bank, and its true character. It began thirty years ago. Prior to that date there had been a bank formed in the same manner higher up, opposite to Errol, but it had not then come down *ex adverso* of the lands of Seaside. This bank, too, was not only higher up the river, but was much nearer the north shore. It was a shifting bank, and shifted from one side to another by gradually descending the river. A considerable portion has now come to be interposed between Seaside and Balmbreich. The whole of it has shifted very much farther south than it was originally, so that from a line on the plan before us it seems, with the exception of a very little portion at the eastern end, to be altogether on the south side of the *alveus*. That is the history of the bank. What is its character? It is not an island. It is not a portion of land separated from an estate on either side, which is private property. It is not an island fit for tillage or pasture. It is not the property of the Crown, otherwise than as being part of the *alveus* of a navigable river. It is a mere accumulation of natural materials in the *alveus* of the river collected at a particular spot, and it is so formed that at ebb tide and for some time before, a part appears above the water; but at high water it does not appear at all. Small and shallow boats can then sail over it, and there is no appearance of any island. That being the history and character of this bank, my opinion is, that it remains part of the *alveus* of the river, and does not change its character.

That being the case, how does this formation affect the legal rights of the parties to salmon fishings, as these existed before this accumulation of mud and sand came to this part of the *alveus?* In my opinion it does not affect them at all. It leaves these rights exactly as they were, Practically it may prevent the owner of the fishings on the south side from exercising his rights as extensively as before, by interfering with him in drawing his nets when it is above water. That may be an advantage to him, or it may be a disadvantage; but whether or no it still remains part of the area within which his right extends. This principle was recognised in the case of *Wedderburn*, 22 March 1864, 2 Macph, 902. If this be so, that leaves the area within which each may exercise his right just as before the bank was formed. That, as I read the Lord Ordinary's interlocutor, is what he has found. He finds (reads findings in law); I think the conclusion to which he has come, and the grounds on which he rests his conclusion, are well founded.

I have only one other remark to make on the argument of the defenders, and that is, that they have been in possession of the right of fishing within this part of the *alveus* on the south side. If that possession had existed for forty years without interruption, I do not say what effect that might have had. But there was no possession until after the bank was formed, and that has taken place within forty years, and therefore there is no prescriptive possession. The possession of the defenders is of no relevancy in this case. I am for adhering to the interlocutor of the Lord Ordinary, except as regards his sixth finding in fact, as to possession for forty years.

Lord Deas.—I am entirely of the same opinion. Although the one party has salmon-fishings, and the other has fishings only, it seems to me that both are *in pari casu*. The title of the one is derived from the Crown, and the title of the other is derived from a subject-superior, but in consequence of the decision in the case of *Sinclair*, that makes no difference. This is a competion between these two parties, and what we do here does not affect the Crown. As between these parties, each has a right to fish from his own shore. If the channel were clear, the result would be that each might fish as far as he could from his own shore *ad medium filum*. But then we have this bank coming down the channel within the last forty years. I don't understand either party to claim the property of the bank, although it was not easy to see that in the argument. The result of their claims is as the Lord Ordinary has stated. The Lord Ordinary has found that the channel of the river is not altered by this bank, while Lord Zetland claims that the north channel is now the only channel. If we did not adopt the Lord Ordinary's view, that would, I think, be the only other view we could adopt. But I take the same view as the Lord Ordinary. Any decision we pronounce is referable only to the circumstances of the case as they are at present. We cannot determine the future rights of the parties if the state of the river should change, but only what are their rights so long as the river is in substantially the same state, and the channel remains unchanged.

Lord Ardmillan concurred.

The Lord President concurred.
Agents for Pursuer—H. G. & S. Dickson, W.S.
Agent for Defenders—Thomas Ranken, S.S.C.

Friday, January 31.

FIRST DIVISION.

CARSON, WARREN, & CO., *v.* COUSTON, THOMSON & CO.

Sale — Experimental Contract. Circumstances in which *held* that a firm who manufactured a quantity of bottles on a new design, to suit the taste of the purchaser, were not responsible for loss occasioned to the purchaser by a large number of the bottles breaking after being filled, the firm not having guaranteed the strength of the bottles, and the purchaser being to blame in not testing their strength.

In April 1865 the defenders, who are wine and spirit merchants in Leith, ordered a quantity of bottles from the pursuers, bottle manufacturers in Port-Dundas, Glasgow. The bottles were to be hexagonal. A number of such bottles was furnished to the defenders. In an action by the sellers for the price of the bottles and of the mould which they had made for the bottles, the defenders alleged that they had, in giving their order, suggested a preference for hexagonal bottles if the pursuers thought the strength would not be materially affected or the packing be made more hazardous; that the pursuers had replied that the hexagonal shape would be nearly as strong as the round; that they accordingly ordered twenty-five gross of such bottles, the pursuers knowing that these were for export trade and required to be strong; that when they began to use the bottles furnished on this order a large number burst, whereupon they rejected the bottles and offered to return them. The defenders farther alleged that the pursuers were in fault in not informing them, until after the rejection of the bottles, that there was a defect in the mould; and they acted wrongfully in manufactur-

ing and delivering bottles which they knew must be useless, and which were of bad workmanship and disconform to order.

