It is of no consequence, in my opinion, whether the transferee may or may not have obtained a transfer effectual to him by reason of his complying or failing to comply with the statutory conditions on which a transfer is granted. His breach of these conditions can never reinstate the transferrer in a right which, according to the view of your Lordships in which I concur, has been absolutely determined.

The Court answered the question in the case in the negative, and dismissed the appeal.

Counsel for the Appellants—H. Johnson—A. S. D. Thomson. Agent—James Purves, S.S.C.

Counsel for the Respondent — Shaw, Q.C.—Lees. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Tuesday, February 23.

FIRST DIVISION.

[Lord President and a Jury.

GIBSON & COMPANY *v.* ANDERSON & COMPANY.

Reparation—Breach of Agreement—Taking Decree in Absence for Debt after Agreement to Stop Proceedings—Publication in "Black List"—Damage consequent upon such Publication.

In an action of damages against a defender for having, in breach of an agreement to withdraw certain proceedings in the Debts Recovery Court, taken decree in absence there against the pursuer, *held* relevant to lead evidence of damage sustained through the publication of the decree in the "Black List," such publication being proved to be the natural and inevitable consequence of decree having been taken.

Davies & Company v. *Brown & Lyell*, June 8, 1867, 5 Macph. 842, *distinguished.*

Reparation—Breach of Agreement—Taking Decree in Absence after Agreement to Stop Proceedings—Publication in "Black List"—Amount of Damages.

Circumstances in which the Court *refused* to grant a new trial on the ground of excessive damages, where the jury had awarded £300 to the pursuer of an action founded on breach of an agreement to stop proceedings in the Debts Recovery Court.

As a result of a long series of transactions between the two firms, Gibson & Company, retail chemists, Edinburgh, were due to Anderson & Company, wholesale chemists, Edinburgh, on 5th November 1895, a sum of £43, 14s. 6d., and on that day a Debts Recovery summons was served by the latter upon the former firm.

Mr Gibson, the sole partner of the firm of Gibson & Company, was absent on the Continent at the time, and on Wednesday, 6th November, his manager Mr Gordon, called upon Mr Anderson, the sole partner of the firm of Anderson & Company, with reference to the summons. It was ultimately agreed between them that if Mr Gordon would pay down £25 in cash, Mr Anderson would undertake to see that all legal proceedings were stopped. Mr Gordon, accordingly, on Friday the 8th, sent Mr Anderson £25 in cash, for which a receipt was duly given.

Anderson & Company wrote to their law-agent to stop proceedings, and posted the letter before 2·45 p.m. on Saturday the 9th. The law-agent had no time to open all his letters before the Court met on Monday the 11th, and did not open Anderson & Company's letter until after his return from the Court. Decree in absence consequently passed against Gibson & Company for £18, 4s. 6d., being the balance of the amount due by them.

Shortly afterwards the name of Gibson & Company appeared in the list of persons against whom decree in absence had been taken, in the *Scottish Gazette*, a periodical which existed for the purpose of publishing such a "black list."

In these circumstances Gibson & Company raised an action against Anderson & Company, concluding for payment of £500 as damages for breach of agreement.

The pursuers averred—"To the trader it is of the utmost importance that his name should not appear in a published list of defaulting debtors. In consequence of defenders' said breach of agreement, by moving for and obtaining decree in absence against the pursuers, and of the wide publication of the fact by the appearance of their name in the "Black List" and other lists of a similar character, which have a most extensive circulation in the country, the pursuers have sustained very serious loss and damage. Their credit has been seriously shaken, and their reputation as a mercantile firm has been irreparably injured. The defenders are liable to the pursuers for all loss, injury, and damage which has resulted to them by and through the wrongous, unwarrantable, and illegal proceedings taken by them, in breach of the foresaid agreement. The said loss, injury, and damage is moderately estimated at the sum sued for; but though the defenders have been asked to make compensation to the pursuers, they have refused, or at least they delay, to do so, and the present action has therefore been rendered necessary."

The defenders averred, *inter alia*, that the pursuers had suffered no damage.

An issue having been adjusted, the case went to trial before the Lord President and a jury on 11th January.

