[13*th April* 1835.]

RICHARD ALEXANDER OSWALD, Miss DOROTHEA MARY MAXWELL, and her Guardian, WILLIAM CONSTABLE MAXWELL, and their Tenants, Appellants. — *Dr. Lushington—Keay.*

JAMES M'WHIR, Assignee of George Little, Respondent.

Fishing.—Question, whether stake-nets placed on sand banks adjacent to the river Nith fall under the exception of the statute 1563, c. 68, as to cruives and yairs upon the water of Solway.

Process—Verdict.—Circumstances under which a special Case, which was substituted by agreement of parties for a verdict, was insufficient to afford grounds for pronouncing judgment; and a remit made to the Court of Session to cause an issue to be sent to a jury.

2D DIVISION.

Ld. Mackenzie.

IN the month of April 1825 George Little, describing himself as infeft in certain fishings in the river Nith, in the county of Dumfries, raised a summons before the Court of Session, setting forth, That, in the course of the year 1816, the appellants, as pretended proprietors of fishings in the lower part of the river Nith, took it upon them most illegally to alter the common mode of fishing which had been hitherto practised in that river, and to erect stake-nets and other fixed engines for catching fish within the limits and upon the banks and shores of the river Nith, opposite to their

OSWALD and others v. M'WHIR.

13th Apr. 1835.

respective lands, whereby great quantities of salmon and other fish were taken, contrary to law, and much injury was thereby sustained by him: that in consequence he presented, in the month of September 1816, to the Court of Session a bill of suspension, complaining of the illegality of this new mode of fishing, and craving an interdict against the Appellants from using such a mode of fishing within the limits of the river Nith, as particularly described in an act of parliament passed in the year 1792, which declares, "that the limits of the "mouth or entrance of the said river Nith shall for the "future be deemed and taken to be, and extend from "the large house of Carsethorn of Arbigland, in a line "across the river Nith due east:" that Lord Gillies, Ordinary, on the bills, in the meantime granted the interdict, which was intimated to the Appellants and their tenants, who all became satisfied of the illegality of the stake-nets and engines complained of, and of their want of title to disturb the possession, and they accordingly removed the said machinery: that the bill of suspension was ultimately passed, and the letters were expede and signeted upon the 19th day of February 1817, and the Appellants were prohibited from using such nets within the said limits, in all time coming, and all of them had, for upwards of six years, acquiesced in and homologated the interdict: that in the course of the year 1822 William Constable Maxwell, now of Nithsdale, and Joseph Grier or Grierson, as his tenant, and in 1824 Alexander Oswald, and John Pagan, as his tenant, James Maxwell, and John Ferguson, as his tenant, while the interdict remained unrecalled, took it upon them, in

violation thereof, and in contempt of Court, again to disturb Little's possession, by erecting stake-nets and other illegal engines of similar description with those made use of in 1816, upon the river Nith and on its banks and shores, and within the same limits as those which were declared illegal by the interdict; and that these nets were continued to be used: that though the said persons, pretending to be proprietors, had no legal title to any mode of fishing, and neither they nor their tenants had any title to erect stake-nets or such other engines as they had done upon the river Nith, nor on its banks and shores, where the tide ebbs and flows; and although, by the common law as well as by special acts of parliament, the proprietors of salmon fisheries are not at liberty to exercise the same, or to take salmon in rivers or friths where the tide ebbs and flows, otherwise than by net and coble, or in such other way as is warranted by the titles of the parties, and may have been sanctioned by immemorial usage; yet, these persons had taken upon them to erect upon the Nith, and on its banks and shores, a number of stake-nets and other machinery, not formerly used in that river, opposite to their respective lands, for taking fish, in violation of the different modes of fishing sanctioned by statute and the common law, to the great hurt of Little and others, the under proprietors. He therefore concluded, first, to have it found, that the appellants had "been guilty of con-" tempt of this Court, and a breach of the interdict " granted in 1816, by erecting the nets in question, " and should be punished by such fines as may seem " proper to our said lords, and decerned and ordained

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" by decreet foresaid to make payment to the pursuer " of such damages as may be ascertained he has suffered " and may suffer in consequence of the foresaid breach " of interdict." And secondly, that the Appellants had no right by themselves, or others employed or authorized by them, to erect stake-nets or other machinery for catching salmon, not formerly used within the river Nith, either in that river or on the sands and shores adjoining thereto, between high and low water marks; and on it being so found that they should be interdicted from erecting or using in future any stake-net, or other standing and fixed machinery, not warranted by their titles and by law, for the purpose of catching salmon within the limits of the said river Nith, or on its banks and shores, and from molesting the pursuer in the peaceable possession of the said fishings in manner foresaid; as also to make payment to the pursuer of the sum of 1,000*l.* sterling, in name of damages.

In defence the appellants stated, 1st, That the interdict had been granted in absence in the Bill Chamber, and was expressly limited in its operation to the 26th of November 1816; that the letters had never been executed, so that the interdict expired; and that on this footing an application had been made by Little to the sheriff of the county for an interdict, which had been refused, and on an advocation the Court of Session had adhered, reserving to him to bring an action of declarator[1]; and they therefore pleaded, that

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[1] See Little and Powel v. Grierson, 7 Dec. 1824, 3 S. & D. 261, new edition; 371, old edition.

the conclusions as to the breach of interdict were unfounded: 2d, In regard to the conclusion relative to the right of fishing, they admitted that they had erected stake-nets for fishing salmon at the places alleged, but they averred that these stake-nets were situated where the salt waters of the Solway ebb and flow, and were protected by the saving clause in the act 1563, cap. 68[1],

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[1] That act, as printed from the record in Mr. Thomson's edition of the Acts of Parliament, vol. ii. p. 537, is in these terms:—"The Quenis "Maiestie and Thre Estatis of this present Parliament ratifeis and "appreuis the act maid be hir hienes maist nobill gudochir King James "the Feird of gude memorie, of the quhilk the tenour followis: Item, "it is statute and ordanit that all cruuis and fische dammis that ar within "salt watters that ebbis and flowis be allutterlie destroyit and put downe, "alsweill they that pertene to our Souerane Lord as vthers throw all the "realme: And anent cruuis in fresche watters, that they be maid in sic "largenes and sic dayis keipit as is contenit in the actis and statutis maid "thairupone of befoir, with this additioun following; that is to say, that "all cruuis and zairis that ar set of lait vpone sand and schauldis far "within the watter quhair they war not of befoir, that thay be incontinent lane downe and put away, and the remanent cruuis that ar set and "put vpone the watter sandis to stand still quhill the first day of October "nixt to cum, and incontinent efter the said first day to be destroyit and "put away for euer; and for execution of this act ordanis euerie erle, "lord, barrone, and euerie gentilman landit within his awin boundis, "to cause remoue, destroy, put downe, and tak away the saidis cruuis "and zairis in maner foirsaid respective vnder the pane of ane hundreth "pundis, to be takin vp of thair gudis, that puttis not this act to dew "executioun, and the said soume to be imbrocht and applyit to oure "Souerane Ladyis vse, and that euerie schiref, stewart, baillie, alsweill "regalitie as rialtie, thair deputis, and vthers jugeis, within their awin "iurisdictiounis, tak gude attendence and see that as is contenit in this "present act be done and put to executioun in all punctis, according to "the tenour of the samin; and failzeing thairof, that euerie schiref, "stewart, baillies, alsweill of regalities as rialteis, and vthers jugeis "within thair awin iurisdictioun as said is, vptak and inbring the said "pane of an hundreth pundis of euerie erle, lord, barrone, gentilman "landit, or vthers negligent in the premissis, and mak compt thairof "zeirlie in the checkar; and gif the saidis schireffis, stewartis, baillies "of regaliteis or rialteis, beis fundin negligent in executioun of thair "officis anent this act, that the foirsaid soume be vpliftit of thameselfis "and imbrocht to our Souerane Ladyis vse, and that but preiudice of the

OSWALD and others v. M'WHIR.

13th Apr. 1835.

which provides, that " this act in noways be extended to " the cruvis and zairs being upon the water of Solway." They also alleged, that stake-nets were the same kind of machinery as yairs, and had been so adjudged in the case of the Duke of Atholl, 7th March 1812, relative to fishings in the Tay.

After a record was closed, the respondent, James M'Whir, who had purchased the fishings from Mr. Little, was sisted as pursuer of the action in place of Little.

