adverso* of those portions of the lands and barony of Ballinbreich or Balmbreich belonging to him, and known as the estate of Balmbreich, and that as far as the centre of the stream of the said river, and including the right to fish as aforesaid from and upon the bank called the Balmbreich Bank, or 'Eppies Taes' Bank, lying opposite to the pursuer's said estate: And it ought and should be found and declared that the defenders and their successors in the lands and estate of Seaside have no right or title to fish for salmon or other fish to the south of the centre of the stream of the said river, and in particular from or upon any part of the said bank: And farther the defenders ought and should be prohibited and interdicted from molesting or interfering with the pursuer in the exercise of his said rights, and particularly from fishing by themselves, their tenants or others, from or upon any part of the said bank."

The estuary, between the properties of Balmbreich and Seaside, is about a mile and a half or a mile and three quarters broad at high water. The pursuer alleged that the stream of the river, on reaching the said bank, divided into two channels, one flowing on the north, and the other on the south side of the bank; the bank was about a mile and a half from the defender's lands, and within a quarter of a mile from the pursuer's; nearly the whole body of the water ran in the channel north of the bank; the bank was situated entirely to the south of the centre of the river, and the pursuer had the exclusive right to fish for salmon thereupon.

The defenders, on the other hand, alleged that the bank had gradually, within the last 60 years, by the action of the river, been moved downwards, until it had come to be in part *ex adverso* of the lands of Balmbreich; that the pursuer and his predecessors had never fished for salmon from the said bank; that the bank had always been fished by the proprietors of fishings on the north side of the river, and that, for 40 years and upwards, it had been fished partly by the proprietors of Errol, the property adjoining Seaside on the west, and *ex adverso* of which the bank had been situated to a great extent for these years, and partly by the defenders and their predecessors.

A proof was taken, and thereafter the Lord Ordinary (JERVISWOODE) pronounced an interlocutor, in which he found, "*primo*, as matter of fact, 1st, That the pursuer and his predecessors and authors have, under and in virtue of the titles founded on in the record, for forty years and upwards, exercised a right of fishing for salmon in the river of Tay *ex adverso* of the lands and estate of Balmbreich and others belonging to them in property on the south side of the said river, and within a portion of the same where the sea tide ebbs and flows, by net and coble and otherwise, to the *medium filum* thereof as the same exists at low water; 2d, That the defenders and their authors have in like manner for forty years and upwards, under and in virtue of the titles founded on by them, exercised a right of fishing for salmon *ex adverso* of the lands of Seaside and others belonging to them in property, and which are situated on the north side of the said river of Tay, and within the influence of the tides, and lying opposite to the foresaid lands and estate, the property of the pursuer, and that by net and coble and otherwise, to the *medium filum* thereof as at low water; 3d, In particular, that within the channel of the said river there has existed for a lengthened period of time, and exceeding forty years, a bank generally known or distinguished by the name of 'Eppie's Taes' Bank, formed chiefly of sand and mud, which is covered by the flow of the tide at high water, and which at low water shows itself as situated within the bed of the fresh water stream; 4th, That the said bank is not and has not been altogether stationary, but has, under the influence and action upon it of the fresh water floods and of the tides in the river, changed its form and position to some extent from time to time, and more particularly of late, and since the year 1838, has been carried further down the stream and more near to the southern bank and to the pursuer's lands on that side of the river; 5th, That the said bank at present lies to some extent to the southern or pursuer's side of the *medium filum* of the river as at low water, and partly on the northern or defenders' side thereof; and 6th, That for forty years, and for time immemorial prior to the date of the present process, the defenders or those in their right have been in use to fish for salmon by net and coble from the said bank, when not covered by the tide, both to the northward and southward thereof, and now maintain their right in this process so to do.—Finds *secundo* as matter of law, in respect that the said bank known as 'Eppie's Taes' Bank is not altogether stationary, or truly in the sense of the law of the character of an island situated within the bed of the river, but is truly a portion of the bed of the river, liable to be affected and moved from time to time by the action of fresh water floods or of the sea tide, that the same cannot be regarded or dealt with as an

