or affected by the disposition, because it deals with moveable estate, with which the disposition had nothing to do.

The question therefore is, are the rents referred to in the agreement those legally payable at Martinmas 1904? The answer seems to me to depend upon the question which I have already so fully discussed, namely, whether the rents legally due at Martinmas 1904, and conventionally payable at Whitsunday 1905, were or were not for possession of the farms between these two terms? As I have already answered the latter question in the affirmative, it follows that the rents referred to in the agreement are those legally payable at Martinmas 1904, and accordingly the defender is, in my judgment, entitled to have these rents divided between him and the pursuer in terms of the agreement.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled and that the second and third pleas-in-law for the defender should be sustained.

The LORD JUSTICE-CLERK concurred, and intimated that LORD ARDWALL—who was then sitting in the First Division — also concurred.

LORD STORMONTH DARLING was absent.

Counsel for the Pursuer—Scott Dickson, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Defender — Dean of Faculty (Campbell, K.C.)—Brodie - Innes. Agents—Mitchell & Baxter, W.S.

Friday, January 10.

FIRST DIVISION.

[Sheriff Court at Oban.

CAMPBELL *v.* MUIR.

Fishing—Salmon-Fishing—Rod-Fishing—River—Right of Fishing beyond Medium Filum.

A proprietor of salmon fishings *ex adverso* of one bank of a river, 60 yards broad, anchored a boat about the *medium filum* of the river and fishing with rod and line cast his lure towards the opposite bank, where at the time an angler, in right of the fishing *ex adverso* of that bank, was fishing, and disturbed him. In an action by the opposite proprietrix for interdict, *held*, in the absence of immemorial practice, that while casting from the bank beyond the *medium filum* might be within a reasonable exercise of the right, the method of exercise adopted was *in æmulationem vicini* and warranted interdict.

Opinion that the rules laid down for the regulation of the right of salmon-fishing in *Earl of Zetland* v. *Tennent's Trustees*, February 26, 1873, 11 Macph. 469, Lord Cowan at p. 474, and Lord Neaves at p. 475, 10 S.L.R. 286, apply to fishing by rod and line as well as by net and coble.

Process—Interdict—Landlord and Tenant — Alternative Conclusion — Interdict against Encroachment on Landlord's Right or against Molestation of his Tenant in those Rights—Competency.

The proprietrix of salmon fishings *ex adverso* of one bank of a river applied for interdict against the proprietor of the right *ex adverso* of the opposite bank "from trespassing or encroaching upon the fishing rights of the pursuer *ex adverso* . . . . or otherwise from interfering with or annoying or molesting . . . . the present tenant of said fishings under the pursuer in the exercise of his rights as such tenant; and to grant interim interdict. . . . ." *Held*, on appeal, that interim interdict which had been granted, and made perpetual, was incompetent and must be recalled.

On August 8, 1906, Mrs Jane Campbell of Inverawe and Dunstaffnage, with consent of her husband Alexander James Henry Campbell, as her curator and administrator-in-law, raised an action in the Sheriff Court at Oban against Esdaile Campbell Muir, Larach Bhain, Kilchrenan, Argyllshire, "to interdict the defender, and all others acting for him or under his instructions, from trespassing or encroaching upon the fishing rights of the pursuer *ex adverso* of her lands and estate of Inverawe, and particularly that portion thereof situated in the Pass of Brander on the south-east of property there belonging to the Most Honourable Gavin, Marquess of Breadalbane, K.G., or otherwise from interfering with or annoying or molesting Sir Robert Usher, Baronet, of 37 Drumsheugh Gardens, Edinburgh, the present tenant of said fishings under the pursuer, in the exercise of his rights as such tenant; and to grant interim interdict, and to find the defender liable in expenses, and to decern therefor."

The defender pleaded, *inter alia*—"(2) The defender not having trespassed or encroached on the pursuer's fishing rights in the Water of Awe, the action should be dismissed with expenses. (3) The defender being the owner of fishings in the Water of Awe (up to the *medium filum* thereof) *ex adverso* of his lands, has a legal right to fish up to the *medium filum* at the place libelled, and is entitled to absolvitor with expenses."

The incident out of which the action arose was thus described by the witness Sir Robert Usher, Bart.—"I remember on the forenoon of 6th August last, between 11 and 12 o'clock, while I was fishing at the Brander Pool, seeing Mr Muir coming down the loch in his launch. Mr Muir landed first from his launch with two friends, and the friends and he separated. Then Mr Muir got a boat, and with the assistance of his servant launched her. The boat had been lying on the bank I think. Having launched the boat, he pushed it out to midstream, or about midstream, above where I was fishing.