An issue was then sent to a jury, which, (after an admission that Mr. M'Whir was proprietor of the salmon fishings in the river Nith set forth in the summons,) was in these terms:—" Whether, during the " years 1822 and 1824, or either of them, in the river " Nith, or on the sands and shaulds within the bounds " thereof, where the water ebbs and flows, the defender, " Richard Alexander Oswald, or John Pagan of Little- " bar, his tenant, wrongfully erected, or caused to be " erected, or from 1822 to April 1825, or during any " part of the said period, wrongfully used or caused to " be used, for the purpose of catching salmon, certain " stake-nets or other fixed engines, to the loss, injury, " and damage of the pursuer?" Similar issues, applicable to the other appellants, were sent for trial at the same time, and the damages were laid at 1,000*l.*

The case came on for trial before Lord Gillies and a jury at the Circuit Court held at Dumfries in April 1830. It was stated by the appellants, that after the jury was

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" panis to be execute vpone the foirsaidis erle, lord, barron, gentilman, " or vther contrauenaris of the foirsaid act; prouyding alwayis, that this " act on na wayis be extendit to the cruuis and zaris vpon the watter of " Sulway."

empannelled, and before the counsel for the respondent had advanced many sentences in opening his case, he was interrupted by a suggestion from Lord Gillies, that as the issues seemed to involve more of law than of fact, he thought it desirable that the jury should be discharged without finding a verdict, and that the parties should endeavour to adjust a statement of facts, upon which ultimate judgment in the cause might be pronounced; coming from such a quarter, this suggestion was, as a matter of course, acceded to; and a juror having been withdrawn, a special Case was prepared and agreed upon by the parties. That Case, after reciting the issues, proceeded in these terms:—

" Afterwards, to wit, at Dumfries, the 6th day of " April 1830, before the Right Honourable Adam " Gillies, one of the Lords Commissioners of the Jury " Court in civil causes, compeared the said pursuer and " the said defenders by their respective counsel and " agents, and a jury were empannelled and sworn to try " the said issues between the said parties; but by the " agreement of the said parties the said jury were dis- " charged without finding a verdict, the parties having " agreed that the judgment in the cause shall be pro- " nounced upon the following statement of facts:—

" 1. That the defenders did, during the years men- " tioned in the issues, use stake-nets of a construction " and in situations which, but for the exception as to the " water of Solway contained in the act 1563, cap. 68, " would be illegal.

" 2. That the river Nith falls into the Solway Frith, " and that these nets are placed above the point at " which the fresh water of the river Nith joins the Sol

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" way Frith at low water, and are within the bounds of " the river Nith.

" 3. That these nets are not placed in the fresh water " of the Nith, but on sands or shaulds adjoining thereto, " which sands and shaulds, and the said nets thereon, " are covered by the tide when it flows, but are left dry " when it ebbs.

" The question for the decision of the Court on the " above stated facts shall be—

" Whether the nets are protected by the exception in " favour of the water of Solway, contained in the said " act?

" If it shall be the opinion of the Court that the ex- " ception does apply to stake-nets in the above situation, " then judgment shall be pronounced against the pur- " suer, and in favour of the defenders, with expences. " If the Court shall be of opinion that the exception " does not protect the above nets, then judgment shall " be pronounced in favour of the pursuer, with expences, " against all the defenders, finding each of them liable " in one shilling of damages, ordaining them to remove " their present nets, and prohibiting them from using " any fixed engines, either in the present situation of " these nets, or within a line drawn from a point on the " Carlaverock side, equidistant from Carlaverock castle " and Blackshaw point; which line, so drawn from this " point, shall run due south till it meet low-water mark " at stream tides, and from thence to follow the line of " low-water mark till it meets a line drawn from " Southerness due east.

". It being understood that, if the fresh water stream " of the Nith shall ever change, so as to cross the fore-

" said line running due south, this arrangement shall " not apply to that part of the stream which shall so " cross the said line.

(Signed) " JOHN HOPE for pursuer.

" H. COCKBURN for defenders."

When the Case was laid before the Lord Ordinary, he appointed the parties to argue the questions arising out of it.

On the part of the respondent it was maintained that, as the appellants admitted that their nets " are placed " above the point at which the fresh water of the river " Nith joins the Solway Frith at low water, and are " within the bounds of the river Nith," it was impossible for them to maintain that they fell within the exception of the statute, which was confined to " cruvis " and zairs being upon the water of Solway;" and it was of no importance that the respondent had admitted " that these nets are not placed in the fresh water of " the Nith, but on sands or schaulds adjoining thereto, " which sands and schaulds, and the said nets thereon, " are covered by the tide when it flows, but are left " dry when it ebbs." Neither was it competent or relevant for the appellants to allege that the river Nith formed part of or was situated within the water of Solway, there being no such fact stated in the special Case, which must be regarded as a verdict. By the expression " water of Solway" in the statute was not meant that arm of the sea which is known by the name of the Frith of Solway, but that part which formed the boundary between England and Scotland,—the purpose of the exception having been, that as Englishmen might on their side of the water fish at all periods

OSWALD and others v. M'WHIR.

13th Apr. 1835.

of the year, so Scotchmen should not be prevented from enjoying the same advantage.

The appellants, on the other hand, contended that the expression "water" comprehended not merely rivers, but estuaries — such as the Frith of Forth, and that accordingly in the case of the Duke of Atholl it had been expressly decided that the Frith of Tay fell within that general term; and, in the opinions which were then delivered, the Frith of Solway had been referred to in confirmation of the argument, as it was generally denominated the "water" of Solway. The provision of the statute, therefore, could not be confined within the narrow bounds contended for by the respondent; it embraced and applied to all the waters of the Solway, including the rivers which flow into it, in so far as the salt waters of the Solway enter into them at the flowing of the tide. On this footing, the House of Lords in the case of Murray v. Earl of Selkirk, relative to stake-nets on the river Dee, which flows into the Solway Frith, made a remit to inquire whether they were not within the water of Solway, and so within the exception of the statute.[1] Now it was admitted in the special Case, that although the nets were placed at a point above that at which the water of the Nith joined the Solway Frith at low water, yet they were not placed in the fresh water of the Nith, but on sands or schaulds adjoining thereto, which are covered by the tide when it flows, and are left dry when it ebbs. The tide here alluded to is the water of the Solway, and consequently it is necessarily admitted that the nets, although within the bounds

[1] 2 Shaw's App. Ca. 299.

of the river Nith, are also within the waters of the Solway.

Lord Mackenzie pronounced, on the 24th of May 1831, this interlocutor: — "Finds, that the exception in the "act of parliament 1563, cap. 68, respecting the water "of Solway, does not protect stake-nets, placed in the "situations in which it is admitted that the stake-nets of "the defenders were placed during the years 1822 and "1824; and therefore repels the defences, and finds each "of the defenders liable to the pursuer in one shilling "of damages, and ordains them to remove their present "nets, and prohibits them from using any fixed engines, "either in the present situations of these nets, or within "a line drawn from a point on the Carlaverock side, "equidistant from Carlaverock Castle and Blackshaw "Point, which line, so drawn from this point, shall "run due south, till it meets the low-water mark at "stream-tides, and from thence to follow the line of "low-water mark, till it meets a line drawn from "Southerness due east; it being declared, that if the "fresh water stream of the Nith shall ever change, so "as to cross the foresaid line running due south, this "decreet shall not apply to that part of the stream "which shall so cross the said line, and decerns and "declares accordingly: Finds the defenders liable to "the pursuer in expences."

The appellants having reclaimed, the Court, on the 8th of July issued this order: — "The Lords, "before answer, in respect of the case depending in the "First Division of the Court, relative to the stake-net "fishings on the Dee, and the remit from the House of "Lords in the appeal thereanent, direct this note to be "laid before the judges of that Division, and the per-

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" manent Lords Ordinary, and desire their opinion in " writing on the question, whether the fishings here " in question are situate within the protection of the " statute founded on? and appoint the parties to give " in minutes relative to the application of the proceed- " ings in the Dee case, to the case here in dispute." This having been done, the consulted judges returned the following opinions: —

Lord President and *Lord Gillies.* — " We have been " difficulted in this case by the terms in which the " statement of facts is drawn up.

" The second fact stated is, ' that the river Nith falls " ' into the Solway Frith, and that these nets are placed " ' above the point at which the fresh water of the river " ' Nith joins the Solway Frith at low water, and are " ' within the bounds of the river Nith.'

" The third fact stated is, ' that these nets are not " ' placed in the fresh water of the Nith, but on sands " ' or shaulds adjoining thereto, which sands or shaulds, " ' and the said nets thereon, are covered by the tide " ' when it flows, but are left dry when it ebbs.'

