

LORD MURE concurred.

LORD PRESIDENT—The great peculiarity of this case, in my appreciation, is that there were two offers made for the farm by the intending tenant, neither of which was either accepted or rejected in writing. Accordingly, the two offers, standing together, were a proposal or proposals on the part of the tenant, and nothing more. In order to convert these, or either of them, into a complete and binding contract, it was necessary that possession should follow. Nothing else could give effect to this one side of an inchoate contract. Possession did follow, but the question is, on which of the offers did it follow, for neither was accepted and neither was rejected? The landlord says that it followed on the second offer, which in his view necessarily superseded the first offer. The tenant says that possession followed on both offers, that neither was rejected, and that both are necessary to the completion of his right.

The object of allowing a proof was to endeavour to ascertain which of the two views was true—whether the possession had reference to the one offer or to both. The result is, to show that the landlord's representative ascribed the possession to one offer, the latter of the two, and believed that the tenant was acting on the same understanding. The tenant, on the other hand, ascribed the possession to both offers, and believed that the landlord's representatives understood he was doing so. If I disbelieved the statements of either party I could then see my way to hold that there was a concluded contract, as I could then decide to which view I was to give credence. But I am in the position of believing both sides to be perfectly honest. I think the landlord or his representative forgot about the first offer, and I am just as ready to believe that the tenant had both in his mind, and regarded both as of importance.

The legal inference from that statement of fact is irresistible. There was no *consensus in idem placitum*, and therefore no mutual contract was concluded. The contract is said to have been completed not by writing alone, but by writing on the one side, followed by possession on the other. But the possession here is so ambiguous as to be no substitute for writing. On that state of the facts, the legal inference is that there was no contract. I therefore concur with your Lordships that we ought to give decree in terms of the declaratory conclusion of the summons.

The Court decerned in terms of the second declaratory conclusion of the summons as amended, and appointed parties to be heard on the conclusions for removing.

An interlocutor was at a later stage pronounced decerning in terms of the conclusion of removing, and of consent fixing the terms of removing at Martinmas 1877 as to the arable land, and Whitsunday 1878 as to the houses and grass. All claims competent to the defender in connection with his possession of the farm were reserved.

Counsel for Pursuer—Gloag—Asher. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender—Fraser—Lorimer. Agents—H. & A. Inglis, W.S.

Friday, June 8.

FIRST DIVISION.

[Sheriff of Forfar.

LOCKHART v. MOODIE.

Sale—Partnership—Joint-Adventure.

Circumstances in which held that a purchase had been made on behalf of a joint-adventure, and that therefore the joint-adventurers were liable *in solidum—diss.* Lord Mure, who thought that the purchase was made on the credit of one of the joint-adventurers only, that the thing purchased had afterwards been contributed by him to the joint-adventure, and that therefore the purchaser alone was liable.

This was an action for £992, the price of 10,000 spindles of yarn, bought by Messrs N. & N. Lockhart, flax-spinners, Kirkoaldy, against Messrs Moodie & Co., bleachers and yarn merchants, Dundee, and Mr Robert Mackenzie, merchant there. The contention of the pursuers was that the yarn in question had been purchased from them by Mr Mackenzie on account of a joint-adventure between him and Messrs Moodie & Co., and that therefore Messrs Moodie & Co. were liable to them for the price, Mackenzie being bankrupt. The defenders Messrs Moodie & Co., on the other hand, maintained that the purchase had been made by Mackenzie on his own account, and that though the goods had afterwards been made the subject of a joint-adventure between them and Mackenzie, that had been accomplished by a separate sale by Mackenzie to the joint-adventure. In point of law, therefore, they contended that there was no liability on them, the purchase being made by Mackenzie as an individual, not as a partner in the joint-adventure.

The purchase in question was made in February 1875. It was stated in a memorandum from Mackenzie to Moodie & Co. to have been carried out on the same footing as a previous transaction in September and October 1874. On neither occasion did Moodie & Co.'s books show any trace of a purchase by them and Mackenzie from Mackenzie, while on the occasion of the former purchase there was an entry of the purchase having been made from "N. & N. Lockhart, per Robt. Mackenzie, on joint a/c with him." Mr Moodie in his evidence stated that the arrangement, as he understood it, was that they should purchase from Mackenzie on joint-account with him a quantity of yarn at 1s. 11d. per spindle. This Mackenzie was at liberty to buy wherever he pleased. For the yarn purchased by Mackenzie, Lockhart was to receive 1s. 11½d. per spindle. Mackenzie did not defend the action.

