*Thursday, Nov. 23.*

## FIRST DIVISION.

SUSP. AND INT.—LOVAT AND OTHERS *v.* TAIT.

SUSP. AND INT.—LOVAT AND OTHERS *v.* MACKENZIE.

Counsel for Suspenders—Mr Gifford and Mr Rutherfurd. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Respondent Tait—The Solicitor-General and Mr Watson. Agents—Messrs Adam & Sang, S.S.C.

Counsel for Respondent Mackenzie—Mr Balfour. Agent—Mr Colin Mackenzie, W.S.

These are notes of suspension and interdict which have been presented by Lord Lovat, Lord Saltoun, Mr Edward Ellice, M.P., Colonel Fraser Tytler of Balmain, Mr Fountaine Walker of Foyers, and Mr Baillie of Leys, all of whom were interested in the salmon fishings on the Ness and the Beauly. The one note was directed against Archibald Tait, salmon fisher in Inverness, and the other against Patrick Grogan Mackenzie of Flowerburn, in Ross-shire, and his tutors and curators. The prayer of each note was to "interdict the respondent either by himself or others in his employment, or having pretended right or liberty from him, from fishing for and taking salmon or other fish of the salmon kind by means of stake-nets, stell-nets, or other fixed engines or machinery," in any part of the estuary of the Ness and Beauly. The suspenders averred that this mode of fishing was practised by the respondents, and that it was illegal and injurious to their rights of salmon fishing.

The respondent Tait, in his answers, denied that he used stell-nets; and explained that in fishing he employed the ordinary mode of net and coble, which he thus described:—"One end of the ropes to which the net is attached is held by a man on shore whilst the net is paid out from the stern of the coble. During stormy weather and strong tides a drag or weight is attached to the seaward end of the net for the purpose of keeping it in position, and the coble returns to shore with the rope. The net is not in any way fixed or made stationary. . . . The above mode of using the net and coble is rendered absolutely necessary on most occasions in consequence of the tides which prevail at the fishings." He also said that this mode had been in use from time immemorial.

The statement of the other respondent was somewhat different. He said that his mode of fishing, though sometimes called stelling, is fishing by ordinary net and coble:—"In stelling, a shot is made with the ordinary net and coble in the following manner:—One end of the net or the rope attached thereto is held on the shore by a man or two men; the net itself is taken out in the coble and paid out of the stern of the same in the usual way, and the rope attached to the outward end of the net is brought back to the shore by the coble. . . . The net is not fastened to any stake or fixed or permanent thing in the water, nor is the net itself kept fixed or stationary throughout the operation of fishing, though, for the purpose of steadying the net, a stone or light anchor is sometimes attached to the outward end of the net."

Lord Barcaple on 25th August 1865 passed the notes in order to try the question whether the mode of fishing practised was illegal, but he refused the interdict in *hoc statu*. The suspenders reclaimed, and urged that interim interdict should be granted. It was mentioned by the respondents that the salmon fishing had been closed on the day after the interdict was refused, and would not be open again until 11th February next.

The Court after discussion adhered—Lord Deas dissenting.

The LORD PRESIDENT said—The record in these cases is not very clear on either side. The complainers do not distinctly describe what they say the respondents do; and the respondents avoid the statement of some things which might have been introduced with great effect if the circumstances had admitted of it. The respondent Mackenzie, in particular, does not state any length of time during which the nets are allowed to remain stationary. Whether the mode of fishing adopted is illegal depends on the length of time. If it is for a tide or thereabouts, that is one thing; if merely for a short time, to prevent derangement of the net in stormy weather, that is quite another thing. It does not appear, therefore, from the statement of parties what are the actual *species facti*. The question is—Are we at this stage to grant interdict? There can now be no fishing until 11th February; and if this case proceeds with due expedition, it is certain that by that time the parties will have made on record all the statements on which they mean to take their stand. It will be in the power of the Lord Ordinary then again to consider the question of interdict. Were I sitting as Lord Ordinary, it would then form an important element in my opinion that the respondents had been causing delay in making up the record for the purpose of in this way staving off the interdict; but I think that at present we should allow matters to remain as they are.

LORD CURRIEHILL concurred.

LORD DEAS said that this was a very narrow question, but on the whole he thought it would be safer to grant interdict. The complainers say distinctly enough that the respondents use stell-nets or other fixed machinery. Now, stell-nets have a character about them which other nets have not. The respondents were thus called on to describe what their nets were, and they have done so; but their description does not seem to be inconsistent with anything stated by the suspenders. The interdict of course might be recalled at any time.

LORD ARDMILLAN concurred with the majority, but was moved to do so solely by the fact that until February there could be no fishing. But for this circumstance his Lordship would have been prepared in Mackenzie's case at present to grant interim interdict.

## SECOND DIVISION.

MAGISTRATES OF ROTHESAY *v.* M'KECHNIE.

Counsel for Suspenders—The Lord Advocate, Mr Millar, and Mr Muirhead. Agents — Messrs M'Andrew.

Counsel for Respondent—The Solicitor-General and Mr Orr Paterson. Agents—Messrs J. & A. Peddie.

In this suspension and interdict the magistrates of Rothesay seek to interdict the respondent from erecting a wall for the enclosure of his property, which wall, they aver, encroaches on the *solum* of the public road between Rothesay and Port-Bannatyne, of which they are custodiers. Issues were ordered and lodged. Thereupon the Lord Ordinary (Barcaple) intimated an opinion that the proper and expedient course was to try the case by a proof on commission, and parties having consented, that course was followed. A proof was accordingly led; and the Lord Ordinary, after hearing parties on the proof, refused the suspension and interdict. The suspenders reclaimed. On the case being called, the Lord Justice-Clerk stated that he had doubts as to the competency of the course that had been followed, and appointed parties to be heard on the question whether this was an action on account of injury to land where the title is not in question, and as such one of the causes enumerated in the Judicature Act, and appropriated to trial by jury.

After hearing counsel, the Court took time to consider.