" Now, there seems to be both contradiction and " obscurity in these two statements.

" In the second, the nets are decidedly stated to be " placed ' within the bounds of the river Nith,' and yet " in the third statement they are said ' not to be placed " ' within the fresh water of the river Nith.'

" Now, as a river, in contradistinction to the sea, or " an arm or bay of the sea, can consist only of fresh " water, it is not easy to understand how nets, or " any thing else, can be said to be within the bounds " of the river, and yet not in the fresh water of that " river.

" Secondly, there seems to be considerable obscurity " in the third statement, where it is said that the nets " ' are covered by the tide when it flows, but are left " ' dry when it ebbs.'

" Now, in flowing into the mouth of a river, the tide " is in several different situations. At first, the tide is " composed entirely of the salt water of the sea. Far- " ther up it mixes with the fresh water of the river, and " the water is brackish. Still farther up, the effect of " the tide is merely to dam up and repel the fresh " water, and the water is entirely fresh.

" Now, it is not stated in which of these ways the " tide covers those nets.

" We confess, therefore, that we do not think that " the statement of facts is calculated to procure a very " decided opinion. But, holding the second statement " to be the leading one, as it is certainly the most clear " and explicit, we are of opinion that the interlocutor " of the Lord Ordinary is well founded."

Lord Corehouse. —" I concur in this opinion. The " special verdict is not clear, and not perhaps con- " sistent; but the finding, ' that the nets are within the " ' bounds of the river Nith,' appears to me decisive in " favour of the Lord Ordinary's interlocutor. If it " had not been for that finding, I should have thought " it competent to inquire whether they are placed on " the proper shore of the Nith, or in an inland bay of " the Solway, through which, at low water, the Nith " flows. If it turn out that the spot where they are " would be covered by the sea at high water, though " the Nith were to cease to flow, I should think that " the exception of the statute applied to them, for,

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" under the denomination of the water of Solway, the " bays of the Solway must be included. But I am not " permitted by the verdict to go into that inquiry."

Lord Moncreiff.—" I concur in the opinion of the " Lord President, with the explanation in that of " Lord Corehouse. But that explanation is necessary " to express the view which I have of the case, and of " the legal construction and effect of the statute. It is " only on the ground, that the situation in which the " nets are placed is to be taken as strictly and properly " within the bounds of the river Nith, that I can hold " that the exception of the statute does not apply to it."

Lord Craigie.—" I regret that, as in other cases of " the same kind, a plan or survey of the different places " and fishing stations referred to in the pleadings has " not been prepared.

" I also regret that there has been no exhibition of " the title deeds and leases of the lands and fishings, " nor any particular statement as to the practice or " usage in the salmon fishings ex adverso of the Solway, " and said to fall under the enactment in 1563, relating " to 'cruives and yairs' being within 'the water of " 'Solway.'

" Lastly, and above all, I regret the inconsistency and " general laxity in the statements given in by the parties, " with the view of obtaining the judgment of the Court, " as if a special verdict had been adjusted. Even as " the cause now stands, however, I entirely concur with " the Lord Ordinary in the cause (Lord Mackenzie), " and also in the opinion of the Lord President, that " the second statement is more complete and applicable " than the third, which rests the defenders' claim chiefly

" upon the state of the water where the fishings are " carried on, whether to be called fresh or salt, which " appears to be of no importance.

" By the law of Scotland, the right of fishing in the " deep sea (as it is called), that is, where the water is " salt, even while the tide is out, belongs to the public " at large.

" But the right of salmon fishing under that limitation " belongs, in Scotland, to the Crown, although the " privilege of fishing in certain places may be alienated " by the Crown, and afterwards become the subject of " commerce: and for preserving the breed of salmon, " and for ensuring the equal exercise of rights of salmon " fishings by those who have obtained grants from the " Crown, various restrictions have been introduced by " the public law, and referring to three different " situations.

" These are, first, in rivers having no immediate " communication with the sea or tide: Second, where " the river meets and mixes with the tide of the sea: " And, third, in salt water, where the tide ebbs and " flows, or within flood-mark of the sea, and without " immediate intercourse with any river.

" In the first of these situations, the owners of salmon " fishing are permitted to use what are called cruives " and yairs, if sanctioned by special grants from the " Crown, and duly followed with possession. In the " second, there can be no fishing unless by net and " coble, cruives and yairs and all fixed machinery for " catching salmon being expressly and anxiously pro- " hibited; and in the third, the prohibition is equally " positive and general, with one very limited exception,

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" on which the defenders' plea is solely founded, with " regard to cruives and yairs being within the water of " Solway.

" It may be noticed, that the same general prohi- " bition is to be found in other enactments, both before " and after that in 1563; and the whole were printed " together from the records, by the care of the deputy- " register, Thomas Thomson esq., in the case of Tay " fishings, in 1810, and in the subsequent case of the " South Esk fishings, both to be afterwards noticed.

" Referring to the enactment itself, it will be observed, " 1st, 'That all cruives and fish dammis that are within " 'salt waters that ebbs and flows are to be uterlie " 'destroyed and put doune, alsweil they thàt perteins " 'to our Souverain Lord as others thro' all the realme.'

" 2d, 'And anent cruives in fresche watters, that they " 'be made in sic largenes, and sic dayis kepit, as is " 'contenit in the actes and statutis maid thairupone of " 'befoir, with this addition following; that is to say, " 'that all cruives and yairis that are set of lait upone " 'sande and schauldis far within the watter quhair " 'they war not of befoir, that they be incontinent " 'tane doune and put away, and the remanent cruivis " 'that are set and put upone the watter sandis to " 'stand till quhill the first day of Oct. next to come, " 'and incontinent efter the said first day to be de- " 'stroyit and put away for ever.' Directions are " given to certain of the neighbouring proprietors for " prosecuting offenders, and also to the local judges, " with penalties on those who should neglect this duty; " and after this is the exception with regard to the " 'crüives and yairs,' being within 'the water of Solway'

" or, in other words, where the salt water ebbs and " flows in the water of Solway.

" Considering attentively the whole of this enactment, " it seems impossible to throw a doubt upon its import " and effect. The exception can only apply to the first " provision of the statute, with regard to cruives and " fish dammes, that are within salt waters that ebbis " and flowis in the Solway,—the intervening provisions " relating to the same engines used in fresh water,—all " which are to be taken down by the 1st of October " then next; and, from the state of the rivers which " flow into the Solway on the Scottish side, being the " Annan, Esk, and Nith, all of which, when the tide is " out, enter the estuary or Frith of Solway, and are " incapable, in their ordinary state, to occasion any " alteration as to the freshness or saltness of its water, " the same conclusion is to be drawn.

" That the cruives and yairs thus placed in the water " of Solway were of the most insignificant and inefficient " description, is apparent from their not having been " taken away in the beginning of the seventeenth cen- " tury, along with the exceptions with regard to the " other Border rivers, the Annan and the Tweed; and, " from the very particular terms of the exception, it " might be inferred, that even cruives and yairs could " only be permitted, if permitted at all, where such " engines had been in use at the date of the enactment. " But it seems needless at this time to enter into such " a discussion. Súrely it never can be imagined, that " an exception from a general enactment with regard " to 'cruives and fish dammes,' that are within said " water that ebbis and flowis in the 'water of Solway,' " were to be extended to fishings in a river many miles

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" distant from the water of Solway, and held by titles " describing the fishing grounds to be, not in the salt " waters of Solway, but in a river, and within the ordi- " nary banks of a river, containing no portion of salt " water, unless during the short space of time when the " tide-water from the Solway advanced so far.

" The want of proper evidence and explanation upon " the particulars connected with this discussion has " been already noticed; and here the burden of proof " lies upon the defenders, the fact of there having been " no practice or possession in support of the argument " now maintained by them being of a negative nature, " and the contrary not to be presumed until the prac- " tice is proved. But it is clear, from the litigations " referred to on both sides, that although cruives and " yairs, and at a late period, far short of forty years, " stake-nets, have been used on the banks of the Solway, " properly so called, no attempt, so far as appears, has " been made (unless during the short interval when " stake-nets were alleged to be in all respects a legal " mode of fishing) to erect such nets, even in the " mouths of the rivers which empty themselves into the " Solway, and which are only mingled with the salt " water of the Solway when the tide is full.

" The argument, that the water within the banks of " the Nith, when the tide is full, is salt, and that it " could not be called a river, but was truly a portion " of the water of Solway, has been fully stated and " decided upon in many of the former cases.

