quired allegation, inference, and qualification characterising it, in order to rear it up to a criminal offence at all. Here, although there was a great deal in what was said for the suspender, if they were dealing with the question of relevancy, I do not think it can be said there is nothing disclosed in the face of this charge which would give the magistrates jurisdiction to try the offence; and that being my opinion, I hold the suspension to be incompetent, as the statute has very clearly provided a tribunal for trial of such an offence, and I have no doubt that when the tribunal came to try the case those matters which were stated not to give them jurisdiction would be fully and carefully considered. I am therefore for refusing the suspension.

The other Judges concurred.

Suspension refused, with expenses.

Agents for Suspender—Muir & Fleming, S.S.C.

Agents for Respondent—Campbell & Smith, S.S.C.

COURT OF SESSION.

Thursday, June 29.

FIRST DIVISION.

MACBRAIRE *v.* MATHER AND YOUNG.

Property—Salmon-Fishing—Public River—Medium filum—"*Fording.*" *Held* that the proprietor of a salmon-fishing on the English side of the Tweed is not entitled—although the Tweed at that point is a public river—to station a man in a boat, or on a "ladder" in the water, on the Scotch side of mid-channel, for the purpose of watching the ascent of the salmon, and signalling their approach to the fishermen on the English side of the river—such practice being an encroachment on the right of salmon-fishing enjoyed by the Scotch proprietor.

This was a note of suspension and interdict presented by James Macbraire, Esq. of Broadmeadows, in the county of Berwick, against Charles T. N. Mather, Esq. of Longridge, in the county of Northumberland, and George Young, fishmonger, Berwick-on-Tweed. Mr Macbraire and Mr Mather are proprietors of salmon-fishings opposite one another respectively on the Scotch and English side of the Tweed. Mr Young is the lessee of Mr Mather's fisheries.

The prayer of the note was as follows:—"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents, or either of them, and their servants or others in their employment, or acting by their instructions or authority, from rowing or otherwise taking any boat or boats, or raft, or other floating engine, to the north of the middle of the channel of the river Tweed *ex adverso* of the complainer's lands of Broadmeadows and Tweedhill, for the purpose of watching for fish coming up the river, and also from fixing or placing any ladder or other engine in or on the *alveus* of the Tweed to the north of the middle of the channel of the river *ex adverso* of the complainer's said lands; and also from scraping or excavating or otherwise interfering with the *alveus* of the Tweed to the north of the middle of the channel of the river *ex adverso* of the complainer's said lands; or to do otherwise in the premises as to your Lordships shall seem proper."

The practice described in the first part of the prayer is known as "fording."

The Lord Ordinary (Ormidale) pronounced an interlocutor, finding that the fisheries of the complainer and the respondent Mather extend respectively across the Tweed to the middle of the river from bank to bank. The interlocutor proceeds—"Finds also as matter of fact (3) that the respondents, especially in or about the month of June last, by themselves or others, encroached on the complainer's right of salmon-fishing foresaid, by taking a boat or boats to the north of the middle of the Tweed, and by fixing or placing a ladder in the *alveus* of the river, to the north of the middle of the channel thereof, *ex adverso* of the complainer Mr Macbraire's foresaid lands, for the purpose of watching for fish of the salmon kind coming up the river, in order to catch the same: But finds also as matter of fact (4) that the complainer Mr Macbraire has not proved that he is the proprietor of the *alveus* of the river Tweed, or any part of it, *ex adverso* of his said lands of Tweedhill; or that the respondents have excavated or scraped said *alveus* to the north of the middle of the channel of the river *ex adverso* of Mr Macbraire's said lands: Finds also as matter of fact (5) that at and between the foresaid fishings, belonging respectively to the complainers and respondents, the Tweed is a tidal river about 150 yards broad, and used by the public for the purpose of passage in pleasure boats; and further, that at said locality it forms the boundary between England and Scotland: Therefore, in the foregoing circumstances, interdicts, prohibits, and discharges the respondents from taking any boat or boats or other floating engine to the north of the middle of the said river Tweed *ex adverso* of the complainer's lands of Tweedhill, and fixing or placing any ladder or other engine in or on the *alveus* of the Tweed to the north of the middle of the channel thereof *ex adverso* of the complainer Mr Macbraire's said lands, for the purpose of watching for fish of the salmon kind coming up the Tweed, in order to catch the same, and to that extent sustains the reasons of suspension and interdict, and decerns; and *quoad ultra* repels the reasons of suspension and interdict, recalls the *interim* interdict formerly granted, and decerns: Finds the complainers entitled to one-half of the expenses of process incurred by them as the same may be taxed.

