Aug. 30, 1831.

Wauchop, 1st July 1817 (F. C. xix. 365, No. 126); Roxburghe and Queensberry Cases (1 Shaw, p. 169); Mordaunt and Duke of Gordon, 5th July 1822 (Morrison's Dic., Tailzie); Lord Strathnaven, 2d February 1728, and 15th February 1730; Stewart, 23d February 1827 (5 S. D. 418); Marquis of Queensberry, 7th March 1828 (6 S. D. 706); 1685, c. 2; 2 Ersk. 8, 32; M'Whinnie, 4th February 1796 (Mor. 125); Mackinnel's Ranking, 9th June 1797 (M. 312); M'Neill, 7th March 1794 (Mor. 122).

Respondents' Authorities.—3 Blackstone, p. 207, note 11, 15th Edit.; 1 Bell, p. 393, 5th Edit.; Russell, 23d May 1792; 1 Bell, p. 394–5; Rucker, B. R. T. 29, 6, 3; 1 Selwyn's Nisi Prius, p. 137; Searle, 2 Stra. 820; Ves. sen. 4356; Chitty, 378; 2 Stair, 3, 58; 1, 14, 6; 4, 18, 6–7; 3 Ersk. 8, 25; 1685, cap. 32; Case of Sheuchan, 31st July 1822; 1 Shaw's Appeal Cases, p. 325; 3 Ersk. 8, 38, 39, 40; Willison, 26th February 1724 (Mor. 15,369); Douglas, 2d February 1758; Case of Ascog (23d Feb. 1827, 5 S. D. 418; reversed 16th July 1830, 4 W. S. 196); Graham, 9th June 1743 (M. 13,010); Kilkerran, 545; 1 Ersk. 7, 54, 56; 1 Stair, 6, 41; 1 Ersk. 7, 53; Case of Stormont (Mor. Dic. 13,998); 1 Bell, 48, 5th Edition; Philp, 14th December 1758 (M. 15,609); Earl of Rosebery, 22d June 1765 (M. 15,616); 26th November 1761; Lord Kinnaird, 26th June 1776; Irvine of Drum (22d Dec. 1710, Mor. 553); Grahame, 13th May 1795 (Mor. 15,439); Sandford on Entails; Smollet, 14th May 1807 (Mor. Ap. 1, Tailzie, No. 12); Ferrier, 10th December 1813 (F. C. xvii. 486, No. 131); 2 Bell, 46, note 4, 3d Edition; 3 Ersk. 8, 26; 2 Bank. 2, vol. i. p. 585; 2 Stair, 3, 58; Thomson, 2d July 1812; 2 Ersk. 11, 7; 2, 12, 16; 4 Ersk. 1, 38; 2, 11; 3 Stair, 2, 21; 1 Bell's Com. p. 212, 3d Edit.; Jackson, 28th January 1676 (Mor. 8362); Massey, 12th July 1785 (Mor. 8377); 2 Bell, 195, note 1; 4 Ersk. 1, 40; 2 Bell, 212, 3d Edit.; 2 Bell, 215, 8th Edit.; Bank of Scotland, 9th July 1709 (Forbes, 304); Young, November 1688 (Harc. 35); Duff, 22d July 1742 (Kilk. 48); 2 Bell, 192; Duchess of Douglas, 26th July 1764 (Mor. 2833–8390); M'Culloch, 21st July 1627 (Mor. 1689); Binning, 5th December 1749 (M. 2832–8389); Horne and Lyle, Young Dic. 1078; Drummond (Dic. 1079); Mackay, 23d November 1798 (Mor. 11,171) Wauchope, 1st July 1817 (F. C).

RICHARDSON and CONNELL,—BROUGTON and WHITE,—Solicitors.

No. 30. LEYS, MASSON, and Co., Appellants.—*Attorney General (Denman)—Lord Advocate (Jeffrey)—Dr. Lushington.*

LORD FORBES and others, Respondents.—*Spankie.*

Fishing—Process—Issue.—Held (affirming the judgment of the Court of Session), that where an issue was sent to a jury as to whether a dam dyke was "to the "injury and damage of the pursuers" as proprietors of salmon fishings in a river, it was not competent for the judge to direct the jury that the question

put in issue, and the only question which they were to consider, was, whether it was injurious in the actual condition of the river, and with reference to the existence of the dykes in the river. Observed, that it is incompetent to construe the issues by referring to the previous pleadings.

LORD FORBES and others raised an action of declarator and damages, before the Court of Session, against Leys, Masson, and Co., setting forth that the pursuers had right to the salmon fishings in the river Don adjacent to their respective properties, and had thereby a sufficient title and interest to protect these fishings against all injury and encroachment; that the defenders were in possession, under a lease or a feu right, of part of the lands of Grandholme, stretching along the north bank of the Don, on which they had erected, in 1810, a large flax-spinning manufactory and a bleachfield; that, without the knowledge or consent of the pursuers, the defenders had taken upon themselves to open a canal or watercourse from the Don, for the purpose of supplying those new works, and had, at a later period, erected a dam-dyke stretching across the river, whereby they were enabled to carry off in the watercourse such a quantity of water that at times the channel of the Don for about half a mile below the dam-dyke was completely dry; and that at all times the passage of salmon was rendered difficult, and often impossible, by want of such a slap in the dam-dyke as is required by the statute 1696, c. 33. The pursuers, therefore, concluded to have it found:—1. That the pursuers never had nor have they yet acquired any right or title to carry off any part of the water of the river Don for the supply of their spinning-mill and bleachfield; that they should be ordained "instantly to shut up the "inlet and watercourse at present used for that purpose, in such "way and manner that no part of the river Don may be thereby "withdrawn in time coming;" and be "interdicted from con-"structing or executing, in time coming, any new intake, water-"course, or canal upon or for the use of the lands of Grand-"holme, or the machinery erected or to be erected thereon:" 2. That it should be declared that the defenders "never had nor "have they yet acquired any right or title to build, erect, or "construct any dam-dyke across the river Don connected with "the said lands of Grandholme;" and they should be "ordained "immediately to remove and take away the said dam-dyke, and "to restore the channel of the river Don to the state in which

Sept. 7, 1831.

2D DIVISION. Jury Court.

Sept. 7, 1831.

" it was before the dam-dyke was at all constructed;" and should be " prohibited and discharged to rebuild the said dam-dyke at " Grandholme, or to construct any other dam-dyke or obstruc- " tion of the like kind, which may interrupt or impede the course " of the river and the free passage of the salmon;" or, at least, that such dam-dyke should be built in a form consistent with the statute 1696, c. 33: And, lastly, that the defenders should be ordained to pay 10,000*l.* of damages. This last conclusion was eventually abandoned.

In defence, Leys, Masson, and Co. alleged, 1. That as there were several dam-dykes built across the river higher up than the one in question, and below the pursuers properties, they had no interest to have the one in question removed; 2. That the canal and dam-dyke were not injurious to the pursuers; who, 3dly, had acquiesced in the erection of the same.

With reference to the first of these pleas, Lord Cringletie, Ordinary, (Jan. 22, 1823,) found, " that even admitting that " there are various dykes across the said river, yet the dyke in " question, being the farthest down the river, the pursuers are in " point of interest entitled to begin with it, and are not bound, " before regulating it, to raise actions for regulating the others; " and, therefore, on the whole, finds, that they have an interest " sufficient to entitle them to pursue the action, sustains also " the title of the pursuers, and appoints them to put in a con- " descendence, in terms of the act of sederunt, of what they " allege, and offer to prove on the merits."

Against this judgment the defenders represented; but the Lord Ordinary (May 13, 1823) refused the representation, and issued a full note of his opinion, in which he observed, inter alia, that " it seems of no importance how many dykes there may be " across the river. The dyke of the representers (defenders) is " the lowest down the river; and, unless the pursuers were to " attack the whole at once, they must begin with the first ob- " struction, because the proprietor of any other dyke would " object, that the pursuers could have no interest to remove it as " long as any one farther down existed; it is, therefore, the " natural course to begin with the dyke of the representers. " Every heritor of salmon fishings has a right to remove obstruc- " tions in the river, though these obstructions be placed on the " property of another; for every one knows that salmon run up

Sept. 7, 1831.