" In the case of Seaside, in the frith or estuary of the " Tay, the stake-nets were placed, not in the ordinary " channel of the river, but wholly on the adjoining " sands, while covered by the tide. In the case of

" Mr. Maule's fishings, which are farther down the
" river than Seaside, the same judgment was given;
" and this was followed by the decision in the case of
" South Esk, in 1812. There the stake-nets were
" placed several miles within the mouth of the river,
" some of them on grounds called sea-greens or sands,
" and some of them within what is called the bay or
" basin of Montrose, and where no salmon could be
" caught unless in time of tide, and where the river
" South Esk never entered, unless when part of the
" water might be driven up so far by the tide; and the
" water in time of tide was eleven feet and more above
" the level of the river at low water; but in all those
" cases, the salmon fishings were exercised in virtue of
" rights flowing from the Crown, and the stake-nets
" were directed to be removed, as being, in the true
" meaning of the statutes, fishings in the rivers of Tay
" and South Esk, although covered, in whole or in part,
" with salt water during the flow of the tide; and thus,
" whether the stake-nets in question were to be viewed
" as erected upon the banks of a river, or upon the
" shores of the sea, or in an estuary, and where the tide
" ebbs and flows, still the prohibitions were held to be
" of equal force, the right of fishing in all those cases
" being exercised only in virtue of a grant from the
" Crown, and this again restrained and limited by the
" public law, which prohibits the use of any fixed
" engines or machinery within the same bounds. In
" the present case, according to the ordinary meaning
" of the words, as well as according to the usage of the
" country, as far as can be known from the decisions
" quoted by the parties, the fishings in question are not
" in the water of Solway, but in the river Nith. They

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" cannot be exercised unless in virtue of rights flowing " from the Crown, in favour of those who have by their " charters the privilege of fishing with cruives and yairs " in the water of Solway; and the defenders cannot " pretend to have any such right, but merely a right of " salmon fishing, more or less extensive, in the river " Nith, and within the ordinary banks of that river.

" In some of the late discussions, a doubt has been " thrown out as to the general authority of the decisions, " whereby stake-nets were held to be illegal; and some " observations are stated as having fallen from a most " eminent and learned lord at an early period, implying " that a similar determination would not again be " given. But now, at the distance of nearly thirty " years from the commencement of the challenge, and " by those more recent determinations in the various " cases referred to, and relating to fisheries of great " extent and value, and these determinations nearly " unanimous, and the last of them in 1812, and without " an attempt to obtain a review in the Court of last " resort, it cannot be imagined that any hesitation " will arise. It would indeed unsettle all security of " private right, if such a series of decisions were at " this time to be overthrown, or even held out as liable " to doubt."

Lord Balgray.—" I concur in the opinion of Lord " Craigie. At the same time I may observe, that all " right of fishing salmon must flow from the Crown, and " that it appears from the grants to the defenders, that " their fishings are limited to certain bounds and limits " applicable to the river Nith; and it is stated in " article 2d of the special case, 'That the river Nith " 'falls into the Solway Frith, and that these nets are

" ' placed above the point at which the fresh water of " ' the river Nith joins the Solway Frith at low water, " ' and are within the bounds of the river Nith.' I " cannot conceive how such fishings ever can be held " as in the water of Solway. A period of near three " centuries may have altered, and is known to have " altered, the boundaries of the frith, but that never " can nor ever ought to alter the nature of the original " right."

Lord Mackenzie.—" I am still of opinion that the " interlocutor pronounced by me ought to be adhered " to. I think that the statement of facts shows that the " stake-nets in question are placed within the bounds " of the river Nith, on the banks of that river, being " dry at low water, and covered when the tide rises by " the expansion of mixed water, caused by the flowing " of the tide into that river, though not covered by the " fresh stream of the Nith at low tide. In this view, I " conceive these nets to be in pari casu with nets " situated, not within the stream at low water, but so " as to be overflowed by the rise of the tide, on any " other part of the banks of the Nith, from its mouth " up to Dumfries, to which the tide reaches; and so " considering them, I think they cannot be held to be " in the Solway, because I see no sufficient grounds for " extending the Solway up the course of all the rivers " that run into it, as far as the tide reaches. I think " the Solway, whether river or frith, must be limited to " its proper channel and banks, and cannot extend over " the channel or banks which belong to any river " flowing into it."

Lord Medwyn.—" I am of opinion that the inter- " locutor of the Lord Ordinary is right. I concur in

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" the preceding remarks of the Lord Ordinary, and " also in the observations of Lord Craigie generally, so " fully stated by his Lordship in his opinion."

Lord Fullerton.—" The facts of this case are ascer- " tained by the 'statement,' which the parties have " consented to hold a special verdict. It is admitted, " in the first place, that the defenders used stake-nets in " situations 'which, but for the exception as to the " 'water of Solway, contained in the act 1563, cap. 68, " 'would be illegal.' 2dly, That the 'river Nith falls " 'into the Solway Frith,' and that 'the stake-nets are " 'within the bounds of the river Nith;' and, 3dly, That " the 'nets are not placed in the fresh water of the " 'Nith, but on sands or shaulds adjoining thereto, " 'which sands and shaulds, and the said nets thereon, " 'are covered by the tide when it flows, but are left " 'dry when it ebbs.'

" I consider the meaning of these two last articles to " be clear enough; namely, that the situation of the " nets is 'within the bounds of the river Nith,' in " relation to the Solway Frith, into which the river " flows, but is washed by the tides of that frith. In " short, I understand the parties to hold, that the " position of the sands or shaulds on which the nets " are placed is, in relation to the Solway Frith, pre- " cisely that which the sands or shaulds in the Tay were " found, in the Tay fishing cases, to have in regard to " the German Ocean; which last sands and shaulds, " though not within the fresh water of the Tay, but dry " at low water, and covered by the tide when full, were " found to be within the bounds of the river Tay, in the " sense of the act 1563. Indeed, it is this peculiarity of " situation, as admitted in the statement of facts, which

" alone, as I understand, has given rise to the dispute;
" for it being admitted, in the first article, that the
" stake-nets are in situations which, but for the 'excep-
" 'tion of the water of Solway, would be illegal,' and it
" not being disputed on either side that the Solway
" Frith, at the mouth of the Nith, is truly sea, there
" could not well be any question of fact, whether the
" nets were within the bounds of the Nith or on the
" shores and bays of the Solway Frith, as on this last
" supposition the defence must have rested on the
" general rule regarding sea fishings, independently
" altogether of the act 1563.

" This statement of facts, then, seems to me very
" fairly to raise the question of law, or of construction
" of the act 1563, respectively argued by the parties.
" According to the pursuer, the expression 'the water
" 'of Solway,' used in the exception, does not apply
" to the Solway Frith as an arm of the sea, but is
" limited to the fresh-water stream, or union of streams,
" alongst with the adjacent sands, on which the salt water
" ebbs and flows, at the upper extremity of the Solway
" Frith, and before it assumes properly the character
" of an arm of the sea. If this were correct, the
" admission that the stake-nets in dispute are 'within
" 'the bounds of the Nith,' and of consequence con-
" fessedly beyond the bounds of the 'water of Solway,'
" explained in this limited sense, would of course be
" fatal to the defence. On the other hand, it is main-
" tained by the defenders, that the term 'water of
" 'Solway' in the statute does not denote any tide
" river, or union of tide rivers, with the adjacent sands,
" on which the tide ebbs and flows, but means the arm
" of the sea now bearing the name of the 'Frith of

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" ' Solway ;' from which the inference is drawn, that it " must, in this statute, comprehend all those positions " within the bounds of the different rivers flowing into " the Solway Frith which, if the rivers flowed into any " other part of the sea, would be affected by the general " prohibitory clauses of the statute. The propositions " maintained by the defenders are very fairly stated " in the following summary of their argument: — ' In " ' order to bring the fishings of the defenders within " ' the operation of the exception, it is necessary to " ' establish, first, that the ' water of Solway' of the " ' statute, and the Frith of Solway of modern geo- " ' graphy, are synonymous and convertible terms; " ' and, second, that the exception is so expressed as " ' to apply to the fisheries within the bounds of the " ' rivers flowing into the Solway.'