The Sheriff-Substitute (CHEYNE) pronounced the following interlocutor:—

"Dundee, 30th May 1876.—The Sheriff-Substitute having resumed consideration of the case, Finds as matters of fact (1) that the yarns mentioned in the account annexed to the summons were sold by the pursuers at the rate specified in the said account to Mr Robert Mackenzie, a defender in this action, against whom decree in absence has been pronounced, and that the price has not been paid; but (2) that the pursuers have failed to prove that in purchas-

ing the said yarns the defender Mr Robert Mackenzie was acting for or on behalf of a joint-adventure entered into between him and the other defenders, Messrs D. Moodie & Co., as alleged in the summons: Finds therefore, as matter of law, that the defenders Messrs D. Moodie & Co. are not liable to the pursuers for price of said yarns, but are entitled to be assoilzied from the conclusions of the action: Assoilzies them therefrom accordingly: Finds them entitled to expenses, as the same may be taxed by the Auditor of Court, to whom remits their account when lodged for taxation and report, and decerns.

"*Note.*—The yarns, the price of which forms the subject of this action, were purchased from the pursuers in February 1875 by the defender Mr Mackenzie in his own name, at the rate stated in the account annexed to the summons—viz., 1s. 11 $\frac{1}{2}$ d. per spindle. In settlement of the price Mr Mackenzie granted his promissory-note at four months' date, but before it became due he found himself obliged to suspend payment, and the note was dishonoured. After the suspension the pursuers learned for the first time that the other defenders, Messrs Moodie & Co., were in some way mixed up with the transaction, and following upon this discovery they have raised this action, the *medium concludendi* being that the purchase, though made by Mr Mackenzie in his own name, was in reality made by him for and on account of a joint-adventure in which he and Messrs Moodie & Co. were partners. The defence stated to the action by Messrs Moodie & Co. (who alone have appeared to defend) is an admission that they had a joint-adventure with Mr Mackenzie, of which these very yarns formed the subject, but a denial that they are liable to the pursuers for the price, their case being that the yarns came into the joint-concern under a sale from Mr Mackenzie, the terms of which were different from those at which Mr Mackenzie bought from the pursuers, and that the price has been paid by them on behalf of the joint-concern to Mr Mackenzie, in pursuance of their arrangement with him. The law applicable to the case is not doubtful. The pursuers, having relied solely on Mr Mackenzie's credit, must in this action be bound by the actual agreement between Mr Mackenzie and Messrs Moodie & Co., and, in order to obtain decree against the latter, must show that in purchasing the yarns Mr Mackenzie was really and truly acting, not for himself, but for and on behalf of the joint-concern.—(See 2 Bell's Com. 539, and Lord Fullerton's opinion in *White v. M'Intyre*, January 12, 1841, 3 D. 334).

"Now, I must candidly say that had no limit of price been fixed by Messrs Moodie & Co., or had the price at which the pursuers sold been 1s. 11d. per spindle, I should, having regard to the whole evidence, and more particularly to the entries in Messrs Moodie & Co.'s own books, have had little hesitation in deciding for the pursuers; but after full consideration of the case, and of Mr Barnet's able argument, I have come to be of opinion that the balance is turned against the pursuers by the fact that the goods were bought from the pursuers at a price higher by $\frac{1}{2}$ d. per spindle than under the arrangement between Mr Mackenzie and Messrs Moodie & Co. they were to be put, and than they were actually put, into

