

MRS. RICHARDSON HAY AND HER HUSBAND, } APPELLANTS.
 THE LORD PROVOST AND MAGISTRATES OF PERTH, } RESPONDENTS.

1863.
 Feb. 24th, 26th,
 27th, March 3rd,
 and May 12th.

Salmon Fishing.—Case in which it was held that the Bermoney mode of fishing in the Tay was not illegal ;—the statutes prescribing no specific mode of fishing.

Policy of the Scotch Statutes as to Salmon Fishing.—Per the Lord Chancellor : The Scotch statutes as to salmon fishing are directed to three objects :—1. To ensure to the salmon a free access to the upper fresh waters, which are the natural spawning grounds of the fish. 2. To secure the unimpeded return to the sea of the smolt or young fry. 3. To prohibit the killing of unclean fish during the fenced months, when the fish are out of season.

Bermoney Mode of Fishing.—Per the Lord Chancellor : I cannot find anything that distinguishes the Bermoney mode of fishing from the ordinary mode of fishing by net or coble.

Per the Lord Chancellor : The supposed 'principle of fair play among rival heritors is not to be found in the language of the statutes.

Per Lord Chelmsford : The Respondents are not at liberty to blend their title as Conservators with their rights as Heritors, and thus to convert an illegality which affects them in their public capacity into the means of protecting their private interests.

ON the 28th October Mrs. Hay, of Seggieden, in the parish of Kinfauns and county of Perth, commenced an action, by the summons of which she prayed the Court of Session to rescind, reduce, and set aside a certain decree pronounced by that Court on the 27th May 1856, finding and declaring that the said Mrs. Hay, her tenants, servants, &c., " were not entitled to

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“ fish for salmon in the river Tay unless by the rod,
“ or by net and coble, and in the ordinary way ; and
“ that the mode of fishing by the use of Bermoney or
“ Beardmoney boats, with fixed stakes, pins, or anchors
“ placed in the tidal bed of the river was illegal, and
“ contrary to the statute and common law ; and
“ whereby the said Court had prohibited and inter-
“ dicted the said Mrs. Hay, and all parties claiming
“ through her, from fishing by means of such fixed
“ stakes, pins, or anchors as aforesaid.”

Subsequently Mrs. Hay presented to the Lords of Session a note of suspension, praying their Lordships *simpliciter* to suspend the said decree and the charge following thereon, and to reponer (*a*) her against the same. Both these proceedings were conjoined.

Mrs. Hay alleged that the decree sought to be reduced had been obtained in her absence, and *per incuriam*, at a time which she happened to be abroad, and “labouring under a mistake as to their nature and effect.” All this was of course denied on the other side.

The parties were respectively ordered to lodge a condescendence and answers, unfolding their respective averments, and these, as set out in the pleadings, are given in the Second Series of the Court of Session Reports (*b*).

The following was Mrs. Hay’s plea in law :

The mode of fishing in question not being illegal, and being adopted and practised by the adjoining proprietors, including the Defenders themselves, and the question of compensation between the Pursuer’s father and the Navigation Commissioners having been determined by the use of the said mode of fishing, the decree in absence obtained by the Defender against the Pursuer ought to be reduced to the extent and effect libelled.

The Magistrates of Perth, on the other hand, relied on the following pleas in law :

(*a*) Restore.

(*b*) Second Series, vol. 24.

I. The Pursuer (*a*) is not entitled to fish for salmon except by the usual mode of fishing by the rod or by the net and coble, and the fishing by Beardmoney boats is illegal at common law.

II. The mode of fishing complained of as involving the use of fixed stakes, pins, or anchors, with ropes attached thereto, and machinery in connexion therewith, is contrary to the statutes referred to.

III. The fixing of a stake, pin, or anchor, with rope fixed thereto, in the tidal channel of the river, not being authorized or done in any recognized exercise of the right of fishing, the Defenders, as conservators of the river, have the right to direct its removal.

IV. The partial exercise of the use of Beardmoney boats in the Tay, especially for a period short of forty years, cannot legalize the practice if otherwise objectionable.

Afterwards a record was closed between the parties, and they were respectively allowed to prove their allegations by depositions before a Commission upon an issue settled as follows :

ISSUE IN THE CAUSE.

Whether during part of the years 1855, 1856, and 1858, or any of them, the Defender, or her tenants with her authority, fished for salmon in the river Tay, opposite or near to her lands of Seggieden, in a manner contrary to law, by means of a Bermoney or other boat hauled or propelled along a rope attached to fixed stakes or anchors, or to a fixed stake or anchor, placed in the said river.