" The question, then, in dispute between the parties " turns entirely on the true meaning of the statute; " and, upon considering the arguments of the parties, " I am of opinion that the construction maintained by " the pursuer is the sound one. It appears to me to " be the only construction by which the term used in " the exception can be reasonably explained, so as to " be consistent or reconcileable with the general scope " of the statute. One important reading of the statute " is fixed by the case of Lord Kintore v. Forbes, as " distinguished from the cases of the Tay fishings, viz. " that the prohibition of cruives and fish-dams, within " ' salt waters that ebbs and flows,' does not strike at " cruives and dams on the sea, but is applicable only " to the mouths of rivers, and the sands within their " boundaries reached by the tide. Now, according to " the construction of the pursuer, the term ' water of

" ' Solway,' used in the exception, is perfectly con-
" sistent with the sense of the general enactment;
" while, on the other hand, that maintained by the
" defenders cannot be resolved into a consistency with
" the general enactment, unless through the means of
" certain assumptions, which, to say the least, are very
" arbitrary. For, in the first place, it is taken for
" granted that the ' water of Solway' is identical with
" the Frith of Solway, as an arm of the sea. But then
" arises the difficulty, that, in the literal sense of this
" last term, the exception would be unmeaning and
" absurd, as cruives and yairs, on an arm of the sea,
" confessedly do not fall under the general prohibition
" of the statute at all, and are lawful independently of
" the exception; so that, to meet that difficulty, it is
" necessary to have recourse to a second assumption,
" that the term ' Frith of Solway' occurring in such
" a statute, being unmeaning in its literal sense, must
" be held to include all those positions within the
" bounds of the rivers flowing into the Solway Frith,
" which, but for the exception, would be affected by
" the general prohibition. In short, to support the
" defence, it is necessary to hold, not only that the
" ' water of Solway' of the statute means the Frith of
" Solway of modern geography, but that the Frith
" of Solway does not truly mean, in the statute, the
" arm of the sea of that name, but all ' the streams
" ' and waters that disembogue themselves into the
" ' Solway Frith.'

" I do not consider myself entitled to take such
" liberties of construction with the terms of the statute.
" It seems to me that the very necessity for assuming
" this extraordinary interpretation of the term ' Frith

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" ' of Solway,' in order to reconcile the sense of the " exception with that of the general enactment, affords " a good ground for holding that the ' Frith of Solway' " could not be meant, and that the ' water of Solway,' " in some much more limited sense, formed truly the " subject of the exception. In the same way, I am " compelled to reverse the argument of the defenders, " founded on the denial that the term ' water of Solway' " ever did designate any particular ' water' of the kind " contemplated in the leading clause of the statute. " I certainly do not consider that point of antiquarian " nomenclature to be made out in favour of the de- " fenders. The quotations from other statutes, such " as that of 1429, cap. 31, and from other contem- " porary or nearly contemporary authorities, rather " favour the presumption, that the term ' water of " ' Solway' meant, at the date of the statute in ques- " tion, something much less extensive than the Solway " Frith. But even considering the case, independently " of the statute, to be doubtful, the legitimate course of " reasoning would lead, not to construe the statute by " assuming a particular view of the doubtful point, but " to the conclusion, that this very statute, excepting " the ' water of Solway' from a general enactment con- " fessedly inapplicable to arms of the sea, was strong and " nearly decisive evidence, that, at the date of the statute, " the name truly designated some ' water' different from " an arm of the sea, and resembling in its character " those to which the general enactment applied.

" Upon these grounds I am of opinion that ' the stake- " ' nets of the defenders are not protected by the " ' exception in favour of the water of Solway, con- " ' tained in the act 1563, cap. 68.' "

The Court, on the 8th of March 1833, adhered to the interlocutor of the Lord Ordinary, found additional expences due, and allowed the decree of removing to be extracted ad interim.[1]

Mr. Oswald and the other defenders appealed.

Appellants.—If the case has been mistried, no fault is imputable to the appellants. To them it always appeared that the parties were, in the first instance at least, at issue upon a mere question of fact as to the locus in quo the fishings are situated,—a question peculiarly fitted for trial by a jury, aided by a view of the subjects. But the judge before whom the case came on for trial thought differently. He was of opinion that it involved more of law than of fact, and, in consequence, the issue, which was sufficient to have raised the proper question of fact, was withdrawn from the jury. If the facts, as stated in the special Case, did not afford to the Court below materials for giving clear or satisfactory opinions, (and which the majority of the consulted judges stated that it did not,) they ought not to have given opinions decisive of a question involving important patrimonial interests; they ought, before pronouncing judgment on the valuable rights of parties, to have required additional information. It is no answer

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[1] 11 S., D., & B., 551. It is stated at page 560 of that report, "that "when the cause was put out for advising, the defenders (appellants) "craved, that, in respect the judges stated that they did not fully under- "stand the description in the special Case, they should be allowed to have "the matter cleared up; to which it was answered, that the Case was "the agreed on statement of parties, which could not be opened up, but "must form the sole ground of judgment. The Court, holding it "incompetent to open up the statement of parties, and generally con- "curring with the opinion of the consulted judges, adhered to the "interlocutor of the Lord Ordinary."

OSWALD and others v. M'WHIR.

13th Apr. 1835.

to say, that the parties had agreed on certain facts as affording sufficient materials for judgment. They may be quite wrong in this; and a judge cannot be called upon by parties to decide upon imperfect materials; he has it in his power, and it is his duty, to call for such information as may remove that which is contradictory or obscure; he cannot be precluded from doing so by any agreement of parties, and if such additional information is not communicated, he ought to hazard no opinion on that which is confessedly defective. In order to extricate the case from its present unsatisfactory position, an issue should be ordered to be sent to a jury for ascertaining whether, (in the words of the statute 1563,) the fishings under challenge are not upon the water of Solway.[1]

Respondent.—The special Case is not only equivalent to the verdict of a jury, but is the deliberate judicial admission of the parties, and is of the nature of a final agreement, on which the fate of the case is to be perilled. A verdict may be brought under review by motion for a new trial, or by bill of exceptions, but a special Case is final and conclusive, and subject to no review whatever. In the present instance it affords sufficient materials for a decision. The appellants averred that the stake-nets were within the water of Solway, while the respondent averred that they were within the bounds of the river Nith. Now they have distinctly admitted that the stake-nets are situated within the bounds of the Nith, and there is no statement in the Case that they are within the water of Solway. The appellants, therefore, cannot

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[1] The points which were discussed in the Court below were also argued, but it is unnecessary to advert to them.

be found entitled to the benefit of the exception in the statute.

LORD BROUGHAM.—My Lords, in this case there are many things in the course which the proceedings have taken in the Court below very much to be lamented. In the first place, it is greatly to be lamented that it appears to have occurred to the learned judge at the trial of the case,—and to have been assented to by the counsel,—that that was a question of law, which is just as much a question of fact as any question which can be stated. Here, we shall say, is a piece of ground; the question is, does it lie within the estate of the Duke of Buckingham or of Lord Kenyon? That is undoubtedly a question of fact, whether it is within the one estate or the other; but that is here said to be a question of law. This is a boundary question, referring to the bounds of a fishery near the river Nith, and near or within the water of Solway.

The second mistake in the conduct of the cause is this, that when, upon the ground of its being a matter of law and not a matter of fact, they agreed to stop the cause, and to turn the matter into a statement of the case, which was to have the effect of a special verdict, they did not state the case with the evidence, so as to enable the Court to know what were the facts submitted to the Court, and upon which the conclusion of the Court, if there was to be any conclusion, might be given; instead of that, they give no evidence at all,—no details at all; but they give certain facts, which ought to have been clearly and distinctly stated, and to have been sufficient to enable the Court to pronounce for the plaintiff or for the defendant.

OSWALD and others v. M'WHIR.

13th Apr. 1835.

The third thing I regret is this, that, instead of stating these facts in such a way as to enable the Court to pronounce a judgment upon them, there are statements which seem to have the appearance of statements of fact, but which do not dispose of the question at all, inasmuch as they are entirely equivocal. "Within the bounds of "the river Nith," is all that they tell you, except they believe that, though it is a fishery within the Nith, nevertheless it is on such a sand, which is covered by the Solway water at flood, and laid bare by the retreat of the Solway water at the ebb of the tide,—that last matter respecting the water covering the ground at high tide, and the retreat of the water at the ebb of the tide, being perfectly immaterial, for the fishery may be either in or out of the Solway, and yet covered by ebb and flow. Then, there is not to be found within the four corners of this Case (which is to have the force of a special verdict, by consent of the parties,) an answer to this material question of fact, Does the fishery lie within the Solway water or without the Solway water?

