[Heard 25*th July*, 1843. Judgment, 5*th September*, 1844.]

HUGH ROSS, of Cromarty, Esq., *Appellant.*

HIS GRACE GEORGE GRANVILLE, DUKE AND EARL OF SUTHERLAND, *Respondent.*

Salmon Fishing.—Held that the prohibitions of the statutes in regard to the use of stake nets, is not limited to the space between where the sea reaches at highest flood, and where it reaches at lowest ebb, as an inflexible rule, but that the space is in each case to be ascertained by evidence of the character of the waters, as contrasted with the terms used in the statutes.

THE respondent was proprietor of lands lying on the water or kyle of Dornoch, and of lands lying on the River Shinn, which falls into the Water of Dornoch, and he was also proprietor of extensive salmon fishings, *ex adverso* of his lands. The appellant, on the other hand, was proprietor of the lands of Cambuscurry and Tarlogie, also lying on the Water of Dornoch, "cum lie "zair et salmonum piscationibus earundem." Some of the lands were described in his titles as bounded "mare ex boreali," and others were granted with the power of fishing "in mare marisque "littore seu acquis infra et prope bondas dict terrarum."

The Water of Dornoch, at the height of flood tide, presents the appearance of an extensive estuary, or branch of the sea stretching many miles up the country, into which the River Oykell discharges itself. The influence of the tide at high water of the highest spring tide, in retarding the waters of the River Oykell, is felt as far up that river as a point called Castle Nekore. The lowest ebb of the spring tide is, on the other hand, at a point called Quarry Rock, about thirteen miles below Castle Nekore. Between these two points four streams discharge their waters. At ebb tide, the breadth of water a little above Quarry Rock, and

all below it, is very much contracted, extensive tracts of land on either side being left uncovered by water. At the full of flood, if the line of coast, as it trends from the north, were continued straight southwards, the mouth of the estuary, taking it at this line, would be of considerable breadth, but when the tide retires, and the land is thus left bare, the mouth of the estuary, taking it at the line before mentioned, is comparatively narrow, the land forming distinct *fauces*; this is at a point called Gizzen Briggs. Within that point, even at low tide, the water opens up in breadth to a considerable extent in some places, though, in most, it is much narrower than at flood tide.

The appellant, in the year 1841, set about fixing stake-nets in the Water of Dornoch, at a point called Meikle Ferry, about eight miles below Quarry Rock. The respondent complained of this proceeding, by suspension and interdict, on the ground that the nets were being placed within an estuary, or river, and within the limits prohibited by the statutes, in regard to salmon fishing.

The appellant pleaded in answer as follows:—

"I. According to the true construction and effect of the "ancient statutes, founded on by the suspender, the prohibitions "thereof cannot be held to operate lower down than the point or "line where the fresh waters, descending from the upper streams, "meet the salt water of the sea in the Frith of Dornoch, at the "lowest point of ebb tide, below which line, stake-nets and all "other engines being in the sea are lawful.

"II. The stake-nets in question being situated below the said "line in the Frith of Dornoch, are in the sea, and therefore not "struck at by any of the statutory prohibitions; and the sus-"pender not having averred that the same are above the said line, "has not stated any relevant ground of suspension and interdict.

"III. *Separatim.* Under the terms of the respondent's titles, "and having regard to the circumstances and evidence before "averred and set forth, he is entitled to erect and use yairs, stake-

" nets, or other fixed machinery, for the catching and killing of " salmon in the Frith of Dornoch, opposite to his lands before " specified, in respect that the said frith is not a locality to which " the prohibitions of the statutes against fixed machinery, are in " any way applicable."

The cause was remitted for trial by jury, upon an issue framed in these terms. Whether the defender has wrongfully " fished for salmon opposite to his lands of Cambuscurry, Tarlogie, " and others, in the year 1841 and 1842, or either of them, by " means of stake-nets, or other fixed machinery, placed in a situ- " ation or situations prohibited by statute."

Evidence was led by both parties, to shew what was the nature of the water within Gizzen Briggs, whether sea proper, or river and estuary. That for the appellant went to shew that from the nature of the bottom, and the deposits on it, the animals and vegetable substances found, and the specific gravity of the water, the sea proper extended above Meikle Ferry; while the evidence for the respondent went to establish, from the same circumstances, that the sea proper ended at Gizzen Briggs. No evidence was led on either side as to the effect of the statements in question upon the salmon or their fry.

The Judge at the trial charged the jury in these terms. " The " defender contends, that according to the legal construction of " the statutes referred to in the issue, the only range of space, or " of water to which their terms can be applicable, is the space " between the point to which the sea flows at flood tide, and the " point to which, in any particular water, the tide recedes at low " water in lowest spring tide,—where low water turns in short,— " that the limit described in the statutes extends no farther sea- " ward than the point to which the tide withdraws itself at lowest " ebb tide. That all the water in the estuary, or frith below this " point, wherever that may be, in any particular frith or estuary, " is, according to the sound construction of the terms of the sta- " tute, exempted from the prohibitions, and is sea under these

" statutes, whether other facts would lead the Jury to hold the " place to be in the sea or not. That this is the test, and the " only test for deciding in all cases, whether stake-nets are in " places prohibited by the statute, without reference to, or even " in opposition to, all other facts which might lead to the conclu- " sion that the place where they are situated is not, in point of " fact, the sea, and has no character whatever of a sea coast: " and that, if it is ascertained that the stake-nets are placed in " any particular water below this point, this test is to decide the " question embraced in the issue, and the stake-nets must in law " be held to be out of the operation of the statutes, and in the sea " in the sense of the statutes.