the joint-concern—the importance of that fact consisting in this, that it satisfies me that what Mr Mackenzie says was his view of the arrangement between himself and Messrs Moodie & Co. is the true one. It is clear upon the evidence that Messrs Moodie & Co. only consented to go into the joint-adventure proposed to them by Mr Mackenzie provided that they got the yarns at a price not exceeding 1s. 11d. per spindle, and that Mr Mackenzie knew this at the time he made his bargain with the pursuers. How, then, unless you are to impute something approaching to fraud to him, can it be said that in making the purchase he intended to bind the joint-concern? Is it not the fair and legitimate inference from his conduct that he really looked upon the purchase, as he swears he did, as a purchase made by him individually, with which Messrs Moodie & Co. had nothing to do, and that he considered the joint-concern as purchasers from him. On any other supposition his failure to disclose the price at which he had bought to his partners (who in point of fact only became aware of it after his suspension) would be most dishonourable; but, of course, taking his view of the transaction, he was under no obligation to disclose the price unless it was below 1s. 11d. per spindle. Mr Moodie deposes that his understanding of the joint arrangement was similar to Mr Mackenzie's, viz., that the goods came into joint account as Mr Mackenzie's goods, and as a purchase from him, and gives that as his reason for not inquiring what Mr Mackenzie's bargain with the pursuers was, and though it must, I think, be admitted that his books rather militate against his version of the transaction, I am not prepared to say that they are so clear or so conclusive upon the point as to lead me to disbelieve his sworn statement as to the real nature of his agreement with Mr Mackenzie, confirmed as that statement is by Mr Mackenzie's evidence and Mr Mackenzie's conduct. On the whole matter, therefore, while I feel that the case is not unattended with difficulty, and while I think it is to be regretted that the parties did not make a memorandum of their agreement, I am satisfied that it was *pars contractus* that Mr Mackenzie should purchase the goods on his own responsibility, and put them into the joint-concern as his goods; and if that be a correct view of the evidence, then the pursuers have clearly no claim against Messrs Moodie & Co.

"Let me say, in conclusion, in a single sentence, lest it should be supposed that I have overlooked the evidence as to the very similar joint transaction between Mr Mackenzie and Messrs Moodie & Co. in September and October 1874, which bulks so largely in the proof, that if I were called upon to judge of it now with the light thrown upon it by the subsequent transaction, I would take the same view of its nature as I have taken of the nature of that subsequent transaction."

On appeal, the Sheriff (MATTLAND HERIOT) adhered.

The pursuer appealed.

Authorities—*Logy v. Durham*, M. 14,566; *Garthwaite v. Duckworth*, 12 East. 421; *White v. M'Intyre*, January 12, 1841, 3 D. 334; *Cunninghame v. Kinnear and Others*, March 27, 1765, 2 Paton's App. 114; *B. L. Co. v. Alexander*,

January 14, 1853, 15 D. 277; Bell's Com., vol. ii., 649-51 of 5th edition, 539-41 M'Laren's edition.

At advising—

LORD DEAS—Messrs Moodie and Co., on the one hand, and Mr Mackenzie, on the other, were traders in Dundee, but, with the exception of two joint transactions in yarns, they were not connected with each other in business in so far as we see. But they had two joint transactions, both in yarns known as "Lockhart's spin,"—Lockhart being a spinner in Kirkealdy and well known as a seller to parties in Dundee. The first of these transactions took place in September and October 1874, and was thus entered in Moodie & Co's books—"8000 spindles purchased from N. & N. Lockhart per Robert Mackenzie on joint-account with him"—that is a joint-account between Moodie & Co. on the one hand, and Mackenzie on the other. I shall drop out of my phraseology the "Company," and as there are only two shares, I shall speak of the share held by Mr Moodie and the share held by Mr Mackenzie. Now, there is no entry in the books of Moodie of any purchase made by him from Mackenzie, that is clear. The next thing that is quite clear is, that the second transaction occurred in February 1875, and was understood to be a transaction of the same kind as the transaction of 1874, with the exception of the matter of discount to be allowed; we have that under the hand of Mr Mackenzie himself; he says in a memorandum addressed by him to Mr Moodie, of date 11th February 1875:—

"I wait on you with

- "(1) Duplicate of an order which I have sent to N. B. R. Co. for yarn from Lockhart.
- "(2) Consignment invoice on joint account of yarn covered by above order.
- "(3) Statement of account shewing due to me by joint account, £480, 8s. 8d.
- "(4) My draft on your good selves for that sum, which be good enough to accept and return to me.

"These are all in accordance with arrangements as carried out last time, excepting that Mr M. (as he explained to you) has not been able to arrange an extra $\frac{1}{2}$ per. cent.

