Appellants' Authorities.—University of Glasgow, Nov. 18. 1790, (2104.); Elton Hammond, June 24. 1812, (F. C.); Houston's Executors, March 4. 1820; A. of S. Feb. 13. 1730; Vere, Feb. 29. 1804, (16,389.); Henderson, Jan. 1803, (14,982.)

Respondent's Authority.—Mackay, March 9. 1796, (16,384.)

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON,—Solicitors.

THOMAS HARVIE of Westthorn, Appellant.—*Dean of Faculty Moncreiff—Brougham.* No. 12.

GEORGE RODGERS, and Others, Respondents.—*Adam—Keay.*

Prescription—Road—Presumption.—The uninterrupted use and enjoyment of a foot-path by adjacent feuars, &c. as far back as the memory of man could extend, through the property of a party infeft under titles which did not mention any such path prior to 1789, having been proved; and the proprietor having proved a series of interruptions from and after 1789, but which were resisted, and the use of the foot-path continued; and the Judge having directed the jury, 1. That, from the evidence of uninterrupted possession prior to 1789, they were entitled in law to presume forty years' possession; and, 2. That the interruptions by the proprietor were not sufficient to defeat the right acquired by such possession;—Held, (affirming the judgment of the Court of Session), That the direction was correct.

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2D DIVISION.

Jury Court.

THE estate of Westthorn, belonging to Harvie, was described in his titles as 'bounded by the river Clyde on the east, south, and south-west; on the west by the paling,' &c. The city of Glasgow lies on the bank of the river, a few miles lower down, and the village of Carmyle a short distance above. Harvie having erected stone walls, surmounted with iron railings, across his property, and running into the bed of the river, so as to prevent all passage by its banks, Rodgers and others, feuars, residenters, and proprietors in the neighbourhood, raised against him an action of declarator, stating, that the slip of ground extending along the north bank of the Clyde from the Green of Glasgow to Carmyle (of course including Harvie's property midway, touching the river), had remained free and unclosed past the memory of man; that through its whole extent a path runs along the bank, and for time immemorial had been resorted to and used and enjoyed by them, and other inhabitants of the neighbourhood, and their predecessors, without challenge, molestation, or interruption; and concluding that it should be found and declared, that the pursuers, inhabitants of and feuars and proprietors of the neighbourhood, have, by themselves, their pre-

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decessors and authors, exercised and enjoyed the free, immemorial, and uninterrupted right and privilege above mentioned, and that they have good and undoubted right and title, at all times, and on all occasions, to resort to the said piece of ground, and road or path, and there to exercise the privilege and enjoy the comfort of a free passage along the same, and of walking thereon for any lawful purpose, according to immemorial usage and custom, and that the right and privilege should be reserved entire, as it has been in time past; and farther, that the defender neither has nor had any right or title to encroach or innovate on this piece of ground, and road or path, or to obstruct the free passage thereof, according to use and wont; that he should be ordained to desist and cease from the like practice in future, and should remove the obstruction and impediments already raised, and be prohibited and discharged from using the said piece of ground, road or path, to the prejudice or injury of the said right of passage, according to use and wont, or from molesting or interrupting the pursuers, &c.

After considerable discussion before the Lord Ordinary, the pursuers averred and offered to prove, that for more than a century, at least for forty years and upwards, prior to the 1st of March 1822, or thereabouts, there existed a distinct and definite foot-road, leading from the Green of Glasgow along the banks of the river Clyde to the village of Carmyle, and separated from the adjoining lands by ditches and other fences; and that this road had, for the period above-mentioned, been constantly used and enjoyed without interruption or restraint by the public at large, and more particularly by the inhabitants of Glasgow and the neighbourhood. Harvie denied that the inhabitants of the neighbourhood, or the public at large, had enjoyed or exercised the right of foot-way claimed; and alleged that the nature of the ground was incompatible with such uses, and that if any person encroached on the property they were turned off. This issue was then sent to the Jury Court:—'Whether, for forty years 'and upwards prior to the months of March, April, and May '1822, there existed a public foot-path or foot-road along the 'right bank of the river Clyde, from the city of Glasgow, from 'the place called the Green, to the village of Carmyle, situated 'on the said bank of the said river?' The jury, in respect of the matters proven before them, found for the pursuer. Harvie then obtained a rule to shew cause in the Jury Court to have the verdict set aside, and a new trial granted, founding his application inter alia upon the direction of the presiding Judge at the trial, as a misdirection in point of law. But the Court