" I am not able to sanction that proposition, or to put on " the statutes the construction contended for by the defender. I " hold that the decisions of the Court have fixed, that the question " to be tried is one to be decided upon all the facts which can be " collected in each case, in order to satisfy the Court or the Jury, " (whichever has to decide the point,) whether the position of the " stake-nets is, in point of fact, in the sea proper, contradistin- " guished from the space described in the statutes; and that the " question, what is the sea and the sea coast, and so not within " the statutes, is an enquiry of fact on the whole case, and not one " to be decided according to any legal view which is to be taken " of what is sea by the force of any one test afforded by the " statutes: and I hold that it is competent and necessary to " attend to all the evidence which can satisfy the Jury, on the " other hand, that the position of the stake-nets is not within the " sea, or on sea coast, but, in point of fact, in waters, or on sands " by the sides of water, in which, according to the real facts of " each case, the sea ebbs and flows, or fills and ebbs. I hold that " the Court or Jury are at liberty, and bound to look to every " fact which can satisfy them, whether the place is really within " the sea, according to the common apprehension of mankind, and " according to all the appearances, facts, and observations,

" results which can be collected on that point, or whether the " place is within a water fresh or salt, in which the sea fills and " ebbs—comes and gangs. I think that this is the clear result of " previous decisions, and I think it is the legal and sound con- " struction of the statutes.

" Hence then, when the defender pleads to me that in point " of law I must direct you that there is one test, which is in " every case to decide how far up the sea goes, without reference " to any other fact, viz., to the point at which at low water the " flow of the tide in each estuary turns, I am bound in duty to " tell you that such is not the test under these statutes, and that " such construction would exclude in most cases, the greater " portion of the space comprehended within the legal meaning of " the statutes."

The appellant excepted to this charge, and maintained that the Judge should have laid down to the Jury that, " according to " the true construction and effect of the statutes referred to, the " prohibitions thereof cannot be held to operate lower down than " the point or line where the fresh waters descending from the " upper streams, meet the salt water of the sea in the said frith, " at the lowest ebb tide, below which line stake-nets, and all " other engines being in the sea, are lawful."

The Jury returned a verdict for the pursuer (*respondent*), with power to the Court to enter up the verdict for the defender (*appellant*) if the direction excepted to should be found to be wrong.

The Court, (*2nd division*,) by an interlocutor of 9th February, 1843, disallowed the Bill of Exceptions. The appeal was against this interlocutor.

The statutes to which the appellant referred in his pleas in law, and in his Bill of Exceptions, are various. The first is 1318, cap. 12, which ordains that all those who have " croas vel pisca- " rias, vel stagna, aut molendina, in aquis ubi ascendit mare et " se retrahit, et ubi salmunculi vel smolti seu fria alterius generis

" piscium maris vel aquæ dulcis, descendunt et ascendunt," shall make these machines of prescribed dimensions.

The next statute is 1424, cap. 12, which ordains that all crufis shall be destroyed for three years, and that those who have " crufis in freshe wateris," shall keep the law anent Saturday slop.

The Act 1427, cap. 6, continues the statute for destroying " crufis in waters that fills and ebbs" for three years.

The Act 1469, cap. 13, " For the multiplication of fish " salmond," &c., which are said to be destroyed by " coupes" and other engines mentioned as being set within " the flude marke " of the sea," directs that all these engines shall be destroyed.

The Act 1488, cap. 16, ordains that all " cruffis and fisch " dammys that ar within salt waterys quhar the sey ebbis and " flowis," shall be destroyed.

The Act 1563, cap. 3, ratifies the Act of James I., 1424, cap. 12, with this addition, " That all cruves and zaires that are " set of late upon sand and schaulds, far within the water, quhair " they were not of before, that they bee incontinente tane down " and put away, and the remanent cruves that ar set and put " upon the water sandes, to stand still quhil the first day of " October nixt-to-cum, and incontinent after the said first day to " be destroyed and put away for ever."

The Act 1685, cap. 24, enacts that " no man set vessels, &c. " or any other engine to hinder smolts from going to the sea, and " that coupes, &c., set on waters that has course to the sea, be " destroyed."

Mr. Solicitor General and *Mr. Pemberton Leigh*, for the appellant.—The great object of the Legislature in the different statutes, was not the protection of the upper heritors against the lower monopolising the fish, but the protection of the salmon fry, and allowing them free passage between the fresh and salt water, for the increase of the fishing generally. To make the statutes apply, therefore, it must be shown that this object will be defeated

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by the erection complained of. If the fry would be intercepted by the stake-nets of the appellant, this would go far to shew that the nets were within the prohibited limit, and this would be an important element for the consideration of the Jury, in determining what under the statutes were the limits; but this consideration was altogether withheld from the Jury by the presiding Judge.

