it does nothing more than give effect to the verdict of not guilty, and the decree of *absolvitor* followed upon that, and the other matter followed, therefore, of course.

It is a matter of regret, that the evil which had already originated has been augmented and aggravated by bringing this appeal. I think, that what your Lordships will be bound to do will be to dismiss this appeal with costs. But with regard to the proceedings before the Appeal Committee, I think there was enough to justify the presentation of that petition ; and although undoubtedly in one sense, which, however, was not the sense in which the appellant contended, that all these interlocutors were appealable, they may be included in the petition of appeal, because if the interlocutors settling the issues were reversed, the reversal of the rest of the interlocutors would follow consequently, yet they ought not to have been included in the appeal in the manner and form in which the appellant contended, that they were themselves separately and individually appealable. I would therefore humbly submit to your Lordships, that the proper order will be to dismiss this appeal with costs ; but to give no direction whatever touching the costs, in themselves most insignificant, which occurred before the Appeal Committee.

LORD WENSLEYDALE.—My Lords, I entirely agree with what my noble and learned friend has proposed to your Lordships. I think, that the appellant is precluded entirely by his having consented to the form in which the issue is framed, and that the other questions which have been discussed in the course of this inquiry become immaterial. It is immaterial to decide whether the Sheriff would support the judicial authority or not. The other points of some nicety thus become entirely immaterial. The whole question upon the summing up of the Lord President also becomes immaterial. I entirely concur upon the grounds which have been stated by my noble and learned friend, that in this case the appellant is precluded, by his own proposal and acceptance of the issue, from making any complaint of it.

LORD CHELMSFORD.—My Lords, I entirely agree with the view taken of this case by my two noble and learned friends.

Interlocutors affirmed with costs.

Agents for Appellant, Simson, Traill, and Wakeford, Solicitors, Westminster.—*Agents for Respondents, Hugh Fraser, W.S., and Dr. Glover*, Bircham, Dalrymple, Drake, and Ward, Solicitors, Westminster.—*For Respondent, Dr. T. G. Weir*, Loch and Maclaurin, Solicitors, Westminster.

MAY 12, 1863.

MRS. CHARLOTTE ELIZABETH RICHARDSON HAY AND HUSBAND, *Appellants*, *v.* THE LORD PROVOST AND MAGISTRATES OF PERTH, *Respondents*.

Salmon Fishing—Fixed Machinery—Net and Coble—Bermoney System of Fishing—*In fishing for salmon in a navigable river with net and coble, H. fixed a stake in the centre of the river, and by means of a ring and rope, enabled his boat to take a wider sweep, and so enhanced the chance of capture. This was called the Bermoney boat system of fishing.*

HELD (reversing judgment), *That there was nothing illegal or contrary to statute in this method of using the net and coble, there being nothing in the nature of fixed machinery, nor essentially varying the ordinary mode of using the net by hand.*

HELD FURTHER, *That the alleged illegality of the stake fixed in the channel made no difference as regards this question.*[1]

In 1856 the Magistrates of Perth brought an action against Miss Hay of Seggieden, (now the wife of Lieut. Col. Henry Maurice Drummond Hay,) and the tenants of her salmon fishings on the Tay, with the view of having it determined, whether a particular mode of fishing adopted by them, called the "Bermoney" system, was illegal.

A considerable portion of the revenue of the city of Perth is derived from salmon fishings on the Tay, one of the most important being at Darry Island, immediately adjoining the fishings at Seggieden. The peculiar method of fishing above referred to had been used at some of the fishings on the Tay for some time, the effect of which, as alleged, was an extraordinary increase

[1] See previous reports 24 D. 230: 34 Sc. Jur. 115. S. C. 4 Macq. Ap. 535: 1 Macph. H. L. 41 ; 35 Sc. Jur. 463.

in the take and profit to those who used it, with corresponding injury to those adhering to the old method of net and coble. Thus it appeared in evidence, that a single station, viz. the "Isle of Peat," belonging to Mrs. Hay, which was let for £5 previous to the use of the new system, was let, in 1859, at £345 per annum; and the Mugdrum fishings, belonging to the same proprietor, at one time yielding only £92, were, at the date mentioned, let for £1100 per annum.