Mr J. A. Gibson, sole partner of the pursuer's firm, deponed at the trial that the publication of the firm's name in the "black list" had been followed by an immediate rush of creditors; that he had been compelled to get an overdraft from the bank and to get security from his

father for it; and that wholesale houses at once became suspicious of him and refused to deal with him, or at all events to give him the same terms as formerly. In particular, he deponed that he had lost £15 by the falling-through of a contract for soap with the firm of Bergmann of Leipsic. He also instanced Raimes, Clark, & Company, Honeyman & Wilson, Melrose, Drover, & Company, Bovril, Limited, and Schultz & Company, as firms which had either ceased to deal with him or refused to give him credit since the publication of his firm's name in the "black list."

Representatives of these and other wholesale firms corroborated Mr Gibson's evidence on that point, and deponed that the effect of the publication of his name in the "black list" would be highly prejudicial to a trader's business. A traveller for Bergmann & Company corroborated Mr Gibson's evidence with regard to the soap transaction. A bank-agent deponed to the sudden pressure brought upon Mr Gibson's business in November 1895.

These witnesses, with two exceptions, deponed to having "heard" or having been "told" of the appearance of the pursuers' name in the "black list"; but Richard Clark, of the firm of Raimes, Clark, & Company, and James Hinton Robertson, manager for Bovril, Limited, deponed to having themselves seen the decree in the "black list." It was further proved that all decrees in absence in the Debts Recovery Court were regularly published in the "black list."

At the beginning of Mr Gibson's examination, on the point of his credit with wholesale firms having been impaired, counsel for the defenders objected to the evidence on the ground that such damage was a consequence of the publication of the decree in the "black list."

The objection was repelled.

The jury returned a verdict for the pursuers and assessed the damages at £300. They further stated "that it makes no difference in their finding whether the evidence of the witnesses Richard Clark and James Hinton Robertson is taken into consideration or not."

The Court having granted a rule to show cause why the verdict should not be set aside and a new trial granted, and the defenders having explained at the bar that they sought to set aside the verdict on the ground of excessive damages only—

Argued for the pursuers — The jury's award of damages ought not to be disturbed. There was ample evidence to support it. The case of *Davies & Company* v. *Brown & Lyell*, June 8, 1867, 5 Macph. 842, which the defenders relied on, was distinguished from the present case by the circumstance that there was no breach of contract there. Further, the opinions there expressed as to damages resulting from publication in a "black list," besides being *obiter*, were expressed, not after the case had been tried and the facts proved, but upon adjustment of issues. Breach of contract had been proved here, and consequential damage might properly be taken into account by the jury—Chitty on Contracts, p. 750. — *MacRobbie* v. *M'Lellan's Trustees*, January 31, 1891, 18 R. 470, also referred to.

Argued for the defenders—The damages were excessive. The pursuers were bound to prove that any damage they might have suffered could be traced to sources of information other than the black list. *Davies, ut sup.*, was express authority for the proposition that the defenders were only liable for the consequences of this decree in absence having been pronounced in and appearing in the records of the Sheriff Court. The pursuers had failed to prove loss of custom or any really substantial damage.

LORD PRESIDENT—The ground of action in this case is that whereas it had been agreed with the pursuers that the defenders should not proceed and take a decree in an action in the Debts Recovery Court in Edinburgh, yet, in breach of that agreement, they went on and took a decree out, to the loss, injury, and damage of the pursuers.

Now, two questions have been argued to us. The first is as to whether, in support of a case of damages on this head, the pursuers were not limited to the injury arising from the persons present in Court, or inspecting the records of the Sheriff Court, learning of the decree having been taken. I put the question in that form, because I think that that is really the logical extent to which Mr Jameson's argument carries him. He has maintained, on the authority of the case of *Davies*, that a person taking a decree in breach of an agreement is not liable for the larger amount of damage which may ensue, because, through the publication of certain lists of decrees in absence, a larger public is reached than that which frequents the Sheriff Court or inspects the records of the Sheriff Court. Now, I shall consider this question, first of all, apart from the case of *Davies* altogether. I suppose it is sound doctrine that when a man is sued for breach of an agreement he is liable in the natural and ordinary consequences of that breach; and accordingly, the question would naturally occur, if a decree is taken in the Debts Recovery Court, what is the ordinary and natural consequence so far as regards the degree of publicity which the fact obtains? Now, it was thought at the trial by the pursuers, and I think quite properly, that it was well that he should lay a foundation of fact on this question, and he asked the Sheriff-Clerk-Depute, as the functionary who had knowledge of the degree of publicity obtained by such decrees, and Mr Kerr says—"Decrees in absence of the Debts Recovery Court are invariably published. That follows as a matter of course." And Mr Anderson of the defenders' firm says very frankly—"I am aware that it is the custom to publish decrees in absence in such papers as the *Scottish Gazette*. If decree in absence were taken against a trader, publication in these papers would be the natural result." It could not, I