Upon the terms of the statute, it is evident from the nature of the machines mentioned in the Act 1318, cap. 12, that it could not have been intended to prohibit their use in the sea or estuaries, as their form is not capable of being used in either, but only in rivers. This is further shewn by the terms "*acquis*," being used as contradistinguished from "*mare*." The prohibition, moreover, is extended to places "ubi salmunculi," &c., "descendunt et ascendunt," and the object is "*ita quod nulla fria piscium impediatur ascendendo vel descendendo secundum quod libere possint ascendere et descendere ubique*," and it is well known that the term ascending and descending of salmon fry is applicable only to their movements while in fresh waters. The limits therefore to which the prohibition of this statute is intended to apply, are those parts of rivers affected by the flowing and receding of the tide, their upper parts, where the influence of the tide is not felt, being excluded on the one hand, and on the other hand all below or beyond the lowest ebb tide, being equally excluded, as beyond that the sea never "se retrahit." If these limits be adopted, as those intended by the statute, they are easily ascertained in every case. If they are not, then each case must depend upon its own circumstances, and no sure rule can be laid down by which the application of the statute can be ascertained.

The Act 1424, cap. 12, evidently refers to the Act 1318, cap. 12, and by the expressions, "fresche wateris quhar the see fillis and ebbis," cannot possibly refer to the sea, or to any thing but estuaries, or that part of rivers where the sea ascends, and afterwards retires.

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The Act 1469, cap. 13, prohibits the use of certain engines in "rivers that has course to the sea, or within the flude mark of "the sea," which latter words were, in the Kintore case, 4 *S.* & *D.* 641, held not to apply to the open coast, but to the point to which the tide flows within rivers. This statute therefore shews that the prohibition of the Legislature was not extended to sea proper.

The Act 1477, cap. 6, applies only to cruives, which in their construction are quite distinct from stake-nets; that Act therefore cannot have application.

With regard to the Act 1488, cap. 16, as the engine, the use of which is there prohibited, cannot be used in a position below the low-water mark, inasmuch as a mound right across is necessary it is evident that it also is not applicable, and that the words salt waters, where the sea ebbs and flows, were used merely to distinguish between the upper parts where the tide has no influence, and the lower parts where it has influence.

The Act 1563, cap. 3, in using the terms "salt waters that ebbs and flows," leaves the matter just where it was, as was held in the Kintore case; for these words, if construed strictly, would embrace the whole sea, whereas the intention seems, but for a clerical error in transcribing the Act 1488, to have been to adopt the terms there used, "salt waters, where the sea ebbs and flows."

The Act 1685, cap. 24, does not prohibit any thing being done *in* the sea, but in waters that have course *to* the sea.

But even if the interpretation contended for by the appellant is not the correct one, still the charge of the Judge is liable to exception, inasmuch as it not only does not lay down any fixed definite rule by which the Jury could be guided, but is calculated to mislead them by using expressions as to the sea "coming and "ganging," which were not in the statutes, and by using other words which by plain inference excluded from their consideration any idea of the necessary proximity or influence of a river, and

would embrace every bay, loch, or frith, by which any part of the coast of Scotland is indented.

Not only is the position maintained by the appellant supported by reason and expediency, but it is also borne out by the authority of decided cases. In Moray *v.* Gordon, mentioned by Lord Kaimes, in reporting the case of Straiton *v.* Fullerton, which is in *Mor.* 12,797, it was held that the *ostium fluminis* comprehended the space between the lowest ebb and the highest flood mark; in other words, that the boundary between sea and river was the line of the lowest ebb. In Kintore *v.* Forbes, 3 *W.* & *Sh.*, 265, it was held that the prohibitions of the statutes did not apply to the sea coast, but were applicable "to rivers, "and to rivers only, and to continuations of rivers;" and in Horne *v.* Mackenzie, *McL.* & *Rob.* 977, the Lord Chancellor, (*Cottenham*,) at reversing the judgment of the Court below, distinctly, and in terms laid down, that the waters mentioned in the Statute 1318, were distinct from the sea, and must "also be above "the level of the sea, at least at low water," so that the sea might be said *to rise* in them, and the fish leaving the sea *to ascend*.

In the Tay case, the decision of the Court proceeded upon the fact of the titles of the parties speaking of the river as far down as the Drumly Sands, and of the Act 1581, cap. 15, speaking of the Tay as a river as far down as the town of Dundee. In the present case, the titles of the parties speak of the water in contest as being sea—the lands are described as bounded by the sea. Another element in the Tay case, was the absence of yairs within the limits in question, whereas in the present case yairs have been in use from time immemorial, within the water of Dornoch. In short, that case was decided entirely upon its own specialties, and did not establish any general principle. Indeed, it is all but doubtful whether the point of lowest ebb now contended for, was raised and brought before the attention of the Court.

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Mr. Kelly and *Mr. Hope*, for the Respondent.—If the point at which the prohibited localities terminate, is to be taken as at where the waters of the river meet those of the sea at lowest ebb, that is a point certainly which, though not obvious to the senses, can be ascertained by the efforts of modern science; but the means for ascertaining it were not known at the time at which the statutes were enacted, it could not therefore have been in the contemplation of the Legislature; though always existing as a matter of fact, as a matter of knowledge it did not exist until modern times. If this point were adopted, it would in practice very much limit, in most instances, the space over which the protection of the statutes could extend, and would produce serious effects upon salmon fishing generally, especially in those cases where a sudden rise should occur in the level of the bed above the point suggested. But it is evident, from a due construction of the statutes, that no such limit is fixed by them.