having dismissed the rule, and thereby confirmed the direction, Harvie tendered a bill of exceptions, reciting the evidence at full length, but which, in substance, was to this effect:—On the part of Rodgers and others it was proved, by aged witnesses, that for at least thirty-four years prior to 1789, the public had enjoyed the free and uninterrupted use of a foot-path along the banks of the Clyde, from Glasgow to Carmyle; that the proprietors through whose ground it ran, in enclosing their grounds, left openings or styles in the fences; and that, although occasionally interrupted, the possession had been continued till the date of the action. On the other hand, Harvie proved, that in 1789, and on several subsequent occasions, his predecessors, and the other proprietors on the banks of the Clyde, had erected fences, sunk ditches, and raised other obstacles to prevent the public going along the path; but it appeared that the fences had been pulled down or burned, the ditches either filled up at the place where the foot-path ran, or made otherwise passable; that the proprietors and the public had had a continual dispute on the matter; and that on the occasion of Harvie erecting a stone wall with iron rails in 1822, the contest came to such a height, that the public peace was disturbed, and the Sheriff was obliged to interfere, and to resort to the aid of the military force. The bill of exceptions then bore, 'That the Lord Chief Commis-
'sioner did then and there observe to the said jury, that the foot-
'path in question was not a private but public foot-path, as
'stated in the issues, from the city of Glasgow to the village of
'Carmyle; and if the jury believed the witnesses on the part of
'the pursuers, the public appeared to have been in possession of,
'and in the habit of using such foot-path, for a long period of
'time, more than forty years; and that there was, on the part
'of the defender, no evidence to establish an interruption till
'within the forty years: That in that case, and upon the whole
'evidence, the truth of which they, the jury, were to weigh
'and consider, the question was, Whether the interruption, as
'to which evidence on the part of the defender had been ad-
'duced, was sufficient to defeat the right as to which the evi-
'dence had been adduced on the part of the pursuers? And
'the Lord Chief Commissioner did then and there give, as his
'direction to the jury in point of law, that the interruptions
'proved were not sufficient to defeat a right in the public to
'the foot-way in question, which right must, on the evidence
'for the pursuers, if believed by the jury, be presumed to have
'been established, by having been used for forty years and up-

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'wards, from the date of the interruption, as stated in the issue: 'That such right in the public could only be defeated by an 'interruption acquiesced in, and submitted to; but that, accord-'ing to the evidence, if satisfactory to the jury, the interruptions 'had not been submitted to, but had been resisted; and the jury 'aforesaid did then and there deliver their verdict for the pur-'suers.' The Counsel for the defender then contended, 'That 'the Lord Chief Commissioner, instead of the direction on the 'law given by him as aforesaid, should have directed the said 'jury to have found a verdict for the defender, by directing 'them,—That the defender having produced an express title to 'the lands of Westthorn, bearing that these lands were bounded 'by the river Clyde, subject to no qualification of any right of 'road or public path-way in the line or direction founded on, the 'only way in which it could be established that the public had 'acquired a right to a public road through his property, was by 'producing positive evidence of the peaceable and uninterrupted 'use and possession of such a public road for forty years; and 'that a proof of partial possession, resisted and interrupted 'via facti by the proprietors, could not make out such a case of 'peaceable possession, acquiesced in by the proprietors: That 'the only right by titles of property being in the defender, it was 'not necessary, in order to defeat any assumed right by indivi-'duals of the public, to prove that actual interruptions made by 'the proprietors had been acquiesced in, and submitted to by 'all the public; and that the proof of peaceable possession by 'the public, and acquiescence by the proprietor, was essentially 'necessary to distinguish a prescriptive right to a public road 'from a case of attempted usurpation on the one part, and the 'assertion of the right of property on the other.'

