

Billers, 1st May 1739; Craigie and Stewart's Reports, p. 255; Nairne, 13th May 1796 (Mor. 2597); Gordon, 1st December 1757 (Mor. 11,161); and Ker, 15th February 1758 (Mor. 15,551). July 18, 1831.

*Respondents' Authorities.*—Dunbar, 14th November 1815, not reported; Roxburgh Feus, November and December 1813; 2 Dow's Reports, p. 149, 229; Ronaldson, 27th February 1799; Innes, 23d June 1807 (Fac. Coll. xiii. 643, No. 285, Ap. 1. Tailzie, No. 13); Hope's Minor Practicks, tit. 16; M'Kenzie on Tailzies, II. 488; 3 Stair, 3, 59; 3 Ersk. 8, 28; 2 Bank. 3, 139; Kames' Elucidations, p. 356; Earl of Callender, 20th July 1687 (Mor. Dec. 16,476); Wallace, 8th February 1693; Fountainhall, I. p. 556. Young, 8th December 1705 (Mor. Dec. 15,487); and 25th January 1705 (Mor. Dec. 4319); Craig, 29th January 1735 (Mor. Dec. 4313); Ure, 17th July 1750 (Mor. Dec. 4315); Lady Reidheugh, 11th March 1707 (Mor. Dec. 15,489); Craig's Creditors, 15th June 1712 (Mor. Dec. 15,494), reversed on appeal; Robertson's Cases, p. 110; Richard, 5th April 1734; 1 Craigie and Stewart's Appeal Cases, p. 143, Gardner, 27th January 1744 (Mor. Dec. 15,501); Campbell, 17th June 1746 (Mor. Dec. 15,505); Hepburn's Creditors, 8th February 1758 (Mor. Dec. 15,507); Sinclair, 8th November 1749 (Mor. Dec. 15,382); Lockhart, 27th January 1761 (Mor. Dec. 12,345); Kempt, 28th January 1779 (Mor. Dec. 15,528); Bruce, 15th January 1779 (Mor. Dec. 15,539); Cunningham, 5th August 1778 (Mor. Dec. 15,526); Stewart, 8th July 1789 (Mor. Dec. 15,535); Brown, 25th May 1808 (F. C. xiv. 153, No. 43, Ap. 1, Tailzie, No. 19); Henderson, 21st November 1815 (F. C.); Oliphant, 7th June 1816 (F. C.); Grant, 9th March 1826; Gibson, 24th November 1795 (Mor. 15,869); Ross, 7th March 1795; 5 Brown's Sup. V. p. 909; Menzies, 25th June 1785 (Mor. Dec. 15,436); Douglas, 5th December 1804; Meldrum, 29th June 1827 (5 S. D. 857); Earl of Fife, 7th March 1828 (6 S. D. 698); Ascog Case, 23d Feb. 1827, (5 S. D. 418,) reversed 16th July 1830 (4 W. S. 196); 3 Ersk. 8, 30; Haggarts, December 19, 1820 (F. C.); M'Kenzie, 23d May 1823 (2 S. D. 293); Nisbet, 10th June 1823 (2 S. D. 339).

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,  
—Solicitors.

MAGISTRATES of DINGWALL and others, Appellants.—*Lord No. 26.*  
*Advocate (Jeffrey)—Lushington.*

HONORABLE MRS. HAY M'KENZIE, with concurrence of His  
Majesty's Advocate, Respondent.

*Breach of interdict—Fishing.*—Circumstances in which (affirming the judgment of the Court of Session with a qualification) an interdict was renewed against fishing in part of a river, and although no prayer to that effect was contained in the petition of complaint.

In 1825, Mrs. Hay M'Kenzie, as heritable proprietrix of the fishings in the river Conon, brought an action against the Ma- July 11, 1831.  
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gistrates of Dingwall and others, concluding to have it found that she had the exclusive right to fish in the river Conon, and to have them prohibited from fishing there. In defence, it was alleged that the river Stavaig was the same with that of the Conon; that the magistrates held a charter, dated in 1587, giving them right to fish along the banks of the Stavaig river, from a march between the lands of Balblair and Breakenord down to the sea, and that their right to these fishings had been judicially ascertained by a decree of the Court of Session in 1778, in a question with one of Mrs. M'Kenzie's predecessors.