The respondents reclaimed.

Watson and Johnstone, for them, argued—The Tweed is a public river, and the complainer has no title to prevent members of the public rowing to any part of the stream. The respondents being thus lawfully there, cannot be prevented from watching the salmon and signalling their approach.

The Solicitor-General and Asher objected to that part of Lord Ormidale's interlocutor in which he found that the complainer had failed to prove that Mr Mather had scraped the *alveus* to the north of the mid channel.

At advising—

Lord President—The first complaint in this case is that on a number of occasions during the month of June 1870, the respondent George Young has, in violation of the complainer's rights, taken a boat to the north of the mid-channel of the river, fixed or anchored the same within the

Scotch water for the purpose of watching, by means of a ladder, either fixed in the boat or in the bed of the river, for fish coming up the river, with the view of rowing a shot to catch them when seen. The days are specified on which the alleged wrongful acts were done. The respondent's answer is "denied under reference to the respondent's statement." His statement on this point is as follows:—"At those parts of the river where the stream flows in a rapid and narrow channel, and especially near fords, the proprietors of fisheries on both sides of the river, or their tenants or servants, have from time immemorial been in the habit of watching the fish as they ascend the shallow water. They do this by rowing a boat to the shallow part, and anchoring, or otherwise keeping near the same part, and watching the fish therefrom, and sometimes they place a ladder in the boat to give the watchman a better view, and sometimes this ladder is placed temporarily in the bed of the river, and the watchman stands thereon. When he sees the salmon ascending the river he gives warning to the other fishermen, who thus know when to make a shot or draw their net. This mode of fishing is called 'fording the fish,' and has been practised from time immemorial. The respondent, Mr Mather's tenant of the fishings, and his servants ford the fish at the place complained of in the ordinary way, and according to the immemorial custom of fishers in the Tweed." As regards immemorial usage there is no evidence. The point to be observed is that the respondent practically admits doing the thing complained of. The question is whether he is entitled to do this upon the Scotch side of the *medium filum*. This proposition is clear, that no proprietor of a fishing on the English side can exercise the right of fishing, or do anything in the way of exercising that right beyond the *medium filum*. It comes to the same thing whether the fish are actually captured on the English or the Scotch side. Fish might be actually captured on the English side by a shot which extended to the Scotch side, but that would not make the shot a legal one. What is done by the man on the ladder is part of what is done to catch the fish. This is *prima facie* an illegal invasion of the Scotch water. I could understand that in certain special circumstances a fisher might be entitled to go across the imaginary line which forms the *medium filum* for some purpose lawful in itself, beneficial to him, and certainly not injurious to his opposite neighbour. But these conditions are not fulfilled by the act done here. The relative situation of the properties is such as to make it in the highest degree probable that the doing of it will be prejudicial to the Scotch proprietor. There is a ford across the river immediately below two shots, one on the English and the other on the Scotch side. The English shot comes next the ford. In the ford, as usually happens, one part is deeper than the rest, and the deepest part is nearer the Scotch side. Consequently, to view the passage of the fish across the ford, the English fisher despatches a man to the Scotch side in a boat with a ladder. It is against reason to say that this is not likely to have the effect of driving the fish more to the English side. The Scotch proprietor has very good reason to object to the invasion of his water for such a purpose. It is said by the respondent that this is not a trespass, because the water and the *alveus* on the north side does not belong to the Scotch proprietor; he has no property in the river, but only in the fishing. That is sound in law. But the Scotch proprietor is entitled to the exclusive occupation of the water for fishing purposes, and for fishing purposes to exclude others. But the respondent says that the public may come there, and if a member of the public chooses to stand in a boat and watch the salmon, and to give a hint to the fishers on the English side when they are coming, no one can stop him. This is really begging the question. If a member of the public uses his privilege as such for this purpose, he in reality ceases to be a member of the public, and becomes an ally of the English fishers. He comes not for navigation, but for fishing purposes. I more than doubt whether, even if he were to come in a pleasure boat, he could defend his taking up his station there on the ground of public privilege, while he was in fact exercising that privilege for the purpose of aiding the capture of salmon on the English side. But the present case is far clearer. The man who comes there does not pretend to come there as a member of the public. He comes avowedly as a salmon fisher, a servant of Mr Young's, in a boat, which he is not entitled to use except at certain seasons, marked and branded as a fishing boat. It is impossible to say that he does not come for fishing purposes. On this part of the case I entirely concur with the Lord Ordinary. With regard to the second part of the complaint—the alleged scraping of the *alveus* of the northern side by the respondent—I also agree with the Lord Ordinary. The first aspect is unfavourable to the respondent. One does not at first see his right to interfere with the *solum* at all. And, accordingly, if he was *versans in illicitis*, even although it was not distinctly proved that he interfered with the *solum* on the north side, I should be disposed to grant the interdict craved. But he is not *versans in illicitis*. He is in the exercise of a recognised right, of smoothing the channel to facilitate the drawing of the net. The operation is rather encouraged by the Tweed Fisheries Act of 1857. No doubt he cannot invade the *alveus* on the Scotch side. But I do not think that it is proved that he did so, still less is it proved that he did so intentionally. It is difficult to ascertain the exact line of the *medium filum* in a river like the Tweed, especially by the rough methods resorted to by the witnesses. One witness makes the breadth of the river 144 yards, and another 150 yards. According as we adopt one measurement or the other, there has or has not been an encroachment. On the whole, I am satisfied that encroachment on the *alveus* has not been made out.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—"Fording" cannot be regarded as anything else than part of the process of fishing. When this is done by means of a boat, the salmon are fished by two boats in combination; when it is done by a ladder, this is just putting an engine for fishing into the fishing grounds of the complainer. It cannot be doubted that this proceeding is likely to be prejudicial to the complainer's fishing, and I think he is entitled to interdict.

