Under these circumstances, if that was the case, I would suggest, whether it would not be justice towards the individual that the specific charges considered proved should be specified, with respect to which they considered his conduct deserving of that censure which the Court has passed upon it. Under these circumstances, I should propose to remit this cause in the terms I have stated. June 28. 1825.

J. RICHARDSON,—Solicitor.

JAMES FORBES, and Others, Appellants. No. 50.

FRANCIS SMYTH, Respondent.

Salmon Fishing—Property.—A party holding a right of salmon fishing, found, in a question with an adjacent heritor, (affirming the judgment of the Court of Session), to have no right to erect sights and towing-paths on the alveus of the stream: But the House of Lords remitted to the Court of Session to inquire, whether a bulwark or embankment, built by the adjacent heritor against the stream, was so constructed as to be injurious to the right of fishing in the water, and in a manner not necessary to its utility as a bulwark or embankment.

THE river Findhorn runs into the Moray Frith. Before reaching the estuary, it divides into two branches, passes the lands of Waterford, leaving, for a space, Waterford on the east of the eastmost branch. Twenty years ago, the river forced, for a short distance, a third branch through a portion of the Waterford lands, and then rejoined the centre stream: thus creating an island partly out of that property. This new course was shut up, but again broke out; and the proprietor of Waterford embanked his lands against farther encroachment. He had no right of salmon fishing. That belonged to Forbes of Echt, whose right, however, was solely of the fishing, having no property on either side of the river. Smyth bought Waterford, and found there the embankment raised against the east stream.

From the nature of the channel, the river, it was said, could not be advantageously fished without certain erections to facilitate the operations of the fishermen. These consisted, 1st, Of sights, *i. e.* subaqueous ridges thrown across, which, rendering the water shallow at that spot, disclose the salmon passing over,—or which, in the language of the old conveyancers, 'market the fishes kyth 'above the said fords;' and, 2d, Towing-paths to give the fishermen solid footing in drawing the nets. Accordingly, Forbes and his lessees made a towing-path across the mouth of the centre

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Lord Meadowbank.

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channel, from the west bank to the end of the island; and a 'sight' from the island across the third branch to Waterford's embankment. Thereupon Smyth applied to the Sheriff of Morayshire to prohibit Forbes and his lessees 'from placing or laying stones, stakes, or gravel, in any part of the river Findhorn 'opposite to the petitioner's lands, and from making any erection 'whatever therein;' and to ordain the dykes, &c. to be removed. The Sheriff found, that Forbes and his tenants had no right to place obstructions of any kind in the river, and ordained their removal. Thereafter, the Sheriff allowed them 'a proof of their 'allegeance of having been in the practice, either by themselves 'or their predecessors, of placing stones, stakes, and making 'erections, in the bed of the river, in the same way, and in that 'part thereof, for which they are now complained on, for a 'period of seven years past.' To this limitation they objected, but the Sheriff adhered. Forbes and his lessees then raised an action of declarator before the Court of Session, setting forth, that they and their predecessors had been in the habit, for time immemorial, in the exercise of their rights of fishing in the Findhorn, of constructing sights and ridges in the channel, and towing-paths and gangways, where requisite, along the banks of the river, and its branches and streams; that they had been of late molested and interrupted in the exercise of these rights by Smyth, who also, in prosecution of what had illegally been begun by his predecessor, had unwarrantably constructed, enlarged, and completed a bulwark along the river and its branches, to their great hurt and prejudice in the exercise of their rights of fishing: and concluding that it should be declared, 'that neither Smyth, nor any person deriving 'right from him, have any right or title to interfere with or pre-'vent the pursuers from so doing, or to interfere in any way 'with the pursuers in the exercise of their said rights, or to 'make or construct any bulwark or embankment along the 'course of the said river, or of any of its branches or streams, 'that may be to the hurt and prejudice of the pursuers in the 'exercise of their said rights of fishing: and the said Francis 'Smyth ought and should be decerned and ordained, by decree 'foresaid, to desist and cease from troubling or molesting the 'pursuers and their servants in the exercise of their said right 'of salmon fishing in the said river Findhorn, and the several 'branches or streams thereof, conterminous to his lands, and in 'erecting and repairing sights and towing-paths, so far as neces-'sary for that purpose in the channel, and along the banks of

'the said river, and of the different branches thereof; and also 'the said Francis Smyth ought and should be decerned and 'ordained, by decree foresaid, to remove and take away the 'aforesaid bulwark or embankment unwarrantably and illegally 'erected by him and his predecessor on the said river and its 'branches, and prohibited and discharged in all time coming 'from making or constructing any bulwarks or embankments 'along the course of the said river or its branches, to the hurt 'and prejudice of the pursuers in the exercise of their said right 'of fishing in time to come.' The advocation was also brought into Court ob contingentiam. June 28. 1825.