On the 15th June 1860 the *Lord Ordinary* (*b*) pronounced an Interlocutor upon the closed record in the conjoined actions, issue, and proofs adduced, and whole process, as follows :

The Lord Ordinary having heard parties' procurators, and considered the closed record in the conjoined actions, issue, and proofs adduced, and whole process, finds that during the year 1855, and part of the years 1856 and 1858, Mrs. Hay, the Defender in the issue and in the original action, fished for salmon in the river Tay, opposite or near to her lands of Seggieden, in a manner contrary to law, by means of a Bermoney boat hauled or propelled along a rope attached to a fixed stake or pin placed in the said river, and in respect of the said finding repels the reasons of reduction and reasons of suspension stated for the said Mrs. Hay in the said conjoined actions respectively; assoilzies the Lord

(*a*) Mrs. Hay.

(*b*) Lord Neaves.

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Provost and Magistrates of Perth from the conclusions of the action of reduction; finds the letters and charge in the suspension orderly proceeded, and decerns; finds the said parties, the Lord Provost and Magistrates of Perth, entitled to expenses.

Upon a reclaiming note, the First Division of the Court of Session, on the 26th February 1861, ordered Cases, which were in due time prepared and deposited.

On the 20th December 1861 the Lords of the First Division (the *Lord President* dissenting) (a) adhered

(a) The Lord President delivered his opinion as follows:— I think the question may be put in this form, Is this net and coble, or is it not? That is the real question, apart from the other question, as to putting obstructions into the *alveus* of the river. Is this a fair exercise of the right of fishing by net and coble, or is it not? Now, I do not say that a party may not use a net and use a coble in a way that is a mere evasion of the right of net and coble fishing. For example, a party puts a fixed net across the river, and he has a coble behind it, in which he goes to take out the fish when they are caught; he is using both net and coble, but that is not what is meant by fishing by net and coble. That is a perversion and evasion of net and coble. The coble goes out with the net in it, the fisherman in the coble begins to drop or pay out the net at any point he chooses, embracing within his sweep as much of the stream as possible, or the whole breadth of the stream, if he can do so. A person on shore holds a rope attached to one end of the net, and that rope is of such length as is suitable for drawing the net; the man with the coble makes a sweep, and arrives at a point further down the river, and, in the meantime, the person who had hold of the rope at the point from where the coble started makes his way, by walking along the bank of the river, or in the river, till he reaches the point at which the net is to be drawn on shore, and then both ends of the net are drawn in. That is fishing by net and coble; and that is done here. The question is, Whether the contrivance used to enable the parties to do it more effectually, renders the doing of it unlawful, yea or nay. It is, no doubt, the fact that the contrivance which has been resorted to of what is called a Bermoney boat has enabled the persons who use it to catch more fish, that is, to do their work more easily, or more frequently in the course of the day, whereby they can take more fish. That is undoubtedly the case, or they would not practise it. I see that certain fishings have risen greatly in value since this contrivance came into use, and that some of the witnesses say they would be of comparatively little value if the Bermoney boat was not per-

to the *Lord Ordinary's* Interlocutor, refused the prayer of the reclaiming note, and found the Lord permitted to be used, though it is not quite clear that the Bermoney boat is the cause, or the sole cause, of the rise, because certain operations have taken place on the Tay which are supposed to have improved some of the fishings. But I may observe that I don't see any evidence of a falling off in the fishings of the proprietors above. It seems to be assumed that because the parties below catch more fish, the parties above catch fewer fish,—not fewer than before—that is not alleged—but fewer than they would otherwise do. No doubt the parties above never can catch the fish that have been already caught below; but if the party below uses all the diligence he can in a lawful way, I don't know any common law or statute law to prevent him from catching every fish that attempts to ascend the river. The limitations on his power to do so arise from the habits of the salmon, and the limits to human skill and dexterity. Now, in regard to this Bermoney boat, I understand the use and effect of it to be this,—that at places where there is, as here, a rise and fall of the tide, it is used at high-water. It can be used at high-water at the same places where, without it, fishing can be carried on at low-water only, or at half tide. At low-water the same sweep might be taken as with the Bermoney boat at high-water, if a man could wade to the same starting point, and could wade down the river to the same hauling point. If the tide goes out far enough he can do that. If the case is put upon the particular position of Mrs. Hay's fishings, that is altogether a special ground of judgment. But the judgment, as now proposed, is put on general grounds. It is against the use of the Bermoney boat anywhere. If the party can, by wading or without wading, go to the same starting point and the same hauling point at low-water as he would resort to with the Bermoney boat at high-water, then he lawfully performs at low-water exactly the same sweep, with the same net in the same coble at the same part of the river, with the same curve, and against or with the same stream, and draws over exactly the same space, and nothing more or less than he does at high-water when using the Bermoney boat in place of wading. Now, then, the question comes to be whether, when he uses means which enable him to do that at high-water, he is transgressing the law. I don't think it is conclusive against this contrivance that it is used at a state of the tide when a party could not fish without it, and that consequently he kills more fish. I don't think that is conclusive, because I think that improvements upon the net and coble mode of fishing, as long as it is fair net and coble, are just as lawful as improvements upon anything else. I cannot understand why progress should be arrested in this matter,—why improvement should be denied to net and coble, and open to everything else that human ingenuity