The bill of exceptions having been presented to the Court of Session, their Lordships, on the 10th July 1827, 'having heard 'Counsel for the parties, disallowed the exception, declared the 'verdict final and conclusive in terms of the statute, and found 'expenses due.'*

Harvie appealed.

Appellant.—A proof of usage of right of way, uninterrupted for forty years, is equivalent to a proof of immemorial usage, whether the public or an individual claims: The only difference

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* 5. Shaw and Dunlop, No. 154.

is, that the individual must have some title with which to connect the usage, whereas the public can have no title but what the usage creates. But the proof itself is the same. The uninterrupted acquiescence for forty years by the proprietor of the ground, is regarded as an acknowledgment of the right claimed. But then the possession of the right of way must be peaceable and continued, without any lawful interruption within the forty years; and any act by which a proprietor uses or asserts his right, as in opposition to the right of way, is an interruption. If such be done, viz. putting up fences, chasing off intruders, this (particularly in a case with the public) will prevent the acquisition of the servitude. The issue sent to the jury was not calculated to bring out the real point between the parties; and even on it the jury was instructed, not to consider whether there had been forty years' acquiescence by the appellant, but whether his acts of interruption had been acquiesced in by the public; thus reversing the rule of law which regulates questions of this kind. Instead of the respondents being obliged to prove, that they had possessed the right of way for forty years uninterruptedly, the appellant was called on to shew that, by his acts, or the acts of other proprietors of the ground over which the right was claimed, he had deprived the public of the supposed right. Even if the respondents' evidence were sufficient to go before the jury, as applicable to the point at issue, the appellant's evidence was most important, as being incompatible with the peaceful uninterrupted enjoyment of the right of way, on which the whole of the respondents' case rested; and yet the Judge's charge had substantially the effect of withdrawing this evidence, led by the appellant, from the consideration of the jury; and thus it is impossible to doubt that a verdict was drawn from the jury, different from what it would have been had the direction complained of not been given. The evidence on both sides should have been considered in mass, and not divided. Although it was, no doubt, quite proper to lead evidence as far back as possible, this must not be taken by itself, but in conjunction with the evidence of possession down to the date specified; and then the jury ought to have been directed to inquire, whether there had been a peaceable possession for forty years retro from that date. It was impossible to maintain, that if there had been no possession during the forty years immediately previous to that date, the respondents would have done enough by shewing, that for the forty years before these forty years they had possessed and enjoyed the right of way. Undisturbed interruption is not legal or intel-

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July 8. 1828. ligible language; and besides, the pretended use of the road was little more than the straying of idle people from Glasgow over ground not enclosed, and by a much more circuitous path than the highway.

Respondent.—A right of way is inter regalia, and the soil over which it extends is the property of the Crown. The question which has arisen, is not whether the solum had once been the property of the appellant, nor whether a servitude had been created by occupancy in favour of the public; but whether, for forty years, or time immemorial, a public foot-path has existed? Now the respondents proved occupation for a period beyond the time ordinarily falling within the memory of man; and there was no evidence that at any period, however remote, there had been no way. In these circumstances, the direction of the Judge was quite correct. It must be taken as a whole, and not in parts. Before the exception can stand, the appellant must make out, not only that there was a direction calculated to mislead, but that it actually did mislead the jury. If it was right in its result, or if it was such as did not fetter the jury, but left them to form their verdict according to their own view of the evidence, it is sufficient. Besides, the Judge's observations on the evidence, or the effect of the evidence, are not the proper subject of a complaint by bill of exceptions. They may be founded on as a reason for a new trial: But that was applied for, and refused. The only ground for bill of exceptions is, that the Judge has conclusively and erroneously ruled a point of pure law influential in the case. But here the direction truly was the expression of an opinion as to the effect of the evidence. The direction, however, was quite correct. The question in the issue was, whether a public foot-path, in a specified direction, had existed for forty years and upwards? The point correlative to this was, whether there were such interruptions as destroyed, for any space of time, the existence of this public path? But the evidence shewed that the general occupancy of the path never was suspended, and therefore the jury were rightly directed to find in the affirmative of the issue. Still the fact, whether such an interruption had been given to the general occupancy, was left to the Jury to decide upon; and they did so. The law applicable to immemorial possession is quite fixed. If once proved, then you presume retro till the contrary can be shewn; consequently you presume the possession of forty years, or rather much more. Thus the public had a prescriptive right at the date of the first interruption; and unless that interruption was acquiesced in, and