" a river to spawn, and if they be prevented the fishing must " perish. It may be true that the interest of the whole pursuers " is small, when compared with that of the representers; but " that is absolutely nothing in the eye of law or justice; for if " any man has an interest at all, he is entitled to defend it, and " is not to have it sacrificed to that of his opulent neighbour." To these judgments the Inner house adhered, on the 14th of July 1823, and 13th of January 1824. *

After a record had been prepared, the Court, before answer, remitted " to the clerks of the Jury Court to prepare the draft " of an issue or issues fitted for the trial by a jury of the facts " therein alleged and disputed by the parties, to be reported to " this Court quam primum."

The following issues were thereupon reported to and approved of by the Court: " It being admitted, that in the years 1792 " and 1793, the defenders, Leys, Masson, and Co., cut a canal " on the north side of the river Don, for the purpose of convey- " ing water from the said river to Grandholme Haugh, where " the bleachfield and manufactory of the defenders are situated; " and that in the year 1805 the defenders formed a dam-dyke " across the said river for the purpose of conveying water into " the said canal: Primo, whether the said canal, cut as afore- " said, is to the injury and damage of the pursuers, or of any " and which of them, as proprietors of salmon fishings in the said " river? Secundo, whether the said dam-dyke, formed as afore- " said, is to the injury and damage of the pursuers, or of any " and which of them, as proprietors of salmon fishings in the " said river? Tertio, whether the whole, or any, or which of " the pursuers, or their predecessors or authors, or their com- " missioners, trustees, or agents duly authorized, acquiesced in " the formation and continuance of the said canal? Quarto, " whether the whole, or any, and which of the pursuers, or their " predecessors or authors, or their commissioners, trustees, or " agents duly authorized, acquiesced in the erection or conti- " nuance of the said dam-dyke?" The Court farther directed, that, on the trial of the first and second of the issues, Lord Forbes and others should stand as pursuers, and that Leys,

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* 2 Shaw and Dunlop, 603.

Sept. 7, 1831.

Masson, and Co. should stand as pursuers on the trial of the third and fourth.

The case was tried before Lord Gillies on the 14th of June 1830, when Lord Forbes and others gave in evidence, inter alia, the interlocutors, and note of Lord Cringletie, and the judgments of the Court adhering to these interlocutors; while Leys, Masson, and Co. adduced evidence to show, that in consequence of the existence of other dam-dykes the one in question was not injurious to Lord Forbes and others. After the proof was concluded, " Lord Gillies (as set forth in the bill of excep-" tions after mentioned) did then and there deliver it as his " opinion and direction to the jury in point of law, with regard " to the meaning and construction of the aforesaid first and " second issues, that the question put in the issue, and the only " question they had to consider, was this,—Is the dyke injurious " to the pursuers' fishings in the actual state of the river and of " other dykes? and not whether it would be injurious to them if " other dykes were demolished or properly regulated. And the " jury aforesaid then and there delivered their verdict upon the " first and second issues for the said defenders (Leys, Masson, " and Co.); and against the said pursuers (Lord Forbes and others). " Whereupon the counsel for the said pursuers did then and there, " on behalf of the said pursuers, except to the aforesaid opinion " and direction of the said Lord Gillies; and that Lord Gillies, " instead of the direction given by him as aforesaid, should have " directed the aforesaid jury, that—the Court of Session having " already decided by a final judgment that the said pursuers " were not bound to raise actions for removing or regulating the " other obstructions in the river Don before challenging the " canal and dam-dyke formed by the said defenders—the point " meant to be tried by the first and second issues, and the ques- " tion which the jury had to consider under them, was, whether " the said canal and dam-dyke of the said defenders were inju- " rious to the fishings of the said pursuers, without reference to " the injury occasioned by the other obstructions in the river; " and further, that as the cruive-dyke might be regulated at all " times in terms of law, and that as the other dykes, in so far " as they were encroachments injurious to the fishings of the " said pursuers, might be removed or properly regulated, and " as the trial between the parties aforesaid did not depend on

"the objections or defences in regard to any other obstructions, Sept. 7, 1831.
"the evidence led with regard to the effects of the other ob-
"structions on the river was irrelevant; and that the injury
"occasioned by them, in their present state, to the fishings of the
"pursuers, ought not to be taken into consideration of the said
"jury in returning their verdict on the said issues."

A bill of exceptions having been tendered to the second division, their Lordships, on the 11th of March 1831 *, allowed the exception, and appointed the same issues to be again tried by another jury.†

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† 9 Shaw and Dunlop, 933.

* *Lord Justice Clerk* observed,—My Lords, in this case we have had a very full and able argument; the question upon which we are now to decide has been very ably discussed by counsel on both sides of the bar; and for one, I must confess, that I am not ashamed to acknowledge that the questions appeared to me to be attended with difficulty, and that difficulty seems to be increased from the shape in which the question is brought before your Lordships. This question does not occur on a motion for a new trial in regard to any thing that occurred on which to set aside the verdict in reference to the evidence which was adduced in the cause. There is no motion founded on any objection to the evidence; but the case comes before us in the shape of an exception to the charge of the Judge, which is said to have affected the verdict of the jury by putting a certain construction upon the issue which they were to try. This is the shape in which the case comes for decision; but I fairly confess, that in my opinion the case would have presented itself in a much more satisfactory manner had there been a distinct motion before your Lordships excepting to the evidence, or the admissibility of the evidence, which was adduced. But there is this advantage to the party excepting, in the shape in which the case comes here:—in taking the exception to the charge of the Judge, the party, if dissatisfied with our decision, may go elsewhere, by appeal to the House of Lords; while, upon a motion for a new trial, if that were either refused or allowed, our decision would have been conclusive and final, not being subject to appeal or review in any manner of way. Parties have certainly this advantage of the form which has been adopted, although I confess the other would have been more convenient, and much more satisfactory to me.

My Lords, I am unwilling unnecessarily to go over the proceedings in this case; but the view which I take of it renders it necessary to bring under your Lordships' notice, however tedious it seems, the proceedings which took place in this action. It was brought by certain upper heritors on the river, complaining of the operations of the defenders in constructing a canal and dam-dyke across the river Don, which had, as they the pursuers state, the effect of interfering with or impeding the course of the river, and of injuring the fishings of the proprietors above, by obstructing and preventing the passage of the salmon up the stream. It is in this respect just like the complaint of the upper heritors on the Tay, complaining of the operations of the inferior heritors, which was before us in that question.

Sept. 7, 1831.

Leys, Masson, and Co. appealed.

The case came into Court, and was met with the defences with which your Lordships are acquainted, and which I think it important to be before your Lordships in forming your judgment; because, although there is an objection in the defence stated to the title and interest of the pursuers generally, there is not, as far as I can discover, any special statement in these defences that there are other operations in the river Don which occasion such obstruction, as while they remain would render that of the defenders harmless. There is a distinct exception to the title and interest of the pursuers, but there is nothing whatever said in regard to other obstructions in these defences. The case came originally before my Lord Cringletie, as ordinary, under the old form of process, and his Lordship pronounced a judgment, with an explanatory note, upon the 2d January 1823, in which his Lordship repels the defences in regard to the title, " Finds that the pursuers have an interest sufficient " to entitle them to pursue the action, sustains also the title of the pursuers, and " appoints them to put in a condescendence, in terms of the act of sederunt, of " what they allege and offer to prove on the merits." A representation was put in against that interlocutor, calling his Lordship's attention more particularly to the views of the party, and to the mistake in regard to the other dykes being higher up the river. The lowest dyke mentioned by the Lord Ordinary clearly did not mean a cruive dyke, but that of a manufacturing company, and in that the Lord Ordinary was perfectly correct, and therefore I don't think the mistake was worth a straw in reference to the question. But that judgment is brought under his Lordship's review, and his Lordship pronounces another interlocutor adhering to the former one.

A petition was presented against that judgment to the Court, to which, on its own showing, we did not think it necessary to take an answer, and it was refused without answers; but, according to the forms of the Court, the party were entitled to give in, and a reclaiming petition was given in, and your Lordships ordered it to be answered by Lord Forbes, &c. This was accordingly done; and in these papers the case was most fully argued, and it was put to your Lordships, again and again, that although the title had been sustained, yet, as the river Don was encumbered with dykes innumerable, to the extent of fourteen or fifteen, it was impossible to have any idea that the opening of a canal, such as that of the defenders, could do any harm at all; and that, therefore, supposing the title to be good, yet " you the " pursuers have no interest sufficient to follow out the action." That is most elaborately stated in the pleadings; and your Lordships, after paying all the attention possible, did come to a unanimous opinion that the interlocutor of Lord Cringletie was well founded. I have looked to my notes of what took place on that occasion, and they are very full. I must take the liberty of reading from them.