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Provost and Magistrates entitled to their expenses.
Hence the present Appeal to the House.

invents. I don't think that a party using a fixed machine upon his own shore, at the place where he draws the rope—a windlass, for example—is doing anything unlawful. Why should the man not use additional power to draw ashore the net, and why should that power necessarily be the power of the human hands, unaided by any mechanical power? In the case of *Sir James Colquhoun* there were stent nets across the river. It is said that stent nets were of the very same nature as the Bermoney boat. They were the very reverse, because there the net that caught the fish was a fixture in the river; it was a stationary net for catching fish, and not the drawing of a net by a coble at all. And the judgment of the House of Lords is quite clear as to stent nets. Then in the case of *The Duke of Queensberry v. The Marquis of Annandale*, it was fixed nets for obstructing the passage of the fish, used (as the judgment states,) “not for the purpose of catching fish, but
“for preventing or obstructing them from passing up the river,
“and, therefore, find that the methods used of stenting nets
“across the river, either reaching altogether from side to side, or
“overlapping each other in the manner mentioned in the proof,” &c., are illegal. Fixed nets, which would prevent altogether the passing of the fish, I hold to be unlawful, whether the engine be a fixed net or fixed stakes stationary in the water. In the case of *Dirom and Littles* it was a hang net; in the Seaside case it was a stake net; in *The Duke of Athol v. Wedderburn* it was toot nets and stake nets, and tent nets alleged to be of the nature of stake nets. Then in the case of *Cunningham v. Taylor* it was a dyke erected; in the case of *Mackenzie v. Houston* it was the case of stent nets, the one end of the stent net being fixed by an anchor in the stream, and the other end on shore, and the net so fixed was left standing stretched into the river—a fixed engine for catching the fish. And in that case, to show the way in which the expression was used, observe the words of counsel asking the interdict, “Our prayer in the meantime is limited to an interdict
“against using any mode of fishing except that which is lawful,
“viz., net and coble.” That is the meaning, I think, of the expression, the ordinary mode of net and coble. The ordinary mode of net and coble means by net and coble, which is the ordinary mode of fishing. The same goes on through all the cases. The case of *Lord Gray* was a case of fixed machinery, and the expression used by the Lord Justice-Clerk there is, that he is against any except the legal mode by net and coble; that is recognizing net and coble as the legal mode. Then *Forbes v. Smith* was a case where salmon fishers had erected sights in *alveo fluminis* to enable them to see the fish. That proceeds on a different principle altogether. The sights were embankments in the river, to make the river shallow at these places, so that the

Sir *Hugh Cairns* and Mr. *Mure*, for the Appellants, insisted that the Court of Session had no authority to prescribe the manner in which a right of salmon fishing shall be exercised, unless express powers to that effect be given by the Legislature, which was certainly not the case here. The opinion of the *Lord President*,

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fish passing over them might be seen; they were ridges erected across the channel of the river. And these are all the cases that are referred to. Therefore, I think, that the phrase in all these cases, "the ordinary mode of fishing by net and coble" means that they are not to fish in any other mode than by net and coble, which is the ordinary mode. And the question always recurs, Is this net and coble? I think the mode of fishing here used is truly net and coble. But still the question remains, whether they were entitled to have that pin in the *alveus* of the river? Now, in the first place, there were some fanciful ideas broached about frightening the fish, but I don't think it is proved that this thing is calculated to frighten the fish, any more than anything else frightens the fish. I think if a boat was anchored there, it would frighten the fish just as much. Then, again, I don't think that this pin obstructs the navigation of the river. But still the magistrates of Perth are the conservators of the river, and it may be that they are entitled to insist on its removal; and the observation which is made, that this party has no right to put a pin into the river at all, and that by putting it into the river, and using it for the fishing, they injure the party who has the fishing above, is a material observation, but still it does not go to the principle of the Bermoney boat fishing, because that might be carried on without putting any pin in the river, as, for instance, by an anchor which was removed at every tide. So that it does not touch the principle of the Bermoney fishing. I dare say there may be a right to cause that pin to be removed, but that is not the judgment that is proposed to be pronounced. I must say that I have great difficulty in arriving at the conclusion that this is anything else than net and coble fishing; and although it is a mode by which they are enabled to exercise that net and coble fishing at a higher state of the tide, I think it is nothing else than an improvement on that system, and that therefore it is not in itself illegal; that it is not illegal to start the boat at a point farther out into the stream, and that it is not illegal to convey the tow rope from that point to the place where the net is hauled in by a boat instead of over a man's shoulder, he walking in the river. Therefore I cannot concur in the judgment that has been proposed on that ground. The form of the judgment of the Court will be to adhere to the Interlocutor of the Lord Ordinary.

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who dissented from his brethren, was strong in the Appellants' favour. The mode of fishing adopted by them arose from local circumstances, and was not contrary to the common law nor prohibited by any statute; neither was it opposed to any decision, except that now complained of. In *Dirom v. Little (a)*, the Court said: "You must not use a net which will catch "the fish when you are not there."