island capable of permanent appropriation by the proprietor or proprietors of the shore on either side of the river, but must be dealt with as being truly within the bed of the river, the fishing of or from which is to be divided so as to afford to the respective proprietors on either side thereof the possession of the fishing to the *medium filum* of the river as the same exists at low water; and, with reference to the foregoing findings, Finds and declares that the pursuer has good and undoubted right to fish for salmon and other fish in the river Tay *ex adverso* of those portions of the lands and barony of Ballinbreich or Balmbreich belonging to him and known as the estate of Balmbreich, and that as far as the centre of the stream of the said river; and including the right to fish as aforesaid from, and upon the bank called the Balmbreich Bank or 'Eppie's Taes' Bank lying opposite the pursuer's said estate, in so far as the same is situated to the southward of the centre of the said river: Finds and declares that the defenders and their successors in the lands and estate of Seaside have no right or title to fish to the south of the centre of the stream of the said river, and, in particular, from or upon any part of the said bank, in so far as the same is situated to the southward of the centre of the said river; and interdicts and prohibits the defenders from molesting or interfering with the pursuer in the exercise of his said rights, and particularly from fishing by themselves, their tenants, or others, from or upon any part of the said bank, in so far as the same is situated to the southward of the centre of said river, and decerns: Finds the defenders liable to the pursuer in the expenses of process, but subject to modification," &c.

"*Note*.—The present case, like others of the same class, involves considerations of some nicety as respects the application of the known principles which regulate the rights of proprietors of salmon-fishings, in a tidal river such as the Tay, to the particular characteristics affecting the bed of the river, at the point in relation to which this dispute between the pursuer and defenders has arisen.

The state of the facts which have led to the present litigation is remarkable and peculiar in so far as it has relation to the right of fishing from a bank in the river Tay, which, although in some respects identified and spoken of in evidence as a known subject, is more truly of the character of a moveable portion of the bed of the stream, and which has in fact gradually changed its position and form, and now exists farther down the stream, and is more near to the pursuer's side of the stream, than at any former period.

"Each party now maintains an exclusive right to the salmon-fishing from this bank,—the pursuer founding his claim on the allegation that the bank is now situated entirely to the south of the true *medium filum* of the river, and the defenders, on the other hand, relying mainly on the possession hitherto had by them of the subject.

"The Lord Ordinary has been unable to follow either of these extreme views. It has appeared to him, on consideration of the whole evidence, that the river must, at the locality in dispute, be taken as having but one bed, and that the bank in dispute is merely a portion of the *solum* of that bed which is left uncovered, as it at present exists, by the tide at low water, and which is liable to be moved, and which has in fact been moved, and increased or lessened, by the action of the stream and tides from time to time.

"In this state of the facts the Lord Ordinary

does not think that the bank can be dealt with as if it were an island in the bed of the stream, capable of permanent occupation by either party, or as now truly a part of the southern bank or shore, as maintained for the pursuer, but that it must be regarded truly as a temporary obstruction in that bed, and that in consequence the rights of the pursuer and defenders must be regulated in respect to the mode of fishing from it, so as most nearly to preserve to them their common law right to fish respectively to the *medium filum* of the stream.

"How this is to be done it is scarcely for the Lord Ordinary at present to anticipate. In forming his present opinion the Lord Ordinary has been guided by the principles which, as it appears to him, were given effect to by the House of Lords in the leading case, relating to nearly the same locality, of *Lord Gray v. Magistrates of Perth*, 30th March 1757, House of Lords, 1 Craige & Stewart, p. 645; and very recently by the Lord Ordinary and by the First Division of the Court in the case of *Wedderburn v. Paterson*, 22d March 1864, 2 Macph., p. 902."

The defenders reclaimed.

The pursuer also reclaimed, and asked the Court to recall the Lord Ordinary's interlocutor, "(1) in so far as it finds that the defenders and their authors have for forty years and upwards, under and in virtue of the titles founded on by them, exercised a right of fishing for salmon *ex adverso* of the lands of Seaside and others belonging to them and situated on the north side of the river Tay; (2) in so far as it finds that the bank called 'Eppie's Taes' Bank lies partly on the northern or defenders' side of the *medium filum* of the said river as at low water; (3) in so far as it finds that for forty years and for time immemorial prior to the date of the present process, the defenders, or those in their right, have been in use to fish for salmon by net and coble from the said bank; and (4) in so far as it only finds the defenders liable in expenses subject to modification."

LORD ADVOCATE (GORDON) and FRASER for Earl of Zetland.

SOLICITOR-GENERAL (MILLAR), JAMIESON, and GLOAG, for Glover Incorporation.