My Lord Craigie says, " Wherever a person has a right of salmon fishing in a " river, he can object to measures that tend to diminish the numbers or obstruct the " passage of salmon;" and Lord Glenlee said, that he did not differ from the opinion given, and agreed with Lord Craigie's first observation, that, however trifling the interest might be, a party was entitled to object to any operation that tended to diminish or impede the salmon in a river.

The case after this went back to the Lord Ordinary, and condescendences and answers were lodged, which were respectively revised; and your Lordships will observe, that the Lord Ordinary first made a remit of the cause to the Jury Court,

Appellants.—The present question is not encumbered with an inquiry into the propriety or impropriety of the structure of the

Sept. 7, 1831.

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but he afterwards altered that interlocutor, and took the cause to report, upon information which were accordingly boxed to your Lordships; and there again, in these pleadings, it was argued, that when you take into consideration the nature of these works, and when you consider the time when they were erected, and the enormous expence attending them, and that in regard to one of them it had stood so far back as 1793, and stood from that time, and that the other had stood from the year 1805, there were sufficient materials to warrant your Lordship to find, that, even admitting the title and interest of the pursuers to be unquestionable, that your Lordships had no ground to find them illegal, and that the answer to the pursuers was sufficient:—"You have acquiesced, and you are barred, after such acquiescence, "from making the demand in which you now insist."

This was met on the other side in this simple way, "That suppose we admit to "you the whole doctrine of acquiescence as contended for, and although persons "who see works of this description going on in suo may be barred by acquiescence, "yet we make this specific averment, that we were in entire ignorance of them;" that we knew nothing of them at all, and had no knowledge of their existence. Lord Forbes was a military man, and was not in the country, and he had not succeeded to his father, and knew nothing whatever about the operations. Others of the pursuers said, that neither they nor their predecessors knew any thing of them, and, until 1813, when Mr. Farquharson was made acquainted with the matter, and took a protest, down to that period they were in utter ignorance of what was going on, and they cannot be held to have acquiesced in that of which they knew nothing. Two of the Judges of this Division of the Court were of opinion, that the length of time, the primâ facie evidence of knowledge from the magnitude and vast importance of the works, the expenditure which appeared from the books to have been employed in supporting them, and the fact, that there were four thousand individuals who were supported by these works, and who, if they were abated, would be driven into absolute poverty, afforded sufficient ground upon which to find that acquiescence must have been presumed. To Lord Glenlee it appeared, that if ever a proposition was clear in the law of Scotland it was this, that before a party can be cut out from trying a question by acquiescence it must be made out that he knew what he was acquiescing in. Just to look back to my notes upon that occasion, I see that I expressed an opinion, which I still entertain, that to say a person has acquiesced who was ignorant of the proceedings to which his acquiescence was pleaded was a doctrine to which I could not subscribe.

The case came repeatedly before us; and in January 1828 your Lordships came to adopt the step of ordaining the pursuers individually to put in an articulate condescendence, as to their or their predecessors alleged ignorance of the acts complained of, and that in six weeks, and ordain the same to be answered, and the papers for the parties to be revised, printed, and boxed on or before the first box-day in the ensuing vacation. This was previous to the draft of the issues, which was afterwards prepared. This order is renewed on 28th February 1828; and in May 1828 answers are ordered, and the parties appointed to revise respectively. The cause is at last put up for advising by your Lordships. And I have only to beg your Lordships to attend to this, that in the last condescendence and answers given in by the parties there is not one syllable that I have been able to discover that

Sept. 7. 1831. issues; these were adjusted by the Court at the sight of the parties, approved of, and sent to trial. Neither is there under

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refers to the different obstructions in the river; but the whole of the statements refer to the knowledge or want of knowledge of the parties of these proceedings and operations going on, with this exception, that in the concluding paragraph of the answers there are just these words: "In conclusion, the respondents beg leave to "add, that they still adhere to all the averments contained in their full answers to "the pursuer's original condescendence of the merits of the cause in process." My Lords, that is all I can discover which refers to what had gone before, and the answers are confined to the averments made in the condescendence in regard to what they knew of the operations complained of. Now, my Lords, when we advised this condescendence and answers, we pronounced the interlocutor which is in these words:—"13th May 1829, the Lords having resumed consideration of this cause, "with former proceedings, and heard counsel thereon, of consent assoilzie the "defenders from these conclusions for damages as set forth in the summons, and "assoilzie the defenders in toto from the other conclusions of the summons, in so "far as these were formerly insisted in by Lieutenant General John Gordon Cum-"ming Skene of Pitling, and the trustees of the late George Skene of Skene, "esquire, and decern." * We assoilzied from the conclusion of damages, and the reason was, that the pursuers had abandoned that conclusion, in consequence of a doubt which had been started, how far they who had separate interests could sue for damages jointly. And while we did this, I read from the interlocutor, before farther answer—"Remit this condescendence and answers to the Clerks of the "Jury Court, to prepare the draft of an issue or issues fitted for the trial by a jury "of the facts therein alleged and disputed by the parties, to be reported to the "Court quam primum."

Now, my Lords, observe this. It may not be absolutely conclusive of what I conceive the issue should be, and which is just in conformity with this view; but it showed what we had in view when we pronounced this interlocutor, and that this should be a direction to the Jury Clerks in preparing the issue, as to whether the pursuers were in the knowledge of and acquiesced in the matters complained of, which are just the words here used. The case goes to the Jury Clerks, and they prepared for your Lordships consideration the draft which I now hold in my hand, and which came before the Court for consideration on 16th June 1829. We were busied a considerable portion of that day in adjusting the terms of the two last issues on acquiescence, and here are various suggestions on the margin, some of which were not adopted; but the issues are afterwards approved of, and sent to the jury in the form they now stand—"Whether the whole, or any, and which of the "pursuers, or their predecessors or authors, or their commissioners, trustees, or "agents duly authorized, acquiesced in the formation and continuance of the said "canal?" and, quarto, "Whether the whole, or any, and which of the pursuers, or their "predecessors or authors, or their commissioners, trustees, or agents duly authorized, "acquiesced in the erection or continuance of the said dam-dyke?" These two issues were adjusted on the 16th of June, and I have marked on my papers issues as to acquiescence adjusted quoad ultra delay. The case is again taken up on the 27th June, and those two issues, as to whether the canal and the dam-dyke are to the injury and damage of the pursuers, are finally settled by the word "was" being

* These parties had withdrawn from the action.

discussion the relevancy or irrelevancy of the evidence sent to the jury; any challenge on that head is too late. Nor is there

Sept. 7, 1831.

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taken out, and the word "is" being put in. They had originally stood, "Whether "the canal 'was' to the damage," &c.; and we changed them into "Whether the "canal 'is' to the damage," &c. Thus, having looked to all my notes which I have of what took place upon the different occasions when the case was before us, to discover whether there were any circumstances stated at the time that called our attention to the special injury, I can discover nothing more than what I have stated to your Lordships.