To these I have unfortunately to add another subject of regret, and that is probably the omission which has led to these omissions, particularly the last omission. Mr. Oswald never appears to have rested his case upon what is the specific and distinct ground, and whereupon he now relies for the first time, that he is within the exception of the statute of 1563, by averring that the fishery is de facto within the Solway water. He says it is not within the bounds of the Nith; the other party say it is within the bounds of the Nith. But as the fishery is struck at, whether in the Nith or not, provided it is not in the Solway water, it is clear the jury ought to have been asked, whether it was in

point of fact within the Solway water, to bring it within the exception. It has been very learnedly argued that Mr. Oswald does say so in the second argument. But he does not; all he says is, that "this "fishery being,"—(which means, "because it is,")—being in a place where the Solway tide ebbs and flows, is therefore within the exception of the statute; but that is not so. It is within the exception of the statute, if it is within the Solway water; but it is not within the exception of the statute, because, wherever it is, it is covered with the Solway tide; that may be twenty or thirty miles up the country, as Teddington is many miles up the river Thames,—its banks may be covered or not covered by the flowing of the tide, but that would not bring it within the exception.

My Lords, having made these general observations upon the regret I feel in this case, I come to the great difficulty of all, and which makes these omissions so much a matter of regret, that the parties, I am afraid, have in some sense bound themselves by these admissions, whether they were prudent or not,—whether they were consistent or not,—whether they were accurately understood by themselves or not, which I greatly doubt, —and therefore we have to deal now with an admission, or a verdict having the force of an admission, which concludes us as to this fact, and makes us have this proposition of fact to contend with in deciding the question, namely, that the fishery was within the bounds of the river Nith. What sense we are to give to the words, "within the bounds of the river Nith," makes another difficulty. It either means that Mr. Oswald's case is gone, because this fishery is out of the Solway, and so out of the exception, and thereby puts him out of court,

OSWALD and others v. M'WHIR.

13th Apr. 1835.

or it means nothing. One can hardly say that a party is to be supposed to have made use of such an argument against himself; but if it does not mean that, it means nothing at all. Now, it is said that the learned judges, and particularly Lord Corehouse, one of the most eminent judges in Scotland, have given an opinion favourable to Mr. Oswald, and that he has talked as if this was an inland bay of the Solway through which the Nith flowed. If he had said any thing of that kind, it would have been utterly repugnant to the conclusion to which he comes, that this fishery is not within the exception of the statute. He says, "if it had not been for that finding, that the nets "are within the bounds of the Nith, I should have "thought it competent to enquire whether they are "placed on the proper shore of the Nith, or in an in-"land bay of the Solway, through which, at low water, "the Nith flows;" but he concludes, "but I am not "permitted, by the verdict, to go into that enquiry." Now, that is just what I lament, that we cannot do—the verdict has said the bounds of the river Nith cover the place in question;—then, if that place is not within the Solway, the case is concluded. Lord Corehouse says, if it was not concluded, I would give you my opinion upon that which, to my humble judgment, it clearly appears to have been. Then Lord Fullerton's observations upon the water of the Solway I really do not understand, for his lordship speaks of the water of the Solway as distinct from the Frith of the Solway. But then I come to an argument, which does appear to me to have escaped the attention of their Lordships in a great degree. Lord Fullerton glances at it, but only in that part of his note which is impeached of accuracy,

that the Solway is to be considered as extending up no farther inland than the outside of the fauces terræ, to use Lord Hale's expression in his treatise de portibus maris. But if the Solway does not come within them, nor interfere with them, what use was there in the words "except the streams and weirs in the Solway water?" It is clear it was unnecessary to except the Solway deep sea, for the law did not apply to that at all; therefore, unless it meant that the Solway water was that part of the frith that comes a little towards the river Nith on the Scotch side, and the Esk and Annan on the other, I am not prepared to say that I can understand any sensible meaning in that branch of the statute. The Esk and Annan would not be within the branch of the statute, for it is a Scotch act, and the legislature of Scotland had no jurisdiction over England. Last of all, I have to remark upon the prayer of the appellants at your Lordships' bar; they say, upon these grounds we claim to have the interlocutor appealed from reversed or altered, or such other relief as to your Lordships may seem meet,—a general prayer. It is impossible we can alter or reverse the interlocutor, because there is no evidence on which we can decide in favour of the defender as against the pursuer. The only question is, whether we can, after what has passed,—what the parties have admitted, (that which is admitted, if taken in one sense, putting the defender out of court, or, in another sense, meaning nothing,)—whether we can remit, for the purpose of taking further evidence. With respect to remitting, for the purpose of further investigation, independent of all other objections, there may be this, that we are not entitled to do that, after parties have bound and concluded themselves, and shut us out from further

OSWALD and others v. M'WHIR.

13th Apr. 1835.

enquiry. That may be one objection; but on the other hand, if pressed by the force of that objection, we take the opposite course, and conclude that the Court below was right in coming to that judgment unanimously as they have done, in favour of the pursuer, then we are in this difficulty, that if we are to construe these words in the only way in which they can bear a construction which does not impute the next thing to insanity to the adviser of the defender, namely, that under cover of referring something to the Court he admitted himself out of court, then we see that the Court below have come to a conclusion of fact, and merely of fact. They have not a tittle of evidence; and if "within the bounds of "the Nith" does not mean "without the Solway," it means nothing; and we are called upon to affirm a mere conclusion of fact, made by the Court below, without any evidence to show us that we ought to affirm it. My Lords, I have stated these as the difficulties which occur to me. I wish to state them fully in the presence of the counsel, that they may see the grounds on which I feel it impossible in this case, at the present moment, to advise your Lordships to come to a conclusion, and I shall take time to consider whether I can or not get rid of these difficulties. It is a very trifling question, compared with the expence laid out upon it. I dare say the fee simple of a fishery, probably a much better fishery, might have been bought for half the money which has been spent. The litigation has been going on five years; and I should be very loth to find that I must come to a conclusion which should occasion a litigation of five years longer. It is very possible I may find my way out of these difficulties, but I cannot say that I can at present.

The case having stood over,

OSWALD and others *v.* M'WHIR.

13th Apr. 1835.

LORD BROUGHAM said:—My Lords, this case is of some importance as to proceedings connected with trial by jury in Scotland, unfortunately of very much less importance in any other point of view; for very inconsiderable is the value of the stake which has created so much litigation, and which, owing to the mistakes committed in two of its stages below, must yet occasion more. The pursuer and respondent is the owner of a certain fishery on the river Nith, which he has enjoyed by fishing with net and coble; and the appellants and defenders being owners of lands below that fishery, and on the same river, have for many years exercised fishing there by stake-nets. The respondent having obtained an interdict ex parte, or in absence, to restrain the appellants from continuing this stake-net fishing, as is said, only until the 26th of November 1816, the latter has, notwithstanding, continued to fish as before, though they say they only did so after the expiration of the interdict on that day. The action of declarator was brought by the respondent, proceeding on these facts, and concluding to have his own rights declared and the appellants perpetually restrained, and for damages for the fishing already carried on by him. A considerable number of averments and denials as well as allegations in point of law, having been made by condescendence and answers and other pleadings, it very plainly appeared that the whole question between the parties turned upon this,—whether or not the appellants' fishery was upon ground within the bounds of the water of Solway; for the act 1563, cap. 68, contains provisions "that the act be in no way extended "to the cruives and yairis being upon the waters of "Solway." Now, this being the question, the Court directed three issues to be tried, which were by no

OSWALD and others v. M'WHIR.