A remit was made to a surveyor, 'to frame and report a sketch 'of the river and adjacent banks, and encroachments complained 'of.' He reported, 'I have made an accurate survey of the 'lands of Waterford, with the embankment, the run of the river 'at its lowest or summer state, also of the sight and the gang 'or towing-path,—all which is laid down and explained in the 'plan to which this report refers; and I am of opinion, that the 'embankment, which is now completed along the whole lands of 'Waterford in a most substantial manner, is liable to frequent 'injury by the sight damming back the water on said lands, and 'also by the gang or towing-path throwing the river over to 'the Waterford side; and both these dykes, which I am inform-'ed are but of recent erection, or only of a few years' standing, I 'think must have a very great tendency in winter, and in time 'of ice, to detain and fill up the channel, so as to bear severely 'on the embankment. Indeed this seems to have been the case 'in winter last; a breach of seventy feet was made, and which 'is now repairing.' The Lord Ordinary, in as far as the report touched matters not specially remitted to the surveyor, found 'it was ultra vires, and was to be held ultroneous and non 'scripto.' The parties then condescended. Forbes and lessees alleged, that to fish the Findhorn with advantage, sights at proper places in the channel, and paths along the banks, where without paths the banks do not afford sufficient passage, are necessary: that the right of making these has immemorially, and for more than forty years, been understood to be in the proprietors of the fishings as part and pertinent of the right; and they have been made for that period at every part of the river where necessary and proper: that the river being liable to change its course, the proprietors of fishings followed it, and exercised their rights in it: these sights were often higher, and often as high, as the sights complained of: that the present sight

June 28, 1825. was made necessary by the shifting of the river: that the towing-paths were made by cutting and levelling the banks, and placing wood and gravel in the stream when necessary. Anciently, the town of Forres possessed and exercised these rights. In later times, and when, from the shifting of the river, it became necessary, 'there was a foot-path or gang-way made of brushwood or gravel opposite Waterford, for the purpose of towing. No interruption to such erections has been met with from any neighbouring proprietor. The pursuers did only what was necessary to their fishing, and created no injury to the defender. The defender's embankment is so constructed as to be injurious to the fishing, particularly from preventing the fishers from passing along the bank, and towing their cables, a circumstance not necessary to the utility of the embankment; and this the pursuers offered to prove. On the other hand, Smyth alleged, that whatever might be on other parts of the river, the pursuers never had erections on any part of the river opposite Waterford: that to make sights and towing-paths was not a part and pertinent to salmon fishing: that the tolerance (if any) of other proprietors did not bind the defender: that he was not answerable for the fishings continuing profitable: that a right of fishing gives no privilege of cutting banks, and placing gravel or wood in the alveus of the stream: that there is the reverse of authority for holding that the encroachments complained of were made with impunity by the town of Forres; and that the foot-path or gang-way was on the lands of another proprietor, and not opposite to Waterford: that the new course the river had taken exposed the defender's lands to great danger, and justified building his embankment: that the danger was manifestly increased by the towing-path, composed of a stone-dyke two feet high, running across the centre channel; and the sight, a similar structure, across the eastern channel. Already these erections had caused a breach in the embankment to the extent of seventy feet. The Lord Ordinary ordered informations to the Court, who (29th January 1824) sustained the defences in the action of declarator, and repelled the reasons of the advocation.*

The pursuer appealed, and repeated his statements,—1st, contending for the legality of sights and towing-paths; that they were necessary for the appellants, and not injurious to the re-

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* 2. Shaw and Dunlop, No. 666.

spondent; that the appellants' right to make such structures is protected by prescription: 2d, alleging, that the respondent's bulwark excludes the appellants from towing or drawing their nets on the east side, and encroaches in some places sixty yards into the bed of the river, and has converted into corn-land a space where the appellants have formerly killed salmon,—all which they offered to prove. June 28. 1825.

