Counsel for the Appellant—Cullen, K.C. —R. S. Brown. Agent—Henry Robertson, S.S.C.

Counsel for the Respondent—The Solicitor-General (Ure, K.C.) — A. J. Young. Agent—P. J. Hamilton-Grierson, Solicitor of Inland Revenue.

Thursday, December 14, 1905.

FIRST DIVISION.

[Sheriff Court at Inverness.

WARRAND *v.* WATSON AND OTHERS.

Process – Possessory Action — Interdict — Competency—Property Held pro indiviso —Right of Pro indiviso Proprietor to Protect Property from Encroachment by Outsider—Salmon Fishing.

A *pro indiviso* proprietor is entitled by interdict to protect the property held *pro indiviso*, as for example salmon-fishing, from encroachment by an outsider.

Process—Interdict — Procedure — Trespass —Wrongous Fishing—Fishing Denied, but Right to Fish Asserted—Right to Interdict de plano.

In defence to an action of interdict, brought by the proprietor of a salmon-fishing against certain persons whom he alleged to have on certain specified occasions unwarrantably fished therein, the defenders denied that they had fished, but asserted that they had a right to fish. *Held* that interdict *de plano* could not be granted, but that there must be inquiry whether the defenders had fished.

Macleod v. *Davidson*, November 17, 1886, 14 R. 92, 24 S.L.R. 69, *distinguished.*

Property — Pro indiviso Property — Trespass—Burgh—Salmon-Fishing—Outsider Pleading in Defence of Trespass a Plea to Title Conceivably Open to pro indiviso Proprietors inter se—Indweller of Burgh Asserting Burgh's Right to Property not Claimed by Burgh.

A was *pro indiviso* owner along with the burgh of X of salmon-fishings, A having the right of fishing on seven days and the magistrates and council of X (as representing the community of the burgh) on every eighth day. The burgh's right to fish had not been dedicated to the public, but was only exercised by the public fishing. A having brought an action of interdict against certain of the indwellers of the burgh for fishing on days other than the eighth day, the respondents pleaded that the rights of the burgh as in a question with A were more extensive than the burgh was content to claim, and that as indwellers in the burgh they were, in exercise of those more extensive rights, entitled to fish not only on the eighth but on other days as well.

Held that the indwellers of the burgh were not entitled to plead in defence to a summary action of interdict rights which the burgh might, as in a question of title, conceivably plead against the other *pro indiviso* proprietor.

This was an action of interdict brought in the Sheriff Court at Inverness by Captain Alexander Redmond Bewley Warrand of Bught, residing at Ryefield House, Conon-bridge, against Donald Watson, fishing-tackle maker, Inglis Street, Inverness, and others, indwellers in the burgh of Inverness.

The pursuer craved the Court "to interdict the defenders and each of them from unlawfully entering or trespassing upon the pursuer's fishings in the water of Ness, known as the "Four Cobles Fishings" and the "Duke of Gordon's Fishings," being the fishings in the said river Ness, between the stone known as the Clachnahagaig and the sea, or upon any part thereof, or in any way interfering with the pursuer's possession, use, and enjoyment thereof, and from taking, fishing for, or attempting to take, or aiding or assisting in taking, fishing for, attempting to take salmon, grilse, sea-trout, or other fish of the salmon kind by means of rod and line, or by any other method, from the said fishings, but always under the exception in favour of the Magistrates and Town Council of Inverness, as representing the community of said burgh, (1) of the right of fishing for salmon or any other kind of fish in the said Four Cobles Fishings every eighth week-day, and (2) of the right of fishing for salmon or any other kind of fish in the fishing known as the Friar's Fishing."