13th Apr. 1835.

means happily framed for deciding that matter. They were all in the same words, relating to the different parties, so that we need only direct our attention to the one touching the appellant Mr. Oswald. It was framed thus:—" Whether, during the years 1822 and " 1824, or either of them, in the river Nith, or on the " sands and shoals within the bounds thereof, where " the water ebbs and flows, the defender Richard Alex- " ander Oswald, or John Pagan of Littlebar his tenant, " wrongfully erected or caused to be erected, or from " 1822 to April 1825, or during any part of the same " period, wrongfully used or caused to be used, for the " purpose of catching salmon, certain stake-nets or other " fixed engines, to the loss, injury, and damage of the " pursuer?" Now, there is one most obvious and fatal defect in this issue, beside other inaccuracies, the question being, whether the stake-nets were erected and used within the Solway waters or not? The issue is, whether they were erected within the river Nith or on the sands within its bounds, where the water ebbs and flows? but it is quite possible that the ground within the bounds of the Nith, and over which the tide comes, may be also within the waters of Solway, for nothing can be more indefinite than the description of " in a certain " river," or " on the shoals within its bounds," it being quite impossible to tell without more what are a river's bounds, and the whole argument here relating to the bounds of the Solway waters. Again, the issue is, whether Mr. Oswald wrongfully used the stake-nets? but that involves the whole question of right, and the point of the nets being used in or out of the Solway; so the issue is, whether Mr. Oswald used the nets to the injury as well as damage of the pursuer and respon-

dent; and that again involves the whole question of right, for the damage would be absque injuriâ, or not, according as the nets were used within the Solway waters or without. It is therefore quite plain that the issue ought to have been framed thus:—" Whether the defender " or his tenant erected or caused to be erected," (a very useless addition, however, " erected" being quite enough,) " or used or caused to be used," (equally useless,) " for the purpose of catching salmon, any stake-nets or " other fixed engines within the waters of Solway to the " damage of the pursuer?" Had such an issue been directed I question if the subsequent errors which encumber this case could have been committed. However, the issues directed by the Court came on to be tried in April 1830 at Dumfries Circuit Court, when it most unfortunately was supposed by the Court and the parties that this was a question of law, and accordingly the jury was by consent discharged and a special Case agreed upon, it being settled that the Court should pronounce judgment upon the facts in that Case as if it were a special verdict. Here I must stop to remark upon the extraordinary circumstance of the Circuit Court and the parties attending it supposing that there was no issue of fact to try, when the Court above had actually directed the trial of the issues. The Court of Session, at least the Lord Ordinary, had under the power of the Judicature Act remitted to the Jury Court, where the issue was framed: the interlocutor directing the trial of course proceeding upon the ground of there being a question of fact to try, namely, the local situation of the fishery in question. This is no question of law, but as strictly and as plainly a question of fact as any one's imagination can conceive; yet the Circuit Court, immediately on the

OSWALD and others v. M'WHIR.

13th Apr. 1835.

trial being called on, decides that it is a question of law; in other words, decides that the Court of Session did not know what it was about, and that it had sent a point of law to be tried by a jury. It is quite true that the insertion of the terms "wrongfully" and "injury" in the issue gave much colour to this opinion of the Circuit Court. Nevertheless, I cannot help thinking that it would have been far better to try the cause as a question of fact, paying due regard to the two words most preposterously added. The judge, in that case, would have been called upon to direct the jury in point of law, and he would then have been obliged to look to the act 1563, cap. 68. Hence he must have told the jury, that though the fishery was in the Nith, or within its bounds, unless it was also without the bounds of the Solway water, it was not wrongfully used; also, that if it were within the bounds of the Nith, and not in the Solway, it might still be wrongfully used. The frame of the issue made it perhaps difficult to deal with; it opened a wide door for error and miscarriage. Still I conceive that the trial might have been had. If, indeed, the real question had been put to the jury by the issue,—namely, in or out of the Solway, without any such absurd words as "wrongfully" or "injury," no difficulty at all could have arisen. But the special Case, or, as it is called, the statement of facts, was prepared and signed by both parties; and as it was to enable the Court to dispose of the supposed question of law, we might have expected all the facts to appear upon it, which were necessary for leading to a decision, by raising the question of law; yet it will be extremely difficult for any one to find what question of law is raised upon this special Case. There is indeed none; for the only position of law involved in the whole

'case is one upon which both parties are quite agreed, viz., that the fisheries in the Solway waters are exempt from the operations of the act. Accordingly, the Court is called upon to decide not any question of law, but one of fact merely, viz., Whether the fishery of Mr. Oswald is in or out of the Solway?—and this is the very question which ought to have been sent for trial to the jury. Thus, the Court having sent a wrong issue of fact, viz., not "in or out of the Solway," but "in or out of the "Nith," a verdict is returned, which leaves the Court itself to decide as matter of law what should have been tried as matter of fact. Instead of asking the jury the plain question, Is or not the fishery in the Solway? they ask the question, Is it or not in the Nith? An answer is returned to this effect: "The fishery is in the Nith; and "we leave you to say whether or not, in point of law, it is "in the Solway?" What should we have said here of this kind of proceeding? The question arises, whether Blackacre is or is not properly situated in the parish of Dale? To determine this, the Court directs an action to try whether Blackacre is or is not properly in the parish of Swale; and there is a special verdict returned that it is in Swale, but leaving it to the Court to say whether it may not be still properly in the parish of Dale. The error was mainly in the frame of the issue, which gave some colour for saying a matter of law had been involved in the issue, by the use of such words as "wrongfully," and "injuriously." But it appears to me that an unfortunate course was taken, by refusing to try this under the kind of direction which I before adverted to, which would substantially have raised the true question, confused and obscured by the frame of the issue. The Case, however, is prepared; and we should

OSWALD and others v. M'WHIR.

13th Apr. 1835.

at least then hope to find facts stated which might enable the Court to decide the question referred to it, of "Sol- "way waters or not." For in no conceivable way could the Circuit Court imagine that any thing was left for the Court above except by supposing that they, the Jury Court, had to state particulars, from which the Court above should deduce the conclusion that the fishing was in or out of Solway water. No such thing, however, is to be found in the Case substituted for a special verdict; on the contrary, we find only a statement of that which leaves us just as incapable of solving the question, as when that question was sent, or supposed to be sent, for trial. It first states, that the defenders (appellants) did use stake-nets, which would be illegal, if it were not for the exception of the Solway water in the statute 1563, that is to say, if those nets were out of the Solway water. It thus states in terms, that the whole question is, whether Mr. Oswald's fishing-ground is in or out of the Solway. It proceeds to state, that the nets are above the junction of the Nith and the Solway Frith at low water, which they may obviously be and yet be in the Solway; and it adds, that they are not in the fresh water, but in the places uncovered by the ebb of the sea, and covered by the flow, and are within the bounds of the Nith, unfortunately using the very words of the issue, on which I have already remarked that they leave the matter quite undetermined, because the nets may be within within the bounds of the Nith, and yet not without those of the Solway; and the Case says not one word of what are the bounds of the Nith and Solway. The Case then states, that the question left for the Court is, whether the nets are within the exception or not, — that is, within the

Solway or not; and if the Court shall be of opinion that they are not, then that a line, which is described, shall be drawn, and the defenders restrained from fishing within that line. If the statement had been that this line is the Solway boundary, there could have been no doubt as to the fact in dispute, but this is the matter left to the Court. The statement agreed to be taken as a special verdict is this,—that the nets are in a certain place, without finding that this place is in or out of the Solway; that the Court is to say, whether this place be in or out of it; and if it holds the place out of the Solway, then that the Solway's boundary is the described line. Three remarks are obvious upon this statement or finding:—First, That as calling a question matter of law does not make it such, so stating that the Court is to determine if a certain place be within the exception of the act or not by no means makes this a question of construction; for the place being within or without the exception depends solely upon its being within or without the Solway; consequently, that question of mere fact and boundary is left to the Court. Secondly, That the line which is to be drawn by the Court only, after it shall have decided the questions, is exactly the decision of that question; and consequently the statement tells the Court, as far as the case before them is concerned, that the Court must determine the question, aye or no; and that if it determines it aye, it decides in the affirmative, the truth of which no man will dispute, any more than he will doubt the entire worthlessness of the information. Thirdly, That the facts stated, or pretended to be stated, and on which the Court is called to draw a conclusion merely of fact, are wholly incapable of leading to any conclusion at all, unless we supply what is not to be

OSWALD and others v. M'WHIR.