Now, my Lords, on this full statement of the proceedings, for which I beg pardon in having detained your Lordships so long, but which was necessary to keep in view the way in which my opinion has been framed, it is perfectly manifest to me, in the first place, that the object which we then had in view was to ascertain whether there were sufficient materials for entering on the defence of acquiescence at all; and that was what the Court meant to entertain; and that it certainly never was meant, at least by me for one, and I conceive that there is not an indication of the intention of any one of your Lordships, to send to the Jury Court the question, or to let an issue be tried, whether, supposing all the other fourteen dykes in the river Don, with the addition of the cruive-dykes, to be constructed contrary to law, is the dyke of Leys, Masson, and Company, one which in law is injurious to the higher heritors on the river. Such a thing was never hinted to your Lordships. It is not contained in the papers or any where else; there is nothing there sent to the Jury Court except the issue, which is, "Whether the said canal, cut as aforesaid, is "to the injury and damage of the pursuers, as proprietors of salmon fishings in the "said river." This is all that appears, and the case goes to the Jury Court upon that issue. We had given the most unequivocal opinion, in adhering to the interlocutor of the Lord Ordinary, that it was no answer to the action to tell the pursuers that there are other obstructions in the river which did as much or greater harm than those complained of. We did not think it necessary to expatiate upon the possibility of putting down all or any of these dykes, or to enter on the consideration of the various hypothetical questions as to the effect of their being regulated or not regulated according to law; but were we not entitled to take into view, if this were averred, that they were regulated according to law? And, if that had been done, is any one prepared to say, that in this river, or in the Tay, or in any other river, because there are dam-dykes and formidable obstructions, and therefore no salmon can get up the river, this would be a good defence, without inquiring as to the nature and character of these dam-dykes themselves. The thing is truly ridiculous. The upper heritors are entitled to have this thing abated, if it is unlawfully there; and therefore, my Lords, it did not occur to me that that was within the case, or even in our contemplation to consider; or that, if a wall was built fifty feet high, by which a complete obstruction was formed, that would be good defence from the mere fact of being there; because, if the argument is good for any thing, it amounts to this, that because other people may do that which is contrary to law, and because they have done so, you have no right to complain of me for committing the same offence. No such proposition was made use of or brought forward, for if it had, and before we adjusted issues of this description, we would and must have deprived them of all ambiguity of meaning, and would have put them something in this shape:—supposing these other obstructions to be permanent and irremovable,

Sept. 7, 1831. room for inquiring as to the preponderancy of evidence as to the permanency, or the reverse, of the other obstructions on the

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does this operation of the defenders do injury? We were bound to have expressed it, if we meant to have such a question tried on the issues; but nothing of the kind is there, and nothing of the kind, I apprehend, ever came across the minds of any of the Judges, in attempting to set aside that bone of contention, which I am sorry to say existed between the parties, and in some respects in the Court itself; but the issue was only meant to try the question, if there was acquiescence, or not, on the part of the pursuers. And I have no idea of the object being to try the question, if these obstructions were removed, would those of the defenders be injurious or not? And well do I know, that in reference to the trial that was coming on I had my own views in relation to the subject of acquiescence.

But, as it is, though we may be perhaps blamable in not having called for a little more explanation at this time, if the defenders had the purpose for which they now contend, I am of opinion for one, that they ought to have spoken it out plainly; and if they had, I have no hesitation in saying, that the issue must have been framed in other language, and expressed in a manner which would have rendered it luce clarius what was to be tried. We should then have had an issue, supposing the dyke of Gordon, Baron, and Company to be removed, and the cruive-dykes or other obstructions regulated, whether the defenders dyke would be injurious. We would have put the question as to their being removable and permanent, or not. We would have put that to the jury, and then asked, does this operation of the defenders do injury or not? That, I have no hesitation in saying, was the proper time for the defenders to have spoken out, and the true and manly way for them to have done. But it is very possible, and I see that referred to, that their adversaries misunderstood the issue as well as the defenders, and that for a time they had the same understanding of it. And I must fairly confess, in looking to the evidence, that there is a sort of evidence allowed here which I cannot comprehend. If the pursuers confine themselves to the point which I think was all that was to be tried, I do not comprehend how a great deal of that evidence for the pursuers was allowed, or how a great deal of the evidence for the defenders was allowed, as to which of the various obstructions does most injury; as to whether Gordon, Baron, and Company's dyke, or the cruive-dykes, and so on, or that of the defenders, does most injury. I cannot conceive how such questions were put; but these are put to the witnesses, and I cannot help thinking that some of the difficulty at least has arisen from the way in which the cause was conducted on both sides. And I am not in the least surprised that Lord Gillies, not being aware of the previous proceedings in this Court, in regard to the question which we wished to have settled, should have taken a different view of the case, and should have been led to conceive that the proper construction of the issue was what he adopted and stated in his charge to the jury; and although, from my knowledge of the case, and of the purpose of the Court when they framed the issue and sent it to be tried, I am compelled to take a different view of it, I am not surprised that Lord Gillies should have formed that opinion. But, my Lords, now that the case is before your Lordships upon the direction of the Judge in the way put in this bill of exceptions, "that the question put in the "issue, and the only question they had to consider, was this:—Is the dyke injurious "to the pursuers fishings in the actual condition of the river and of other dykes? "and not whether it would be injurious to them if other dykes were demolished or

Don. Nor is any weight due to the alleged finding, that the respondents were not bound to bring any action to remove or

Sept. 7, 1831.

"properly regulated." I am bound to say, that I cannot hold this to be a due construction of the issues sent for trial. If this question had been put:—Supposing the dyke of Gordon, Baron, and Company to be according to law, and properly regulated, would then that of the defenders be injurious? the direction of the Judge was right. Without being accompanied with these words, I must say that Lord Gillies's interpretation of the meaning of the issue was never intended by the Court. I had no conception that we were sending, by these issues, a question to the Jury Court which we had already determined in our interlocutor on the relevancy, as to which we had given our opinions, that the circumstances of there being other operations was no ground to bar this action, and that this was an issue on the merits of the cause, but in reference to the question of acquiescence alone.

Such being my opinion, I think it our bounden duty to find, that this exception must be allowed; and as this motion is brought by an exception to the charge of the Judge, the parties may have the benefit of carrying the decision elsewhere, if they are dissatisfied.

Lord Chief Commissioner.—When a Court desires to obtain information by the verdict of a jury for its guidance in deciding a cause, the construction of the issue should be regulated by the object of the Court. It is not going out of the bill of exceptions, (out of which we ought not to travel,) to state the object of the Court, as it is to be collected from that instrument. There it appears that the information which this Court principally required was, whether the obstructions complained of had been acquiesced in. The issues on this point (the third and fourth) have not been tried, nor any verdict found on the acquiescence. The object of the Court has, therefore, miscarried. That miscarriage appears to have arisen out of the construction put by the judge at the trial on the first and second issues; and we must now say whether that construction was erroneous. We must likewise consider the course that may be pursued in the farther progress of this case. Upon this head it is material to observe, that the case does not come here on a motion for a new trial; if it did, the future proceedings would be more simple. If a new trial were granted, founded on the misconstruction of the issue, no proceeding by appeal would have been competent, unless this Court thought it necessary to alter the wording of the issues. Then, upon the analogy of the practice of Courts of Equity in England, (which may with propriety be referred to, as this is part of the machinery of jury trial imported from thence,) an appeal might be competent; but the subject of it would be confined to the single question of, whether the original issues or the amended issues should be sent to trial. But here we have to deal with a bill of exceptions, in which it is competent for the unsuccessful party to carry th case on its merits to the Court of last resort.

Before entering on the construction of the issues, I will endeavour to explain how the difficulties from proceeding by bill of exception may be got over. If this Court allows the exceptions, and the judgment is appealed from, it would be presumptuous to state what opinion the House of Lords might form upon the merits; but it is quite respectful to that House to say, that attention would be paid to the object of this Court in directing the issues, and that the case would not be treated as one in which the rights of the parties were to be decided out and out by the trial of the issues. So that, if the House of Lords should reverse the judgment of this Court, allowing

Sept. 7, 1831. regulate the other obstructions; for there only the question of title was under discussion,—the question of merits was reserved.

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the exception, the case would either be sent back to this Court, with directions to, frame issues calculated to obtain the object of this Court, or they would take advantage of the clause in the statute 55th Geo. 3, which enables the House of Lords to frame issues, and send them here for trial. But suppose the judgment of this Court not to be appealed from, the future proceedings might be regulated by the act of the 59th of Geo. 3, c. 35, sec. 8, which provides that the Court of Session, if not satisfied with the information which a verdict affords on issues which it sent for their information, may send further issues. The 8th section is regulated by the 15th section of the same act, which prevents an appeal from an order for farther issues. In that event the position in which this case would then stand would be this, that the object of this Court having miscarried, it might send other issues calculated to attain its object, or it might, under the same authority, direct the issues on the acquiescence, which have not been tried, to be tried, and thus attain its end. These views may be useful to the parties in regulating their farther proceedings.