The pursuer, *inter alia*, claimed to be, and produced a title as, *pro indiviso* proprietor to the extent of three and a-half cobles of the Four Cobles Fishing in the river Ness, and the town of Inverness was the other *pro indiviso* proprietor. He averred—"(Cond. 7) The only practical way of exercising fishing rights by rod and line in a case similar to the present is to limit the number of rods in proportion to the rights of the respective proprietors, or to allocate certain days to each proprietor in proportion to the extent of his right. By an arrangement entered into between the predecessors of the pursuer and the town of Inverness it was agreed that the Magistrates and Town Council of Inverness, as representing the community of said burgh, should exercise their right of fishing in respect of the one-half coble now vested in them by fishing over the whole of the Four Coble waters once in every eighth week-day, the pursuer's authors on the other hand being permitted to exercise their rights of fishing during all the other days of the season without interference by the Magistrates and Town Council or members of the community of said burgh. This arrangement has been in force for forty years, and the dates on which the town's rights can be exercised are published in the *Inverness Courier* in February of each year. Each fishing-tackle maker in town published a list of said dates, and in particular the said Donald Watson, or the firm of D. Watson & Company, has done so for the last ten or twelve years. The pursuer is absolute pro-

prietor on seven days out of every eight week-days, and the town is sole proprietor on the eighth day. The present action has been informally intimated to the town by their vassal, but that body is satisfied with the right to fish on every eighth week-day, and on that account have not as yet appeared in the action. The defenders are not in right of the town of Inverness. They merely fish by toleration one day out of every eight week-days without any authority whatever from the town, and they are without any right or title to represent the town in this action. The counter statement is denied, and it is averred that the arrangement in question was in force during the past year and when the present action was instituted."

In answer the defenders stated—"(Ans. 2) Admitted that the town of Inverness did feu out certain fishings in the water of Ness described as part of the Four Cobles Salmon Fishings, which are still in part held feu of the town. *Quoad ultra* denied, and explained that the town retained and still retains the right to the whole fishings . . . except in so far as limited by certain of the said grants of feu to vassals to hold of them of certain *pro indiviso* shares in said fishings; that part of said fishings remain in superiority and property wholly and solely vested in the town of Inverness for behoof of the community thereof without qualification or restriction; that the town of Inverness was in use to let the same to tenants, and did let the same to tenants down to season 1859, when the town ceased to let the said fishings and resumed the natural possession thereof, and has since occupied and possessed the same by and through the inhabitants and indwellers of the said town of Inverness, who have exercised the town's rights therein of fishing for salmon or other fish; and that the defenders are one and all indwellers within the said burgh who with the consent and approval of the said Magistrates have exercised the town's right of fishing in the water of Ness other than the town's right in the portion of the said fishing known as the Friar's Shott, to which the town has the exclusive right and which the town still lets to tenants. Explained further that the rights granted by the town of Inverness to their said vassals in the said grants were mere *pro indiviso* rights with the town and the other vassals, and no exclusive right to fish in any part of the said four cobles water was ever granted by the town or acquired by any of the town's vassals. . . . (Ans. 7) Any arrangement as to the mode of exercising the said right of fishing has been solely from season to season for the convenience of the *pro indiviso* proprietors of the said fishings and their said tenants, that no such arrangement is now in existence, and that the defenders, as in right of the town of Inverness, are entitled to fish at any and every time on any and every part of the said fishings, so long as they do not thereby unduly interfere with the rights of the pursuer, which they have not done."

The pursuer further averred—"(Cond. 9) The defenders have no right or title to fish for salmon or other fish of the salmon kind in the portion of the said river between the stone of Clachnahagaig and the sea on any other day than the day selected under the arrangement above referred to, by which the said Magistrates and Town Council have chosen to exercise the rights they are entitled to in respect of the half-coble presently vested in them. The arrangement referred to is not disputed by the burgh of Inverness or the Town Council thereof, which alone has the right to make or unmake it. The defenders are called upon to sist the said burgh as a party to the action."

The defenders' answer was — "(Ans. 9) Denied. The defenders are entitled to exercise the town's rights of fishing in the said river. The pursuer is not entitled to question the actions of the defenders so long as they are within the rights of the town of Inverness in the said fishings."

The pursuer specified various dates on which he alleged that the various defenders had fished in contravention of his rights. In addition to the instances mentioned, he averred that all the defenders had fished said waters on many occasions both before and subsequent to the dates mentioned, and were in the habit of doing so, and asserted a right thereto.