The conclusion of the summons, referring to this method of fishing, is in these terms:—"It ought and should be found and declared, that the said Charlotte Elizabeth Richardson Hay, etc., are not entitled to fish for salmon unless by the rod or by net and coble, and in the ordinary way; and that the mode of fishing, by the use of Bermoney or Beardmoney boats with fixed stakes, pins, or anchors placed in the tidal bed of the river is illegal, and contrary to the provisions of the Statutes thereanent and common law."

Mrs. Hay having been abroad at the time the action was raised, and no defences having been lodged by her, decree of declarator and interdict in absence was pronounced on 27th May 1856.

In 1857 Mrs. Hay raised an action of reduction to have the decree set aside, in so far only as it found and declared in terms of the conclusion above quoted. In her condescendence, after quoting the 4 and 5 Will. IV. cap. 47, § 14, which provides for compensation by the Navigation Commissioners to the proprietors and lessees of fishings in the Tay, she made this statement (article 5 of condescendence):—"Previous to the operations of the Perth Navigation and Harbour Commissioners under their Acts of Parliament, the pursuer's fishings consisted of four stations. Subsequent to the completion thereof these were reduced to one. During the probationary period of five years, after the completion of the works mentioned in the clause just quoted, and which extended from 1842 to 1846 inclusive, the Bermoney boat was employed on the remaining station with such result, that the salmon and other fish taken amounted in value to that taken at the four stations during the previous five years. In consequence of this no compensation was due to the pursuer's father, but if the mode of fishing by the Bermoney had not been made use of, the result would have been different, and compensation would have been due. The present defenders, by the recent Perth Burgh Act, have taken place of the Commissioners, and are now the conservators of the river."

On this statement the pursuer founded her single plea in law, which was,—The Bermoney mode of fishing not being illegal, and being practised by adjoining proprietors, including the defenders themselves, and the question of compensation between the pursuer's father and the Navigation Commissioners having been determined by the use of the said mode of fishing, the decree in absence ought to be reduced to the extent libelled.

The defenders founding, in particular, on the Acts 1424, cap. 11; 1503, cap. 72; 1535, cap. 16; 1581, cap. 111; 9 Geo. IV. cap. 39; pleaded that,—1. The pursuer was not entitled to fish for salmon except by the usual mode of fishing by the rod or by net and coble; and, that fishing by means of Beardmoney boats was illegal at common law. 2. The mode of fishing complained of, as involving the use of fixed stakes, pins, or anchors, with ropes attached thereto, and machinery in connexion therewith, was contrary to the Statutes. 3. The fixing of a stake, pin, or anchor, with rope attached thereto, in the tidal channel of the river, not being authorized or done in any recognized exercise of the right of fishing, the defenders, as conservators of the river, had the right to direct its removal. 4. The partial exercise of the use of Beardmoney boats in the Tay, especially for a period short of forty years, could not legalize the practice, if otherwise objectionable. 5. The pursuer was barred from seeking reduction of the decree by *mora* and acquiescence.

The Court of Session after evidence being taken as to the *modus operandi*, held, that this method of fishing for salmon was illegal, and found for the Magistrates of Perth.

The pursuers appealed, maintaining in their case, that the judgment of the Court of Session should be reversed, for the following reasons:—1. The mode of fishing practised by the appellants is not contrary to common law. 2. Nor is it prohibited by any Statute. 3. Nor by any previous judgment of the Court. 4. The mode of fishing practised by the appellants is substantially and essentially the net and coble system. 5. The appellants being proprietors of the lands adjoining the river, as well as of the fishings *ex adverso* of the lands, they are entitled to place in the alveus of the river a stake or pin, provided such stake or pin does not interfere with the navigation of the river. 6. The placing of a stake or pin in the alveus of the river is not essential to the mode of fishing practised by the appellants. 7. The mode of fishing practised by the appellants has been practised on the river Tay for upwards of thirty years, and was never challenged by the Tay Navigation Commissioners, who are now represented by the respondents.