[The Court seems to hold that you can only fish by a net kept in hand.]

That is so; and the Appellants do not violate the rule so laid down. Lord *Eldon* considered that the Court of Session had gone a great way in venturing to exercise a discretion nowhere conferred on them by the statutes relating to salmon fishing in Scotland (*b*). The present is a remarkable illustration of this judicial interference, which must be checked and repressed by a reversal of the decision now appealed from.

The *Lord Advocate (c)* and the *Solicitor-General (d)* for the Respondents.

Lord Chancellor's
opinion.

The LORD CHANCELLOR (*e*):

My Lords, it was a just remark of Lord *Eldon*, 60 years since, that the decisions in the Courts of Justice in Scotland upon the subject of salmon had gone far beyond any principles embodied in the statute law. And the observation then made is undoubtedly still more true with regard to the course and tenor of subsequent decisions. My Lords, it does not appear to have occurred to that very learned judge that the decisions were capable of being attributed to

(a) Morrison's Dictionary, 4, 282.

(b) See *Johnstone v. Stotts*, 4 Paton, 274.

(c) Mr. Moncreiff.

(d) Sir R. Palmer.

(e) Lord Westbury.

common law. That has been the plea subsequently made for them. But with the exception of the general principles that salmon fishing is *inter jura regalia*, and the other constitutional principle, that the bed and soil of navigable rivers are vested in the Crown, I am unable to find any rule or principle of common law that is not embodied in the statutes themselves upon the subject, which in truth, especially the earlier ones, may be considered as declaratory of the common law.

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It is most important to observe the principles which these acts embody, and the objects which the legislature sought to attain. My Lords, they are directed to three objects. One to ensure to the salmon a free and unimpeded access to the upper fresh waters, which are the natural spawning grounds of the fish. The second, to secure the unimpeded return to the sea of the smolt or young fry of the salmon. The third was to prohibit the killing of unclean fish during the fenced months, as we call them in England, that is, when the fish are out of season.

For the purpose of accomplishing these objects, which are clearly declared in various statutes from the very earliest times down to the latest, the statutes rendered it unlawful to erect any cruives or weirs in waters where the sea ebbs and flows. Cruives and weirs were allowed in fresh water with certain limitations. One was that there should be a mid stream, the width of which is carefully defined. The other, that the hecks (as they are called), that is, the interstices between the wickerwork of the cruives, should be at least three inches wide. Fishing is also prohibited at mill dams by any description of fixed net or engine. And then there is an enactment rendering it absolutely necessary that a free passage should be given, both at the cruives and at the mill dams in fresh water,

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from Saturday evening to the rising of the sun on Monday morning.

My Lords, these are the objects which the statutes sought to accomplish, and your Lordships will recognize in them provisions for preserving the breed of the fish, but they nowhere descend to any directions touching the mode or the manner of fishing.

When we come to the decisions upon the subject, we find from the earlier decisions that the *ratio decidendi* assigned by the Judges has been to secure the free passage of the fish both up and down the river. The earlier decisions give that as the reason for holding that stent nets were illegal, that stake nets were illegal, that dykes and dams ought not to be erected, and that towing paths could not be projected into the river for the purposes of fishing. The reason for the determinations is therefore found to have been in strict conformity with the principles enunciated in the statutes. No doubt it was perfectly competent to the Courts in Scotland to extend their decisions beyond the letter of the enactments, proceeding upon that which we are accustomed to call in England the equity of the statutes, a mode of interpretation very common with regard to our earlier statutes, and very consistent with the principle and manner according to which Acts of Parliament were at that time framed. I do not therefore deny that so far the decisions are consistent with the general principles of the statutes, and are in conformity with the law. And probably, my Lords, we are right in coming to the conclusion that those decisions have gone so far as to make it clear law at the present time that it is illegal to fish for salmon with any net or with any species of engine or machinery devised or constructed for catching fish which is a fixture, which is at all fixed or permanent, even for a time, in the water. And if I were asked

to define the conclusion which I should derive from the statutes and the decisions, it would be this, that it was not legal to fish with a net, unless when the net continued in the hand of the fisherman. The net must not quit the hand, and the net must be in motion, during the operation of fishing.

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My Lords, I am very careful to state this conclusion that I have come to in the outset, because your Lordships will observe from the whole of the reasoning in this appeal case, that the conclusions sought to be established by the Respondents are that the decisions interpreting the law have left open for the exercise of the right of salmon fishing merely the mode of fishing by net and coble; and the Respondents are not content with that, for they contend that the decisions require us to hold not merely that the fishing must be confined to net and coble, but that it must be fishing by net and coble *in the ordinary way*. My Lords, these words are of great moment, and would in my opinion be excessively prejudicial if they were regarded as part of the just conclusion to be derived from the decisions and enunciated as settled law. The result of those words, if they were held to be part of the formula of the law would be this, that upon the present plan of fishing by drag net and coble (that is, by net and coble) there could be no improvement whatever. It would in effect confine the fishermen entirely to the old practice introduced centuries ago, and handed down from generation to generation; it would be impossible to improve either upon the shape of the net, or the mode of using the net, or the character of the boat, or the mode of propelling the boat.