I come now to what may be called the merits of the case, which I approach with all the deference due to the great attainments and eminent talents of the individual who directed the jury at the trial. I have considered the matter again and again, and have looked at it in every respect; but I have not been able to bring my mind to Lord Gillies's understanding of the first and second issues. They arise out of an action of declarator of right, in which there was originally a claim for damages. From that the defender was assoilzied. In consequence of the judgment assoilzieing from damages, it appears on the face of the issues that no damages are sought, and, consequently, that a compensation for pecuniary loss was not the matter to be tried, or one on which a verdict was required. The only question under the first and second issues was, whether the building the dam-dyke, and making the canal, were injurious to the pursuers as proprietors of the salmon fishings. The summons does not limit the injury to loss of fish; it admits of an injury resulting from the act of obstruction. An increase of the number of obstructions is of itself an injury to the proprietors of fishings, as every additional obstruction must be removed in order to obtain a free stream. If there are two, three, or four in existence, and a fifth is erected, all belonging to different proprietors, each is a separate injury, and I do not know how they could all be convened as parties in one action. They must be taken up one by one, and the pursuer may select in what order. This, I think, is the legal course of proceeding, and it seems to me to be agreeable to common sense. The dam-dyke and canal complained of impede the free course of salmon to the upper parts of the river, to which free passage for salmon the proprietors have a right. It may be compared to the case of a servitude of a road, across which obstructions are erected. A. erects an obstruction which interrupts the way, B. erects a second, an action is brought against A. to get his obstruction removed. He answers, B.'s obstruction does the injury. An action is raised against B., who says, that it is A.'s obstruction which does the injury. Can a person, having a right to a road, be thus deprived of it? or does not common sense and law say, that the party injured is entitled first to deal with the one obstruction, and then with the other, until he gets rid of both? My opinion, therefore, is, that the question is, and in all such cases must be, whether the obstruction complained of is injurious in its nature. And if in this case the obstruction of the defender is one which in its nature is calculated to prevent the passing of

The point, therefore, now before the House, is, simply, whether the issues, as sent, could mean any thing else than an injury, Sept. 7, 1831.

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salmon to the upper parts of the river, it is no defence to say, that there are other operations which obstruct as much. The proprietors of the fishings may have a treaty on foot to take those obstructions down, or may proceed by actions for that purpose. An action of declarator is the proper proceeding in such a case; and such an action is not answered by showing that there are other obstructions greater or equal to that which is complained of.

Upon these grounds I concur in the opinion given by the Lord Chief Justice Clerk upon the merits; but his Lordship will pardon me if I differ on one point; I mean as to the frame of the two first issues. I think they are well calculated to obtain the object of the Court; and they cannot be put so well in any other shape, or be better expressed, viz. whether the canal and dyke are injurious to the pursuers, as proprietors of the salmon fishings. Suppose there are three dykes across a river, constructed according to the Scotch statute, each having the proper central slap in the proper situation; suppose they all belonged to different proprietors, and that the obstruction is at one time rendered complete by building up all the slaps; are the proprietors of the fishings deprived of their right of action because the injury is done by three? In such a case, this, I think, would be the proper issue to try the question; and I cannot make up my mind to interpreting the issue by the explanatory words which, by the bill of exceptions, appear to have been used at the trial to limit the question to actual damage. Upon the whole, I do not think that the construction put upon the issues at the trial was correct, and I consider it as not to accord with the nature of this case, which is a declarator of right. I am of opinion that if the evidence establishes that the obstructions of the defenders are in their nature injurious to Lord Forbes and the other pursuers, as proprietors of salmon fishings, that the jury should have been directed upon these issues to find a verdict for the pursuers; the issue being quite sufficient in its form and expression to try the question. I think it right to add, that if this frame of issue were to be deserted I should not know where to resort for an issue to supply its place, without having recourse to issues of specific facts. This may be illustrated by what took place when Gordon, Baron, and Co. had an action with Leys, Masson, and Co. about the dam-dykes. It was in the year 1817, before the general issue was in use. There were nineteen or twenty issues of specific fact proposed, and one of the parties insisted that there ought to be five and twenty. That plan of issues has been long given up, and we ought to be very cautious in shaking the general issue (like the present), which has been found to answer so well. I think the exceptions must be allowed; but I must add, with reference to what I have stated as to the ulterior proceedings in this case, that it would be extremely desirable that the parties should meet and arrange the further proceedings, so as to avoid the difficulties, the expence, and the delay that may arise out of the pursuers having sought redress by a bill of exceptions. I have said nothing about the extent of the works of the defenders, about their great value, nor about the small value of the fishings; because these are matters that cannot and ought not to influence the opinion of a Court of Justice.

There is one point which I have omitted. It is said that the pursuers appear to have acquiesced in the construction which the judge put upon the issue at the trial, by not objecting to the evidence given by the defenders as to the other obstructions. It is stated in the bill of exceptions, that the evidence given by the defenders was not

Sept. 7, 1831. having respect to the existing obstructions at the time. The issues are present and positive. The respondents would make

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relevant as applicable to the injury done by the other obstructions. It is incorrect to have introduced this into the bill of exceptions, as the sole exception made at the trial was upon the construction of the issue. But with respect to the admissibility of that evidence, I am clearly of opinion, that it was admissible under the issues respecting the acquiescence. It is a strong and important ingredient of proof, to establish acquiescence, that other obstructions already existed; and the defenders were then in the course of going on to prove acquiescence. But though I would have admitted the evidence in that view, I would have required the party adducing it to confine it to the issues as to the acquiescence, and would have prohibited them from using it, or the jury from considering it, as applicable to the two first issues, those on the injury. I cannot, therefore, conclude, that the pursuers acquiesced in the construction of the issue, by not objecting at the time to this evidence, which was admissible when it was given. I consider this case as one of very great importance, both as it relates to the forms of proceedings in this Court in jury causes, and in a general point of view; for if we were to confirm the doctrine which is connected with the construction put at the trial, upon the first and second issues, we should embarrass the rights of parties who have suffered injuries by obstructions, in all cases where more than one act of obstruction has taken place.

Lord Glenlee.—I entirely concur.

Lord Cringletie.—My Lords, I was ordinary in this case; and your Lordship has saved me a great deal of trouble by the very full and accurate manner in which you have gone over the different proceedings. From my interlocutor, embodied in this bill of exceptions, it is perfectly clear what I meant; and I have only to say, that I concur in all that I have heard from the learned judge on my right hand. My Lords, I do go the length of saying, that this issue is a right issue. The question here is, Is this an actual and substantive obstruction? that is the point; Is it, or is it not, a real obstruction? If it is, it does not signify one straw whether there are other obstructions in the river or not. The party is entitled to have it abated. I also concur with what was stated by my learned brother in the conclusion of his opinion, that if the construction of this issue, as stated by my Lord Gillies, be given effect to, no man can maintain his rights to protect himself against encroachments by others.

Farther, I also agree that it was in our power to have sent back new issues, as this did not try the point. Your Lordships will recollect the case of Watson and Hamilton, where I was Lord Ordinary. It related to a settlement. Your Lordships sent the case to the jury, and it was tried by a jury, and when it came back to have the verdict applied, your Lordships thought that it was not satisfactory, that it did not contain the information the Court wanted, and they sent it back again to the Jury Court for trial. And, my Lords, if this bill of exceptions had not been before us, I would have been for having the case sent back upon an issue to satisfy the minds and conscience of this Court, and enable it to dispose of the cause and do justice to the parties.

Lord Meadowbank.—My Lords, as the case is already decided, independently of my opinion, it is of the less moment for me to take up the time of the Court. But still, having doubts in my mind, notwithstanding what I have already heard, I consider it to be my duty, as I do entertain doubts, to take this opportunity to express

theirs future, contingent, and dependent for meaning on extra- Sept. 7, 1831.
neous circumstances. When the suit was instituted, the respon-

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them. And, in the first place, I am satisfied that the object of the Court in sending this case for trial has not been attained by the issue of the trial and the verdict of the jury. I think that it was the intention of the Court in sending this case to trial to learn whether or not this was an obstruction in the river Don, which, if all the other obstructions were removed, would be detrimental to the rights of the pursuers. In the next place, I have no doubt whatsoever that it was competent for a party having a right of salmon fishing in a river, when there are various obstructions in that river alleged to be injurious to his rights, to select that obstruction with respect to which he means first to complain; I think it is quite within his competency to do so, and I should be very sorry if any proceedings in this Court were to put a party in a situation in which he was not entitled to adopt this course. Upon these matters I have no doubt whatsoever; but, after stating these points, I confess that a difficulty still remains. It is one of form; and therefore, before stating it, I ought to premise, that I agree that, in another shape, the remedy which the pursuers wish to obtain might be attained, and the redress which they ask given; because I have no doubt, when this case came to be considered by your Lordships on the verdict, it would have been competent, and under the 8th section of the statute it would have been in your Lordships' power, to have sent back the case to have the matter tried anew, and the rights of the parties settled in the present action. But, my Lords, that is not the shape in which the case here is before the Court.