The Court adhered, finding no expenses due since the date of the Lord Ordinary's interlocutor.

Agents for Complainer—Tods, Murray & Jamieson, W.S.

Agents for Respondents—Hope & Mackay, W.S.

Thursday, June 29.

SECOND DIVISION.

ANDERSON *v.* FRASER.

Sheriff—Jurisdiction. A party raised an action in the Sheriff-court, founding on a letter as an obligation to convey a heritable subject, and concluded (1) for a conveyance, and (2) for money expended on the subject on the faith of the letter. Action *dismissed* as incompetent in the Sheriff-court.

This was an action raised in the Sheriff-court of Inverness by John Anderson, gardener, against James Fraser, sometime residing at New York, and at present at Inverness. The pursuer alleged that the defender sometime previous to 1859 succeeded to certain subjects in Inverness; and further, "in the end of the year 1858, or beginning of the year 1859, the pursuer wrote to the defender, informing him that the buildings on said property were in a ruinous condition, and of the necessity of repairs, and the defender, on the 22d day of February 1859, wrote to the pursuer the letter of that date herewith produced. Said letter is holograph of the defender, and he then, *inter alia*, writes as follows:—'This last letter gives me bad accounts about the leaky house. What on earth do you want me to do with it? Is it not your own, to do with it what you please? and do you really want me to repair it besides for you? So you need not be afraid to expend on it. Me or my heirs will not trouble you in this life, or the life to come, or dispute it with you; and if it is not worth keeping, let it go.' The expressions in said letter above quoted refer to said property above mentioned." The conclusions of the summons were for a disposition of these subjects, or for payment of £200 expended on them.