In order that I may bring an illustration to show to your Lordships what would be the practical consequence of that interpretation of the law, let me suppose a river, shallow but having numerous holes in it

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where the fish would shelter themselves from the net. The ordinary drag net would sweep over the holes, and not enclose or catch a single fish. If you accepted the law as thus interpreted, the consequence would be, that supposing some man was ingenious enough to devise a mode of constructing a drag net so that when it came to the hole it should accommodate itself to that inequality in the bed of the river, and thereby catch the fish, that exercise of ingenuity in improving the ordinary modes of fishing would be struck at and prohibited by the interpretation put upon those words by the Respondents. So again, my Lords, if during the discolouration of the water any fisherman having rights of salmon fishing was desirous of catching fish in a part of the river to which the ordinary drag net could not be accommodated, and he used that which your Lordships have frequently seen, namely, a casting net, in that case, according to the interpretation of the Respondents, that also would be a thing which it would not be competent to him to do.

My Lords, it appears to me that there is no foundation for that narrow interpretation; but I think that in conformity with the principles of the statutes prohibiting anything which by its being a fixture would tend to prevent free passage of the fish up the river, and also in conformity with the spirit of the decisions, the proper conclusion is, that "the net and coble" is merely symbolical of the proper legal form of fishing, that legal form of fishing being by a net which is not to be fixed or stented, or in any manner settled or made permanent in the river, but is to be used by the hand, and is not to quit the hand, but is to be kept in motion during the operation of fishing.

My Lords, there has been another controversy upon this subject, which it is necessary also to allude to, namely, as to the object for which those laws have

been passed. If we take that object from the preambles of the statutes, undoubtedly it must be held to be the common object of all law, namely, the general good of the community. But I find in many decisions, and particularly in the judgment in the present case, that a narrower object has been assigned to the legislature, and that the legislation is supposed to have been directed for the benefit of the co-rival proprietors upon the river. My Lords, I find no trace of that in the language of the statutes, and I agree entirely with the observations which I find were used by Lord *Gillies* and Lord *Meadowbank* in an early case, I think the case of the *Duke of Athol v. Maule* (a), of which extract is given in the cases before us. Lord *Meadowbank* says, and I think correctly says, "There is no indication in the statutes of what Lord *Woodhouselee* has laid down. There is not a vestige of evidence perceptible to me that they were intended to prevent a monopoly on the part of the inferior heritors or of any body of men. It seems to me that the predominant radical idea of the Legislature was invariable that they should preserve and encourage the breed of fish. That was the object of all their enactments." (b)

My Lords, this correction of ordinary language is by no means immaterial, for your Lordships will observe, in the judgments which are now under review, a continued reference to the supposed principle of securing fair play among the heritors. One of the principal reasons of decision given by two of their Lordships in the Court below (c) was this supposed right

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(a) Buchanan's Remarkable Cases, p. 254.

(b) Per Lord Gillies: "It is said that the King, having made grants to various persons, it must have been the object of the Legislature to protect those grants. It is clear to me that no such idea ever occurred to the Legislature." See Mr. Buchanan's entertaining Reports, p. 271.

(c) See Report in Second Series, vol. 24.

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introduced by the statutes, of so regulating the distribution of the catching of the fish that all the co-rival proprietors should have their share. Now I need hardly point out to your Lordships that it would be impossible to carry such a principle into anything like practical operation; and yet it figures as one of the principal grounds of decision in the judgments of the learned Judges in the Court below.

My Lords, if this be so, then there are one or two other corrections which it is necessary to make before we come to consider the legality of the mode of fishing adopted by the Appellants. I will point out to your Lordships the extreme uncertainty which has found its way into some of the judgments of the learned Judges in the Court below from confounding two things in the present case, namely, the right to put a stake or stents in the *alveus* of the river, with a view to the navigation of the river, and the right to use the stakes when placed there for the purposes of fishing.

Now, my Lords, the present action in which this Appeal is brought was an action of reduction by the present Appellants (*a*) of a decree which was obtained against them in absence in an action of declarator by the Respondents (*b*), which was addressed entirely to the question of what was a legal or illegal mode of fishing. And the right of the Respondents, who are the conservators of the river Tay, was not a matter properly to be regarded either in the decision of that case or in the decision of the present case. I am desirous, therefore, of pointing out to your Lordships that the question whether a stake fixed in the river does or does not in any way interfere with the navigation of the river, and whether that stake was or was not removeable by the

(*a*) Mrs. Hay and her husband.

(*b*) The Magistrates.