13th Apr. 1835.

found in any way stated, viz., that the bounds of the Nith and Solway in no way interfere, and that whatever is within the Nith's bounds is without the Solway's. If, indeed, we do supply this, the case is abundantly clear; but, then, it is a statement not enabling the Court to determine, but itself determining the whole matter in dispute; for it is not only in substance, but it is in terms, a finding for the pursuer; it is a distinct statement that the locus in quo is not in Solway. Now, we are not at liberty to supply any such statement; and for two obvious reasons: first, no party in his senses could in terms admit his case to be wrong by admitting the very point, and the only point in dispute, to be against him, and that in the very statement upon which he is content to have the whole matter argued; and, secondly, the reference of the question to the Court, viz., whether the locus in quo is in the Solway or not, and the addition, that if the Court shall decide, and only if the Court shall decide in the negative, then the boundary line shall be such as to exclude the locus in quo, clearly shows that there is no kind of assumption made like that which I have spoken of supplying. Therefore we must take the statement as it is, supplying nothing at all; and then the parties or jury (by agreement) have left the fact just where they found it, by only telling us in answer to the question, "Is the locus in quo within the Solway or "without?"—that it is within the Nith; and not telling us whether the Nith and Solway are separate; and, therefore, not enabling us to say how far a place may be both within the bounds of the Nith and those of the Solway. Such was the case with which the Court below had to deal. They had sent to be tried an issue of fact; and instead of trying it, the Jury Court sent them back an intimation,

that it was an issue of law, which they, the Court of Session, were required to decide. Then it appears that the question left for the decision of their Lordships is a pure question of fact; and I should doubt, had the matter rested here, whether, in the circumstances of an issue having already been sent for trial by a jury, the Court ought to have touched the case returned at all. I incline to think that their Lordships should have said, "This is "still a mere question of fact, and therefore you, the "jury, must try it yourselves." For observe how, by collusion, as it were (and I use the word without any offence), the parties and the Jury Court may defeat every trial of an issue, and send all facts to be decided by the Court. This might have been my opinion, even if, by the admissions of parties, facts and circumstances had been stated sufficient to enable the Court to draw a conclusion of fact from those admissions; but it is unnecessary to go into that part of the statement. The special verdict here contains nothing which could enable the Court to draw that inference in point of fact; it leaves the question exactly where it originally stood; and the Court of Session is exactly in the state of information upon the facts, after the return or verdict, in which it was before the jury trial, and which rendered an issue necessary for its information. I have already fully explained how this is, and proved that the special Case or verdict, by saying nothing of the Solway's boundary, leaves the whole question as it stood on the face of the issue. In my humble opinion, much of this confusion and miscarriage arose from the inartificial and erroneous frame of the issue, which raised a question not as to the Solway, but the Nith, and only let in the question really in dispute as to the boundary of the Solway by the introduction

OSWALD and others v. M'WHIR.

13th Apr. 1835.

of the words "wrongfully" and "injury,"—words tending by implication to raise the point which should have been plainly and distinctly raised in terms, viz., whether or not the locus in quo was within the exception of the statute, that is, within the Solway water's boundary. The Court below did not take this view of the case, but proceeded to dispose of the question. Immediately, however, their Lordships found the difficulty in which they were involved, by the want of materials in the special Case on which to form their opinion; and all their efforts, of course, were unable to extricate them from the difficulty, because they could not discover the findings of fact necessary for the determination of the question. They only, as I think, arrive at their conclusion in the respondent's favour by supposing what is clearly not in the statement; and is, for the reasons I have given, to be held as wholly excluded from that statement, namely, that within the boundary of the Nith means beyond the boundary of the Solway; in other words, that the appellant admitted in terms that his fishing was out of the Solway, being the only matter in dispute, in which case there could have been no question for the Court, either of law or of fact, to determine. The party would have signed a judgment against himself. One of the learned judges, indeed, introduces a new view of the case, by supposing as a fact that the water of Solway means something different from the Frith of Solway; but I can see no warrant for this, because it is quite certain that there is no such thing in the finding or special Case; and no man ever heard of the proper name of Solway, except as designating the frith or arm of the sea, there being no river of that name. "Water of Solway" must, as I apprehend, be taken to mean that part of the Solway

Frith which is within the bounds of the fresh water that flows into it; I can give it no other meaning. All this appears entirely a question of fact: it is a mere question of boundary, of the boundaries of a fishery, and whether or not it is within the water of Solway. After all the facts are found or agreed upon, and among others, whatever facts relate to the name "Water of Solway," it is barely possible that the Court may still have to determine whether the locus in quo is in the district which the proviso in the statute denominates the Water of Solway; but this will then be purely a question of construction, which at present it is not; or at least at present there are no materials in fact on which the Court can deal with it as a matter of construction. Thus, it is possible that evidence may be given of the name Water of Solway having in all times past been used to denote one known portion of the Solway Frith, or the fresh water neighbourhood bordering upon and adjoining to the frith. That would at once dispose of the case as a boundary question; but other circumstances short of such evidence may also be found to enable the Court consistently and clearly to say whether the locus in quo is in the Solway or not. All that relates to the neighbourhood, and to the name, and to the sea, and to the river, may be examined with advantage to the ascertaining of the point, Does or Does not the locus in quo lie within the Solway water? I therefore think that the cause must be remitted, with directions to try the issue, framed as I have already stated,—"Whether or not the defenders did fish sal-
"mon by stake-nets or other fixed engines, or erect or
"use such nets or engines for the purpose of fishing
"salmon within the waters of the Solway, to the

OSWALD and others v. M'WHIR.

13th Apr. 1835.

" damage of the pursuers?" If any finding on the Nith is deemed desirable by the Court then there may be retained the first of the present issues, striking out the words " wrongfully," " or caused to be erected," " or " caused to be used," " loss," and " injury;" " caused " to be" is unnecessary; if a man causes a certain thing to be done, in law he does that thing. But then two other issues must be added, in these words: — " 2. Whether the stake-nets, or other engines, if any, " erected or used by the defenders for fishing salmon, " were within the water of the Solway? 3. Whether " the place on which the stake-nets, or other engines, " if any, erected or used for fishing salmon by the de- " fenders, being within the bounds of the Nith, was " within or without the bounds of the water of Sol- " way?" That this House can remit for the purpose of having another issue tried is clear. Your Lordships did so in the great case of Duff v. Fife, I believe more than once—once I know—and seven issues having been before tried, which, putting all the evidence in issue, had failed to produce a verdict of any use, one comprehensive issue in the nature of a Devisavit vel non was substituted in their place by this house: nor does the admission and consent of the parties here at all limit our power to do so. For if parties can only agree on admissions, which leave the matter of fact just as much in dispute as before the trial or proceeding commenced, we have no course left but to require either further admissions, or the verdict of a jury, which shall find the necessary facts. The Court below have, from the necessity of the case in which the imperfect verdict had placed them, drawn a conclusion of fact upon data which give us no means of determining whether they were right or

wrong; they may have been right, but we cannot say so. The Judicature Act, 6th Geo. 4, cap. 120, provides, in the 33d section, for the case of admissions by the parties, which shall preclude the trial of an issue framed and settled; but it gives no power to the Jury Court, as I read the enactment, even with consent of the parties, to hold the whole issue a question of law, and send it back to the Court of Session in the state in which it was sent down by that Court for trial. It only enables the parties, by admissions of fact, to preclude the necessity of trial. The section excludes all review by appeal, but in one only event, and in one only kind of question arising:—in case the parties shall differ on the matters of fact, but agree that a preliminary matter of law should be decided before the trial of the issue, or in case one party requires this, the other resisting it, then this previous determination being obtained shall not be appealable; otherwise indeed the trial must be stopped. I have gone more at length into this case, because the decision below was unanimously pronounced; and, consistently with that profound respect for the learned judges, which, in common with your Lordships, I always must feel, I was bound to justify my differing in opinion with them. It is very possible that the further inquiry may fail to show facts sufficient to justify either the jury in drawing a clear and satisfactory inference in point of fact, or the Court in deciding satisfactorily an inference of law. This is a fate by no means peculiar to the present question; but the regularity of our proceedings in jury trials seemed to require the course which I have ventured to recommend, and which I now move your Lordships to take.

OSWALD and others *v.* M'WHIR.

13th Apr. 1835.

The House of Lords declared, "That it is the opinion of this House that the "Statement of Facts" in the pleadings in this cause mentioned as having been submitted to the Court for their judgment thereon, does not furnish a sufficient ground for the judgment of the Court upon the question in this case, and that there ought to be a further trial before a jury upon another issue; and therefore it is ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed: And it is further ordered, that the cause be remitted back to the Second Division of the said Court of Session, in order that their lordships may direct another trial before a jury upon the following issue; that is to say, Whether the places in which, during the years 1822, 1824, and 1825, stake nets or other fixed machinery were placed and used for fishing salmon by the defender Richard Alexander Oswald, and the other defenders respectively, or their respective tenants, are within the water of Solway? And it is further ordered, that the defenders respectively in the action in the Court below be pursuers in the trial of the said issue: And it is further ordered, that the before-mentioned "Statement of Facts" is not to be used or founded on by either party as any evidence or admission of any fact therein alleged: And it is further ordered, that the said Court of Session do and shall make such orders and give such directions relative to the costs already paid or ordered to be paid by any of the parties in this cause as to such Court shall seem meet, and do further proceed in the said cause in such manner as shall be just and consistent with this judgment.

MACDOUGAL and BAINBRIDGE — SPOTTISWOODE and ROBERTSON, — Solicitors.