The different defenders denied that they had so fished.

The pursuer pleaded, *inter alia*—"(3) The pursuer being proprietor of three and one-half cobles of the water known as the Four Cobles Fishing in the river Ness, is entitled, under the arrangement with the proprietors of the remaining half-coble, to the sole and exclusive right to fish for salmon and fish of the salmon kind on seven week-days out of every eight."

The defenders (Watson and Others) pleaded, *inter alia*—"(1) All parties not called, and pursuer has no title to sue. (3) The defenders having exercised only the rights of the public of the town of Inverness in the fishings of the said river Ness, and having exercised such rights only to such limited extent and in such manner as not to interfere with any right of the pursuer in or to said fishings, the prayer of the petition ought not to be granted. (4) The pursuer having no exclusive right of fishing in the said fishings, is not entitled to interdict as craved. (5) Any right the pursuer has in the said fishings being only in the nature of a *pro indiviso* share therein, and not having been invaded or interfered with by the defenders, pursuer is not entitled to decree as craved."

The defenders (Fraser and Shaw) pleaded, *inter alia*—"(5) The defenders not having trespassed as alleged the action should be dismissed."

On 24th October 1904 the Sheriff-Substitute (GRANT) appointed the pursuer to intimate the dependence of the action to the Provost, Magistrates, and Town Council of Inverness in order that they might, if so advised, crave to be sisted as parties to the action.

Thereafter on 23rd December 1904 he granted interdict against the defenders

(other than the defender Fraser, who had been cited by mistake).

The defenders appealed to the Sheriff (FERGUSON), who also granted interdict *de plano* against the defenders (other than the said defender Fraser) in terms of the prayer of the petition, "reserving to the pursuer and to the Magistrates and town of Inverness, as representing the community of the said burgh, the right to give such permission to fish in the town cobles fishings grant as they respectively think fit, in so far as the granting of such permission is not regulated by agreement between the pursuer and the said Magistrates, or by the order of a competent Court."

Note.—"This case raises several questions of some delicacy. The defenders state under one head the separate pleas of no title to sue and all parties not called. These are both founded on the common interest of the pursuer and the Town Council of Inverness in the fishings which are the subject of litigation. It is unnecessary in this process to determine the alleged uncertainty as to the precise extent of the rights which belong to each of the *pro indiviso* owners. The pursuer's rights have not been questioned by the other owners, and his titles produced are amply sufficient, apart from any specialty in the law of common property, to entitle him to sue. The plea is truly founded on the fact that he is a part owner and the alleged necessity for the concurrence of the other joint owner. Now, while both joint owners must concur in the general administration of the joint property and the removal of tenants, &c., this is not necessary where the property is merely being defended against encroachment, and the owner is entitled to vindicate it against intruders—(*Johnson* v. *Crawfurd*, 17 D. 1023; *Lade* v. *Largo Baking Company*, 2 Macph. 17; *Aberdeen Joint Passenger Station Committee and G.N.S.R.* v. *N.B.R.* (1890), 17 R. 975, at pp. 981 and 984). If the pursuer is right in this case, he is undoubtedly merely repelling illegal encroachment on his rights. Whatever might be the case if a declarator were being sued, there is no obligation upon him to call any other than the intruders in a petition for interdict. His conclusions are drawn so as to leave undisturbed the arrangements with and right of the other proprietor as understood by him, and it is difficult to see what ground there could be for making the Magistrates of Inverness, whom he avers to be friendly to his action, respondents in a petition for interdict. The proper course to enable them to safeguard their own interest, or any public interests of which they may be guardians, has been taken by the formal intimation of the action to them. I have no hesitation in repelling the preliminary pleas for the defenders.