suppose, be more frankly or pointedly put than it is in these words; and as Mr Young pointed out when Mr Anderson was narrating in cross-examination his reasons for the agreement, he avows that Mr Gordon, who represented the pursuer, expressed anxiety to have the matter taken out of Court, "I suppose in order to avoid publicity." Accordingly, in this case it would appear, whatever the law may be, that as matter of fact the foreseen and natural consequence of a decree being taken is that that reaches the knowledge of the commercial class who are concerned with such information through the medium of certain newspapers—commercial newspapers. I do not say that the matter would be a bit different if some of the ordinary newspapers had found it profitable to have a column containing information of this kind. The question simply is, what is the custom, what is the natural consequence of a decree of this sort being taken? I suppose it would be a matter of evidence whether many or few people frequented the Sheriff Court and inspected the roll, and whether many or few people have access through this other channel to the news in which they take an interest.

Now, I leave to others to comment on the decision, which is supposed, doubtless erroneously, to tend to exclude what apart from authority would seem *prima facie* to be very good evidence. It is scarcely to be supposed that if the question had been presented to the Court on proved facts such as I have adverted to, the Court would have rejected evidence which clearly showed that the degree of publicity actually obtained was the natural and foreseen consequence of a breach of agreement such as this. I may mention merely by way of explanation of what took place at the trial, that, feeling there was apparent plausibility in the argument of the defenders founded on that case, I thought it well that the jury should separate the damage which they considered to arise from the knowledge of this fact of the decree in absence having reached certain persons through these newspapers from the general evidence where there is no such tracing of the information to that particular class of newspapers; but it turned out that the jury did not think—there were only two gentlemen whose names were suggested—that the figure of the damages would be altered supposing these gentlemen had never heard of the decree at all.

Now, I pass from that special question to the more general question argued by Mr Jameson that the verdict for £300 is unconscionable or exorbitant and excessive; and I may say that if I had sat in the jury box at the trial, I might not have given so much as £300; but I mention that, not by way of placing my judgment against that of the jury, but merely as an observation of a hearer of the evidence at the time. It is rather difficult to assess the damages in a case of this kind, because there are various elements of a more or less delicate character to be considered. The facts of this case are not very complicated, but a brief narrative of them may suggest these difficulties. Unquestionably, when this decree was taken, the first result was to paralyse the business of the pursuer. Everybody came down upon him, demanding their due, and everybody raised his terms—I mean among the wholesale dealers—if further supplies were asked. I think the pursuer, to a large extent through his own exertions and still more through the business capacity of his subordinate, was lucky in getting over the pinch of the difficulty; but that cannot disentitle him to such damage as he proves in a competent way. Now, the heads of damage under which his claim fell, so far as supported by evidence, seemed to me to be these. First of all, certain wholesale traders left him altogether—their travellers never called again. Honeyman & Wilson were representative of that class. Other people said "We will not carry on transactions with you on the liberal terms hitherto given." He had to pay cash or higher prices. Again he says—"I lost customers." To that Mr Jameson, rather rashly I think, says—"No, you did not, because you got a lot more customers." But the two things are quite consistent, and there was evidence, on which the jury were entitled to go, that the pursuer did lose some customers, though the volume of business, taken as a whole, subsequently increased. But there is another element, substantial though incapable of exact measurement. He had been apparently indulgently treated by some of his wholesale people, but from this time they, as they put it, put him under supervision. That means that he got less liberal treatment, and he was more liable to be pulled up suddenly than before. Then, again, he had to go to friends—his servant actually produced a small sum of money—to keep the thing going. He had to go to his father—and it will not do to say these are not exhaustions of resources which injure a man. If he had been let alone his father would have been fresh and untried if another reverse had come—and so would his servant. I mention these things to show that it is not quite so easy a one-two-three calculation as Mr Jameson represented it to be, and accordingly I think the jury were entitled to proceed, not founding on actually proved figures, but estimated. Another case more palpable was where a German firm represented by Mr Brager refused to accept an order that would have been very advantageous, though not a very large one, to the pursuer. I have specified these things, not by way of furnishing an exhaustive collection that will work out £300, for I confess my sum would have been a somewhat smaller one; but your Lordships I understand in practice do not set aside a verdict merely because you think, or because the presiding judge thinks, that £200 might have been more like it than £300, and I must, speaking as I am bound to do, frankly say that I think a verdict for £200 would have been completely unassailable.