The Act 1318 does not refer to proper fresh water rivers, because it speaks of the sea ascending and descending; and as little does it refer to sea proper, because the sea does not flow into waters, but upon the coast. The description refers then to localities where there is both sea and river: estuaries where both exist, answer the description, and the mention of ebbing and flowing of the tide was not intended to mark the portion of each particular estuary, but the character of the waters in which the engines prohibited were not to be used. This is shown more distinctly by what is said about the fry of salmon and other fish descending and ascending; for the fry of salmon never ascend, but descend from the fresh to the salt water, and the fry of other fish never ascend beyond those parts where the fresh waters are strongly impregnated with the salt.

With regard to the Statute 1424, cap. 11, the record of which has been lost, it seems almost certain the word "fresche" before "wateris quhair the sea fillis and ebbis," was either put by mistake in the original, or is an interpolation in copying, as is evident

from the subsequent mention of "fresche wateris," which are put in direct opposition to those "quhair the sea fillis and ebbis."

This is shown more distinctly by the Act 1427, cap. 6, which continued the operation of the Act 1424, and in which the word "fresche" does not occur. There the expression is "watteris "that fillis and ebbis," which is quite irreconcileable with the notion that the part designated is confined to that affected above the line at the lowest ebb.

Again, the Act 1469, cap. 13, made perpetual by the Act 1581, prohibits the engines mentioned in it in "rivers that has "course to the sea, or within the flude marke of the sea." This certainly is not applicable to the upper parts of streams, which never have been held to be included; but with the exception of these, it is plainly applicable to every other part of a river's course, embracing every point between river proper and sea proper, every point from which the salt water is never absent even at lowest ebb, but where, nevertheless, the river can be traced working its way to the ocean.

Again, the provisions of the Act 1488, cap. 16, are directed to "salt waterys quhar the sey ebbis and flowis." Here salt waters cannot be supposed to be the sea: they evidently mean an estuary of a river, from the mouth of the estuary on the general line of the coast where the sea enters at flood tide, and covers the banks and sands on either side, for the time obliterating the features of the channel.

The expressions in the Act 1563, cap. 3, by the introduction, "sand and schauldis far within the water," and "water sandes," describe still more distinctly what in modern language is known by the single word "estuary;" they evidently imply great breadth and space of water. In this statute, as in a previous one, 1429, "the waters of Solway" are excepted; but there is no river of this name that can come under the term waters; there is only a large estuary, receiving into it a number of rivers. If, therefore, the statute applied to rivers only, this exception of the Solway

would have been unnecessary, as it would not, from its character, have come within the prohibition.

The Court below, therefore, was right, upon the terms of the statute, in holding that the Judge at the trial had correctly laid down that there was no inflexible rule such as that of where the point of lowest ebb can be ascertained, and their judgment is moreover supported by the decided cases. In Kinnoul *v.* Hunter, *Mor.* 14,301, stake-nets were prohibited at a point very far below the lowest ebb, as was ascertained by the subsequent inquiries in Atholl *v.* Maule, 5 *Dow.*, 292. In that case, (the Tay case,) "the highest point at which the sea is continually ebbing and "flowing," was minutely ascertained by the engineers employed, and recommended to the consideration of the Court. That point was stated to be the confluence of the Earn with the Tay; but the Court disregarded it, and extended the prohibition down as far as the east or seaward end of the Drumly Sands, many miles below the point. This was a judgment that the prohibitions of the statutes extended to estuaries and friths forming the continuation of rivers; and it has always been regarded as laying down the general law, and not as confined to its own *species facti*. In Carnegie *v.* Ross, 7 *S.* & *D.*, 284, the point of lowest ebb was never suggested, although in a previous case, in 1812, Carnegie *v.* Dunn, *N. R.*, in regard to the same fishings, that point had been ascertained to be far above the one in question in the case.

The position contended for is, that the prohibitions apply between the highest point to which the sea reaches at flood, and the highest point to which it reaches at lowest ebb; but at ebb tide the whole body of water between these two points is quite fresh; how can that answer then the words of the statute, "*salt* "waters, where the sea ebbs and flows."

As to the Cromarty case, it did not in any way overule or run counter to the Tay case. The judgment left the general law untouched, and was entirely addressed to the particular terms of the Judge's charge.

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The other authorities referred to by the respondent, were Fraser *v.* Duff, 5 *Sh.* & *D.* 14; Kintore *v.* Forbes, 4 *Sh.* & *D.* 641; McWhirr *v.* Oswald, 1 *Sh.* & *M'L.* 393.

Lord Chancellor.—My Lords, at the trial of this cause, three exceptions were taken to the charge of the learned Judge. The two last only have come by appeal to your Lordships.

Of these, the first is, that the learned Judge should have directed the Jury that the prohibitions in the statutes do not apply to that part of the channel which is below the point where the fresh water meets the salt water at the lowest ebb tide. This is the main question for your Lordships' decision. The river Oykell flows into an estuary bounded by banks on each side, until it reaches the open sea. It has been decided that the prohibitions of the statutes do not apply to the open sea, or its shores. It is contended, on the part of the appellant, that in cases like the present, the limit beyond which the prohibition does not extend, is the point of lowest ebb of the salt water, beyond which the sea never entirely recedes, that from this point upwards to the line of highest flood the sea flows and reflows, mingling with the fresh water during the flood, and leaving it entirely at the extreme ebb. This boundary is in some cases apparent to the eye; in all cases it may be ascertained by a proper application of science. In order to determine the correctness of this position, it will be necessary to refer to the statutes and to the decisions upon them.