"A question of more difficulty is, however, raised when we come to consider whether the pursuer is entitled to interdict *de plano*, or whether there are averments that must be made the subject of proof. If the defenders had clearly and specifically averred the express authority of the Town Council of Inverness to fish the water on any lawful day as claimed by them, granted to them either by individual licences or by resolution of the Town Council, specifically condescended on, a very different case would have been presented from what can be discovered on record. What they do aver is that at a certain period the town, which had hitherto let the unalienated half coble or thereby of the four cobles fishing, ceased to let it, and that the natural possession was resumed and exercised by the indwellers of Inverness, with the consent and approval of the Town Council. Now, this means no more than that the Council ceased to let and did nothing, whereas in dealing with a body such as a corporation, express authority, either by written permission or in recorded resolution, was to be expected, and if founded on could have been at once verified. It is impossible to overlook the facts that the precise position of the fishings in question has been more than once the subject of judicial consideration, and that in the Four Cobles Fishings we are not dealing with fishing rights of doubtful character or description as to their being private property, or the subject of the exercise of general public rights, but with a heritable estate of salmon fishing, granted by charter and feued out as property from time to time. The proper vindicators of the rights of Inverness in the fishings are the Town Council of Inverness, and as they have deliberately refrained after judicial intimation from making any appearance, it must be assumed that the petitioner's prayer does not conflict with any rights which it is their duty to protect, or affect any licence, express or tacit, which they may have given to others to fish.

"This being so, it does not appear to me that the defenders have any title to challenge the averments of the petitioner as to the arrangement between him and the Town Council for the adjustment of their respective rights and the satisfactory exercise of them in terms fair and reasonable to both. Fishing on the eighth day is not challenged by the petitioner. The existence of an eighth day, on which the town may let the water lie open, is significant as to the true meaning of the defenders' averment, and they have made no sufficiently specific and relevant averment as to authority from the town to fish on the seven days, on which alone the pursuer seeks interdict.

"The neutral and negative attitude of the Town Council is natural in the circumstances, and affords a good illustration of the propriety of the rule that one part owner is entitled to vindicate the common property against encroachment. The Town Council are a body dependent on popular election, and the defenders may or may not be municipal electors. The petitioner is in right of the fishings to the extent of at least three-fourths, and his interest far exceeds that of the Town Council. On the other hand the Town Council are bound in good faith to do nothing to injure the value of the rights derived from them by the petitioner and his authors. The effect of

the defenders' contention is that an unlimited number of persons being or pretending to be indwellers in Inverness, could at all times whip the water in respect of one-fourth or one-eighth of the fishing rights, with the result of destroying the letting value or the fishing amenity of the petitioner's three-fourths or seven-eighths. A more graphic example of the lean kine eating up the fat could hardly be afforded, and the substantial interest and reasonable apprehension which justify the remedy of interdict obviously exists.

"The defenders Watson and others give a general denial of the petitioner's averments as to specific acts of fishing. Had there been conclusions for damages, a proof as to these would therefore have been necessary. But apart from this, they have appeared to defend, stated that they 'one and all' have exercised the town's right of fishing, and maintained on record that they, as in right of the town of Inverness, are entitled to fish at any and every time on any and every part of the said fishings. There is therefore that threatened injury to the petitioner, and statement of a defence negative of his rights, which is itself sufficient to entitle him to protection by interdict. (*Moncrieff* v. *Arnot*, 1828, 6 S. 530; *Dunn* v. *Hamilton*, 1837, 15 S. 853 (6th exception at p. 871); *Macleod* v. *Davidson*, 1886, 14 R. 92).

"The defenders Simon Fraser, clerk, Holme, and Edward Shaw, state defences in somewhat different terms from the other defenders, but they aver a right on the part of the inhabitants of Inverness undistinguishable from that claimed by Watson and others. They also therefore truly challenge the pursuer's rights, and if they do not impinge these the interdict will not affect them. While I am not clear that I would in the first instance have granted interdict against these defenders I am not prepared to differ from the conclusion to which the Sheriff-Substitute has come in regard to them.

"While my judgment is an affirmation on the merits of the cause, the interlocutor appealed against has been recalled, and the one now pronounced substituted, on the ground that in possible eventualities it might possibly prove that the interlocutor of 23rd December 1904 had given the pursuer more than he asked. He asks for no interdict affecting the eighth day, as to which he avers an existing arrangement which excludes him, and the exceptions in his own prayer must be given effect to in terms."

