drawn there, it would be quite within his power, and perfectly legal for him, to remove these rocks or boulders from his own foreshore, and to dress the foreshore so as to make it possible to draw salmon nets upon it, with net and coble, in the usual way. There would be no obstruction to fish by removing the rocks, though the effect would be that more shots were made and more fish caught, and in that sense obstructed, because you cannot obstruct fish more effectually than by catching them; but then catching fish by the net is a legal mode of obstructing, so that this is not an obstruction in the sense of the statute. But, secondly, supposing it were an obstruction, I am of opinion that it is proved on the evidence that substantially it is nothing more than a restoration of an old bank that was there before; and I cannot help attaching great importance to the real evidence, for such it appears to me, of the levels of the tide and ground here. It is not disputed that Kincardine Bay is at a lower level than the proper channels of the river Oykell, so that in the flow and ebb of the tide there will always be a tendency for the water to flow, if it can get an estuary at all, into the lower level of Kincardine Bay. And thus there will necessarily be a tendency to eat away, so to speak, the long bank which forms the tail of this tidal island. I think that presumption, which we can reach by the nature of the ground, is corroborated by the witnesses to whom Lord Ormidale has referred. But still further, I think it is proved that that tendency is increased by what is called the Skibo embankment on the other side; and, on the whole, I have very little doubt that during a good many years back there has been a gradual tendency of the tide and of the water of the river to get over this ridge, which originally kept it in its main channel, and to divide it more and more between that main channel and Kincardine Bay. Now, I take it to be quite legal for a proprietor of the foreshore, in circumstances of this kind, to restore timeously a bank that is in the course of being eaten away, and the eating away of which is to his detriment. On the evidence, I think Sir Charles Ross has not done more than fairly to restore to that extent. I agree with Lord Ormidale that the excess of 18 inches at part —for that only applies to part—is not more than may be fairly said to strengthen the bank against a force which was found too strong for it. But then, in the third place, even though there had been no bank there before, I am of opinion that it is a legal operation of a defender with an island of this kind to lengthen it seawards upon the foreshore. It is his own property. The embankment F H is all, I think, within the proper foreshore. It is all marked as uncovered at dead low-water. Now, I think it is legal for him to do that. Even if it were in the *alveus*, I agree with your Lordship in the chair that the Duke of Sutherland, who is not an *ex adverso* proprietor, but at some considerable distance up the river, would not have any title to challenge it. But we are freed from any delicacy as to operations *in alveo*, for the operations are on the foreshore. Now, why should not the proprietor of the foreshore, and this is a barony, gain land from his own foreshore? I do not see any reason why he may not, excepting that it is alleged that so gaining land will give him an additional shot as a salmon-fishing proprietor. But what does that matter? A man may get as many shots as he can by an erection on his own land if he does not obstruct the passage of the fish or infringe any of the laws enacted for the preservation of salmon. And therefore, on all these grounds, I think the embankment F H is a legal embankment. As the Lord Ordinary puts it, it is little more than giving him additional standing ground to draw his nets upon, and I see nothing illegal in smoothing the ground or making it fit for standing upon when the net is being drawn. And therefore, on these three main grounds, I think the embankment F H is legal, and that it is not an illegal obstruction in terms of the statutes. These statutes have been interpreted very widely in favour of salmon rights, and things have been held to be obstructions which could hardly be considered as such—the rattling of bones under a bridge, for instance,—but I do not think they apply to a case like the present.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Darling. Agents—Mackenzie & Black, W.S.

Counsel for Defenders (Respondents)—Asher—H. Johnston. Agents—Maclachlan & Rodger, W.S.

Saturday, June 9.

FIRST DIVISION.

[Bill-Chamber.

JOHNSTONE *v.* THOMSON.

Landlord and Tenant—Removing—Process—Suspension and Interdict.

A suspension and interdict is not a competent process for removing a tenant—the term of whose lease has expired, but to whom no formal warning has been given, although there may have been such correspondence between the landlord's agent and the tenant as to constitute an obligation on the latter to remove.

Observed per Lord President (INGLIS) that suspension and interdict is only appropriate if the tenant is not in possession.

This was a note of suspension and interdict, presented by Sir Frederick Johnstone of Westerhall, against John Thomson, tenant in Solwaybank, asking the Court to interdict, prohibit, and discharge the said John Thomson from ploughing, sowing, manuring, labouring, or in any way interfering with the said farm of Solwaybank, or any of the fields thereof; and further, to interdict, prohibit, and discharge the said John Thomson from preventing or in any way interfering with the complainer, or any one authorised by him, entering upon and ploughing, sowing, manuring, labouring, and cultivating the said farm of Solwaybank, or any of the arable fields thereof, and also having such use of the farm-steading as may be necessary for the stabling and lodging of the animals employed by them in such cultivation. The respondent was tenant of the farm of Solwaybank, under a lease which expired, as to the arable land, Candlemas 1877; as to the meadow ground, 1st April follow-

ing; and as to the houses and grass, at Whitsunday following. No formal warning was given to the tenant before Candlemas 1877, but the landlord averred that certain correspondence had passed between him and the tenant before that term which constituted an obligation on the tenant to remove.