It has been brought here upon a bill of exceptions, tendered to the charge of the judge who presided and directed the jury at the trial. Now, in the first place, I understand it to be quite clear that there are two ways in which the remedy now sought may be obtained by the party conceiving himself aggrieved by the result of the trial and the verdict of the jury, at least by which a corresponding remedy may be obtained. It may be obtained by a motion for a new trial, or by means of a bill of exceptions against the charge of the judge. It may be obtained in either of these ways; but these are things totally separate and distinct; so separate, indeed, that, as has been stated more than once to day, the order of your Lordships in the one case is subject to be reviewed by appeal to the House of Lords, while the order of your Lordships in the other is not subject to such review by appeal in any shape whatever. Now this particular case comes before us by a bill of exceptions to the charge of the judge, and on that ground alone; and therefore, as I understand the forms, it was the duty of the presiding judge at the trial to take the issues just as your Lordships sent them to be tried, without looking back to any former proceedings, to ask or inquire what your Lordships meant. I do confess that it is not easy for me to discover how the judge who presided at the trial could give a different direction from what he did give to the jury. I have read these issues over again, and I must say, that, taking them without the explanation given by your Lordships, and attending to the charge of my Lord Gillies, I don't see, looking at the words of the issues, without looking back to the previous proceedings to find out what was the mind and intention of the Court, how it is possible to put a different construction on them from what his Lordship did. I think that the learned judge would have gone out of his duty if he had entered into an inquiry as to what either was or might have been the intentions or views of your Lordships in forming the issues. Having that view of the question, after all I have heard, limited as I am here to the question, as to whether the judge at the trial stated

Sept. 7, 1831.

dents maintained that the canal and dyke were injuring the fishings. The appellants answered,—In the existing state of the river the canal and dyke are altogether harmless. The issues in question are, Whether the said canal, cut as aforesaid, is to the injury, &c.—Whether the said dam-dyke, formed as aforesaid, is to the injury, &c. Could any person of common sense and plain perception have directed differently from the judge who presided?

If it were considered competent to institute such an inquiry, there are various grounds and elements for determining that the direction given conveyed the true meaning of the issues, and that the parties had joined issue on the principle that the question of injury was to be tried solely in reference to the existing state of the river, and of the whole obstructions between the fishings and the sea. The respondents failed to show that the other obstructions could be so removed or regulated as to render the canal and dyke injurious, and thus confined the question to the limits put by the judge upon it. Thereby the jury were not precluded from considering the effect of such removal

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the import of the issue right or wrong, looking to the express words and terms, and taking the common sense of the words, I do not feel myself entitled to say that it is my opinion that he put a wrong interpretation upon them.

It is simply on that difficulty in point of form that my doubts are rested; for I think the question may be got at in another form; that when it comes back, and your Lordships find that the question has not been tried, which, for the information of the Court, was sent to be tried, your Lordships may, under the eighth section of the statute, remit the cause back to the Jury Court for that purpose. The whole error, I think, has arisen from the Court not stating more distinctly, and expressing more clearly, what was the object they wished to arrive at by having the case tried.

My Lords, I confess I am not much inclined to be actuated in my opinion by the analogies of the law of England, because I do not think, so far as I understand it, that it holds exactly on this case. As I understand, in the Courts of Equity in England, when a case comes before it for further direction, or, on account of an omission, for a new trial, then the Court has the right and the power to send back the cause to the Courts of Common Law for a new trial, in consequence of the object the Court had in view having miscarried. But that is precisely where I think the distinction lies between the powers of the Courts of Equity in England and the Courts here; because we have a bill of exceptions against the misdirection of the judge, and we have also another form, by a motion for a new trial, which is not the way in which the Courts of Equity deal with the matter in England. These are the difficulties that have struck me, and which I have considered it my duty to state to your Lordships.

or regulation; but being furnished with no termini habiles in this particular to proceed upon, the presumption was in favour of the legality of the canal and dyke, and the inference in favour of the appellants incontrovertible. Sept. 7, 1831.

Respondents.—The question raised by the suit in dependence may be regarded as a simple declarator of right. The respondents are entitled to the fishings in the Don. The appellants have cut a canal and erected a dyke, which the respondents alleged injure the fishings. It plainly was of no consequence, in a question with the appellants, whether any or how many other parties had also done or continued to do a similar injury. Issues are framed with the view of bringing out the affirmative or negative of injury; that is, of simple and positive, not relative, injury. The presiding judge directed the jury to have reference to the actual condition of the river and of the other dykes, and even without taking into view its condition in the event of the other dykes being demolished or properly regulated. It is quite manifest that these issues cannot bear the construction whereby they are confined to the existing state of the river. This is made very plain by looking to the summons, defences, and by the interlocutor of Lord Cringletie. Particularly are the condescendence and answer important, as showing that neither the parties nor the Court ever contemplated such a restriction on the meaning; holding, on the contrary, the issues to be without reference to the injury created by the other obstructions.

Lord Chancellor.—What can it signify what was intended? The issues must speak for themselves. We have no concern with what passed before the issue was framed; we are bound by the issue that has been framed. The remit to the Jury Court makes that quite clear. I am bound by what appears on the face of the record; I cannot go to the sources you are desirous of opening.

Serjeant Spankie.—It is not very material for the respondents to press this point, the words of the issue are sufficiently explicit in themselves; but it ought to be remembered, that the issues to the Jury Court are not precisely like the issues in the Common Law Courts of this country; they were rather as issues from Chancery; not sent for final adjudication of the case, but to inform the mind of the Court.

Lord Chancellor.—I have much difficulty on that head. There are

Sept. 7, 1831. certainly wide powers given by the Jury Statute; but can such issues as these be considered in the light of equity issues, sent merely to satisfy the conscience of the judge? It would be dangerous to adopt a view which might have the effect of throwing loose the pleadings just begun to be adopted in Scotland; they are already there too imperfect pleaders,—too ready to plead loosely, and rather require to be kept tight than relieved from strictness.

Serjeant Spankie.—The misdirection is obvious, and as it pervaded the whole case, the verdict cannot stand. The simple way of putting the point to the jury was,—here is an obstruction in a salmon river; is it enough of itself, and in its own nature, to injure the fishing? You are not to look up and down the river for obstruction. It is no defence that other parties have done equal or more mischief. But the judge said, it is immaterial to consider any thing else than the present state of the river? Was this a fair way of reaching the question? If I raised a mound across a road to a fair, and a party challenged it, what would be thought of my defence if I said, it is of no use to remove my mound, for there is another much worse at a mile distance? In no view can the direction be supported; it was a plain misdirection, the remedy for which was, taking the exception now before the House, and which has been sustained by the Court below.

Lord Chancellor.—(2d September 1831). My Lords, although I shall not advise your Lordships at present how to deal with this appeal, yet as I have uniformly made it my practice, as long as I have been in the situation I have now the honour to fill, to make what observations occur to me in presence of the counsel, immediately after hearing their arguments, instead of postponing it to an indefinite period, when counsel may not be present, I shall follow that course upon the present occasion, reserving the final decision of the question until I shall have been able narrowly to inspect the pleadings. I think it is more important that a correct view should be taken (and when taken here should be adhered to) on the subject of these pleadings, than to consider the way in which your Lordships shall ultimately decide this appeal. It has been justly observed that the forms of the pleading in the Jury Court, under the salutary act which regulates its proceedings, are more important, as regulating what follows, than the interests of the parties. The learned serjeant was arguing upon the meaning of the issues, (and that is the only question before your Lordships,) as they appear upon the record, and the direction of the judge as connected with them, and purporting to expound them; and in order to get at that meaning the learned serjeant was about to have recourse to the previous interlocutor of Lord Cringletie, and that perhaps he had

Sept. 7, 1831.

a right to refer to, although it was given in evidence in a somewhat singular manner; but when he was about further to refer to the preliminary proceedings by way of pleading, and to call the attention of your Lordships to consider the issue that arose, and was framed by the clerk out of them; when he was about to read the condescendence and the answers that were framed to raise the issues, I took leave to stop him, and to suggest that we had no concern with what had passed before the issue was framed, and that we were bound by the issue as the Clerk framed it. The interlocutor of the Court remitted the condescendence (of November 1828) and answers "to the clerks of the Jury Court, to prepare the draft of "an issue or issues fitted for the trial by a jury of the facts therein "alleged and disputed by the parties, to be reported to this Court "quam primum." The clerk, according to the exigency of this order, takes into his consideration, as I apprehend, the condescendence and the answers, asking himself the question, what the facts are that these pleadings show to be disputed by the parties; and out of the facts thus appearing to be disputed he frames, according to the terms of the order, an issue "to be reported to the Court "quam primum," by which I understand that the Court is to exercise its judgment upon the issue so framed, and that the parties, one or other, or both of them, are entitled to object to the frame of the issue, and to call upon the Court to remit it to the Jury Court, or alter the framing of it; at all events it is reported to the Court, and has the sanction of the Court, either expressly by some order adopted, or tacitly by not altering or varying it.