Respondents in the exercise of their powers as conservators of the river, is not a question that can properly enter into your decision upon the present case as an element of judicial determination. Your decision in the present case will be confined entirely to the question of the legality of the mode of fishing adopted by the Appellants.

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My Lords, it is necessary to mark that particularly, because in looking at the note appended to the Interlocutor of the *Lord Ordinary*, your Lordships will observe that the reasoning of that learned Judge appears to be this, that the erection of a stake in the bed of the river was a thing to be prohibited by principle as affecting the navigation of the river, and that, consequently, it was illegal to use, for the purposes of fishing, a thing which was, for other distinct grounds, in itself an illegal occupation of part of the *solum* of the river (a). My Lords, with that we have nothing to do upon the present occasion. The introduction therefore of that into the Judgment as a ground of decision is the introduction of an element which does not properly come within the *ambit* of the present inquiry. My Lords, I will next notice another ground which figures very much in the Judgments in the Court below, but which I think your Lordships will dismiss as being entirely unworthy of your attention. It is said that the erection of stakes in the river, and the use which is made of the stakes by a rope which is stretched between them, is the putting of something into the river that has the effect of frightening away the fish and preventing them from ascending the river. My Lords, I think that may be at once dismissed, because there is really no foundation for it in the evidence. It is a thing that is quite unworthy of serious attention.

(a) See Second Series, vol. 24, p. 232.

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With these remarks, my Lords, I now come to consider what is the mode of fishing that has been adopted by the Appellants, and whether that mode of fishing can or cannot be truly denominated fishing by net and coble. Now the Appellants are the owners of certain lands lying on the banks of the river Tay, and they have the right of salmon fishing *ex adverso* of those lands. Immediately in front of those lands (a narrow channel, part of the *alveus* of the river alone intervening), lies a long bank of gravel and sand. That portion of the *alveus* of the river which is immediately between this bank of gravel and sand and the lands of the Appellants is dry at low water, the consequence therefore is, that in the flowing tide (probably the most favourable time for fishing for salmon) it would be impossible for a coble to quit the immediate bank of the lands of the Appellants. It would be necessary for the coble to start from the other side of the low bank of sand and gravel which is interposed between the lands of the Appellants and the principal *alveus* or stream of the river. Accordingly, my Lords, from necessity the Appellants' coble starts from the other side of this bank of gravel and sand, and at the place whence the coble starts with the net the water is exceedingly deep. It deepens of course as the tide ascends, for this narrow channel opposite to the bank of gravel is covered at high water.

Now the mode of fishing by the ordinary drag net your Lordships are familiar with. You know that the net hangs at the extreme ends of two ropes, one I will denominate the tow-rope, that is, a rope at the upper extremity of the net; the other, the hauling-line, which is a line at the lower extremity of the net. The net is taken in an ordinary little row-boat, familiarly called a coble. One man ordi-

narily holds the tow-rope. The coble is then rowed or taken out into deep water. Another man at the stern of the coble pays out the net. The coble makes a sweep as long as the length of the net and the tow-ropes allow. The man with the tow-rope hastens down to the lower point, which is the place of destination of the coble when it comes in from its sweep, and then, with the aid of both ropes, the tow-rope and the hauling-line, the net is dragged to the shore.

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Now in consequence of the coble in the present case being obliged to start from the inner side of the bank of sand and gravel, it became necessary to devise a mode for the tow-rope being carried to the shore. And here I regret to find that so much unnecessary importance has been given to the machinery adopted by the Appellants by the words used,—particularly the word Bermoney, and the term Bermoney boat, which has given an unnecessary degree of importance to a very simple plan for carrying the tow-line to the shore. My Lords, there is no necessity for adopting any particular mode of machinery. If a common rope were fastened to a stake upon the land at the hauling-point, the point where the net is hauled in, and were fastened to a stone at the upper point, the place of departure of the coble, and if a boy by the aid of the rope carried down the tow-line in a tub to the place of hauling in, it would be equally effectual for the purpose with the apparatus which has been dignified with this special name. The evil resulting from this special name is this, that it has been called a peculiar system, as if there were something in it distinct from the ordinary mode of fishing by net and coble. Why, my Lords, imagine for a moment that you were fishing by net and coble in a river having precipitous banks with very deep