The Sheriff-Substitute (THOMSON) allowed a proof.

The Sheriff (IVORY) pronounced an interlocutor in the following terms:—"Recals the interlocutor appealed against: Finds that the process involves a competition of heritable rights, and is therefore incompetent in this court: Dismisses the action, and decerns: Finds the pursuer liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report.

"*Note.*—The pursuer in the present action asks to have the defender decerned to deliver to him a valid conveyance of certain heritable subjects in Fraser Street, Inverness, or alternatively to pay him the sum of £200, expended by him upon the said property.

"The pursuer maintains that the defender is bound to grant the said conveyance, on the ground that the latter, by holograph letter dated 22d February 1859, conveyed, or undertook to convey, to him the property in dispute; and that on the faith of the said letter he laid out a large sum in improving it.

"The defender, on the other hand, resists the pursuer's demand, on the ground that he is the true proprietor of the subjects in question, and that the said letter does not contain either a conveyance in favour of the pursuer, or any obligation to convey the property to him.

"There seems, then, no room to doubt that the right to the said property in dispute is directly in the present action. Further, before the defender can be decerned to grant the said conveyance, it must first be determined whether by the said letter the defender conveyed, or undertook to convey, the said subjects to the pursuer, and whether on the faith of it the latter expended a large sum in improving the property. But the determination of these questions will substantially decide whether the pursuer or defender is the proprietor of the subjects in dispute, and thus involves a question of heritable right.

"It appears to the Sheriff, therefore, that the present action involves a competition of heritable rights, and is incompetent in the Sheriff-court."

The pursuer appealed.

ÆNEAS J. G. MACKAY for him.

THOMS and RHIND for the respondent.

The Court unanimously adhered to the judgment of the Sheriff. The Lord Justice-Clerk had some doubt whether it would not be proper to sustain the competency of the action so far as the second conclusion of the summons was concerned.

Agent for Pursuer—Æneas Macbean, W.S.

Agent for Defender—William Officer, S.S.C.

Thursday, June 29.

WILSON *v.* WILSON.

Oath—Extrinsic—Deletions. Under a reference to oath the deponent admitted receipt of upwards of £50 of coppers, but admitled the validity of a state of his affairs in which his brother was entered as creditor for £98 and corresponding dividends. The name and first sum were deleted, but not the dividends; and the sums deleted were included in the summation, and two other names deleted were those of admitted creditors. The deponent stated repayment of the debt by delivery of flour—*Held* the oath was affirmative of the reference both as to the amount of the debt and its resting-owing, as the repayment by flour was extrinsic.

In this action the pursuer, who is a baker in Glasgow, sought payment of the sum of £98, which he alleged had been lent by him to his brother the defender in 1861. Under a reference to his oath the defender deponed that he had received in 1861 upwards of £50 of copper coin from the pursuer, in order to be transmitted to the Mint, but he could not remember whether he had got any loan, or any discharge for repayment of this money, or whether the sum received amounted to £100, or whether he had given silver or other money in exchange. It was, however, not due, as he had repaid his brother by supplying him with flour to the extent of £300; but whether this flour was supplied previous to his business difficulties in 1862, or after, or before or after the date of his state of affairs, or in what quantities, he could not remember; as all record had been lost by the burning of his books a few years ago. He, however, admitted the validity of a draft scheme of ranking and division, prepared for his creditors in 1862. In this the pursuer was inserted as a creditor for £98, but both the name and the figures were scored out. Why they had been so deleted he did not know. He had inserted his brother's name for this sum "to protect him fully in the event of it going to a trustee." And the sum, though scored out, was included in the summation; the dividends for the pursuer were not deleted, and two others, who were unquestion-