The defenders appealed, and argued—The interdict granted was too wide, as it would prevent the defenders fishing for trout. The defenders did not admit that they trespassed, and therefore granting interdict *de plano* was incompetent. The mere assertion of a right was not equivalent to actual trespass. The pursuer had only a *pro indiviso* right of fishing, and therefore had no title to sue. Some of the defenders had not even asserted the right, and therefore the interdict against them was clearly incompetent. There had been no encroachment on the pursuer's rights, and any threatened injury must be very obvious before interdict would be granted *de plano*. The defenders were exercising the town's right of fishing. *Esto* that they had no permission, permission was unnecessary. Each member of the community had an interest and a title to assert the town's right. Moreover, in cases of long user (as here) no title was necessary. *Esto* that a *pro indiviso* owner could interdict a trespasser, there had been no trespass here, and the pursuer must prove trespass before getting interdict. The defenders did not admit the pursuer's right to fish on days other than the eighth. That being so, the pursuer must bring a declarator of his rights against the town, and the town was not called. In any event a proof of the alleged fishing was necessary. Reference was made to *Magistrates of Inverness* v. *Duff*, January 27, 1775, M. 14,257, and *Warrand's Trustees* v. *Mackintosh*, February 17, 1890, 17 R. (H.L.) 13, 27 S.L.R. 393.

Argued for respondent—The pursuer did not claim right to interfere with the town's fishing rights. The defenders were claiming much more than the town's rights. Moreover, the rights they claimed were inconsistent with those claimed by the town, and were such as the town could not grant. The defenders had no permission from the town, and they had not set forth facts and circumstances which would lead one to infer that they were exercising the town's rights of fishing. In these circumstances interdict had been properly granted against them *de plano*—*Macleod* v. *Davidson*, November 17, 1886, 14 R. 92, 24 S.L.R. 69.

LORD PRESIDENT—This is an action of interdict brought by Captain Warrand against certain inhabitants of Inverness, and he seeks to have them interdicted from fishing in "the pursuer's fishings in the water of Ness, known as the Four Cobles Fishings and the Duke of Gordon's Fishings." The pursuer sets forth his title to the fishings in question, which consists of a title to three and a-half cobles of the ancient fishings of the burgh of Inverness from Clachnahagaig to the sea. This fishing has been more than once already the subject of litigation, and in particular the extent of it was judicially determined in the case of the *Magistrates of Inverness* v. *Duff* in M. 14,257, and it came under the cognisance of the House of Lords in the case of *Warrand's Trustees* v. *Mackintosh* in 17 R. (H.L.) 13.

Now, the case of *Duff* settled conclusively that the Four Cobles Fishings were (with the exception of certain specified shots, as to which I need not particularise) exhaustive of the whole fishings of the burgh of Inverness between the stone of Clachnahagaig and the sea, and it is therefore certain that any right that the burgh of Inverness now have is not a right in virtue of their ancient charter, but is a right in virtue of a re-grant of a portion of the fishings which they originally feued out. That right we are told by the pursuer in this case he believes amounts to a half of a coble in the person of the burgh of Inverness. The pursuer

further sets out that, he being *in titulo* of three and a-half cobles, and the burgh of Inverness being *in titulo* of half a coble, an arrangement had been entered into a long time ago, under which it was agreed that the fishings should be exercised thus—the pursuer in right of his title should have exclusive right to the whole of these fishings for seven days and the burgh of Inverness for one day. He then goes on to allege that the defenders having, some of them in good faith and some not, conceived that the rights of the indwellers of Inverness were of greater or of somewhat undefined extent, proceeded to assert those rights by fishing in the waters on days other than the eighth day which was allocated to the burgh in terms of the arrangement I have mentioned.