At this time Mackenzie had made the purchase from Lockhart, and ordered the yarns to be sent to him by the North British Railway Company, but they never came into his possession. He sent a delivery-order in favour of Moodie to the railway company, as he had done in 1874, and repeated it on the arrival of each parcel of yarns, for, as in 1874, the yarns were not all forwarded at once. In this second transaction there is no entry of any purchase from Mackenzie in Moodie's books. That is said by certain witnesses to have been an omission, but we have it plainly stated by the documents that the second transaction is to be on the same terms as the first. On neither occasion was Lockhart made aware that Moodie was concerned in the purchase. That is clear, and therefore it cannot be said that he relied on Moodie's credit in making the sale, but it is as clear in law, as it is laid down by Mr Bell, that that does not affect the question of Moodie's liability. Mr Bell says (Com. vol. ii. 649, in M'Laren's edition 539)—"If the parties have formed their agreement and arranged their joint interest, and, in pursuance of the adventure, authorise goods to be purchased, they will be jointly re-

sponsible for the price. It is a purchase by the society, whatever credit may have been relied on. This is the settled doctrine both of the Scottish and of the English law." He refers there to what was laid down by Lord Ellenborough in the case of *Garthwaite v. Duckworth*, 12 East. 421, in these words—"If all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose (responsibility) as if all the names had been announced to the seller, and therefore all are liable for the value of them." The same principles of law were laid down by Lord Fullerton in the case of *White v. M'Intyre*, January 12, 1841, 3 D. 334, and I can find nothing in that opinion contrary to the law I have already laid down. The circumstances of that case were peculiar, but there is not a syllable which can be held to infringe the general rule of law as stated by Mr Bell. Now, it is said of this second transaction—and if it is said fairly of it, it must be true of the first, since we have the documents expressly stating that the conditions were the same—that Mackenzie bought from Lockhart, and sold to Moodie. There is no such transaction entered on the books. It is not really a question of fact, but a question of law—a question as to the legal constructions of facts that are not in doubt. These facts are as follows:—This joint-adventure was agreed on before Mackenzie made the purchase from Lockhart; for I hold the import of the evidence clearly to be that it was finally agreed on then, and that Mackenzie should purchase the yarn on the joint-adventure. It was understood that he should go into the market and purchase. I am aware that there is some discrepancy in the evidence as to whether the transaction was finally arranged, but it is not disputed that they had agreed that the thing was to be done. Mackenzie tries to make out that though the joint-adventure was to be so many spindles, it was not actually fixed. Lockhart swears that Mackenzie told him it was fixed, and he is corroborated by his son. I have no doubt it was so, and that he said so. Then the subject in dispute was the whole subject of the joint-adventure. That is clear too. It was no case of contribution. The joint-adventure consisted in buying yarn and bleaching it and then reselling it. The expense of bleaching it was to be borne by the joint-adventurers, and was borne by them. It will not do for Moodie to say that he thought that there was a sale by Mackenzie to him. I do not question that he settled with Mackenzie for the yarn which he had bought, but if he did so he mistook the law. In point of law, it is not doubtful that Moodie is liable.

The only puzzle in the case is this. The price paid by Mackenzie to Lockhart was $\frac{1}{4}$ d. per spindle more than was refunded to him by Moodie. Yet the more one thinks of it the more one thinks that the case really is as I have stated it. There is nothing in that farthing. It comes only to this—Mackenzie was told "you are to purchase at a certain price, and we will not refund you more." Mackenzie paid an extra farthing; but it is plain to me that he did that because he was anxious to go into this transaction, by which he expected to profit. On the whole, I think that this is a very clear case of legal liability.

LORD MURE—The difficulties of this case are on the evidence. As to the law, there is not much doubt or dispute either at the bar or on the bench. The point to be decided is the question of fact as to the terms, and the nature of the transaction relative to the purchase and sale of the yarn. The law laid down in the case of *White v. M'Intyre* is this—The fact that goods are purchased by one member of a joint-adventure, and afterwards find their way into the joint-adventure, will not subject the joint-adventurers to liability, for they will be held to be the purchaser's contribution to the joint-adventure. The opinion of Lord Fullerton has been quoted, but there were other pointed opinions delivered in that case, which I think are applicable here. The opinion of Lord President Hope runs thus—“There is no doubt that the work which forms the foundation of the action was *in rem versum* of the joint-adventure. But then it was ordered by and furnished to Reid as an individual. It is not said that he pledged the credit of the company, nor even that he told that there was any joint-adventure at all, or that the defender was any way concerned with the contract. If I buy goods on my own credit, and afterwards use them for the purposes of a joint concern, the seller's only claim is against me.” Lord Gillies followed, concurring with his Lordship, and refers to Mr Bell at a different passage from that quoted by Lord Deas, viz., page 653 (542 of M'Laren's edition), where he is speaking of *Jardine's case* (*Jardine v. M'Farlane*, 16th Feb. 1828, 6 Shaw 564). Then Lord Fullerton says—“But there is another class of cases to which the principle, viz., of joint-liability, will not apply. Such are the cases referred to by some of your Lordships, in which a party to a joint-adventure has agreed to put into the common stock a certain quantity of goods or certain sum of money; and in order to fulfil this agreement to his partners, has a separate dealing with a third party in his own name and on his own credit, from whom to get the goods or money. In such cases the individual partner is neither ostensibly nor really acting for the joint-concern, as may be seen at once by considering that the joint-adventure has no interest whatever in the terms of that dealing. In such cases I think there is no principle for holding the *socii* jointly liable, as the dealing of the individual is not joint in point of law.” The question here is, whether this case has been brought under the rules laid down by Lord President Hope in that case? I may say at once that I think there is sufficient evidence to bring it under these rules. Mackenzie was to secure a certain quantity of Lockhart's yarns, and that was to be his contribution to the joint-adventure. It was necessary that the yarn should be bleached, and Moodie's contribution was that he should bleach it. It was then to be sold. That is the substance of the terms of the joint-adventure. It is agreed by all that Mackenzie could have bought Lockhart's yarns wherever he pleased. Nobody disputes that he might have bought them at any price he liked, but he was to put them into the adventure at a certain price, viz., 1s. 11d. He did pay more, as the case turned out. As regards payment, he granted his bill to Lockhart, and Lockhart took payment from him as an individual. Lockhart knew nothing of Moodie being in the transaction; he dealt with Mac-