The first statute is that of Robert I. It regulates the construction of machines in waters where the sea flows and reflows, —"*ubi ascendit mare et se retrahit, et ubi salmunculi vel smolti* "*seu fria alterius generis piscium maris vel aquæ dulcis descen-*" *dunt et ascendunt*," so that the fry shall not be impeded in their ascent or descent. The words of this statute have been made the subject on both sides of much refined criticism. There is nothing in this statute to confine the meaning of the word "waters" to

fresh waters, and the expression "*ubi mare ascendit et se retrahit*," means, I think only where the sea flows, and reflows, and in fact those are the very words of the rubric. The argument built on the words, "se retrahit," is, I think, too refined; the sea which ascends, does withdraw itself, although that portion which is permanent and stationary, does not. The passage relating to the fry of the fresh and salt water fish ascending and descending, would rather lead to the more extended construction.

The subsequent Acts are Acts of prohibition. The first is James I., chap. 12 (1424). By this Act all *crufis* and *yaris* set in fresh waters, where the sea fills and ebbs, which destroy the fry of all fish, are ordered to be destroyed and put away for three years to come, and they that have *crufis* in fresh waters, are warned to keep the laws of the Saturday slop, and not to suffer them to stand in the forbidden time.

The next Act, James I., chap. 6, continues the former Act for three years, omitting the word "fresh," in the description of the waters where the sea fills and ebbs, but adding words of reference "in form and effect, as was statute in the first Parliament." It is supposed by the appellant, that the word "fresh," in the Act of 1424, is a mistake in the copy, (the original has been lost,) and that word being omitted in the continuing Act, affords some ground for the conjecture, though the words of reference in the continuing Act, might have been thought to render the repetition of that word unnecessary.

The next material statute is that of James III., chap. 13 (1469). It is in these terms,—"For the multiplication of fish," &c., "which are destroyed by cowpers, narrow masses, nets, and "prynes, set into rivers that has course to the sea, or set within "the flude mark of the sea," it is ordered that they "be destroyed "and put away for three years." To this Act there is no downward limit. "In rivers that have their course to the sea," include the whole course of the river, and the words "or set within the "flood mark of the sea," would, I think, comprehend the whole space from high water mark to the open sea.

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This Act was followed by the Statute of James III. (1477), chap. 6, which re-enacts the Statute of 1424, almost in the same terms, omitting the word "fresh," as in the Act of 1427.

The Statute of James IV. (1488) is deserving of notice. It is as follows:—"It is statute and ordained that all crufis and fish "dams that are within salt waters where the sea ebbs and flows, "be absolutely destroyed and put down, as well they belonging to "our Sovereign Lord, as others through all the realm. And as "anent the cruffis in fresh waters, that they be made of sic largi- "ness, and sic days keepit, as is contained in" former statutes. It is impossible, I think, to exclude from this description, viz., the "salt waters where the sea ebbs and flows," much of what lies below the line contended for by the appellant.

The subsequent Statute of Mary (1563) leads to the same conclusion. After confirming the Act of James IV., it proceeds to direct "that all cruves and zaires that are set of late upon sand "and shoals far within the water where there were none before, "be taken down and put away, and the remaining cruves that "are set, and put upon the water-sands, stand still till the "first day of October next, and then be destroyed and put away "for ever." This description would not, I think, apply to the river above the suggested line, but it is distinctly applicable to the estuary between that line and the sea.

There is a provision in this Act, as in a former one, that it shall not extend to the cruves and zaires being upon the water of Solway. The water of Solway is an estuary, and from these provisions we must assume that the Scottish Parliament considered that, without this exception, the Act would have extended to that estuary. It seems to follow, therefore, that they meant to include that description of water in their legislation.

This brings me to the consideration of the authorities. The brief notice of the statute by the institutional writers of Scotland, does not, I think, throw any material light upon the question now in controversy. I shall proceed therefore at once

to consider the cases which have come under review in this discussion.

The most important in every respect is the Tay case, which was decided in the Court of Session, and afterwards affirmed on appeal in this House. In that case, a report was drawn up by Mr. Jardine, the object of which was to ascertain the point at and below which the tide continually ebbs and flows, in other words, the place of the lowest ebb tide. The report was commended and adopted by Professor Playfair, as the best criterion for determining where the frith ends, and the river begins. It was contended that the prohibition did not extend below that point. This opinion was adopted by one of the learned Judges, Lord Gillies. "My own impression," he says, "is that the "statutes do not apply either to the sea or to the frith, and that "the river ends at the place pointed out by Mr. Jardine." If the question had been, whether this line was in strictness, and philosophically speaking, the boundary between the river and the frith, there would be little doubt that Mr. Jardine was right, and if the Legislature intended so to confine the prohibition, the learned Judge came to the proper conclusion. But the rest of the Court did not consider this to be the true meaning of the statutes, and forming their opinion upon the whole of the evidence, they determined that the defenders had no right to place their machinery within the high water mark opposite to lands bounded by the river, frith, or water of Tay, as far down as Drumly Sands, a point far below the line so assigned by Mr. Jardine for the common boundary of the frith and river. There was no dispute as to the accuracy of Mr. Jardine's conclusion, but the Court did not consider it as the test by which the application of the statutes was to be directed. When the case came before your Lordships, the same argument was raised, but with the same result. The decision of the Court of Session was affirmed, with permission to inquire whether the river, frith, or water of Tay, did not extend further eastward than Drumly Sands.