Under these circumstances, this note was presented, and refused by the Lord Ordinary on the Bills (CURRIEHILL), with the following note:—

"*Note.*—The lease under which the present question arises expired at Candlemas 1877 as to the arable lands, 1st April as to the meadow land, and Whitsunday as to the houses and grass. The tenant is taken bound to remove at these respective periods, 'and that without any warning or process of removing, otherwise the said John Thomson binds and obliges himself and his foresaids to pay £160 sterling per annum of additional rent until renewed, . . . without prejudice to the landlord's right to insist in a process of removing.'

"The tenant refused to leave the farm at Candlemas 1877, and the complainer seeks to have the tenant interdicted from cultivating the farm for the crop of this year, as being truly no longer tenant. Under the Sheriff Court Act 1853, which comes in place of the regulations of the Act of Sederunt 1756, formal notice of removal in one or other of the forms prescribed by the statute ought to have been given by the complainer at least forty days before Candlemas, in order to entitle him to remove the respondent from the farm; but no such notice was given, and the tenant was therefore entitled to regard the farm as relet to him for one year by tacit relocation. In November 1876 and January 1877 some negotiations took place in writing between the complainer and respondent as to a renewal of the lease for a term of years, but no arrangement was effected. In the meantime, the farm was advertised repeatedly to be let, with entry to the arable lands as at Candlemas 1877, and it has been let to another tenant conditionally on the respondent being found to have no right to continue in possession. The complainer maintains that by these proceedings on the part of the tenant he has waived his right to retain the farm by tacit relocation, or to object to remove on the ground of want of formal statutory notice. I do not think the contention is well founded, because, although the complainer may have had ground for believing that the respondent considered his tenancy at an end at Candlemas 1877, he was nevertheless bound, if he desired to ensure his tenant's removal, to give him the statutory notice. There must, in my opinion, be either a letter from the landlord delivered or posted to the tenant forty days before the ish requiring him to remove, proved by a certificate of a messenger or sheriff-officer, or an acknowledgment by the tenant, indorsed on the lease. Nothing equivalent to either of these is to be found in this case. The case seems to me to fall under the rule laid down by the Court in the case of the *Magistrates of Perth*, February 20, 1798, Hume 562.

"The note of suspension and interdict must therefore be refused, with expenses."

The complainer reclaimed, and argued—No warning was necessary. It is possible to introduce by implication an obligation to remove without warning, and an undertaking to that effect by a tenant will be enforced—*Heron* v. *Rollo*, June 28, 1825, 4 S. 118; *Macnair* v. *Blantyre's Tutors*, July 9, 1833, 11 S. 935, Hunter, vol. ii. 31, new ed. There were here *res gestæ* sufficient to bind the tenant to remove without warning, as in *Blair* v. *Ferguson*, Feb. 8, 1840, 2 D. 546. The letters passing between the parties import an obligation to remove, or at least a waiver of the necessity of warning. If that is so, the tenant is wrongously in possession here, and it is competent to remove him by an interdict.

The respondent was not called on.

At advising—

LORD PRESIDENT—This tenant was bound to remove at the termination of his lease at three different terms in 1877, viz.—"As to the arable land, Candlemas; as to the meadow ground, 1st April following; and as to the houses and grass, at Whitsunday following." It is perhaps not very common that there should be three different ishes of a lease, but there is nothing more common than that there should be two, and in giving warning it is quite established that the warning must be given forty days before the first term of removing. In this case there was no warning given, and nothing done of a formal kind to terminate the tenant's possession until after Candlemas. It is maintained by the landlord that certain communications passed between his factor and the tenant which were equivalent to an obligation on the tenant to remove. I assume that that is so, in dealing with a question of competency. Now, what was the landlord's proper remedy? If that obligation was of a definite character, it would have founded an action for ejection, but if there was need of some inquiry into the constitution of the obligation, then a more formal process would perhaps be necessary, but one or the other was necessary to terminate the tenant's possession. The tenant's possession is not terminated by the expiry of the term of his lease—that is only the commencement of a new term of possession by tacit relocation, just as valid and effectual as his possession under the original lease. Tacit relocation had begun here before any steps were taken by the landlord to terminate the possession of the tenant. The question that is necessarily raised in these circumstances is—Is the tenant in possession by tacit relocation, or is he there in spite of an agreement made by himself forty days before Candlemas to remove at the term? That is a question to be tried in an action of removing. I never saw it tried in any other way, and it is highly undesirable that it should be tried in any other way. Above all, I am clear that the question cannot be tried by a process of suspension and interdict. That is a process only appropriate if the tenant is not in possession. Now, he is *de facto* in possession, and *de jure* says he has a right to be in possession. That is a questhat can only be tried by a removing or by a process of ejection.

LORDS DEAS, MURE, and SHAND concurred.

Counsel for Complainer—Lord Advocate (Watson)—Mackintosh. Agents—Welsh, Forbes, & Macpherson, W.S.

Counsel for Respondent—Trayner—Hunter. Agents—Beveridge, Sutherland, & Smith, S.S.C.