After a proof, the Lord Ordinary (BARCAPLE) held that any defect in the quality of the bottles was caused by the peculiar shape in which they were made, in terms of the defenders' order; that from the nature and terms of the transaction between the parties, the pursuers were not responsible for any defect arising from that cause; and decerned against the defenders.

The defenders reclaimed.

YOUNG and CAMPBELL SMITH for reclaimers.

DEAN OF FACULTY (MONCREIFF) and H. J. MONCREIFF for respondents.

LORD PRESIDENT—This contract was entered into in 1865, and whether actually constituted by writing or not, the terms are pretty evident from the two letters of 11th and 13th April. The kind of bottles ordered by the defenders was a new kind, likely to be liable to some imperfection not attaching to the making of the ordinary kind of bottles. There was a good deal of communication between the parties in conversation, and at last the matter came to this, that the defenders said in their letter of 11th April, "it might be preferable to have the bottles after the same general design of a hexagon shape, plain, not fluted, if you think that the strength would not suffer to any material extent, or affect the packing. You must cut fine in this matter, as we are likely to require a large quantity." That letter shows, in the first place, that the defenders were quite aware that the peculiar shape of the bottles rendered it doubtful whether it would be sufficiently strong. It also proves, to my mind, that what was contemplated was not one order once for all, but a continuous supply from time to time. The pursuers answer on the 13th that they "think it is quite practicable to make a good mould for you, hexagon shape, plain, without fluting. It will not be quite so strong as the round bottles, but we think it will be nearly so, and on hearing that you decide on this, we shall endeavour to carry out your wish as soon as a mould can be prepared. The bush in the bottom cannot be much depended on with these moulds, as the glass is a good deal chilled before leaving them, but we shall do the best possible." The defenders answer on the 14th, "Please set about getting the mould at once for the hexagon shape." And so the bargain was concluded. It appeared to me at first that the defenders meant to suggest that this letter of the 13th was a guarantee by the pursuers that the bottles of this shape would certainly prove sufficient in all respects for the purposes of the defenders. I cannot so read that letter. It is more cautiously expressed. The pursuers do not say, on their credit as bottlemakers, that these new bottles will be as strong as ordinary bottles, or as strong as will do for the purposes of the defenders. They leave it as matter of experiment, and that it was so on the part of both admits of no doubt on the evidence. That may not be conclusive of the case, but it is very important. It was essentially an experimental contract. The defender ordered 25 gross, and asked the pursuers to send a pattern as soon as possible. Then there is some correspondence; and the next important fact is, that on 22d June the pursuers write that they will send a parcel of the bottles on Monday. These arrived in Leith, and receipt was acknowledged on the 30th by the defenders, who say—"The small quantity of bottles have arrived. They are very nice, excepting the neck, which we think would be better about half the length." Looking to the nature of the contract, and the kind of goods, I think there was a duty incumbent on the defenders to satisfy themselves by experiment whether these bottles would answer their purpose, and if they had become satisfied that they would not do so, they should have stopped the manufacture. But they do nothing of that kind. Their excuse is that they were not persons of skill, and could not tell by looking at them whether they were good or bad. But surely from the making of the contract there was a doubt of their sufficiency. Persons who purchase goods in the course of their trade are judges of their sufficiency as much as the sellers. But there is a man of the name of Hunter in the employment of the defenders, whom they treat as a person of skill, and they might have taken his opinion, and they might have taken advantage of his practical skill by bottling, and trying whether the bottles would stand. Hunter says that when he saw the bottles he was struck with their appearance. He thought they were very light and thin, and required great care in washing. If that was the appearance of the bottles, in the view of the cellarman, that enhanced the duty of the defenders to try them. They failed to do so, and instead they go on by letter to press the manufacture of more, urging the pursuers to furnish them as fast as possible. Such is the state of the written evidence. When we turn to the parole evidence we find that these bottles in the hands of the defenders did not stand the test to which they were subjected. I am not disposed even to conjecture that there was anything improper or unskilful in the way of treating them. That is not necessary for the present case. I take for granted that the defenders used fair skill in handling them, and yet so great a proportion broke. The question is, Did the pursuers fail in the discharge of their duty? I think not. I have said the defenders were wanting in a duty incumbent on them; and I think the pursuers did their duty. They undertook to make as good a bottle of this kind and shape as they could; and, in the proof, there is abundant evidence of men of skill that, looking to the conditions of the manufacture, these are as good bottles as could be produced. Taking the length and shape of the bottles, it is said that no house in Glasgow could have made better. In these circumstances, the pursuers ask payment of the price; and the defenders resist the demand *in toto*. Their pleas in defence are exclusive of all claim by the pursuers. Meantime, in September 1865, three gross were sent to Canada. This action was raised in 1866. The defenders admitted that they had sent away this quantity, and promised, in the course of the process, to explain the fate of the cargo, but they have not done so. All we have is this, that when the principal defender is examined eight months after, he says he can give no bad account of them, from which I think the fair inference is, that this was a successful adventure on his part. That is inconsistent with his defences. I have no hesitation in adhering to the interlocutor of the Lord Ordinary.

The other judges concurred.

Agent for Pursuers—Henry Buchan, S.S.C.

Agent for Defenders—Thomas M'Laren, S.S.C.