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water immediately close to the shore, and a bank above it covered with brushwood and with trees, rendering it impossible for a man to walk upon the bank, and suppose that the water was so deep that it was impossible for him to wade with a tow-line, in such a case you must of necessity carry down the tow-line, either by another coble used for the purpose, or by some apparatus similar to that which is here employed. But the great distinguishing remark applicable to the whole is this, that the apparatus for carrying the tow-line from the upper point to the lower point does not in the smallest degree interfere with the action of the net. The net still continues in the hand of the fisherman; the net still continues in motion; the net is not fixed for any period during the time of the operation. The operation, in order to be effectual, must of necessity be as rapid as possible, for any one conversant with that mode of fishing knows well that the great object is to make your sweep with great rapidity, and to bring the ends of your net together as quickly as possible, otherwise the fish strike away in the spaces which are still open to them between the ends of the net and the shore, and escape the haul of the net; the net, therefore, always remains a thing in motion, and if a thing in motion, not a thing that can be brought within the principle of any of the decisions, or within the prohibition against fixtures or fixed engines, which is either contained in or ought to be derived from the language of the statutes. I cannot therefore find, when the thing itself is looked at with an understanding of the subject, anything that in the least degree distinguishes this mode of fishing from the ordinary mode of fishing by net and coble. It has the peculiarity of that mode of fishing, and it has the requirements of that

mode of fishing, because it is a mode of fishing which exists only, and takes the fish only, whilst the net is kept in motion, and which preserves all the distinctive peculiarities of fishing by net and coble, namely, taking a grasp of a portion of the river during such time only as is required for the boat to row round the net. The rapidity of the operation is assisted even by this apparatus, the object of which is merely to carry the tow-line from one end to the other in a locality in which it is not possible to carry it by the ordinary mode.

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My Lords, these appear to me to be the substantial grounds upon which this mode of fishing ought to be held to be a mode of fishing strictly within the principles of the law, and to be not at all struck at either by the language of the statutes or by any decisions derived from the statutes.

Now the decisions are well collected shortly in the judgment of the *Lord President* (a). They are also stated correctly (for I have tested them all) in the case of the Appellants; and in every one of these cases, beginning from the earliest times, (I will note particularly the Athol case (b), and the case of Dirom and Little (c), amongst others,) your Lordships will find that invariably the thing which is struck at by those decisions is a mode of fishing by having nets which are either permanently fixed or fixed for a time, such as being left in for the night, or left in during the whole of the tide, and having therefore the character of permanent fixtures, and on that ground denominated an illegal mode of fishing.

I may here advert to an ingenious suggestion which was made by the Respondents. The Respondents

(a) See *suprà*, p. 538, note.

(b) Buchanan's Remarkable Cases, p. 254.

(c) Morrison's Dictionary, p. 14, 282.

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appealed to a case in which it was held that an individual having the right of fishing had no right to construct a permanent towing path in the river or a gangway in order to facilitate his operation of fishing, and they describe this Bermoney apparatus (as it is called) as being in reality a towing path or gangway. But the reason for the determination of the case referred to, and from which this argument is derived, is because the towing path or the gangway was a fixture in the river, and *pro tanto* impeded the tidal way of the water, and the passage of the fish up the river; whereas here there is nothing at all of that character,—nothing that can be called a fixture,—nothing that could in the operation of fishing in any perceptible degree operate either as an impediment to the passage of the fish, or as an interference with the tidal way of the river.

I believe, therefore, my Lords that you will be satisfied upon an examination of the judgments which are now brought before you for review, and upon a comparison of them with the principles of the statutes, and with the *rationes decidendi* given in the decisions, that the judgment of the *Lord President* expresses correctly the rational interpretation of the law, and the conclusion that is applicable to this case. And therefore, without further detaining you, I submit to your Lordships that upon every ground the mode of fishing adopted by the Appellants is a mode of fishing coming clearly within the principle and reason of the law; that it is in reality just the ordinary net and coble fishing, because it possesses that which I believe to be the main characteristic of that mode of fishing, namely, the necessity for the net being kept in motion during the operation, and not being a fixture for any length of time.

I therefore submit to your Lordships that these

Interlocutors ought to be reversed, and that your Lordships will declare that the Appellants were entitled to decerniture in conformity with the conclusions of the summons in the action of reduction; and that the decision of this House should, of course, have the effect of giving to the Appellants the expenses of that action incurred by them up to the time when the Interlocutor of the *Lord Ordinary* now appealed from was pronounced.

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My Lords, the question raised by this Appeal, though it has given rise to considerable discussion in Scotland, and to long and able arguments at your Lordships' bar, is really a very short one, and if it were not for the difference of opinion which it has occasioned I should have added one of no great difficulty.

The only point to be determined is whether the mode of fishing employed by the Appellants falls within the description of "net and coble fishing," or is such an addition to or variation from the sort of fishing understood by that denomination as to render it a distinct and different kind.

The Respondents throughout their argument insisted upon a very strict and narrow definition of the fishing in question; and if they are right in their assertion that there is only one legally recognized mode of net and coble fishing, in form as well as in substance, they are well founded in maintaining that any, the slightest, deviation from this form is sufficient to render the Appellants' operations illegal.

It is clearly established that from very early times fishing "by net and coble" was a well understood description, and that a grant of salmon fishing, without more, would entitle the grantee to this species of fishing only.

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The mode in which net and coble fishing is usually conducted has been minutely described in the course of the argument, as it was by the Judges in Scotland ; but no definition of it is to be found in any Act of Parliament, or in any of the decisions of the Court of Session. Whenever it is mentioned it is always spoken of as "the right of fishing by net and coble," or "the usual and ordinary way by net and coble," or "the right of fishing by net and coble in the usual and legal manner."