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After this decision, I do not see how it can be contended that the learned Judge ought to have directed the Jury, that, according to the true construction of the statutes, the prohibitions thereof cannot be held to operate lower down than the line suggested. This would be to reverse the decision in the Tay case, in which it was held that the prohibition might have such an operation. If the rule were such as is contended for, all the rest of the evidence after the establishment of the position of this line, would have been wholly immaterial.

The Tay case was followed by that of Cromarty. The same question was raised upon the Bill of Exceptions, and decided by the Court unanimously, in conformity with the decision in the Tay case. On the appeal to this House, the interlocutor of the Court of Session was reversed, but upon grounds not affecting the present question.

With respect to the case of the Earl of Moray *v.* The Duke of Gordon, it does not appear to me to have a very close application to the present question. The Duke had a right of fishing *in ostio fluminis de Spey*. The Earl of Moray had the upper fishings of the river. The question was as to the upward point to which the Duke's right extended. The Court of Session decided that his right varied with the state of the tide,—that it extended to the point at which the river runs into the sea at whatever time of the tide. The House of Lords reversed this decision, and adjudged the Duke of Gordon's right to extend from the place where the line which the sea makes upon the coast cuts the river at high water down to the sea. The judgment fixes only the upward boundary of what is called the *ostium*. This was all which it was necessary to decide, as between the parties to that suit.

I do not lay much stress upon the argument that the mode of determining the boundary of rivers is a recent discovery, and requires considerable science in the application of it. If the Legislature intended to confine the prohibition strictly to rivers,

it is no objection to such an interpretation, to say that they could not with accuracy define the limits of what, under particular circumstances, constituted a river, and that a greater degree of precision has been attained by the aid of modern and more advanced science. The rule would be applied according to its more truly defined limits. I submit to your Lordships, therefore, that the first exception cannot be maintained.

Then as to the second exception, the substance of the charge is this. The Jury are to enquire whether the place in question is in the sea properly so called, and in the usual acceptation of the term, or whether it is in a water, whether fresh or salt, in which the sea ebbs and flows, and as to this, they are to form their conclusion from all the facts in evidence before them. It is an enquiry of fact upon the whole case. If the prohibition is not confined to what may be considered in strictness the river, and if it does not apply to the sea coast, and the open sea, I do not very well perceive how the learned Judge could have done more. In fact the only ground alleged in support of the exception, is that the same charge would equally apply to a bay, or a loch, or other inlet of the sea where there was no river passing into or through it. But the learned Judge was directing the attention of the Jury to the case before them, of an estuary into which a river poured its waters, and the only material question is, whether he was correct in what he laid down with respect to waters so circumstanced. Had it been the case of a mere bay or inlet, such a charge would have been justly liable to exception.

I would therefore recommend your Lordships to affirm the judgment of the Court of Session.

LORD COTTENHAM.—My Lords, this case undoubtedly raises a question of very great difficulty, and which has been the subject of long litigation in the Courts of Scotland, and I must say that the mode in which this case was left to the Jury, in my opinion, by no means tends to diminish the probability of future litigation

upon this subject. At the same time, it is, I am aware, extremely difficult to prescribe the mode in which the question ought to be left to the Jury. I have taken into consideration all the cases which have occurred, and from the extreme uncertainty which has resulted from the various decisions that have taken place, I think that the rights of parties interested in fishings in Scotland, will not be upon a satisfactory footing, until that great uncertainty, which arises from the old statutes upon the subject and the decisions which have taken place upon them, has received some little attention from the Legislature. It appears to be impossible to reconcile the decisions and the statutes together, and therefore the law requires amendment in the position in which it now stands.

My Lords, this case comes before us upon two exceptions taken to the direction to the Jury at the trial of the issue. It is sufficient, as it was in the Cromarty case, for the purpose of sending it back to be again tried, if we should be of opinion that the learned Judge was wrong upon either of the points excepted to. If that learned Judge was right in regarding the construction of the statutes suggested by the first exception, but was not right in the construction he put upon them by the part of his address to the Jury embodied in the two exceptions, the verdict cannot stand.

I propose to abstain altogether from discussing the much litigated point raised by the first exception; and shall refer only to what has been decided by this House in Lord Kintore's case in 1828, and in the Spey case in 1752. In the former, the upper heritors claimed an interdict against fixing nets "within "the salt water that ebbs and flows adjoining to the river Don, "or upon the sands or shoals within the said water." In advising the House in this case the present Lord Chancellor observed that Bankton, Erskine, and Lord Stair, in referring to the Acts, did not in any instance apply them to the sea coast, but spoke of the prohibition as applicable to rivers, and to rivers only; and said that the whole body of the Acts taken together

refer, not to the sea coast, but to rivers and continuations of rivers.

In the Spey case, the ultimate result was as has been stated by my noble and learned friend; but it is to be observed in that case, that the claim of the parties to the lower fishings was stated in these terms,—it was between the lowest ebb and the highest flood. The order of this House did not prescribe the lower limits, it only ascertained the higher limits, but the parties did not lay their claim lower down than as is there described, the lowest ebb; they claim between that and the highest flood, which is described in these words, that is, the line which the sea makes upon the coast at high water.