The defenders supported the judgment in their case on the following grounds:—1. The only legal mode of fishing is by the ordinary way of net and coble, while the Bermoney system is not net and coble fishing, but something in addition to it, which confers enormous advantages on those who use it, and creates corresponding loss and damage to the other proprietors of fishings.

2. Every proprietor must exercise his rights of fishing in accordance with the nature of his grant, and in such a manner as not to hurt his neighbour, and to give fair play to the fish, which is not the case when an artificial shore is created in the middle of the stream, from which, and not from the banks, the fishing is carried on. 3. No fishing proprietor is entitled to use fixed machinery; nor to put any fixed *opus manufactum in alveo fluminis*, wherefrom he can run off the coble, or whereby he may haul in the net. 4. The Bermoney boat and other machinery employed frightens the fish, and turns them back, and is an obstruction to their free passage upward and downward, and to the navigation.

Sir H. Cairns Q.C., and *D. Mure*, for the appellants.—The judgment of the Court below is wrong, for two reasons—(1) The Bermoney boat system of fishing is nothing else than net and coble fishing; (2) whether it is or not, it is legal and competent.

The Bermoney boat is merely a device rendered necessary by the nature of the shore, which at high tide prevents a man from wading in the ordinary way. If a man were to wade with a small rope in his hand attached to the net, such is the shallow state of the shore, and the weight of the net, that a sweep of the net could not be made at all. The Bermoney boat, therefore, is only adopted where a man cannot practically perform the same kind of operation by wading. By the common law of Scotland the right of salmon fishing with net and coble is derived by grant from the Crown; but there is nowhere a definition given by the institutional writers of what is the mode of exercising the right. The only qualification at common law seems to be, that one owner of the fishing in a river cannot actually intercept the fish passing up and down the river; but any mode of catching the fish short of that is competent, and there is no limit to the quantity he may kill. There is no ground for saying there is any implied condition in a Crown grant, that the grantee is to take no greater advantage than his neighbours. The Statutes on the subject consist of prohibitions of special Acts; but they nowhere define what is the kind of fishing which may be lawfully pursued, so that everything which is not prohibited is lawful. The object of these Statutes is not to benefit the adjacent co-proprietors, but solely to benefit the public at large by securing the breeding of salmon. As far as the Statutes themselves are concerned, they do not say whether one, or two, or three cobles may or may not be used in fishing. With regard to the decisions of the Court, which began near the beginning of the 18th century, they are all in actions by one owner of fishings against an adjacent owner. The decisions began by finding, that particular acts were evasions of the Statutes—thus, that cruives are illegal; then weirs, then baskets, hang nets, bag nets, etc., until at last the Court came to say, that the only fishing open to the owners was net and coble fishing; and the model decree came at last to be this, You must not fish otherwise than by net and coble. Hence, when interdicts were so often applied for, it came to be a settled practice for the Court to say, Restrain so and so from fishing except by net and coble. None of these cases have come to the House of Lords, and this practice is unwarranted by the Statutes or the common law. The Court had no right to say, that there should be no fishing except by net and coble. The first reported case of *Duke of Queensbury* v. *Marquis of Annandale*, M. 14,279, related to stenting of nets in the river, whereby they overlapped each other. The real object there was to deter the fish from going up the river, and the Court very properly said, that was not a legal method of catching fish; at the same time, the Court said, all legal methods were open to the inferior proprietor. In *Dirom* v. *Little*, M. 14,282, hang nets were used which entangled the fish, and obstructed their passage up the river; and the Court said, You must not use a net which will catch the fish of itself, when you are not there, but you may use a net in hand in any way you please.

[LORD CHANCELLOR.—The Court seems to hold, that you can only fish by keeping the net in your hand.]

Yes. The next case was *Colquhoun* v. *Duke of Montrose*, M. 14,283, which was to the same effect, directed against stented nets and stobs or stakes stretching across the river, and the Court said, that also was illegal. In 4 Paton's App. 221, Lord Eldon remitted the case on the ground, that, as the right in question had existed from time immemorial, it might have had a legal origin; and in the ultimate interlocutor there was no reference made to net and coble. In *Lord Kinnoull* v. *Hunter*, M. 14,301; 4 Paton, 561; there was an interdict to prevent Lord Kinnoull from using fishing machinery not hitherto used; but that was a simple generic proposition, and did not mean, that no improvement was ever to be made in the net or the coble.