Now, the defenders have put in defences, and the first matter in the defences to which I think it necessary to direct your Lordships' attention is that they do not admit the actual fact of fishing on days other than the eighth day. It is true that they do not, I think, make any very frank statement of when and where they did fish, or any frank statement that they did not fish at all, but at any rate it is the fact that they have not put in anything that can be construed as an admission of the pursuer's statement that they fished on days other than the eighth day. Their defences also deal with a vast variety of matter. In the first place they indulge in a good many not very precise statements, which, if fairly read, mean, I think, nothing at all if they do not mean a contraversion of what was laid down in the case of *Duff* (M. 14,257). They further go on to deny that there was any arrangement as between the burgh of Inverness and the pursuer as to the regulation of the fishings, and they also proceed to say that for many years the burgh of Inverness has not let such fishings as belonged to it (with the exception of one specified shot, with which we have nothing to do), but has exercised its right through permitting the indwellers of Inverness to fish.

Upon this state of the pleadings the learned Sheriffs have granted interdict *de plano*. I think it is abundantly clear that the point which was really litigated in argument before the learned Sheriffs was a point of which we have not heard much, if anything, in this discussion, namely, the attempt on the part of the defenders as a matter of law to urge that they as indwellers of Inverness were entitled to the rights that the burgh of Inverness possessed, and that therefore they could not be proceeded against in a summary manner as by interdict, but were entitled to raise as in a competition of title all questions which the burgh of Inverness could conceivably raise against the pursuer. As I have said, we have not heard anything of that argument here. I think that argument was very justly put aside in the Sheriff Court as quite unmaintainable, and the reasons are very well given in the learned Sheriff's note. But I think that particular topic of discussion perhaps rather obscured the matter which I shall have immediately to advert to—whether the interdict should be granted *de plano* or not.

Now the defenders have appealed against the judgment of the learned Sheriff, and their argument is that your Lordships should either dismiss the action altogether —a contention for which I am bound to say but feeble support was put forward, and which indeed I cannot imagine could be very well supported—or alternatively allow them to go into proof of those various matters which I have mentioned as tabled in their defences.

There is only one other matter which I think it necessary to mention on the state of the facts so as to be in a position to dispose of the case, and that is this, that the learned Sheriff quite rightly at an early stage of the case and in view of the pleading that the pursuer had tabled this arrangement which had been made between himself and the burgh of Inverness, appointed intimation of the action to be made to the burgh of Inverness so that the burgh of Inverness, if they saw fit, might sist themselves as defenders to the action. That was done, and the burgh of Inverness had made no appearance.

Now as regards the competency of the action, it is quite clear that any *pro indiviso* proprietor is entitled to have a possessory action against an outsider who is troubling him in the possession of the *pro indiviso* property; and therefore that the action of the pursuer is a competent action seems to be absolutely clear. Let us then see if the defence of the defenders makes any difference. They first of all table certain views of the title which are inconsistent with what has been already decided; but I do not need to go into that, because the question really is whether the defenders are persons who are *in titulo* to table any views of the title at all. Of course the other *pro indiviso* proprietor might table views as to title, but he does not choose to do so, and the defender here is therefore in no better position than this, that he merely says—"I am a person who lives in Inverness, and who, as I propose to show, with the permission or at least without the hindrance of the town of Inverness, proposes to exercise the right which the town of Inverness has"; but then, if the agreement is standing, those rights do not go to fishing on anything except the eighth day.

Therefore the conclusion I come to is this—I do not think that the pursuer here can be entitled to an interdict *de plano*, while there is standing the denial that the defenders have actually fished. The pursuer maintains that he ought to get his interdict *de plano*, because he says that the defenders in their defences put in the statement that on a proper construction of the titles they are entitled to fish everywhere; and he tried to assimilate that matter to the case of *Macleod* v. *Davidson* (14 R. 92), where an interdict was pronounced, although the defenders did not actually admit that they had been upon the ground,

but at the same time put in pleas that they were entitled to go there. I do not think the two cases are exactly parallel. In that case the state of affairs put forward by the defenders did not arise on the original summons and pleadings, but arose in respect of a minute that was put in. Now here, when I come to look at the pleadings, it does not seem to me that the two portions of the pleadings are inconsistent. It is not an inconsistency for the defenders to say when charged with trespass—"We do not admit that we ever went, but at the same time we say to you that as a matter of fact we have got a right to go."