The question now is, did the learned Judge expound the statute to the Jury in a manner consistent with what had been decided in this House, and with the meaning of the statutes themselves? He tells them, indeed, that if the nets are in the sea proper, they are not within the Acts; but he tells them that what is sea proper, as contradistinguished from the space described in the statutes, is to be decided upon all the facts that can be collected in each case, and that the Jury were to look at every fact which could satisfy them whether the place was really within the sea according to the *common apprehension* of mankind, and according to all the appearances, facts, and observations, and results which could be collected on that point, or whether the place was within water fresh or salt, in which the sea fills and ebbs, comes and gangs. He also said, that what is the sea and sea coast within the statutes, is an inquiry of fact on the whole case, and not one to be decided according to any legal view which is to be taken of what is sea by the force of any one test afforded by the statutes.

To this charge to the Jury there appears to me to be two decided objections. First, that the learned Judge abstained from informing the Jury what was in his judgment the legal construction of the statutes; and, secondly, that he misdirected the

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Jury as to the tests by which they were to form their judgment as to what were the waters protected by the statutes.

As to the first, whatever difficulty there may be in putting a satisfactory construction upon the various expressions to be found in the different statutes, it is clear that they intended to protect one description of waters only. In the Kintore case, this House did put a construction upon them, so far as to hold that they applied only to rivers, or continuations of rivers. The only question open, therefore, is, what is a continuation of a river. This, also, seems to have received a definition, so far as such a definition goes, by the claim made by the parties in the Spey case, although it might not have received a decision of this House. Where the continuation of the river ends, the sea proper for this purpose begins, and in giving to the Jury the test by which they are to try the one, they are in fact instructed how to define the other.

What then are the tests by which the Jury were told they were to distinguish between a continuation of the river and the sea proper? First, "The common apprehension of mankind." The statutes certainly intended to lay down some general rule, but the apprehensions of mankind probably would differ in every case of difficulty. How can the rights of property and the construction of Acts of Parliament depend upon the common apprehension of mankind? The apprehensions of Judges upon this subject have been very various. Can it be expected that certainty will be attained by reference in each case to the common apprehension of mankind?

The second test to which the Jury were referred was "ap-"pearances." Now it is clear, that nothing can be so uncertain upon this subject as appearances, varying in different localities without any variation in what is essential to the protection of the fish. Many narrow straits of the sea have the appearances of a river; many rivers are so broad as to have the appearance of the sea. Take some of the sea lochs of Scotland. Can any one

by appearance say whether they are rivers or the sea? The same may be said of the upper part of the Bristol Channel. Into that, and probably into all the sea lochs, rivers empty themselves, but the appearance cannot decide where the rivers end and the sea begins.

The most objectionable part of the charge, however, is the conclusion of the passage excepted to, in which he informs the Jury what are the tests by which they are to judge whether the place in question be within the protection of the statutes, "whether the place is within a water fresh or salt, in which the "the sea fills and ebbs, comes and gangs." Now, suppose these expressions to be found in the statutes, which the latter I believe is not, the law upon the subject is not to be ascertained by any particular expression to be found in some particular statutes, but by a construction to be put upon the whole of them taken together, as was done by this House in the Kintore case. Does the test thus laid down necessarily describe the only waters protected according to that decision, that is, "rivers, or conti-"nuations of rivers?" Is there no place within a salt water in which the sea fills and ebbs, comes and gangs, other than in a river, or a continuation of a river? Is there any bay upon any coast in the open sea, in which there is not salt water, in which the sea fills and ebbs, comes and gangs? Upon this test it is obvious that the Jury may have supposed a place, within the protection of the statute, which was not within the river, or a continuation of it, and therefore not within the definition prescribed by this House in the Kintore case. The description, indeed, is very similar to those used in the Kintore case, and there held to describe places not within the statutes. Whether the Jury were so misled is immaterial; if the address of the learned Judge was calculated to mislead them, it is sufficient to have this case sent to a further inquiry.

My Lords, I have stated the difficulties which have occurred to me, with reference to the cases, and with reference to the

statutes applicable to the language used by the learned Judge, in directing the Jury. I think the expression used, and the tests he afforded to the Jury, were not such as were likely to lead them to a safe conclusion. The majority of my noble and learned friends, I believe, are of a contrary opinion. I certainly lament that it should be laid down by this House, as it will be, if the second exception (I do not speak as to the first) be overruled, that that is a proper mode in which questions of this sort are to be left to a Jury. Beyond all doubt, that will be the form, in future, in which such questions will be left, and that will very much, in my opinion, increase the difficulty which now exists, and add to the uncertainty which already prevails upon this subject, and will therefore, I believe, add to the necessity very much, which I before suggested, that some enactment should be made for the purpose of ascertaining at once what is meant to be protected, and what quarters are not protected.

Lord Campbell.—My Lords, what we may do by legislation I hardly know, as ever since the time of Robert I. attempts have been made by legislation to settle doubts, and every new Act has only created fresh doubts; I, therefore, think that it would be better to abide by judicial decision.