You understand I had begun to fish, and was fishing at this time. I had been there probably five minutes before he came. When he got to midstream he anchored the boat, and proceeded to cast his line upon both sides of the river, on his own side first, and then he began casting over towards me. His line came quite close to me, and fell above me first, but as he lengthened his line out, it came down, and came practically just opposite where I was standing. Lengthening his line still further, it got below me, and fell in such a way as effectually to prevent me from fishing, unless, of course, I had risked casting over him, and hooking his line in my fly. I stopped fishing then. . . . ."

On 4th April 1907 the Sheriff-Substitute (MacLachlan), who had granted on 8th August interim interdict, which was on the 9th continued, after a proof pronounced this interlocutor — "Finds that the principal pursuer is proprietrix of the estate of Inverawe, and also of, *inter alia*, the salmon and other fishings in the river Awe *ex adverso* of that portion of her estate in the Pass of Brander known as the lands of Branrie, which she had let, *inter alia*, to Sir Robert Usher, Baronet, of 37 Drumsheugh Gardens, Edinburgh, for the period from 1st July to 30th September 1906, both inclusive: Finds that on 6th August 1906, while the said Sir Robert Usher was fishing from the bank at a part of said river called the Brander Pool, let to him aforesaid, the defender approached in a boat which he had moored in mid-stream, or nearly so, and allowed to float down the river by lengthening or letting out the mooring-rope, and when he came opposite to the place where the said Sir Robert Usher was fishing, interfered with him in such a manner as to make it impossible for him at the time to continue fishing there: Finds that the defender is proprietor of fishings on said river on the opposite side from those belonging to the principal pursuer, but that his actings on the occasion above mentioned were illegal and unwarrantable, and an encroachment on her rights of fishing as above mentioned: Therefore continues the interim interdict formerly granted and declares the same perpetual: Finds the defender liable in expenses. . . ."

Note.—"This action between Mrs Campbell of Inverawe and Esdaile Campbell Muir of Inistrynich and Larach Bhain, two proprietors whose lands extend along the two opposite banks of the river Awe, and who have as pertinents of their lands the right of fishing in said river, arose out of the above-mentioned incident of 6th August 1906, described in the evidence of Sir Robert Usher and of Walter Macgregor, Mrs Campbell's gamekeeper, when Sir Robert, who was exercising his right of fishing as Mrs Campbell's tenant, was so rudely interfered with by the defender, whose conduct I am unable to justify on any ground. He maintains that there was an arrangement or understanding between the proprietors of the fishings on the river Awe that they could fish over the whole breadth of it, but there is no proof of such an arrangement, and if he had such a right either by law or agreement, it must be limited by the condition that he did not act *in æmulationem vicini* (Stewart on the Right of Fishing (2nd ed.), p. 143). The Brander Pool, where the occurrence took place, is about 146 yards long and about 60 yards wide, and there was quite sufficient room for more than one fisherman to enjoy the sport without interfering with one another, and when the defender saw Mrs Campbell's tenant fishing there he could easily have kept away from him, but his behaviour in interfering with him in this manner was not only ungentlemanly, as characterised by the witness Macgregor, but also illegal, and I have no hesitation in continuing the interim interdict in so far as it prevents the defender from interfering with or molesting the pursuer or any of her tenants who may be fishing from her side of the river. If they cannot fish at the same time the only course would be to have some arrangement made either by mutual agreement or by some competent authority, binding them to fish on separate days, a most inconvenient course, and surely unnecessary in a river the size of the Awe. The prayer of the petition, however, goes further, as it seeks an interdict against trespassing or encroaching upon the fishing rights of the pursuer *ex adverso* of her lands, and this involves my defining what these rights are—a question of heritable right of doubtful competency in this Court, as there is no evidence of the exact value of the subject-matter, but I am relieved from any question of this kind from the admissions of the parties themselves. Mrs Campbell, for instance, says — 'I understand I have only the right to fish to the middle of the river on my own side,' and the defender in his pleas (No. 3) says that he 'being the owner of fishings in the Water of Awe (up to the *medium filum* thereof) *ex adverso* of his lands, has a legal right to fish up to the *medium filum* at the place libelled.' They have both therefore equal rights of fishing in the river Awe, and as a general rule the rights of each extend only to the middle of the river, but there may be some places where the river is so narrow or the water at times so low that the restriction to one-half of the breadth would amount to a denial of the right of fishing altogether, and at these places it would be necessary that the right of fishing over the whole breadth be conceded, and there need not be much difficulty in making some regulations that would prevent fishers on either bank from interfering with each other, but at the part in dispute, where the river is 60 yards wide, there is no such necessity, and I think the law laid down in the case of *Milne* v. *Smith*, November 23, 1850, 13 D. 112, may be applied, so that each fisher may be restricted to his own half of the river. By fishing I would understand casting the line over the water, so that one is fishing wherever his line reaches, and I am unable to agree with the defender's contention, which I gather from his pleadings, that he has a right to fish over the whole surface of the river, and