In the course of the preparation of the cause the Lord Ordinary, on the 11th of March 1828, pronounced this interlocutor: “ The Lord Ordinary, having heard counsel for the parties upon  
 “ the whole cause, and in particular upon the demand now made  
 “ for an interdict against the defenders to fish above the march  
 “ between the lands of Balblair and Breakenord, in respect it  
 “ is averred that the defenders have been fishing above the said  
 “ march, which, by their admissions on the record, they are  
 “ not entitled to do, in the meantime prohibits, interdicts, and  
 “ discharges the said defenders, or any of them, their tenants,  
 “ servants, fishers, or dependents, from fishing or killing salmon  
 “ in any part of the river Conon above the line delineated on the  
 “ plan in process as the march between Balblair and Breaken-  
 “ ord; but in respect, the defenders do not admit that the said  
 “ line is accurately laid down in the plan, without prejudice to  
 “ the parties to ascertain the exact march between Balblair and  
 “ Breakenord before the interdict is declared perpetual, grants  
 “ diligence at the defenders' instance against havers, for recover-  
 “ ing the printed informations in the case which depended be-  
 “ tween the commissioners of the annexed estates and the  
 “ Magistrates of Dingwall, founded on as res judicata by the  
 “ defenders, or copies of these informations, &c.” The magis-  
 trates having, as was alleged by Mrs. M'Kenzie, continued to fish above the march, and particularly in two pools called Pool-Oure and Pool-Breakenorde, she, with concurrence of the Lord Advocate, presented a petition and complaint against the magistrates, alleging that they had violated the interdict, and praying to have it found that they “ had been guilty of a contempt of  
 “ court and breach of interdict, and in respect thereof to find  
 “ and amerciate the said defenders in the sum of 200*l.* sterling,

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“ or such other sum or sums of money, or to punish them other-  
 “ wise by imprisonment, as in the discretion of your Lordships  
 “ shall seem just, and so to deter others from committing the like  
 “ in time coming; and further to find the said defenders, con-  
 “ junctly and severally, liable to the complainers in the sum of  
 “ 1000*l.* of damages, or such other sum, more or less, as your  
 “ Lordships may be pleased to modify as the amount thereof,  
 “ together with the expences of this complaint and whole pro-  
 “ cedure to follow hereon, or to do otherwise in the said whole  
 “ matter as to your Lordships shall seem just.” In answer to  
 this complaint, the magistrates denied that they had fished above  
 the march, and while they admitted that they had fished in the  
 two pools, they asserted that these were situated below the march.  
 The parties being at issue as to the precise position of the march,  
 the Court, on the 4th June 1829, “ before further answer, remit  
 “ to Neil M'Lean, land surveyor in Inverness, to examine the  
 “ ground on the northern bank of the river Conon, delineated  
 “ on the plan by Alexander Sangster, specially referred to in the  
 “ pleadings of the parties; and in reference to the site of the old  
 “ houses of Breakenord and Balblair, as laid down in that plan,  
 “ as also in reference to the entry of the burn of Altnacack into  
 “ the river Conon, to ascertain where the line, delineated on the  
 “ plan as the march between Balblair and Breakenord, falls to  
 “ be placed on the ground, and to strike the bank of the river;  
 “ to report to the Court such explanations as he may deem ne-  
 “ cessary, of the modes he shall have adopted in following out  
 “ the purpose of this remit, accompanied by a hand-sketch suffi-  
 “ cient to illustrate the matter in dispute; and he is further  
 “ directed to mark on his sketch such parts of the river as shall  
 “ be pointed out to him where it is alleged that the magistrates  
 “ have fished illegally.” On the report being made by the sur-  
 veyor, their Lordships, on the 11th of July 1829, renewed “ the  
 “ interdict as granted by the Lord Ordinary against the respon-  
 “ dents fishing in the Pool-Oure and Pool-Breakenord; and in  
 “ the meantime direct the complainers to keep an exact account  
 “ of the fish caught in these two pools; and, with this finding and  
 “ direction, remit the cause to the Jury Court to proceed as  
 “ directed by the statute.”

The Magistrates of Dingwall and others appealed against this interlocutor.

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*Appellants.*—Although the redress sought by the respondents is confined to a demand for fine, imprisonment, and damages, yet the Court below have by the interlocutor complained of, without any prayer to that effect, renewed the interdict granted by the Lord Ordinary, have extended it beyond its original terms so as to make it applicable to Pool-Oure and Pool-Breake-nord, and have ordered an account of the fish to be kept. The interlocutor, therefore, is clearly *ultra petita*, is inapplicable to the true state of the rights of the parties, and amounts in effect to a new interdict, different from the original one, for the alleged breach of which alone the complaint was presented. Besides, there was no sufficient evidence laid before the Court to justify them in prohibiting the appellants from fishing in the pools. Indeed, a remit is made to the Jury Court which necessarily assumes that the facts require to be investigated, and therefore it was premature and incompetent to issue such a prohibition.

*Respondents.*—It was within the power of the Court below, under the complaint, to regulate the interim possession until the matter of fact should be ascertained as to whether there had been a violation of the interdict; and as there was sufficient evidence to satisfy the Court that it was at least doubtful whether the pools were not situated above the march, it was competent for them to prohibit the appellants from fishing there, and to order the respondent to keep an account of the fish which she might there catch.