Accordingly, I daresay, I have fulfilled my part in the expression of opinion I have now indicated—that while I think the award is a liberal one, I do not think it so excessive a measure of damage as to entitle the Court to interfere.

LORD ADAM—The only ground on which the verdict is assailed is that the amount of damages given is excessive, and it is said to be excessive, as I understand the argument in the defenders' case, principally because the jury have taken into consideration what they were not entitled to consider—the damages suffered from the fact of this decree in absence having come to the ears of certain people through a newspaper called the *Scottish Gazette*. It is contended that the only damage which the pursuer is entitled to recover is, as Mr Jameson put it when he first opened his case, damage resulting from the knowledge having come to the ears of people from other sources than the *Scottish Gazette*. This paper seems to be one of those papers that are not uncommon nowadays—*Stubbs' Gazette* being perhaps the best-known paper of the kind—which are the chosen home of what is called the black list—that being a list where a record is published of all parties who, like the pursuer in this case, have had decrees in absence taken out against them in the Court. Now, I did not gather from Mr Jameson that he could draw a distinction between publication in a paper of that description and the publication of the same thing in any other paper which is the vehicle of ordinary news. I think when Mr Jameson was pressed in the course of the argument to say whether publication in a paper containing a black list as its principal information differed from publication in an ordinary newspaper, he could not say that it did. Therefore, as your Lordship has pointed out, he was driven in the end to maintain that no damage could be awarded except what was traceable to persons who had been in Court or had examined the records of the Court. The question as it appears to me is whether we are to follow the well-known doctrine applicable to cases of this kind, that the damage to be awarded is the damage naturally flowing from the breach of contract. If we follow that rule, the evidence here shows quite clearly and distinctly that the damage arising from publication in the *Gazette* is just that which naturally, not only probably, but we may say certainly, would flow from such a decree being taken, because it is proved in this case, and it would have been assumed without proof, that one of the natural results flowing from such a decree being taken is that it is immediately published in papers such as the *Scottish Gazette*. I think, therefore, that the conclusion at which your Lordship has arrived, unless the case is to be treated as thoroughly exceptional, is the right one.

In support of his argument the defender founded upon certain observations made by the Judges in the case of *Davies*. Now, in the first place, I am not of opinion that these observations apply to this case. That was an action, as I understand it, for damages for malicious use of the forms of Court. The ground of action was that the defender after he had been paid what was due him, had gone and taken decree against the pursuer, and the issue was whether that proceeding was malicious and without probable cause, which is quite a different issue from what we have here. It certainly was not a case, as put in the issue, of breach of contract. In the next place, as I understood what was read to me, the stage at which these observations were made by the Judges was when they were adjusting the issues to try the cause, and it does not appear to me that the question of what was relevant or was not relevant to the amount of damages really came properly before them for consideration on the second point.

Your Lordship who tried the case is of opinion that supposing the jury had given the sum of £200 that would not have been unreasonable. In such a case I do not think the Court, even if they would have given £200 instead of £300, would hold the award to be such as twelve reasonable men could not have given, and to be so excessive as to justify the setting aside of the verdict.

I therefore concur with your Lordship.

LORD M'LAREN—In considering an application to set aside a verdict on the ground of excessive damages, it must be kept in view that no two persons independently endeavouring to arrive at the true amount of damage will ever fix upon the same figure, except in those cases, which are comparatively infrequent, where the damage is ascertained by exact calculation. Experience proves that good judges meaning to be perfectly fair differ very considerably in the value they put upon a thing that depends upon estimation, and therefore, unless jury trial is to lose all finality, we must allow a considerable margin for difference of opinion, and I agree with your Lordship that while we might be content to put a lesser value upon the damage done to this gentleman's commercial reputation, which I am glad to see has not been great, yet the difference between £200 and £300 is not such a difference as would justify us in setting aside the verdict on the ground of excessive damages. It is no more than the difference that honest and skilled valuators of property might reasonably put on the same subject.