tolerated for forty years, the public have not lost their right. The appellant endeavours to assimilate this case to a claim of servitude. That, however, is obviously an incorrect view; but even if correct, it would not avail him, for a servitude can be acquired by possession for forty years; and the possession here exercised and proved is, in law, equivalent to possession for forty years. It is a still greater error to maintain, that the forty years to be inquired into were the forty years immediately preceding the date specified in the issue; for that would lead to the untenable proposition, that the advantage of a possession for a century could be lost by interruption in the hundredth and first year. It is enough if there were possession for forty years at any one time previous to that date specified; and even if this point were also conceded to the appellant, his case would not be strengthened, for the facts described by the appellant as interruptions are not legally so. The passage was not merely used by idle boys, nor was the ground unenclosed, or the way too circuitous to be used as an access to Glasgow. Besides, these were statements for the jury, and cannot be here founded on.

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The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutor complained of affirmed, with 'L.100 costs.'

LORD CHANCELLOR.—My Lords, There is a case of Harvie *v.* Rodgers, argued some time since at your Lordships' Bar, which now stands for judgment. It was a case as to a public right of way on the north bank of the Clyde, from the city of Glasgow to a village of the name of Carmyle. In the course of the proceedings it was directed that an issue should be prepared for the Jury Court. An issue was accordingly prepared in these terms:—'Whether for forty years and 'upwards, prior to the months of March, April, or May 1822, there 'existed a public foot-path or foot-road along the right bank of the river 'Clyde, from the city of Glasgow, from the place called the Green, to 'the village called Carmyle, situated on the said bank of the said 'river?' That issue came on for trial under the direction of the Lord Commissioner of the Jury Court, and a verdict was found for the pursuers, establishing the right of way. An application was made for a new trial, on the ground of a misdirection in point of law. The argument for a new trial was carried on at considerable length, and the Court were finally of opinion that there was no ground for a new trial. Afterwards a bill of exceptions, regularly signed, was tendered by the defender; and the question in point of law, with respect to the direction of the learned Judge, came before the Court of Session, who, after hearing arguments, were of opinion that the direction given by the Lord Commissioner at the trial was perfectly correct. It is from

July 8. 1828. this judgment that the appeal has now been brought for your Lordships' decision. The whole case, therefore, arises upon the bill of exceptions; and I shall state to your Lordships, very shortly, the effect of the evidence on the bill of exceptions, so far as it is necessary to point your Lordships' attention to it, with reference to the direction of the learned Judge who presided at the trial.

It appeared by the evidence of living witnesses, who attended at the trial, that, so far back as seventy years previously to the time of the trial, (I think as far back as the year 1755), this way was used without interruption. There was no evidence whatever of any interruption of the right occurring until the year 1789, thirty-four years subsequent to the beginning of the period to which the evidence related. Not only was there no evidence during that thirty-four years of any interruption of the right, but there was distinct and positive evidence to the contrary. The exercise of the right of way had never, during that period, been at all interrupted; and there were various circumstances which were referred to in evidence for the purpose of confirming that statement, and, among others, that in the fences there were regular stiles placed, in order to facilitate the passage of persons using the way. In the year 1789, for the first time, according to the evidence, this right was attempted to be interrupted. Even with regard to this interruption there was contradictory evidence. It appeared, however, by very clear and distinct evidence, that in the year 1797 an attempt had been made to interrupt the exercise of this right; and from the year 1797 down to the period of the trial, at successive periods, the occupiers of the property, over which the right of way extended, had at different times interrupted the exercise of it; but in no instance whatever had these interruptions been finally successful. They had been always resisted; the fences which had been from time to time erected had been pulled down; and the public had enjoyed the right of way, subject to these occasional interruptions, from the year 1755 down to the period of the trial. It appeared, therefore, that, except the interruption in the year 1789, even supposing that interruption to have been satisfactorily established, (with reference to which there was contradictory evidence), there was no interruption existing at a period so far back as forty years previous to the time of the trial.