LORD CURRIEHILL—The pursuer of this action is owner of the lands and barony of Balmbreich, lying on the south shore of the estuary of the Tay, where that river is navigable; and he claims right to the salmon-fishing in the river *ex adverso* of his lands *ad medium filum*; and he produces, as his title, certain deeds which contain expressions well known in law, which, with the possession that has followed, establish a right to salmon-fishing generally. He is in the position of having a title and some salmon-fishings, and he claims in virtue thereof a right to fish *ad medium filum*. The defenders are owners of the lands on the north shore of the estuary opposite part of Balmbreich, and they also claim a right to salmon-fishings in the river *ex adverso* of the lands of Balmbreich, from the north shore *ad medium filum*. They also have produced a title which conveys to them a right of salmon-fishing, which has been followed by possession; I don't at present say what that possession has been; and the question has been raised whether that title is sufficient, in respect it does not proceed from the Crown, but was granted by a subject-superior. On the authority of the case of *Sinclair*, I am of opinion that that is to be held sufficient, so that both parties are in the position of having a

sufficient title to salmon-fishing. The question which has arisen is as to the respective areas in which the parties may exercise that right.

The river Tay, so far as intervening between these properties, is of considerable breadth even at low water, and at high water the breadth ranges from a mile to two miles in extent. At a former period there was no impediment in the *alveus* of the river to prevent the ordinary rules of law from having full effect as to the areas in which parties having rights on opposite shores might fish. Had this question arisen then, there would have been no doubt that each was entitled to fish *ad medium filum*. Not only were they entitled to fish to the full extent of the net, but, on the bermyone boat principle, each might fish *ad medium filum*. But, during a period varying from twenty to thirty years,—as the Lord Ordinary says, from 1838, and that may be taken as the *punctum temporis*,—a natural operation has been going on in the channel of the river. A bank has been formed by natural causes, consisting of sand and mud, in the channel of the river. Both parties seem to think that this bank has altered the areas within which they are entitled to exercise their rights. Accordingly, the pursuer, the proprietor of Balmbreich on the south side of the river, instituted this action to have that question settled, and the conclusions of this action are stated very generally. On reading the summons and the statement of facts for the pursuer, and also the statement of facts for the defenders, I was at some loss to understand within what areas each claimed a right. But, in answer to inquiries, we got distinct answers from both parties. The pursuer, Lord Zetland, stated, in answer to my question, that he claimed a right to fish *ad medium filum*. But the question is, What is the *medium filum*? He appears to have contended before the Lord Ordinary that it was on the north side of the bank, the effect being to throw the *medium filum* considerably farther north than it had originally been. The defenders, on the other hand, stated that they claimed three stretches on the river, one being 150 yards from the north shore, another 150 yards from the north side of the bank, and the third 150 yards from the south side of the bank towards the south shore. That is quite distinct and explicit, and both parties found their claim on the theory that the bank has been becoming part of their respective properties. But whatever be the theory, the fact of their claim is as I have stated. Now, in order to settle these questions, this action has been raised by Lord Zetland, and the Lord Ordinary has pronounced the judgment which is now before us. The question is whether we shall adhere or alter; and if we alter, in whose favour we shall alter.

In order to determine these questions, the way I look at the case is this. I consider how matters stood had the question arisen before 1838, *i.e.*, before there was any bank intervening between the two properties, and when the channel was quite free; and then the effect of this bank on the rights of parties will have to be considered. As I have already stated, if this question had occurred when no bank was interposed, each party would have been entitled to an area for fishing extending from his own shore *ad medium filum*. If that was the case, has the area within which each may exercise his right been changed by this natural change on the river?

To form a clear opinion on that point, we have to ascertain the history of the formation of that

bank, and its true character. It began thirty years ago. Prior to that date there had been a bank formed in the same manner higher up, opposite to Errol, but it had not then come down *ex adverso* of the lands of Seaside. This bank, too, was not only higher up the river, but was much nearer the north shore. It was a shifting bank, and shifted from one side to another by gradually descending the river. A considerable portion has now come to be interposed between Seaside and Balmbreich. The whole of it has shifted very much farther south than it was originally, so that from a line on the plan before us it seems, with the exception of a very little portion at the eastern end, to be altogether on the south side of the *alveus*. That is the history of the bank. What is its character? It is not an island. It is not a portion of land separated from an estate on either side, which is private property. It is not an island fit for tillage or pasture. It is not the property of the Crown, otherwise than as being part of the *alveus* of a navigable river. It is a mere accumulation of natural materials in the *alveus* of the river collected at a particular spot, and it is so formed that at ebb tide and for some time before, a part appears above the water; but at high water it does not appear at all. Small and shallow boats can then sail over it, and there is no appearance of any island. That being the history and character of this bank, my opinion is, that it remains part of the *alveus* of the river, and does not change its character.