This issue as framed, becomes therefore the order of the Court; and being sent down to be tried by a jury, it is too late—with very great submission I speak to some of the learned judges who appear ultimately to have dealt with this question—it is too late for the Court to say, and it is past all doubt too late for the counsel to contend, that your Lordships, or that the Court, or that Lord Gillies and the Jury who tried the cause, had any thing to do with the condescendence and the answers out of which in point of fact, no doubt, but accidentally, for the purpose of this argument, the issue arose that was so framed. Not only have they nothing to do with them, but it is too late to have to do with them, and they have no business to ask about them. The issue precludes them from saying a word upon what appears in the condescendence and answers, as much as the record of an act, after the bill has become an act, precludes any court of law dealing with an act from looking back to the bill out of which that act arose, or by referring to the speech of the honourable or noble person who may have introduced it, or to their conversation with an individual, by which it might be made to

Sept. 7, 1831.

appear, if you could get at it,—which you never can,—that the meaning was so and so, when the only question is, not what he meant, but what the law intends; in another sense of the word, what the law fixes as the legal meaning of the words which the Legislature, possibly upon his instigation, possibly in spite of his efforts, may have thought fit to use, in framing the law arising out of his bill or proposition. This I think of great importance to be attended to by the Court below,—judges and practitioners. You are as much precluded from going out of the issue framed by the officer, and adopted by the Court, as you are precluded from construing an act by going out of the four corners of the statute, and looking into the bill, or dehors the bill, to gather the meaning. The Legislature only tells its meaning, as a celebrated case has decided, by the enactments in the statute, or after the statute has passed, by a declaratory act affixing the meaning to it; so much so, that the preamble of a statute, saying, whereas a certain act was passed for such a purpose, has been held to fix no construction upon such act, although it is the declaration of the Legislature that passed them both. The issue in this case has been framed by the clerk of the Court. He may have miscarried as much as you please; he may have put one fact in issue, when there was another fact to be put in issue; he may have made it an action for a trespass, instead of an action upon the case; he may have made it an action for a libel, instead of for an assault; he may have made the grossest blunder, but you are bound by the issue he has framed as it now stands. I should have been ashamed to have taken up so much time in stating these matters, which are of such ordinary and plain necessity in judicial proceedings in this country, but that I see there is some occasion for recalling them to the attention of the practitioners below, who do not seem to think they are bound by the issue framed. What would be the consequence of this laxity of proceeding? Precisely that which I suggested to the learned serjeant, who had the good sense and candour immediately to abandon that part of his argument. The consequence would be this: The clerks of the Jury Court may not be, under all the chasteness and strictness of practice and proceeding, the best persons to frame issues. I may have the prejudice of an English lawyer; but I believe the true way to plead is, that the parties should each frame his portion of the record under the fear arising from the penalty of a demurrer; that is to say, if he pleads ill he shall pay the penalty of failing at that step of the proceeding. I believe this is the true way of pleading. It may have assumed an appearance of a strict science, with many technicalities, but all the merits of it are derived from that course of proceeding. But be that as it may, the Legislature has said here, that the clerk shall frame

Sept. 7, 1831.

the issue, as a master in Chancery in England frames a question to go to a Court of law. Be it so. But how can the clerk ever be expected to perform his important office of a common pleader between the two parties, if he is to have all the while before his eyes such doctrines as seem to have been admitted, again and again, in the course of this case,—that the parties and the Court are not to be bound by what he draws out as the issue, but that they are to gather the meaning from something upon which he proceeded—the condescendence and answers, and the arguments of the Judge in a former stage of the case, which is referred to by the Court. But if the issue is to be the canon obeyed by all, the Court as well as the parties, then the clerk will draw an accurate constat of the question in dispute; whereas if he knows that no such thing is to be the canon, but that every thing else is to be taken into consideration in construing his words, he will do it in the laxest way possible, and parties will have the utmost difficulty in ascertaining the meaning. That I know is but too much the practice in Scotland; irregularity, I may say, is but too regularly pursued; slovenliness is but too carefully followed. I speak from experience in the judicial proceedings in that part of the United Kingdom, and I wish to guard the Court against it. I wish to point out a principle, and state a ground of decision, that shall make it imperative upon them to go strictly to work, to leave nothing to inference, conjecture, and guess, and groping out of the record; and that I can only do by holding them to, and binding them by, whatever they put upon the record. What I have said may not lead very directly to the decision of this question, when your Lordships come to consider more narrowly what is in dispute between the parties; but binding them by the words of the issues, and holding that to be on either side the canon, the question arises, What have we in these words, and what meaning have we to affix to these words; and has the cause miscarried below? I mean, has Lord Gillies affixed a wrong meaning, and tied up the jury from the consideration which was open to them by force of the words of the issue? That is really the question, and the only question before your Lordships. But, before coming to it, I have an observation to make, as some question has been raised whether issues, under the jury act, are to be taken as resembling those which in law we have here, or as in the nature of issues directed out of a court of equity. If they are to be considered like issues directed out of a court of equity, very much of the laxity and slovenliness and imperfection I have been just adverting to will inevitably mix itself up with these Scotch proceedings; for no importance whatever is attached, in practice, to the form of an issue which is sent down from the Court of Chancery. The order here gives authority to the parties

Sept. 7, 1831.

to call upon the judge, and to the judge, whether the parties call upon him or no, to endorse a special matter upon the postea; the consequence is, that many things are tried not to be found in the issues out of the Court of Chancery; the whole question is tried, whether raised by the issue or not. I therefore do most anxiously hope that I shall find no such thing in these jury acts, or in the practice of the Court of Session, as a sanction for the proposition, a perilous proposition as regards the strictness of proceeding, that these issues are to be taken rather as issues out of Chancery. I see nothing whatever in this case, or in the act, to sanction that doctrine; and as at present advised, I shall take it that you are bound completely here by the issue framed by the officer of the Court, directed by the order of the Court, and sanctioned by the approval of the Court. This is the first issue: "Whether the said canal, cut as "aforesaid, is to the injury and damage of the pursuers, or of any and "which of them, as proprietors of salmon fishings in the said river." The second is like the first: "Whether the said dam-dyke, formed "as aforesaid," (instead of whether the said canal, cut as aforesaid,) "is to the injury and damage of the pursuers, or of any and which of "them, as proprietors of salmon fishings in the said river." Lord Gillies confines this to the existing state of things. Now, as I have said before, I shall look into the pleadings with great anxiety before I advise your Lordships to come to a final decision as to the rights of the parties, and the general question, as to the mode of proceeding in Scotland; but, as at present advised upon the argument, and the view of the record itself, I consider it to be plain enough that the only restriction which is here by force of these words affixed to the generality of the question, is the two-fold restriction—"cut as afore-"said," and "as proprietors of salmon fishings in the said river," and that those are the only two parts of these two issues that can be said to bear any reference to the existing state of things. Now, how do these bear reference to the existing state of things? "Cut "as aforesaid" means only a canal cut in the given line and of the given dimensions; it does not mean cut in such a way that there is one obstruction above and another below. It is not, therefore, to be read as if it were, cut in all the circumstances of the river, as they actually stand; that would be a forced and violent construction to put upon the words; but "cut as aforesaid" simply indicates the manner in which the canal is cut. As to "the injury and damage of the "pursuers," that is quite clear; and then as to the words, "or of any "and which of them, as proprietors of salmon fishings in the said "river;" does that limit it in any way to the present existing state of the river? Does it not let in all the considerations, and all the rights and equities of these parties, in whatever way you look into

Sept. 7, 1831.