My Lords, in this case I confess that I feel very great difficulty. With respect to the first exception, none at all, for I am clear and decided that the rule contended for by the appellant cannot be supported. It is wholly inconsistent with the decision of this House in the Tay case, and applied to that case would bring the point of junction between sea and river from the Drumley Sands, and carry it many miles up the Tay. That rule, therefore, clearly cannot be insisted upon. But what we are to do with the second exception is certainly much more difficult, and I must own that I have again and again thought that it would be necessary to set aside this verdict, and to have a *venire de novo*. But then, my Lords, in fairness to the learned

Judge, I think we should be bound to tell him what the rule is which he ought to have propounded to the Jury. After the most anxious consideration, I am not prepared to say what that rule ought to have been, and I must, therefore, see whether he has necessarily misdirected the Jury, because, upon a Bill of Exceptions, you must clearly see that the Jury, in giving weight to the direction of the Judge, have been misled. I should be very sorry if this were taken as a model for directing a Jury, in similar cases hereafter. I think that it is not conceived in the most felicitous terms, but I must see whether it contains any misdirections, upon which it necessarily follows that an injustice has been done.

You must take the whole direction together. It is not fair to pick out a particular expression of the learned Judge, but you must suppose that the Jury paid equal attention to all that fell from him, and in looking at the whole, let us see whether they might not have come to a right conclusion without disregarding the directions they received. The words are, "I hold that it is "competent and necessary to attend to all the evidence which "can satisfy the Jury, on the other hand, that the position of the "stake-nets is not within the sea, or on the sea-coast, but in point "of fact, in waters, or on sands by the sides of water, in which, "according to the real facts of each case, the sea ebbs and flows, "or fills and ebbs. I hold that the Court or Jury are at liberty, "and bound to look to every fact which can satisfy them, whether "the place is really within the sea, according to the common "apprehension of mankind." Now I think that was right, they ought to take every fact into consideration. "And according to "all the appearances." If they were to take only "appearances," as my noble and learned friend has suggested, a stranger coming upon Loch Fine, might not be able to tell whether it was a river or an arm of the sea. But that is not all that the learned Judge says. "According to all the appearances, facts, and observations." Now if any one were to come to Loch Fine, and compare it with

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Loch Lomond, they would soon discover that it was an arm of the sea, and not a river. "And the results which can be collected on "that point, or whether the place is within a water, fresh or salt, "in which the sea fills and ebbs, comes and gangs. I think that "this is the clear result of previous decisions, and I think it is "the legal and sound construction of the statutes." Now I cannot say that by these words the Jury have had the best assistance in coming to a right conclusion; but what we are to consider, is whether they have been misdirected, and I cannot see satisfactorily that the law has been misstated.

For these reasons, my Lords, I think that we are not justified in setting aside the verdict, and ordering a new trial, and that therefore the interlocutor appealed from should be affirmed. On account of the difference of opinion among your Lordships, and even without that, seeing that there was a highly probable ground of appeal from the loose manner in which the question was left to the Jury, I should recommend to your Lordships that the interlocutor should be affirmed without costs.

Mr. Robertson.—My Lords, it is necessary to explain the matter with regard to the exceptions. There were three exceptions in this case, and your Lordships' judgment has now proceeded upon the second and third exceptions. The first exception was withdrawn at the Bar, and it will be necessary in the judgment to state that.

Lord Campbell.—Then the whole are now disposed of.

Mr. Robertson.—Precisely so, my Lord, but the judgment affirmed will be sent back upon the first exception to the Court of Session. The Court of Session have directed something to be done upon the first exception, which exception is now withdrawn. I should submit that the judgment will be an affirmance and a remit to the Court of Session.

Lord Cottenham.—The appeal is only as to two exceptions.

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Mr. Robertson.—As to three exceptions, my Lord.

Lord Chancellor.—The appeal is confined distinctly to two exceptions, and the reasons are confined to two exceptions, and all we have disposed of is as to those two exceptions.

Mr. Robertson.—But, my Lord, in the remit to the Court of Session, it may be necessary to take notice that the first exception was withdrawn at the Bar.

Lord Cottenham.—Was the first exception the subject of appeal?

Mr. Robertson.—It was so understood.

Lord Chancellor.—It is quite clear it is not so according to the papers.

Lord Campbell.—I well remember that we refused to hear the cause till the point had been decided by the Court of Session; it was abandoned because we would not conditionally hear the case.

Mr. Robertson.—The first exception was not brought here by appeal, but the House refused to proceed with the two other exceptions till that was withdrawn.

Lord Chancellor.—It is not brought here, and we have nothing at all to do with it. It is distinctly stated in the papers which I have recently read, that the appeal is confined to two exceptions, and we think that there is no foundation for that appeal.

Lord Cottenham.—The first exception certainly was not matter of appeal.

Lord Campbell.—Your doubt, Mr. Robertson, is as to the manner of drawing up the order.

Mr. Robertson.—Exactly, my Lord.

Lord Chancellor.—We will take care that it shall be drawn up properly. It shall be looked to.

Lord Campbell.—Between such gentlemen as are concerned in the case, there can be no difficulty. You will do whatever is right on both sides, I am sure.

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Ordered and adjudged, That the petition and appeal be dismissed this House, and that the said Interlocutor therein complained of, in respect of the said second and third exceptions, be affirmed. And it is further ordered, that the said cause be remitted back to the Court of Session in Scotland, to do further therein, as shall be just, regard being had to the fact, that the first exception was withdrawn by the appellant at the Bar, upon the hearing of the cause as above mentioned.

Richardson and Connell—Spottiswoode and Robertson, Agents.