But assuming that the Court proceeded on the feeling that the appellants had been guilty of a breach of interdict, they were not called on either to fine or imprison, but might competently issue a more mitigated judgment, of which the appellants can have no reason to complain. The proof which was adduced was sufficient to establish that the pools were situated above the march; and as it is admitted that the appellants fished there, they were guilty of a breach of interdict.

*Lord Chancellor.*—My Lords, this case has now resolved itself into a mere question, with respect to the costs of the present appeal; because as to every thing in the Court below, the whole proceeding appears to be put an end to, in consequence of some considerations unnecessary now to discuss, as they have occurred since the appeal. In this view we must consider the case as it was, when the interlocutor

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was appealed from and brought before us for decision. One of the interlocutors in this case, and the governing one, which is not appealed from, is that whereby the Lord Ordinary “prohibits, interdicts, and discharges the said defenders, or any of them, their tenants, servants, fishers, or dependents, from fishing or killing salmon in any part of the river Conon above the line delineated on the plan in process as the march between Balblair and Breakenord; but in respect the defenders do not admit that the said line is accurately laid down in the plan, without prejudice to the parties to ascertain the exact march between Balblair and Breakenord before the interdict is declared perpetual, grants diligence at the defender’s instance against havers, for recovering the printed informations in the case which depended between the commissioners of the annexed estates and the Magistrates of Dingwall, founded on as *res judicata* by the defenders, or copies of these informations.” Then comes the interlocutor of the 4th June 1829, which does not carry it much further—does not certainly specify the pools as pools—but refers to the line under dispute. Next we have the interlocutor appealed from—that of the 11th July 1829—and it unfortunately introduces the mention of two pools. If those had been left out, there would have been no doubt that what the Court meant to do by this interlocutor was to renew the former interlocutor; and when you come to examine it very narrowly, it does not seem to be decisive respecting those two pools—for it says, that the respondent shall not fish in those two pools, but that the complainer may fish, keeping an account; which shews that it was to have effect till the final hearing and adjudication of the cause. Nevertheless, it appears to their Lordships, who have considered this case, that, though that is not absolutely inconsistent with the interlocutor of the Lord Ordinary, it certainly would have been much clearer if, professing to renew the interlocutor of the Lord Ordinary, the Court had just adopted the terms he used, and had prohibited the fishing above the line delineated on the plan in process as the march between Balblair and Breakenord, instead of introducing mention of the pools, which leaves a doubt as to their identity. Whether a wrong name may be given to the pool, or the pool has changed its bed, and which would have left open the question as to the physical existence of those pools, which, it is to be observed, in two of the maps out of three, are not named at all—the Pool-Oure and the Pool-Breakenord—their Lordships think that, after this unnecessary introduction of these pools into the last order, it was not unnatural that the appellant should be led into the doubt; they think that he was sent to the inquiry with a certain degree of restraint upon him, which precluded a full and fair inquiry; and, therefore, under

July 11, 1831. these circumstances, we are to consider whether or not the costs should be given, which is now the only question before your Lordships. Without saying that the interlocutor, in its material part, is wrong, I would yet move your Lordships to affirm the judgment, with a declaration, which I shall pen myself, that the mention of these pools shall not affect the question touching the boundary line. There may be still some litigation as to the course of that line, and it is better that we should express, in words, that which is the understanding of the parties, and the feeling of your Lordships. But no costs of appeal can be given.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed, with this declaration, that the mention of Pool-Oure and Pool-Breakenord, in the said interlocutors complained of, shall not prejudice, bind, or at all affect the question touching the course of the boundary line, nor decide whether the said line was below or above the said two pools.

RICHARDSON and CONNELL,—MONCRIEFF, WEBSTER,  
and THOMSON,—Solicitors.

No. 28. JOHN BURNS and ROBERT GRIER, Appellants.—*Lord Advocate*  
(*Jeffrey*)—*Lushington*.

DUNCAN STEWART, Respondent.—*Rutherford*—*Stuart*.

*Contract—Landlord and Tenant.*—Circumstances in which it was held (affirming the judgment of the Court of Session) that a tenant was not entitled to a stipulated deduction of rent, in respect of not being provided with a road in terms of his lease, a road equally good being enjoyed by him.

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1ST DIVISION.  
Lords Alloway,  
Eldin,  
Corehouse, and  
Newton.

ON the 20th of February 1818 a contract of lease was entered into between M'Neill of Raploch (of whom Stewart was the disponent) and Burns and Grier, by which M'Neill let to them the coal within the lands of Raploch for the space of thirty-one years, while they, on the other hand, bound themselves to pay to M'Neill a money rent of 92*l.* 10*s.*, or, in M'Neill's option, a certain lordship. From the first year's rent they were empowered to retain 30*l.* towards making and repairing the roads