The chief interest in this case seems to me to depend on the question which was raised as to the value to be attached to the indirect evidence in the case, that is to say, to the evidence of people in whose estimation the pursuer is said to have suffered because they had read his name in a publication of decrees in absence. Now, from the outset it seemed to me impossible to take any clear distinction between the evidence admissible in a case of this kind, and in the case of an ordinary action for defamation or injury to reputation. Sup-

posing the statement had been that the defender in presence of certain persons in the trade, possibly at an exchange or place of resort in the trade, had said, "I know that the pursuer is not able to meet a bill of £43," in such a case the injury complained of is not the opinion merely of the persons to whom the statement is directly made, but in such cases a wave of opinion is set up, and in a very short time spreads through the whole class of persons with whom the aggrieved person is associated in business. It has never been doubted that it is a good case of damage to prove that a calumnious statement had been circulated and had reached persons whose good opinion was valuable to the pursuer and whose opinion was affected by it. Nor does it make the slightest difference in such a case whether the wave of calumny is propagated by word of mouth or through the medium of newspapers, as in cases where the calumnies are uttered at public meetings or under such circumstances that they enter the press as items of news. But now, if instead of stating circumstantially that the pursuer is unable to meet a claim of £43, the defender puts it to the test of taking a decree in absence against the pursuer, and thereby gives the information the widest publicity, does it make any difference? Of course if it were a just decree no responsibility is incurred, every creditor is entitled to force his claim of debt, and no claim lies against him because of the injury which the debtor thereby sustains in his commercial reputation. But if, contrary to an agreement, the creditor takes a decree by an abuse of the forms of process, I cannot see that he is in a different position from a person who ultroneously makes the same statement which everyone would make on reading the decree, namely, that the debtor is unable to pay a claim to that amount. Therefore it appears to me that the presiding Judge rightly admitted the evidence of witnesses who had derived their knowledge of the decree through the newspapers or through the publication called the *Scottish Gazette* which contains this so-called black list. In saying so I do not mean to imply that if any greater harm is done by the insertion of the pursuer's name in a list along with other debtors, than would result from its isolated publication, the defenders ought to be responsible for that. I think he should be responsible just in the same way as if in the law reports of the newspaper, in addition to the defended cases, it had been said, "Decree in absence was obtained against Gibson & Company on this day." But one can see that there are cases where the association of a name along with other names may constitute an aggravation of the injury or a separate ground of injury. It might not be very injurious to reputation for example, that a person had not been admitted into a particular club, but if somebody published a list of persons who had been blackballed by this club, or say who had been refused admission to a racecourse, and the unfortunate complainer found his name associated with "blacklegs" on the turf, he might suffer injury to character and feelings of a very different character from that resulting from the mere publication of the fact that he himself for some reason or other had been refused admission to this social function. Now, if in the case of *Davies*, the observations made by the Lord President and Lord Curriehill had reference to a claim of damage of the kind I have indicated, I should entirely agree. If they meant anything more than that—if it was meant that publication in the black list could not be used as evidence of injury to character, I should venture respectfully to differ; and I think we are free to consider this point independently of authority, because the observations founded on were observations thrown out in the course of a discussion of the relevancy, and in no way binding the Court to exclude evidence of the description we are now considering when the question is formally raised on a motion for a new trial. Strictly speaking, I am not sure that we could in the absence of a formal exception to the Judge's ruling, reject the evidence or displace the verdict on this ground, but this is immaterial in my opinion, for I am satisfied that the evidence was rightly admitted. I am of opinion that the rule should be discharged.

LORD KINNEAR—I agree with your Lordships. I think that if any question as to the admissibility of evidence were formally before us, no evidence was allowed to go to the jury that was not properly receivable. The wrong of which the pursuers complain arises from the publicity of proceedings which he says were wrongly taken against him. That is the sole ground of complaint. It is because they were made public, and so injured his credit among the tradesmen with whom he dealt, or his customers, that he has any claim for damage. It is the natural and ordinary, and indeed it appears to be the inevitable consequence of taking decree in absence in the Debts Recovery Court, that the proceedings are at once made public by a variety of newspapers, including those papers which publish separate black lists. If that be the ordinary and necessary consequence of the defenders' breach of contract in taking decree, then I agree with all your Lordships that it is a consequence of which evidence is admissible. Therefore I think the learned Judge was perfectly right in allowing this evidence to go to the jury.