The respondent repeated his former statements, and denied, 1st, that the appellants had any legal right to make the erections complained of, or that a prescriptive right elsewhere could have effect on a short and challenged possession opposite Waterford; and alleged that he had suffered injury: and, 2d, that he was entitled to protect his lands from being flooded; and that the allegation as to encroachment on the bed of the river had not entered into the appellants' condescendence or answers in the Court below, and was now, without any authority in fact, hazarded to give a better complexion to their case.

The House of Lords ordered and adjudged, 'that the interlocutors complained of be affirmed, except in so far as, in the 'action of declarator, they sustain the defence and assoilzie the 'defender from the conclusions of the libel respecting the bulwark or embankment erected against the river Findhorn; as to 'which part of the said interlocutors it is ordered, that the cause 'be remitted back to the Court of Session to review the same, 'and to inquire, in such manner as the said Court may think 'right, whether the said bulwark or embankment is so constructed as to be injurious to the right which the appellants have 'of fishing in the said river, and in a manner not necessary to its 'utility as a bulwark or embankment.'

LORD GIFFORD.—My Lords, In the case of Forbes *v.* Smyth, the appellants are James Forbes, Esq. of Echt, and Messrs Forbes, Hogarth and Company, merchants of Aberdeen, who are entitled to a salmon fishery upon the river Findhorn; and Francis Smyth, Esq. of Waterford, is the respondent. It appears, my Lords, that this river, at the place in question, divides itself into two principal branches, and one of those branches passes by the lands of the respondent, Mr Smyth; and, in order to protect these lands from the inroads of the river, his predecessor erected what is called a bulwark or embankment against the river, by which bulwark and embankment the appellants say their right in the salmon fishing has been injured. It seems, in order to facilitate the catching of the salmon, that the appellants had made what is called a sight. They had raised a ridge of stones or gravel in

June 28. 1825. the course of the river, over which the salmon must pass, and which would secure their being taken higher up the river; and on the opposite side of Mr Smyth's land they had made a towing-path, in order that they might walk along this towing-path to haul their nets. In consequence of this, the respondent complained that his rights were injured by this sight and towing-path; that he had sustained an injury by the hindrance of the water in passing through his lands; and he made an application to the Sheriff of Morayshire, complaining of the operations, and praying for an interdict against placing any obstructions in the river, and that the appellants should be ordained to remove any obstructions which they had already placed there. That interdict was granted, and the Sheriff found, that the defenders had no right whatever to place obstructions of any kind in the river in consequence of their right of fishing, or to make any alterations in the bed of the river; and, therefore, he ordained them to remove the stones, stakes, and gravel placed therein. Against this interlocutor the appellants presented a petition to the Sheriff, who allowed the defenders a proof of their allegeance of having been in the practice, either by themselves or their predecessors, of placing stones, stakes, and making erections, in the bed of the river, in the same way and in that part thereof for which they are now complained on, for a period of seven years past. The fact was, however, (as it is stated in the respondent's Case), that no possession in that part of the river could be alleged for seven years; and therefore Messrs Forbes and Company gave in two successive reclaiming petitions against the limitation imposed upon them by the Sheriff's judgment; and the Sheriff having adhered by refusing these petitions, Messrs Forbes and Company commenced an action of declarator in the Court of Session against the respondent, in their own name, as well as in the name of William Forbes, Esq. proprietor of the fishings, and Colonel Grant of Moy, another proprietor of fishing in this river; and at the same time they presented an advocation of the process before the Sheriff, to be conjoined with their action of declarator. In their action of declarator they sought to have it declared, that they had a right to make these sights and towing-paths in the channel and along the banks of the river, as well as to repair those already made; and that Mr Smyth ought to remove and take away the bulwark or embankment unwarrantably and illegally erected by him and his predecessors in the river and its branches, and prohibited and discharged, in all time coming, from making or constructing any bulwarks or embankments along the course of the river to the injury of the pursuers.

The action was brought before Lord Gillies, who appointed the parties to be ready to debate; but, preparatory to the hearing, defences were lodged, and after hearing parties upon the defences, the Lord Ordinary directed, that Messrs Forbes should make a special condescendence, in terms of the Act of Sederunt, of the facts they offered to prove in support of the conclusions of the summons, and,

when lodged, appointed the same to be answered; and in the mean time he remitted to Mr Peter Brown, a surveyor, to examine the eye sketch produced by one of the parties of the river Findhorn opposite the lands of Waterford, and river and lands in question, and frame and report a sketch of the river, and the adjacent banks and encroachments complained of. My Lords, the remit to Mr Brown was recalled, and it was remitted to Mr William Cuming, surveyor, Inverness, to examine the eye sketch of the river Findhorn opposite to the lands of Waterford, and the river and lands in question, and frame and report a similar sketch of the river and adjacent banks, and so on. He gave in a plan, accompanied by a report, and his observations were considered as ultra vires, as undoubtedly they were, the object being to get a plan of the present respondent's lands, and the encroachments complained of. June 28. 1825.