kenzie; he took his bill. I think that falls within the rule laid down by Lord President Hope—“If I buy goods on my own credit, and afterwards use them for the purpose of a joint-concern, the seller's only claim is against me.” Mackenzie did buy goods on his own credit, and did afterwards use them for the purpose of a joint-concern. It appears that Mackenzie's name does not appear in Moodie's books as the person from whom the goods were purchased, but that arises from the fact that they were invoiced by Lockhart to Dundee, and therefore the clerk entered them as coming from him. In the circumstances, I am not prepared to say that the Sheriffs are wrong here. That the joint-adventure was arranged before the goods were bought, does not affect the question in my opinion, although I may say that I do not think it is proved that the adventure was arranged.

LORD SHAND—This is a question of some nicety. I have carefully considered the case, and I think that the legal considerations dwelt on by Lord Deas are of great importance; that this was a joint-transaction; and that Mr Lockhart is entitled to sue Mr Moodie for the price of the yarns. It is clear that the yarns were sold to Mackenzie without any reliance on Moodie's credit, but it is clear in law that although a man may be dealing with another on his credit alone, he is not limited to that alone if it turns out that that person is dealing for others who are really concerned in the transaction. If it turns out that the buyer has no real interest in the matter but his commission, the seller is entitled to go to the real buyer and say “you must pay me.” So, when others are interested in the purchase, the seller is entitled to go to them and recover the price from them. The question is, whether Mackenzie was purchasing for himself alone, or for himself and Moodie? I am of opinion he was doing the latter. The transaction took a shape in regard to documents passing between the parties that was calculated to make parties believe that the case was taken out of the category of joint-adventure. The discrepancies in the evidence are as to the parties' ideas of law, not as to the facts. This is not a case where each of a set of joint-adventurers contributes something to the joint-adventure. Both here contributed the whole yarns. Even in Moodie's view that is so. He says that he and Mackenzie bought from Mackenzie, and put their purchase into the joint-adventure. It is not one of the cases where each puts in something that is his own. The next thing I desire to say is this. A good deal of light is thrown on the February transaction by what passed in October. The February transaction is declared to be on the same terms as that in October. I think the entry in Moodie's books referred to by Lord Deas is of great importance. That entry, I observe, was brought under the notice of Mr Moodie in his evidence. He says—“As I read the first entry in the excerpt, No. 83 of process, it records a sale from Mr Mackenzie to joint-account—at least I intended it to bear that meaning;” but when this is shown to Mackenzie he says—“Mr Moodie's books, in my judgment, as regards that entry, are incorrect. So far as the pursuers were concerned, the October and February transactions were on the

same footing." There is another document in process which shows that Mackenzie, too, must have regarded this as a case of joint-adventure, viz., a memorandum from Mackenzie to Moodie & Co. running thus—

"Dundee, 17th Oct. 1874.

"Lockhart has sent on our joint a/c 3072 sps. 3½-lbs. tow, which I have instructed the railway company to deliver to you."