[LORD CHANCELLOR.—That decision seems to have gone on the ground, not that it was a fixed stake net, but that it was an engine auxiliary to the old mode of net and coble fishing.]

It is difficult to say on what ground the decision goes. There was a double vice in Hunter's proceeding. He made an enclosure or trap in the alveus of the river, and he laid down a net extending obliquely across the river for half a mile so as to prevent the fish from coming up through the opening. All that Lord Eldon said was, that that mode of fishing was illegal, but the case did not determine any abstract right. In *Cunningham* v. *Taylor*, Hume, 715, it was a case of a weir, which is clearly an obstruction to the navigation. In *Earl of Fife* v. *Gordon*, M. App., Salmon Fishings, No. 2, it was a dyke of stones with a basket in the middle. In *Duke of Atholl* v. *Maule*, 7th March 1812, F.C., Buchanan's Remark. Cases, 270, Lord Gillies and

Lord Meadowbank both lay it down, that the object of the Legislature was solely to protect the breed of fish, and not to interfere for the protection of any set of proprietors.
[LORD CHANCELLOR.—The great difficulty in the way of that view is, that if the object was merely to give the fish free access to the spawning grounds, as every one of the fish might have been caught when going up, the legislation might be reduced to a nonentity.]

What is meant by protecting the fish is, the taking care to let no fixed engines be in the river to destroy them wholesale.

In *Johnson* v. *Stotts*, 4 Paton, 274, Lord Eldon said, the Court of Session had assumed a wide discretion in administering these Statutes such as no English Court would have done. The first example in which the Court of Session interfered by specifying net and coble fishing as the proper exemplar of fishing, was in *Duke of Atholl* v. *Wedderburn*, 5 S. 153. That, however, was only a Bill Chamber case, the sole object of the application being to keep things as they were. *Mackenzie* v. *Houston*, 8 S. 796, was a similar case, being an interdict against using nets fixed with anchors.
[LORD CHANCELLOR.—The question is, whether those decisions warrant the conclusion, that you shall not have fixed in the ground anything or any apparatus to assist you in your fishing.]

The decisions warrant no such conclusion. In *Lord Grey* v. *Sime*, 13 S. 1089, the Lord Ordinary says, the formal interdict against using any mode of fishing except by net and coble was adopted, until a jury, or some other mode of probation, ascertained whether the particular mode attempted was legal. All the Court said there was, that fixed nets would not be allowed. All the authorities only prove, that the Court would prevent persons settling in the alveus of the river fixed machinery which might continuously catch fish. As regards the pin fixed in the river in the present case, it is said by the respondents to be illegal, and therefore the use made of it renders the fishing illegal; but no aid can be derived from that argument. If there is any injury to navigation, that is not to be mixed up with the present question, which is, whether the fishing is in itself illegal. The legality or illegality of the fixed pin in the alveus, must be the subject of a separate and independent suit. The case of *Forbes* v. *Smith*, 2 S. 721; 1 W. S. 583, relates entirely to that point, and is therefore irrelevant, as the right to the soil is not here in question. So as to *Trotter* v. *Hume*, M. 12,798. As to the Bermoney boat being calculated to frighten the fish, there is no evidence to support it, and it is obvious, that boat can no more frighten the fish than any other boat. The Bermoney boat is a contrivance of a similar kind to a windlass used in conjunction with the net and coble, of which there are many instances in the river Tay. The same purpose could be answered by other ways than the Bermoney boat.
[LORD CHANCELLOR.—If I have a bar of iron from one point to another, and I attach a tow rope to a ring which runs round the bar, and there is a small cord connected with the ring: when the net is out and being hauled in, would that small cord running down the bar be a fixed machine which would be prohibited?]