Now these are all the facts, or rather the result of the facts, stated upon the bill of exceptions, necessary for the purpose of explaining the direction of the Lord Commissioner. His Lordship's direction was in these terms:—'If the jury believed the witnesses on the part of 'the pursuers, the public appeared to have been in the possession of 'and in the habit of using such foot-path for a long period of time,— 'more than forty years,' (that there is no doubt of); 'and that there was 'on the part of the defender no evidence to establish an interruption 'till within the forty years,' (with respect to that fact also there was no doubt); 'that in that case, and upon the whole evidence, the truth of 'which the jury was to weigh and consider, the question was, Whether

'the interruption, as to which evidence on the part of the defender 'had been adduced, was sufficient to defeat the right as to which the 'evidence had been given on the part of the pursuers? And the Lord 'Chief Commissioner did then and there give as his direction to the 'jury in point of law, that the interruptions proved were not sufficient 'to defeat a right in the public to the foot-way in question.' Now pausing here, my Lords, the direction of the Lord Chief Commissioner appears to be perfectly correct, that is, assuming the right of foot-way to have been satisfactorily established by evidence. The interruptions which were proved were not sufficient to defeat such right,—they were occasional interruptions, exercised during a period of about thirty-four or thirty-five years, but always resisted, and effectually resisted. Supposing, therefore, the right of way to have been established, an attempt on the part of the occupiers of the land over which the way ran, from time to time to interrupt that right, but not effectually succeeding in interrupting that right, never can be considered as sufficient to get rid of a right of way once established. So far, therefore, there can be no doubt of the propriety of the direction of the Lord Commissioner. He then went on thus, 'Which right must, on the evidence 'for the pursuers, if believed by the jury, be presumed to have been 'established by having been used for forty years and upwards from 'the date of the interruption as stated in the issue.' Now, my Lords, with respect to that passage some doubt was entertained, and the principal part of the argument bore upon that part of the direction of the learned Judge; but when it is considered with reference to the evidence, it appears to me to be perfectly distinct and intelligible. He tells the jury, that the right must, on the evidence for the pursuer, if that evidence be believed by the jury, be presumed to have been established, by having been used for forty years and upwards from the date of the interruption, that is, previous to the date of the interruption in the manner stated in the issue; for in the issue the attention of the jury is directed to the period of forty years' enjoyment as being a period which is sufficient, if uninterrupted, to establish the right of way.

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Now, my Lords, what is the evidence with respect to that part of the case? I shall assume, for the purpose of argument, that the interruption in 1789 was established to be an interruption without any contradictory evidence. I do not mean interruption that was finally successful, for the interruption was resisted; but for thirty-four years previous to that time, this way had been used without any interruption at all, by the acquiescence of the proprietors of the land over which the way ran. That carries back the evidence as far as seventy years,—as far back as the memory of any witness could extend who was examined upon the trial,—as far as it is probable the recollection of any witness could apply to a case of this description; and if thirty-four years of uninterrupted exercise of the right of way were established, it was then competent for the jury to presume, and they ought in point of law to

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be directed by the learned Judge to presume, from thirty-four years' exercise of a right of way uninterrupted, a previous enjoyment corresponding with the manner in which it had been enjoyed during the thirty-four years. They therefore were entitled from the evidence to presume, that for forty years previous to the year 1789, the date of the first interruption, this right of way had been exercised without any interruption; more particularly from those circumstances stated in the evidence, that there were actually openings made by the proprietors of the land, for the purpose of allowing the free use and enjoyment of that right of way. The case then stood thus:—The learned Judge in substance told the jury, There is evidence, from which you may assume that for a particular period, namely for forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you in point of law, that subsequent interruptions not acquiesced in cannot defeat the right so acquired. It was contended, and contended strenuously, in argument by Counsel at the Bar, that, according to the law of Scotland, it was necessary to prove forty years' uninterrupted enjoyment down to the period of the trial. But it is quite impossible to maintain a position of that kind, for it would lead to this consequence, that if you were to establish an uninterrupted enjoyment, even for the period of sixty or seventy years, an occupier could at any time defeat that right so enjoyed, by successive obstructions, although those obstructions might be resisted by persons exercising the right of way, unless they thought proper to go into a Court of justice. I apprehend that that cannot be the case. It cannot be the case certainly by the law of England. If the right be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in. There was no interruption here acquiesced in; and therefore I should humbly submit to your Lordships, that the judgment given by the Court below, confirming the judgment of the Jury Court sustaining the direction of the Lord Chief Commissioner upon the trial, ought to be affirmed.