them, whether in the potential or in any other sense, with regard to those salmon fishings? I incline to think it does. But Lord Gillies does not take the same view of the subject. He imports, if his words have any meaning, a plain and manifest and intelligible qualification and restriction into the words, the generality of which, in my opinion, is undoubted. He says, "Is the dyke "injurious to the pursuers fishings"—that I have no objection to —"in the actual state of the river and of other dykes?" I want to know what warrant there is, in the issue framed by the clerk, in the strictest sense of these words, "whether the canal, cut as aforesaid, "is to the injury and damage of the pursuers, or of any and which of "them, as proprietors of salmon fishings" for importing these words, "in the actual state of the river and of other dykes." It may be fit and proper that the actual state of the river and other dykes should be taken into the account; but this does more than allow the jury to take it into account; it directs the jury to confine themselves to the actual state of the river and the other dykes; it says, that the jury are only to consider whether the dyke is injurious to the pursuers fishings in the actual state of the river and the other dykes, and not whether it would be injurious to them if other dykes were demolished or properly regulated; and then comes the exception which is taken, that the question which the jury had to consider was, "Whether the said canal and dam-dyke of the said defenders were "injurious to the fishings of the said pursuers, without reference to "the injury occasioned by the other obstructions in the river." "And farther, that as the cruive-dyke might be regulated, at all "times, in terms of law, and that as the other dykes, in so far as "they were encroachments injurious to the fishings of the said pur-"suers, might be removed or properly regulated, and as the trial "between the parties did not depend on the objections or defences, "in regard to any other obstructions, the evidence led, with regard "to the effects of the other obstructions on the river, was irrelevant, "and that the injury occasioned by them, in their present state, to "the fishings of the pursuers, ought not to be taken into the con-"sideration of the jury, in returning their verdict on the said issues." The ground of exception taken to the direction of Lord Gillies is, that he left to the jury the question, whether there was or was not injury from the dyke to the pursuers, in the actual state of the river and of other dykes. If Lord Gillies did not use these words, if that was not the way in which he left the question to the jury, he ought not to have signed this bill of exceptions which he has signed, because it appears clearly and undeniably by it that he used those words in addressing the jury; and the objection to it is, that it was so put, and that they were told that the question was not,

Sept. 7, 1831.

whether it would be injurious to them if other dykes were demolished or properly regulated. But here arises a difficulty, and it is pretty nearly the only difficulty. If we are to approve of the bill of exceptions altogether, I doubt whether we must not go a little farther than saying Lord Gillies was wrong, and admit that the bill of exceptions is right in saying what should have been the form in which Lord Gillies ought to have presented the question to the jury; for that is the complaint—not only that Lord Gillies said so and so, but that he did not say that which ought to have been his direction, and which it is contended was the only question to be left to the jury. The exception would have been much better framed if it had simply objected to the form in which Lord Gillies presented the question to the jury, and not contained the form in which they say it ought to have been presented to the jury; because it may happen that Lord Gillies was wrong, and then the exception will hold; but it may be that the parties likewise were wrong; it may be that the way he put it was not right, but that the way in which they put it may not be right either. I think the Court was left in a difficult alternative, in not being satisfied with the object of the bill of exceptions, or that what was said was what ought to have been said. But the Chief Commissioner adopts a very wide and lax construction, in my opinion, and much more so than is safe to indulge in, as to what is the function of a judge directing a jury in any issue framed by the Court, and sent to him.

My Lords, I have stated thus much to show your Lordships the view I take at present of the pleadings in this case. I intend to look more narrowly into them before I advise your Lordships to give judgment; but I thought it fit to state in the presence of the counsel what I have done, and nothing I am likely to hear further will alter my opinion upon that. I may think, that the Court of Session have the power of originating an issue by the express provisions of the statute, and of sending an issue back, if they are not satisfied. The Chief Commissioner argues upon that, and says, if the Court had granted a new trial on ground of misconstruction, they might have sent another issue to try the question; but what I wish to impress upon your Lordships, and the Court below, and the practitioner, is, that unless the Court of Session mean to send an issue in the nature of an issue out of the Court of Chancery or Exchequer here,—if it is a common issue, framed in the ordinary way,—it must be framed to be binding, and it must be held that the words of the issue are to be the canon of the parties and the judge; otherwise you are trying nothing before the jury; you do not know what you are arguing about, or directing your evidence to; and, among other inconveniences, this would be one of the worst, that the very issue before the

jury will lead to a preliminary argument before and a decision by the judge as to the meaning of the issue the jury have to try; a proceeding utterly indecorous and wasteful of the time of the Court. Sept. 7, 1831.

Attorney-General.—Will your Lordships allow me to make one observation?

Lord Chancellor.—Certainly; I rather court it.

Attorney-General.—Supposing the enlarged power which your Lordship alluded to to be in the Court of Session—

Lord Chancellor.—If you look at the appellants' case, to the notes of the Chief Commissioner's speech, you will find the 8th section of the jury act is alluded to, which, he says, provides "that the Court "of Session, if not satisfied with the information which a verdict "affords on issues which it sent for their information, may send fur-"ther issues." That cannot be done, as you know very well, by the Court of King's Bench; they cannot be dissatisfied, like the Court of Chancery, upon an issue which it directs.

Attorney-General.—Though the Court of Chancery possesses that great power, if, under an issue drawn up and directed by the Court of Chancery, any indorsement was sought for by either party, the parties would be as much bound.

Lord Chancellor.—Yes; the parties would be bound, but not the Court. The judge may indorse special matter upon the postea, though the parties do not wish him. If the parties do not call upon the judge to indorse the finding, it binds the parties. But the Court may afterwards say, its conscience is not satisfied with this finding, and, though you do not ask it, I will send it back again; and that is done every day. But the fact is, that issues in Chancery are quite for a different purpose; they are directed to inform the conscience of the judge; the Court is not bound by the result; and it may at any period decide in the teeth of the finding.

Attorney-General.—Just so, my Lord.

It is declared, by the Lords Spiritual and Temporal in Parliament assembled, That the meaning and intention of the issues directed in this case were, to raise the question, whether the canal and dam-dyke of the appellants are, or are not, injurious to the respondents' fishings, as well in the actual state of the river, as after, by lawful means, that state shall be changed by the removal or regulation of other dykes in the river Don in the proceedings mentioned, so that the questions in the issues must be answered in the affirmative if the jury find, either that there is now any injury in the actual state, or that there would be injury in the state so altered, or that the canal and dyke are or would be

Sept. 7, 1831. injurious in both states of the river: And, with this declaration, it is ordered and adjudged, That the interlocutor complained of in the said appeal be, and the same is hereby affirmed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to proceed farther therein as shall be consistent with this judgment, and as shall be just.

Appellants' Authorities. — 3 Ersk. 9, 13; Glasgow Waterworks, Dec. 20, 1814; Colville, May 27, 1817; Charity v. Riddel, July 5, 1808.

Respondents' Authorities.—Stat. 1477, c. 73, 1489, c. 14; Scott, July 16, 1742 (14,264); Grant, Jan. 17, 1777; Supp. Vol. v. 447; Fraser, March 4, 1766 (10,742.)

RICHARDSON and CONNELL,—SPOTTISWOODE and ROBERTSON, —Solicitors.

No. 31.

JOHN CALDER, Appellant.—*Lushington.*

GEORGE AITCHISON and Co., Respondents.—*John Campbell*—*Sandford.*

Proof—Cautioner.—When a party bound himself "to guarantee an agent for four "per cent. for commission and guarantee,"—held (affirming the judgment of the Court of Session), first, that this merely imported an obligation to guarantee the payment of the price for which goods sent to the agent should be sold, and not for his faithful conduct; and, second, that evidence of mercantile men was inadmissible to prove, that in practice the words comprehended an obligation to the latter effect.

Sept. 10, 1831.

1ST DIVISION. Jury Court.

CALDER, a merchant in Leith, raised an action in the Court of Session against George Aitchison and Co., also merchants there, setting forth, that in the month of September 1820 he consigned to them 700 barrels crown-brand white herrings, for the purpose of being forwarded to and sold by their agents at Konigsberg; the said George Aitchison and Co. being to receive four per cent. on the amount sales of said consignment, for commission and guarantee.

"That the pursuer, as well as the said George Aitchison and "Company, considered said herrings to be worth at least 23*s.* "per barrel, which was the sum at which they were insured: "That in terms of their agreement, the said George Aitchison