But seeing that interdict is a matter which may be followed by criminal proceedings, I do not think that interdict ought to be granted without seeing that the defenders have been actually fishing in the waters, or have, as individuals, been asserting their intention of going on the waters because they had a right. And therefore I am of opinion that, before granting interdict as has been done by the Sheriff, a proof must be allowed upon this matter. I do not think the proof can go any further than that. When the defenders say that they want to go into what is the true partition between the town and the pursuer, they seem to me to try to raise a matter which they have no title to raise. The town having been given a perfectly good intimation that that is the arrangement which the pursuer tabled, and not having thought fit to come forward and deny it, the defenders here at the utmost can only have a subordinate right to the town; because, although the question of so called dedication was mooted in the argument, the defenders' counsel when pressed really could not put his argument so far as to say that there could possibly be anything in the matter of dedication so as to give him a right which was good even as against the town—a right which in a proper case of dedication the inhabitant has, as for instance in the case of the Kirkcaldy Links. That being so, the defender's right can only be a granted right by the town, and if the town stand by and allow the pursuer to put forth his version of the agreement, and the town say nothing either for or against it, I do not think it would ever do in such circumstances to allow an indweller of Inverness to come forward and litigate that question with the pursuer. My opinion therefore upon the whole case is this—we must recal the interlocutor of the Sheriff and allow the pursuer a proof of the averments that the defenders fished in the waters on a day other than the eighth day permitted to the town, and to the defenders a conjunct probation,—and I think it better to explain to the defenders, in case there should be any misunderstanding, that conjunct probation means a probation conjunct to the one fact which the pursuer is allowed to prove. I say that in order that they should not go to the expense of preparing a case upon the other matter, because they will not be allowed to go into any proof or enter into any other matter whatever, except to show that they did not actually fish upon those particular days. We shall keep the case here, and keep that matter right by taking the proof before one of ourselves.

LORD M'LAREN—I agree with your Lordship, and I think the proof ought to be limited as your Lordship suggests.

LORD KINNEAR—I also agree. It is common ground that the complainer and the burgh of Inverness are *pro indiviso* proprietors of the fishings described in the condescendence. If there be any question as to the extent or limitations of the rights of those *pro indiviso* proprietors, it is a question that must be settled either by agreement, or, if by litigation, then by litigation between them and them alone. The pursuer's rights as *pro indiviso* proprietor cannot be effectually defined either by agreement or by judgment obtained in a disputed case between him and residents in the town of Inverness, who have no title to bind the burgh as a corporation. It appears to me to be quite sufficient to say that the respondents are not proper contradictors of the complainer in any question as to the extent or limit of his rights; and therefore their answer, founded upon a challenge of his right, is no good answer to an action for obtaining a possessory judgment. Although the question of legal right as between the two *pro indiviso* proprietors cannot be effectually determined in this action, I have no doubt that the pursuer, as one of them, is entitled to protect the fishing which they hold in common from encroachment. If the burgh chose to take up the question which is raised in the defences, they would be quite entitled to do so, and they had an opportunity of doing so. They have not come forward, and therefore the position of the present action is this, that the answer of the defenders, that the pursuer has overstated the true extent of his right in the salmon fishings, is one upon which the pursuer is not bound to meet them. He is bound to meet any person only who has a title to raise that question with him, and so to raise it that a final and conclusive judgment can be obtained as between the two disputing litigants in the action. I quite agree with your Lordship therefore that we must look upon this case, so far as it remains in Court, as an action for an interdict only, based upon averments of encroachment; and I agree that, the encroachment not being admitted by the respondents, the pursuer must prove it before he can obtain an interdict. I think the proof must be limited as your Lordship proposes.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute and of the Sheriff, dated respectively 23rd December 1904 and 20th February 1905: Allow the pursuer a proof of his averments that the defenders have fished in the waters of Ness described in the

condescendence on a day other than the eighth day appropriated to the town of Inverness, and to the defenders a conjunct probation, said proof to proceed before Lord on a day to be afterwards fixed by his Lordship: Find the expenses of the appeal to be expenses in the cause," &c.