Thus you have Moodie's books recording that joint-adventure, and then you have this memorandum, which shows that Mackenzie, the other joint-adventurer, believed this transaction to be a joint-adventure. That goes strongly to show that it really was so. The result of the evidence as to the conversations between parties is, that the transaction was settled before the purchase was made, and that appears too from the correspondence.

You have the circumstance of the extra ¼d. paid by Mackenzie, which seems to have led the Sheriffs to a conclusion differing from the result I have arrived at. That just comes to this, that Mackenzie saw he could not get the yarn under this price, and he thought it was worth his while to pay it for the sake of the joint-adventure. The result of that is, however, that Messrs Lockhart are not entitled to get decree for more than what Mackenzie was authorised to pay as agent for an undisclosed principal. On the whole the joint-adventure appears to me to be made out, and therefore Moodie & Co. must pay.

LORD PRESIDENT—There is no doubt as to the law, but the question of fact here is attended with difficulty. I have, after serious consideration, come to be of the same opinion as the majority of your Lordships. The question is, whether there were two sales here or one? The idea of Mackenzie having put in this yarn as his contribution is out of the question. If Mackenzie in dealing with Lockhart was acting for the joint-adventure, the pursuer is entitled to prevail. The result of the evidence is, that the arrangement as to joint-adventure was made between Moodie and Mackenzie before Mackenzie approached Lockhart, and that Mackenzie received instructions to buy yarns at the limited price of 1s. 11d. I think the fair result of the evidence is that Mackenzie was to act as agent for the joint-adventure in making the purchase, and I don't think that the circumstance that he agreed to give ¼d. more than he was authorised to give affects him. If an agent exceeds his instructions, that does not alter the character of the transaction. He may not bind his principal in a question with third parties, but he will not make himself anything but an agent. That is an immaterial point, although the Sheriffs make it the sole ground of their judgment.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively the 30th May and the 7th August 1876: Find that the yarns, the price of which is sued for in this action, were purchased by the defender Robert Mackenzie (against whom decree has been pronounced in absence) from the pursuers (appellants), at the rate specified in the account libelled, viz., 1s. 11¼d. per spindle: Find that the said

purchase was made by the said Robert Mackenzie for behoof of a joint-adventure previously arranged between the Robert Mackenzie and the other defenders, D. Moodie & Co.; that the said yarns formed the sole subject of the joint-adventure; and that they were subsequently used by the defenders for the purpose of the joint-adventure: Find that the said Robert Mackenzie was authorised by his co-adventurers, D. Moodie & Co., to pay 1s. 11d. per spindle for the said yarns, but was not authorised to pay more, and the said Robert Mackenzie contracted to pay the pursuers at the rate of 1s. 11¼d. per spindle without the knowledge or consent of the defenders D. Moodie & Co.: But find that the said Robert Mackenzie did not disclose to the pursuers either that he was purchasing for behoof of a joint-adventure or that he was restrained by the instructions of his co-adventurers from paying more than 1s. 11d. per spindle for the said yarns: Find that in these circumstances the defenders are in law liable to the pursuers in the price of the said yarns; but find, of consent of the pursuers, that the same is limited to the rate of 1s. 11d. per spindle: Therefore decern against the defenders D. Moodie & Co. for payment to the pursuers of the sum of £981, 6s. 8d. sterling, being the price of the yarns in question at the said rate, together with interest on the said sum at the rate of 5 per centum per annum from the date of citation till payment: Find the pursuers entitled to expenses in both the Inferior Court and this Court; allow accounts thereof to be given in; and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—M'Laren—Johnstone.
Agents—Macara & Clark, W.S.

Counsel for Defender—Trayner—M'Kechnie.
Agent—Wm. Archibald, S.S.C.

Saturday, May 26.

SECOND DIVISION.

[Lord Young, Ordinary.]

DUKE OF SUTHERLAND *v.* SIR CHARLES ROSS.
Fishing—Salmon-Fishing—Obstruction to passage of Salmon.

By the action of stream and tide in the estuary of a river, part of a salmon fishery district, a long narrow stripe of land had gradually been separated from the mainland by a channel which was dry at low tide, except when the river was in flood. From the seaward end of this island there extended a long low bank dry at low water, which confined the river in its main channel at low tide as in a canal, and prevented it spreading into an adjacent bay. By operations on the opposite side of the estuary, performed thirty years before the date of action, a larger body of water was thrown on to this bank, which was thus broken through, so that a new channel was made for the river into the bay. The proprietor of the adjacent