My Lords,—In this case, as it appears to me that the direction of the Judge to the jury was correct; and as there was an application made, in the first instance, for a new trial, on the ground of misdirection in point of law; and as that motion for a new trial was overruled; as the case was afterwards brought in upon a bill of exceptions for the purpose of raising the same question; as the Court of Session was of opinion that there was no ground for the bill of exceptions, and confirmed the direction of the learned Judge; I should conceive that, under such circumstances, your Lordships will be of opinion that this appeal ought to be dismissed with costs.

Appellant's Authorities.—Hamilton, March 5. 1793, (12,824.); 2. Stair, 12. 11.; 3. Ersk. 7. 39.; Kinnaird, Feb. 26. 1662, (14,502.); Nicolson, Nov. 14. 1762, (11,291.); Duke of Roxburgh, June 5. 1713, (10,883.); 1617, c. 12.

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Respondents' Authorities.—1. Bankton, 3. 4.; 1. Craig, De Feudis, 16. 10.; 2. Ersk. 6. 17.; M'Kenzie, Feb. 15. 1822, (1. Shaw's Appeal Cases, No. 23.); Duff, May 22. 1826, (2. Wilson and Shaw's Appeal Cases, No. 19.); 55. Geo. III. c. 42.; 59. Geo. III. c. 35.; 6. Geo. IV. c. 120.; Tait on Evidence, p. 491.; Montgomery, June 24. 1663, (12,722.); Ker, Feb. 12. 1714, (12,723.); Nicolson, Nov. 14. 1662, (11,291.); Beaton, July 13. 1670, (10,912.); 3. Ersk. 7. 38.; Wright, Dec. 11. 1717, (11,268.); Rugby Charity, 11. East, 376.

MONCREIFF, WEBSTER, and THOMPSON—ALEXANDER DOBIE,—Solicitors.

EARL OF KINTORE and Others, Appellants.—*John Campbell—Keay.* No. 13.

J. FORBES and Others, Respondents.—*Spankie–Adam–Lumsden.*

Salmon Fishing—Title to Pursue.—Found, (affirming the judgment of the Court of Session), 1. That stake-nets erected on the proper shore of the sea, are not illegal; and, 2. That proprietors of salmon fishings in an adjacent river, have no title to object to heritors on the sea-coast, who hold a right of fishing by net and coble from the Crown, exercising their right by stake-nets.

July 11. 1828.

2D DIVISION.
Lord Mackenzie.

FORBES, and other proprietors of land, stretching northward along the sea-shore six or seven miles, from about two miles from the mouth of the river Don in Aberdeenshire, (a river that issues into the ocean without any frith or estuary), held by their title-deeds the right of salmon fishing by net and coble ex adverso of their estates. These fishings they let to tenants, who erected stake-nets in the sea, and caught white fish and salmon. The Earl of Kintore, and other proprietors of the salmon fishings in the river itself, and of the sea fishings at its mouth, challenged these erections, and raised an action of declarator before the Court of Session, concluding that it should be declared, that Forbes, and the other proprietors, had 'no right, by themselves, 'or other persons employed or authorized by them, to erect or 'use the said dams, stake-nets, yairs, or machinery aforesaid, or 'other machinery of the same nature, within the salt water that 'ebbs and flows, or upon the sands and schaulds adjacent thereto:' 'that the defenders should be ordained to demolish them, and pay 'damage for the loss already sustained by these erections; and be 'interdicted from erecting or using in future the machinery fore-'said, or any other machinery of the same nature, within the salt