There is, perhaps, an unavoidable ambiguity in these expressions, of which the Respondents availed themselves in their argument, by treating them as descriptive of a precise form of fishing invariably practised from the earliest times down to a very recent period. Of course if they could succeed in fixing this meaning upon the descriptive terms there would be no difficulty in establishing the illegality of employing the Bermoney boat, which was not introduced into the Tay before 1821, and was not begun to be used by the Appellants till 1843. I cannot however find it anywhere laid down that "net and coble fishing" must be carried on in exact conformity in every particular with the method in which it has been usually conducted. Of course if there is such a substantial variation from the ordinary mode as will convert the fishing into a different kind, or if anything which is itself illegal is added to the net and coble fishing to increase its efficiency, these acts will be extensions or evasions of the right, and may be prevented.

The Respondents were repeatedly pressed during the argument to state what deviations from "usual and ordinary" practice would carry the fishing beyond the defined limits of net and coble fishing. Amongst other suggestions they were asked whether, if instead of employing a man to carry what may be called the

shore end of the line and net down to the hauling point, a coble or any other boat were substituted, this would still continue to be net and coble fishing? If I understood the answer correctly, it was admitted (though with some hesitation) that this would not be such a departure from accustomed practice as to render it a different mode of fishing. But the argument was brought at last to this point, that any fixed machinery of whatever description, and however insignificant, was unlawful, and would be found to have been repeatedly condemned both by statutes and by decisions of the Courts; and therefore that the pins in the river to which the rope is attached, by means of which the Bermoney boat traverses to and fro, being of the nature of fixed machinery, were necessarily illegal. The Respondents however were not able to adduce any authority for so large a proposition.

Whatever may have been the object of the statutes, whether to preserve the breed of salmon, or to protect the rights of the upper heritors, or both, the argument can derive no support from them. Some of these statutes provide against fishing at unlawful seasons, but the great part of them are directed against the obstructing the river and the passage of the fish by means of cruives and weirs, which obstruction could not be produced merely by a pin or a stake placed in the water. The decisions which have been appealed to establish nothing more than that contrivances for the purpose either of preventing the fish from passing up the river, or for catching them by fixed nets or engines or any other fixed machinery, are illegal.

In order to apply these decisions, the Respondents had recourse to an ingenious mode of reasoning. They said, the pins or stakes fixed in the *alveus* of the river are an obstruction to the navigation, and might, therefore, have been removed by the Respondents as

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conservators of the river ; and that these things being thus illegal in themselves, the Respondents, as upper heritors of fishings, have a title to interpose for their interests, and to object to any mode of fishing which a lower heritor carries on by illegal means, and thereby improves his fishing to their detriment. They are, however, told in the course of this argument, that even assuming the pins used by the Appellants to be injurious to the navigation (of which, however, there is no proof), they in their character of heritors had no right to complain unless the means employed by the Appellants rendered their fishing in itself unlawful. The Respondents are not at liberty to blend their title as conservators with their rights as heritors, and thus to convert an illegality which affects them in their public capacity into the means of protecting their private interests.

The only question that can be raised between the parties in the present proceeding is whether the use of the pins and the Bermoney boat makes the Appellants' fishing illegal. Throughout the argument I have been unable to perceive the substantial difference between the mode of fishing adopted by the Appellants and the fishing by "net and coble" in its ordinary description. Is the Bermoney boat anything more than a contrivance by which the fishermen with one end of the line and net can be transported, instead of having to wade a certain distance, towards the hauling place, to which the other end of the net is to be brought by the coble ? It was admitted by the Respondents that a boat rowed with oars might be employed for this purpose, and it seems difficult to suggest the difference in principle between a boat so moved and one passing backwards and forwards from one fixed point to another. The banks in the part of the river within the limits of the Appellants' fishing present an impedi-

ment to their fishing operations at high water. They are not at liberty, in order to overcome this natural disadvantage, to resort to any contrivance by which in the act of fishing the net shall be fixed instead of being drawn ; but if they are able to create a new point of departure for the sweep of the net, and thereby to carry on the same operations during more hours of the day than formerly, I do not think that this can be looked upon as any evasion, or as such a material variation from the ordinary method as to render it substantially different from net and coble fishing.

Upon these grounds I am of opinion that the Interlocutor appealed from ought to be reversed.

Ordered and Adjudged, That the said Interlocutors complained of in the said appeal be, and the same are hereby reversed : And it is *Declared*, That the said Appellants are entitled to a decerniture in conformity with the conclusions of the summons in the action of reduction, together with the expenses incurred by them in the conjoined actions in the proceedings mentioned down to the time when the first Interlocutor appealed from was pronounced by the Lord Ordinary : And it is further *Ordered*, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this declaration and judgment.

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