My Lords,—A condescendence was afterwards put in, and in that condescendence they confined themselves to the circumstance of the sights and the towing-paths. In the first condescendence they said nothing at all respecting the embankment which had been made on the respondent's lands. However, my Lords, in their answers to the defender's condescendence, they expressly allege, 'that the defender 'is not entitled to be assoilzied from the pursuers' demand that the em-'bankment shall be altered, for this reason, that it is so constructed as 'to be injurious to the fishing, particularly from preventing the fishers 'from passing along the banks and towing their cables—a thing, more-'over, not necessary to its utility as an embankment, and this the pur-'suers offer to prove.' That part of the condescendence was denied by the other side, but no proof has ever been gone into as to the nature of these embankments. That is the first point. As to the second point, namely, the sights and the towing-paths, it was contended by the appellants, that although the right to make these sights and the towing-paths was not necessarily incident to the right of fishing, yet that having, in other parts of the stream, been permitted to make them, and having enjoyed them in other parts for a length of time, that gave them a right of prescription—a right to do so in every part of the stream. The Court of Session were of opinion that was not sound argument, and that the action was not maintainable; and the Court were unanimously of opinion, that the proceeding of the Sheriff was a proper proceeding.

But then, as to the embankment, the Court of Session, without any inquiry, have said, that it is not injurious to the right of fishing, and that the respondent had a right to make it, although they have gone into no proof upon the subject; which I think they should have done, with a due regard to that right which the appellant avers he has of drawing his nets upon the banks of the river, and which he is utterly precluded from doing in any manner, now this embankment is made. It was alleged also by the appellant, that the respondent had carried the embankment a considerable way into the stream, and obstructed

June 28. 1825. their right of fishing in the stream. These facts have not been inquired into at all. I cannot give any opinion whether it will turn out or not that these embankments are injurious to the right of fishing. It may turn out that they are not an injury at all; but the question is, whether your Lordships can decide that, not having the facts before you. They have alleged on the one side, that it is not an injury; and on the other side, that it is; and, without any proof, the Court have said, the embankment shall stand, although it may injure the right of fishing. Under these circumstances, although I regret very much that in this case there should be further expense and further inquiry, I do not see how it can be disposed of without remitting it to the Court of Session for further inquiry, to be obtained in the best way the Court can obtain that information. It may be that it is not a serious prejudice to the right, but when I find it is alleged that it is a prejudice, it appears to me that it would be rather unjust to the parties to determine that question without farther inquiry; and therefore I should request your Lordships to affirm all the interlocutors complained of, except in so far as in the said action of declarator the Court sustained the defence, and assoilzied the defender from the conclusion of the libel respecting the bulwark or embankment erected against the said river; as to which part of the said interlocutor, remit the cause back to the Court of Session to review the same, and to inquire, in such manner as the said Court may think right, whether the said bulwark or embankment is so constructed as to be injurious to the right which the appellant has of fishing in the said river, and in a manner not necessary to its utility as a bulwark or embankment, which is the allegation made on the part of the appellants. It seems to me that justice cannot be attained in the case without inquiring, if the appellants choose to prosecute it.

Appellants' Authorities.—Lord Monymusk, July 15. and Dec. 18. 1623, (10,840. and 14,264.); Mathew, Jan. 18. 1612, (14,263.); 1. Dallas's Styles, 208.

Respondent's Authorities.—2. Ersk. 6. 15. and 1. 5.; Farquharson, June 25. 1741, (12,779.); Fairlie, Jan. 26. 1744, (12,780.); Magistrates of Aberdeen, Nov. 22. 1748, (12,787.); Trotter, July 9. 1757, (12,798.); Earl of Kinnoul, Jan. 18. 1814, (F. C.)

DUTHIE—FRASER,—Solicitors.

No. 51. WILLIAM DALGLIESH, Esq. of Scotscraig, Appellant.

JOHN DUKE OF ATHOLE, and Others, Respondents.

Interdict—Salmon Fishing.—Circumstances under which (reversing the judgment of the Court of Session) a party, who had been interdicted from fishing by stake-nets within certain bounds, was held not to have committed a breach of the interdict.