cast his line right to the other side provided he keeps himself to his own side, and fishes either standing on the bank or one of the platforms or jetties placed there for the convenience of anglers, or wading in the water, or as in the present case from a boat. As it would be almost impossible to mark down the exact line beyond which one may not cast, it may frequently happen that a good fisher would make his cast reach beyond the middle of the stream, but in that case I must hold that it is not done by any legal right, but only permitted by sufferance and the good-neighbourly feeling that ought to subsist between neighbouring proprietors, and I think there should be no reasonable objection, except that it might incommode some one fishing on the opposite side of the river, and I also think the defender is not likely ever to find himself restricted in his casting so long as he refrains from interfering with others who may have as good a right of fishing as he has himself. This right of fishing in the river Awe adds very much to the letting value of such an estate as Inverawe, but would be of little use if the owner were unable to guarantee her tenant against interference or molestation, and it is for this purpose that interdict is sought. I may observe that there is now no doubt as to the Brander Pool, the place in dispute, being part of the river Awe. This is admitted in the pleadings, and it is in evidence that the river, as distinct from the loch, begins at a place called Rudha-na-ha, about 100 or 120 yards further up than the Brander Pool."

The defender appealed, and argued—(1) The prayer of the petition, by which the pursuer must stand or fall, was not sufficiently specific to warrant interdict—*Cairns* v. *Lee*, October 29, 1892, 20 R. 16, Lord Kinnear at p. 21, 30 S.L.R. 47; *Cathcart* v. *Sloss*, November 22, 1864, 3 Macph. 76, Lord President Colonsay at p. 77. The interdict sought was really aimed at (*a*) casting across the *medium filum*, (*b*) fishing from a boat, (*c*) doing both together. (2) Nor was summary interdict the appropriate remedy here. The pursuer should, if it were necessary, apply for regulation of the fishing. Only one act of fishing beyond the *medium filum* was alleged against the defender. There was, besides, a long-established practice so to fish on the river Awe, and indeed such fishing was the proper exercise of the right. The doctrine as to the *medium filum* being the boundary was borrowed from landed property and had nothing to do with fishing rights. These rights were incorporeal, and their measure was whether it was possible to exercise them in the owner's own water. Fishing by net and coble, the original and highest form of the right, was, save in a few rivers of unusual breadth, exercised by opposite riparian proprietors beyond the *medium filum*—*Lady Ashburton and Another* v. *Mackenzie*, July 8, 1829, 7 S. 849, Lord Craigie at p. 851; *Earl of Zetland* v. *Tennent's Trustees*, February 26, 1873, 11 Macph. 469, Lord Neaves at p. 474, 10 S.L.R. 286. Similarly the right of rod fishing, the lower form of the right, extended beyond the *medium filum* unless there had been some agreement or the rights had been regulated by the Court. The right to fish for trout extended beyond the *medium filum*—*Arthur* v. *Aird*, 1907, S.C. 1170, Lord Low at p. 1174, 44 S.L.R. 823. Regulation by the Court was always open, as for example where the Court had given the competing proprietors alternate days—*Town of Perth* v. *Lord and Lady Gray*, January 9, 1750, M. 12,792, 1 Pat. App. 645. But until such regulation the appellant was within his rights in casting across the *medium filum*, at any rate in a river of the size of the Awe at this place. The cases of *Somerville* v. *Smith*, December 22, 1859, 22 D. 279, and *Milne* v. *Smith*, November 23, 1850, 13 D, 112, though dealing with salmon-fishing, did not apply, as they concerned the river Tweed where it was the national boundary. The Sheriff was wrong and the interdict should be recalled.

Argued for the petitioner and respondent—(1) The appellant had interfered with the exercise of a lawful right *in æmulationem vicini*, and the appropriate remedy was interdict. (2) No one was entitled to cast across the *medium filum* in the river Awe. It might no doubt have been done, but never as of right, and never when someone was fishing the opposite water. And even if the practice had existed it would not justify the use of a boat. But the defender could not rely on any such practice, which did not exist. The legal position, at least to begin with and until it was shown to have been altered, was that the right to fish extended to the *medium filum* and no further—Stewart, Rights of Fishing, 2nd ed., pp. 142–3; Moore on Fisheries, p. 118. To fish by net and coble across the *medium filum* was lawful only when there was not sufficient breadth of river to fish within the *medium filum*—*Earl of Zetland* v. *Tennent's Trustees*, *ut sup.*, Lord Cowan at p. 474. Here there was abundant room to exercise rights of rod-fishing within the *medium filum* without either proprietor crossing it to the water of the other. Further, there might be in rivers requiring it a legalised practice of fishing by net and coble across the *medium filum*, but that did not apply to fishing by rod and line—*Milne* v. *Smith*, *ut sup.*, Lord Medwyn at p. 121. The judgment of the Sheriff-Substitute was right and should be sustained. (On the suggestion of the Court that the interdict as granted was incompetent, counsel did not press for interdict.)