No. Other cases may be assumed, where the purpose would be equally served. The device is only resorted to when the shore of the river cannot otherwise be made available for fishing by net and coble; it therefore only puts owners of fishings at certain awkward parts of the river on an equality with other owners. All the cases shew, that it is not net and coble fishing that is alone legal, but it is because that is the mode which most nearly contains all the essential characteristics of legal fishing. The essence of net and coble fishing is, that the net is kept in hand all the time of the operation. But as to whether a windlass is used to take the net on shore, or a tub, or a rope, or a Bermoney boat to carry the man who holds the tow rope, is a mere accident.

The *Lord Advocate* (Moncreiff), and *Solicitor General* (Palmer), for the respondents.—The judgment of the Court below was right, for it was in conformity with the Statutes and the decisions which have established the rule, that no fishing except by net and coble is legal, and the present was essentially different from net and coble fishing.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, it was a just remark of Lord Eldon sixty years since, that the decisions in the Courts of Justice in Scotland upon the subject of salmon had gone far beyond any principles embodied in Statute law. And the observation then made is undoubtedly still more true with regard to the course and tenor of subsequent decisions. It does not appear to have occurred to that very learned Judge, that the decisions were capable of being attributed to common law. This has been the plea subsequently made for them. But with the exception of the general principle, that salmon fishing is *inter jura regalia*, and the other constitutional principle, that the bed and soil of navigable rivers is vested in the Crown, I am unable to find any rule or principle of common law which is not embodied in the Statutes themselves, upon the subject, which, in truth, especially the earlier ones, may be considered as declaratory of the common law.

It is most important to observe the principles which these Acts embody, and the objects which the Legislature sought to attain. They are directed to three objects, one to insure to the salmon

a free and unimpeded access to the upper fresh waters, which are the natural spawning grounds of the fish. The second was to secure the unimpeded return to the sea of the smolt or young fry of the salmon. The third was to prohibit the killing of unclean fish during the fence months, as we call them in England, that is, when the fish were out of season. For the purpose of accomplishing these objects, which are clearly declared in various Statutes, from the very earliest times down to the latest, the Statutes rendered it unlawful to erect any cruives or weirs in the waters where the sea ebbs and flows. Cruives and weirs were allowed in fresh water with certain limitations. One was, that there should be a mid stream, the breadth of which is carefully defined. The other, that the hecks, (as they are called,) that is, the interstices between the wicker work of the cruives, should be at least three inches wide. Fishing is also prohibited at mill dams by any descriptions of fixed nets or engine. And there is an enactment rendering it absolutely necessary, that a free passage should be given both at cruives and at the mill dams in fresh water from Saturday evening to the rising of the sun on Monday morning.

These are the objects which the Statutes sought to accomplish, and your Lordships will recognize in them provisions for preserving the breed of the fish, but they nowhere descend to any directions touching the mode or the manner of fishing. Now, when we come to the decisions upon the subject, we undoubtedly find from the earlier decisions, that the *ratio decidendi* assigned by the Judges has been to secure the free passage of the fish both up and down the river. The earliest decisions give that as the reason for holding, that stent nets were illegal, that stake nets were illegal, that dykes and dams ought not to be erected, and that towing paths could not be projected into the river for the purposes of fishing. And the general principle and the reason for the determination is therefore found to have been in strict conformity with the principles enumerated in the Statutes. No doubt it was perfectly competent to the Courts in Scotland to extend their decisions beyond the letter of the enactments, proceeding upon that which we are accustomed to call in England the equity of the Statute, a mode of interpretation very common with regard to our earlier Statutes, and very consistent with the principle and the manner according to which Acts of Parliament were at that time framed. I do not, therefore, pretend to deny, that so far the decisions are consistent with the general principles of the Statutes, and are perfectly in conformity with the law, and probably we are right in coming to the conclusion, that these decisions have gone so far as to make it clear law at the present time, that it is illegal to fish for salmon with any net, or with any species of engine or machinery, devised or constructed for catching fish, which is a fixture, which is at all fixed or permanent even for a time in the water; and if I were asked to define the conclusion which I should derive from the Statutes and the decisions, it would be this, that it was not legal to fish with a net unless when the net continued in the hand of the fisherman. The net must not quit the hand, and the net must be in motion during the operation of fishing.