Counsel for Pursuer and Respondent—Johnston, K.C.—D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Defenders and Appellants—Hunter, K.C.—Constable. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, December 14.

FIRST DIVISION.

[Lord Pearson, Ordinary.

H. *v.* P.

Reparation—Slander—Statement by Defender that Pursuer had Committed Adultery with Defender—Veritas—Averments of Misconduct by Pursuer with Men other than Defender—Relevancy—Deletion.

In an action of damages for slander founded on an alleged statement by the defender, contained in a letter written by him to the pursuer, and subsequently repeated by him before witnesses, that she (the pursuer) had committed adultery with him, the defender pleaded that the statement was true, and lodged a statement of facts in which he averred, *inter alia*, that the pursuer had on a specified occasion committed adultery with A, and had on other specified occasions been guilty of indecent familiarities with B and C.

Held (*affirming* judgment of Lord Pearson, Ordinary) that these averments were irrelevant and fell to be deleted from the record. *A* v. *B*, Feb. 23, 1895, 22 R. 402, 32 S.L.R. 297, *followed.*

On 15th August 1905 Mrs —— or H., wife of H., raised an action against P., in which she sought to recover £1000 as damages for alleged slander.

The pursuer averred—"(Cond. 2) On 12th August 1905 she received the following letter from the defender:—

'. . . 11*th August* 1905.

. . . . . .

'Dear Madam,—I have now to notify you that I have at last made up my mind to make a confession as to my having committed an act of adultery with you, while you was, and is now, the lawful wife of G. F. H... As to time and place, I will fully explain when my opportunity comes to be heard in Court. You can make use of this letter in any way you think fit, and either answer it personally to me or through your agent.—Yours truly, D. C. H. P...'

"(Cond. 3) The said letter contains a statement that the pursuer had carnal connection with defender at a time when the pursuer was the wife of the said G... F... H.., and thus committed adultery with him. Said statement is false, malicious, and slanderous. The pursuer has never at any time committed adultery with the defender. The defender has since the 11th of August last repeatedly stated to a number of people that the pursuer has committed adultery with him, and in particular he called on the pursuer's husband on or about 17th August last and repeated that statement to him. (Cond. 4) Further, the defender on 27th September last went to the house occupied by pursuer, and there in the presence and hearing of his step-daughter," Miss E, Mr F, "and the defender's brother-in-law," Mr G, "said to the pursuer that he had fornicated with her, and that she and Miss" E "were a pair of whores, or used words of the like import and effect of and concerning pursuer, meaning thereby to represent that the pursuer was a prostitute. Said statements are false, calumnious, and malicious."

In answer the defender admitted writing the letter, and averred that the statement therein was true. In a statement of facts he averred that there had been great intimacy between the pursuer and himself, that they had been together on a great many occasions, on all of which the pursuer had indulged in improper familiarities towards him, even before strangers and friends, and that "the result of this intimacy was that the pursuer committed adultery with the defender on two occasions, viz., in the parlour of the defender's dwelling-house at ——, on a Saturday evening towards the end of September 1904, and again in the private office at defender's public-house between 1st and 17th October 1904."

The statement also contained the following articles:—"(Stat. 7) Both before and during the time when the pursuer was intimate with the defender she made a regular practice of walking and driving with other men, both alone and in company with the defender and others. She also allowed and encouraged these other men to take improper familiarities with her, and her conversation and conduct in the course of said walks and drives was of a lewd and indecent description. Among those was A, with whom in August 1900 she committed adultery in her own house in . . . . She confessed this act of misconduct to her husband, who forgave her. (Stat. 8) Among others with whom the pursuer thus made a practice of walking and driving alone or in company with the defender and others were B and C. Between 1899 and 1904 she very often drove out with B to agricultural shows or places in the neighbourhood. Both on these occasions and in her own house she allowed and encouraged B to take indecent familiarities with her. In particular, on one occasion in the month of July or August 1900 or 1901, when the pursuer and B were driving in the neighbourhood of . . . ., their conduct was such that the pursuer's brother-in-law, Mr ——, who met them while cycling, stopped and publicly remonstrated with