Lord President—The view of the situation here taken by the Sheriff-Substitute seems to me to have been perfectly correct, and I have nothing to add to what he says in his note and what he expresses in his findings, where he pronounces findings as to the actual facts which happened. In that view it is perhaps unnecessary to say anything more. But as the case has been so carefully argued, and the question of the right of fishing beyond the *medium filum* has been raised, I should perhaps say something on the law of the subject. I do not think I can add anything to

what was said by Lord Cowan in the case of the *Earl of Zetland*, in 11 Macph., at p. 474, taken along with the comments thereon made by Lord Neaves at a subsequent period of the judgments. Lord Cowan says—"A good deal has been said about the *medium filum* of the stream. If there had been no possession at all, and we came to consider how the different competing rights of heritors on the banks of the river, having each a right of salmon fishing *ex adverso* of their lands, were to be regulated, then indeed I think the Court have recognised clear principles upon which the fishings must be carried on. If the stream is broad enough to allow of a clear sweep of the nets without crossing the *medium filum*, each riparian proprietor must so exercise his right as to keep within the *medium filum* of the stream. But then, again, a different state of matters arises where the stream is not sufficiently broad to admit of this. The Court in such cases has found that some arrangement must be made for an alternate sweep of the nets from the different sides. In the case, however, where immemorial possession has been enjoyed, I cannot think that the ascertainment of the *medium filum* is of any avail in determining such rights of fishing."

He is dealing there with fishing by means of net and coble, but the same principles I apprehend apply equally to rod fishing. Now I agree with that exposition of the law. After all, a right of salmon fishing has nothing whatever to do with the *medium filum*, but it must be defined as to the place for its local exercise. When that is defined by immemorial practice the matter is settled thereby, but rights of fishing are not necessarily so defined, and it is by no means impossible, even at this day, to figure a case where there will be no such definition. Take, for example, the case of the Tummel. If the Falls of Tummel were blown up and salmon were thereby enabled to get to the upper reaches of the river, the Crown might—saving any fishing rights existing in the barony of Athole—grant rights of salmon fishing in the upper waters of the Tummel to the *ex adverso* riparian proprietors. If this were so, and the question of the limits of their rights were raised, I apprehend that they would fall to be determined on the principles laid down by Lord Cowan. In the particular portion of the Tummel to which I have referred the stream is so narrow that the method of regulation would have to be by the adoption of fishing on alternate days, or something of that sort.

But coming back to the facts of this case the findings of the Sheriff show no immemorial practice of exercising a right of fishing by means of anchoring a boat in the river and fishing from it in the way the defender here has done. I think it is also shown that a perfectly reasonable way to exercise the rights of fishing here would be that each proprietor should remain on his own bank of the river. It may be that a good caster, such as Mr Muir seems to consider himself, might be able to cast across the river so that his fly would get beyond the *medium filum*. That is certainly a different thing from starting out in a boat and anchoring in the middle of the stream, and then proceeding to fish over to the opposite bank. I come to the result embodied in the findings that the defender was on the particular occasion acting *in æmulationem vicini* against his neighbour's right, and that that was a just ground for complaint.

Now when the parties came into Court I think the whole case might have taken a perfectly different turn if the defender had chosen to act up to the situation and had frankly said—"I agree I did what I see I ought not to have done, but this is not a case for interdict." I think the case would not have gone on if he had said so. There might have been a matter of expenses for bringing the process up to that early stage. He does not take that position, but the case goes to proof and the defender says he is absolutely entitled to do what he did, and so *sibi imputet* if he finds himself cast in the expenses. The interdict, I agree, cannot stand, because it was an interim interdict made perpetual in terms of an alternative conclusion, and that is sufficient to condemn it at once. At the same time I do not think there would be any difficulty in framing an interdict appropriate to the action out of the prayer. We have been relieved from that by the concession which has been made by Mr Fleming that he does not press for the continuation of the interdict. I am for recalling the interdict, and *quoad ultra* affirming the findings of the Sheriff, and finding the pursuer entitled to expenses.

LORD KINNEAR—I agree both upon the general law and upon the particular question which is raised in this case.

LORD ARDWALL—I concur.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Sheriff-Substitute and the interdict, but repeated his findings in fact, with expenses to the pursuers.

Counsel for the Pursuers (Respondents) — Fleming, K.C. — Maitland. Agents — Murray, Beith, & Murray, W.S.

Counsel for the Defender (Appellant) —Johnston, K.C. — Constable. Agents— Macrae, Flett, & Rennie, W.S.