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

In order that I may bring an illustration to shew to your Lordships what would be the practical consequence of that interpretation of the law, let me suppose a river shallow, but having numerous holes in it, where the fish would shelter themselves. The ordinary drag would sweep over the holes, and not enclose nor catch a single fish. If you accepted the law as thus interpreted, the consequence would be, supposing some man was ingenious enough to devise a mode of constructing a drag net, so that when it came to the hole it should accommodate itself to that inequality in the bed of the river, and thereby catch the fish, that exercise of ingenuity in improving the ordinary modes of fishing would be struck at and prohibited by the interpretation put upon those words by the respondents. So again, if, during a discolouration of water, any fisherman having the rights of salmon fishing, was desirous of catching fish in a part of the river to which the ordinary drag net could not be accommodated, and he used that which your Lordships have frequently seen, namely, a casting net, in that case, according to the interpretation of the respondents, that also would be a thing which it would not be competent for him to do.

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

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

This correction of ordinary language is by no means immaterial, for your Lordships will observe, in the judgments which are now under review, a continued reference to the supposed principle of securing fair play among the heritors. One of the principal reasons of decision given by two of their Lordships in the Court below was this supposed right introduced by the Statute, and so regulating the distribution of the catching of the fish, that all the co-rival proprietors should have their share. Now, I need hardly point out to your Lordships, that it would be impossible to carry such principle into anything like practical operation, and yet it figures as one of the principal grounds of decision in the judgments of the learned Judges in the Court below.

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

Now the present action, in which this appeal is brought, was an action of reduction by the present appellants of a decree which was obtained against them in absence, in an action of declarator by the respondents, which was addressed only and entirely to the question of what was a legal or illegal mode of fishing. And the right of the respondents, who are the conservators of the river Tay, was not in any manner or matter properly to be regarded, either in the decision of that case or in the decision of the present case. I am desirous, therefore, of pointing out to your Lordships, that the question, whether a stake, fixed in the river, does or does not in any way interfere with the navigation of the river, and whether that stake was or was not removable by the respondents in the exercise of their powers as conservators of the river, is not a question that can properly enter into your decision upon the present case as an element of judicial determination. Your decision in the present case will be confined entirely to the question of the legality of the mode of fishing adopted by the appellants.

It is necessary to mark that particularly, because in looking at the note appended to the interlocutor of the Lord Ordinary, your Lordships will observe, that the reasoning of that learned Judge appears to be this, that the erection of a stake in the bed of the river was a thing to be prohibited by principle as affecting the navigation of the river, and that consequently it was illegal to use for the purposes of fishing a thing which was for other distinct grounds, in itself, an illegal occupation of part of the *solum* of the river.

With that we have nothing to do upon the present occasion. The introduction, therefore, of that into the judgment as a ground of decision is the introduction of an element which does not properly come within the scope of the present inquiry.

I will next notice another ground which figures very much in the judgments in the Court below, but which I think your Lordships will dismiss as being entirely unworthy of your attention. It is said, that the erection of stakes in the river, and the use which is made of the stakes by a rope which is stretched between them, is the putting of something into the river that has the effect of frightening away the fish, and preventing them from ascending the river. I think that may be at once dismissed, because there is really no foundation for it in the evidence. It is a thing that is quite unworthy of serious attention.

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

The mode of fishing by the ordinary drag net your Lordships are familiar with. You know that the net hangs at the extreme ends of two ropes; one I will denominate the tow rope—that is a rope at the upper extremity of the net; the other the hauling line, which is a line at the lower extremity of the net. The net is taken in an ordinary little row boat, familiarly called a coble. One man ordinarily holds the tow rope. The coble is then rowed or taken out into deep water. Another man at the stern of the coble pays out the net. The coble makes a sweep as long as the length of the net and tow ropes allow. The man with the tow rope hastens down to the lower point which is the place of destination of the coble when it comes in from its sweep, and then, with the aid of both ropes, the tow rope and the hauling line, the net is dragged to the shore.