The only difficulty that has occurred to me in the case has been created by the citation of *Davies* v. *Brown*. But in the first place I agree with what has been already said about that case, that the observations relied upon were not necessary to the judgment, but were observations by the way, and were therefore not binding upon us. But then I should myself have very great reluctance in coming to any decision directly contrary to an opinion expressed by such high authorities as the learned Judges whose observations are quoted in *Davies* v. *Brown*. But I am not

at all persuaded that the Lord President and Lord Curriehill were really considering the question which we are called upon to determine now, or that they intended to say anything at all about the admissibility of evidence. In that case there was a very specific, detailed, and somewhat elaborate statement in the condescendence of publication in certain newspapers; and the observations of the learned Judges were all made with reference to that statement only. They knew nothing more of the case than what they saw in the condescendence, and it was as a criticism of the condescendence that they made the observations in question. Now, it is not the function of the condescendence to set out in detail the evidence on which the pursuer means to rely. Its proper purpose is to aver the facts upon which his claim is grounded, or in a case of this kind the facts which constitute the wrong of which he complains. And therefore it appears to me the Court may very well in that case have looked on this averment as an averment of a separate wrong which the pursuer was bringing forward as a ground of claim. I do not think that, if that were so, there is anything to create any surprise or doubt in the opinions expressed, that that was not a relevant ground of action —for it merely came to that—that it might not be a direct or natural consequence of what the defender had done, that this other wrong set forth in the specific averment was committed. But I cannot read these opinions as amounting to a judgment that it is not relevant to prove injuries to the trade or credit of a person making a complaint of this kind by reason of its having come to the knowledge of persons trading with him, not because of their having been in Court and learned the proceedings by their own ears, but because they had read it in the newspapers. That is what the defenders maintain here. I do not think that it is supported by the judgment in *Davies* v. *Brown*. But if it were, then I should agree with your Lordships that we are not bound to follow it, and ought not to do so.

As to the other matter, I entirely agree with all your Lordships that it is a question for the jury to determine what is the proper amount of damage, and as your Lordship has said, it is a question of difficulty and of considerable delicacy. Whatever our own opinion is, we ought not to interfere with the verdict of a jury unless it is quite evident that they have given not what we may think too much, but what is so excessive and exorbitant as to make it unreasonable that their verdict should stand. I do not think that is the case here, and therefore I concur in the judgment proposed by your Lordship.

The Court discharged the rule and applied the verdict.

Counsel for the Pursuers—A. J. Young—Kemp. Agent—Francis S. Cownie, S.S.C.

Counsel for the Defenders—Jameson—Watt. Agent—William Manuel, S.S.C.

Tuesday, February 23.

FIRST DIVISION.

DUKE OF FIFE *v.* GEORGE (CLERK TO DEVERON FISHERY BOARD).

Fishings—Salmon Fishings—Salmon Fisheries Act 1862 (25 *and* 26 *Vict. c.* 97), *sec.* 6, *sub-sec.* 6—*Salmon Fisheries Act* 1868 (31 *and* 32 *Vict. c.* 123), *Schedule F—Regulations—Width of Cruive.*

Sub-section 6 of section 6 of the Salmon Fisheries Act 1862 empowers the Fishery Board Commissioners to make general regulations with respect, *inter alia*, to the construction and use of cruives, . . . "provided that such regulations shall not interfere with any rights held at the time of the passing of this Act under royal grant or charter, or possessed for time immemorial."

By Schedule F of the Salmon Fisheries Act of 1868 the Commissioners made a regulation that no cruive should be less than 4 feet broad.

A proprietor owned a right of salmon-fishing by cruives under royal charters, which contained no specific provisions as to the size of the cruives.

In an action raised against his predecessor in 1774 by upper riparian proprietors for the purpose of regulating the size of the cruives, the Court found that the cruives must be an ell (37 inches) in breadth. Since that date the cruives were uninterruptedly maintained of that breadth.

Held (1) that the above proviso did not exempt these cruives from the application of the new regulation; (2) that the cost of altering them so as to be in conformity with it must be borne by the proprietor.

Kennedy v. *Murray*, July 8, 1869, 7 M. 1001, *followed.*

The Duke of Fife, in virtue of ancient royal grants, was the proprietor of the salmon fishings in the river Deveron from the sea for about four miles upwards; he was also proprietor of the lands on both sides of the river for the same extent. The royal grants and the title of the Duke and his predecessors connecting therewith comprehended the right of fishing both by cruives and by net-and-coble. The cruive-dyke belonging to him was situated on the river about two miles from the sea.

In an action of declarator in the Court of Session at the instance of Lord Banff and others, proprietors of upper fishings in the river, against James second Earl of Fife, the Duke's predecessor, raised for the purpose of regulating the position, dimensions, and use of the cruives and cruive-dyke belonging to the Earl, the Court, by interlocutors, dated 16th February and 8th December 1773 and 4th August 1774, found that the defender and his tacksmen "were entitled to maintain and uphold the cruive-dyke now belonging to the first party in the