That being the case, how does this formation affect the legal rights of the parties to salmon fishings, as these existed before this accumulation of mud and sand came to this part of the *alveus*? In my opinion it does not affect them at all. It leaves these rights exactly as they were. Practically it may prevent the owner of the fishings on the south side from exercising his rights as extensively as before, by interfering with him in drawing his nets when it is above water. That may be an advantage to him, or it may be a disadvantage; but whether or no it still remains part of the area within which his right extends. This principle was recognised in the case of *Wedderburn*, 22 March 1864, 2 Macph. 902. If this be so, that leaves the area within which each may exercise his right just as before the bank was formed. That, as I read the Lord Ordinary's interlocutor, is what he has found. He finds (reads findings in law); I think the conclusion to which he has come, and the grounds on which he rests his conclusion, are well founded.

I have only one other remark to make on the argument of the defenders, and that is, that they have been in possession of the right of fishing within this part of the *alveus* on the south side. If that possession had existed for forty years without interruption, I do not say what effect that might have had. But there was no possession until after the bank was formed, and that has taken place within forty years, and therefore there is no prescriptive possession. The possession of the defenders is of no relevancy in this case. I am for adhering to the interlocutor of the Lord Ordinary, except as regards his sixth finding in fact, as to possession for forty years.

LORD DEAS.—I am entirely of the same opinion. Although the one party has salmon-fishings, and the other has fishings only, it seems to me that both are *in pari casu*. The title of the one is derived from the Crown, and the title of the other is derived from a subject-superior, but in consequence of

the decision in the case of *Sinclair*, that makes no difference. This is a competition between these two parties, and what we do here does not affect the Crown. As between these parties, each has a right to fish from his own shore. If the channel were clear, the result would be that each might fish as far as he could from his own shore *ad medium filum*. But then we have this bank coming down the channel within the last forty years. I don't understand either party to claim the property of the bank, although it was not easy to see that in the argument. The result of their claims is as the Lord Ordinary has stated. The Lord Ordinary has found that the channel of the river is not altered by this bank, while Lord Zetland claims that the north channel is now the only channel. If we did not adopt the Lord Ordinary's view, that would, I think, be the only other view we could adopt. But I take the same view as the Lord Ordinary. Any decision we pronounce is referable only to the circumstances of the case as they are at present. We cannot determine the future rights of the parties if the state of the river should change, but only what are their rights so long as the river is in substantially the same state, and the channel remains unchanged.

LORD ARMILLAN concurred.

The LORD PRESIDENT concurred.
Agents for Pursuer—H. G. & S. Dickson, W.S.
Agent for Defenders—Thomas Ranken, S.S.C.

Friday, January 31.

FIRST DIVISION.

CARSON, WARREN, & CO., v. COUSTON,
THOMSON & CO.

Sale—Experimental Contract. Circumstances in which held that a firm who manufactured a quantity of bottles on a new design, to suit the taste of the purchaser, were not responsible for loss occasioned to the purchaser by a large number of the bottles breaking after being filled, the firm not having guaranteed the strength of the bottles, and the purchaser being to blame in not testing their strength.

In April 1865 the defenders, who are wine and spirit merchants in Leith, ordered a quantity of bottles from the pursuers, bottle manufacturers in Port-Dundas, Glasgow. The bottles were to be hexagonal. A number of such bottles was furnished to the defenders. In an action by the sellers for the price of the bottles and of the mould which they had made for the bottles, the defenders alleged that they had, in giving their order, suggested a preference for hexagonal bottles if the pursuers thought the strength would not be materially affected or the packing be made more hazardous; that the pursuers had replied that the hexagonal shape would be nearly as strong as the round; that they accordingly ordered twenty-five gross of such bottles, the pursuers knowing that these were for export trade and required to be strong; that when they began to use the bottles furnished on this order a large number burst, whereupon they rejected the bottles and offered to return them. The defenders farther alleged that the pursuers were in fault in not informing them, until after the rejection of the bottles, that there was a defect in the mould; and they acted wrongfully in manufactur-