In consequence of the coble, in the present case, on the appellants' land, being obliged to start from the inner side of the bank of sand and gravel, it became necessary to devise a mode for the tow rope being carried to the shore. And here I regret to find, that so much unnecessary importance has been given to the machinery adopted by the appellants by the use of words, particularly the use of the word Bermoney and the term Bermoney boat, which has given an unnecessary degree of importance to a very simple plan for carrying the tow line to the shore. There is no necessity for adopting any particular mode of machinery. If a common tow line were fastened to a stake upon the land at the hauling point—the point where the net is hauled in, and were fastened to a stone at the upper point, the place of departure of the coble, and if a man or a boy took out the net in any kind of vehicle, that was sufficient to sustain the weight and pressure of the net hauled upon the tow line, and carried down to the lower place of hauling, that would be equally effectual for the purpose with this apparatus, which has been dignified with a special name. The evil resulting from this special name is this, that it has been called a peculiar system, as if there was something in it distinct from the ordinary mode of fishing by net and coble. Why, imagine for a moment, that you were fishing by net and coble in a river having precipitous banks, with very deep water immediately close to the shore, and a bank above it covered with brushwood and with trees, rendering it impossible for a man to walk upon the bank, and suppose that the water was so deep, that it was impossible for him to walk with a tow line, in such a case you must of necessity carry down the tow line either by another coble used for the purpose, or by some apparatus similar to that which is here employed. But the great distinguishing remark applicable to the whole is this, that the apparatus for carrying the tow line from the upper point to the lower point does not in the smallest degree interfere with the action of the net. The net still continues in the hand of the fishermen, the net still continues in motion, the net is not fixed for any period during the time of operation. The operation, in order to be effectual, must of necessity be as rapid as possible, for any one conversant with that mode of fishing knows well, that the great object is to make your sweep with great rapidity, and to bring the ends of your net together as quickly as possible, otherwise the fish strike away in the interstices which are still open to them in the net, and escape being comprehended within the haul of the net. The net, therefore, always remains a thing in motion, not a thing that can be brought within the principle of any of the decisions, or within the prohibition against fixtures, or fixed engines, which is either contained in or ought to be derived from the language of the Statutes. I cannot therefore find, when the thing itself is looked at with an understanding of the subject, anything that in the least degree distinguishes this mode of fishing from the ordinary mode of fishing by net and coble. It has the peculiarity of that mode of fishing, and it has the requirements of that mode of fishing, because it is a mode of fishing which exists only and takes the fish only whilst the net is kept in motion, and which preserves all the distinctive peculiarities of fishing by net and coble, namely, taking a grasp of a portion of the river during such time only as is required for the boat to row round the net. The rapidity of the operation is assisted even by this apparatus, the object of which is merely to carry the tow line from one end to the other in a locality in which it is not possible to carry it by the ordinary mode.

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

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

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

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

I therefore submit to your Lordships, that these interlocutors ought to be reversed, and that your Lordships will declare, that the appellants were entitled to a decerniture in conformity with the conclusions of the summons in the action of reduction, and that the decision of this House should, of course, have the effect of giving to the appellants the expenses of that action incurred by them up to the time when the interlocutor of the Lord Ordinary, now appealed from, was pronounced.

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

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

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

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

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

There is perhaps an unavoidable ambiguity in the expressions of which the respondents availed themselves in their argument by treating them as descriptive of a precise form of fishing invariably practised from the earliest times down to a very recent period. Of course, if they could succeed in fixing this meaning upon the descriptive terms, there would be no difficulty in establishing the illegality of employing the Bermoney boat, which was not introduced into the Tay before 1821, and was not begun to be used by the appellants till 1843. I cannot, however, find it anywhere laid down, that net and coble fishing must be carried on in exact conformity, in

every particular, with the method in which it has been usually conducted. Of course, if there is such substantial variation from the ordinary mode as will convert the fishing into a different kind, or if anything which is itself illegal is added to the net and coble fishing to increase its efficiency, these acts will be extensions or evasions of the right, and may be prevented.

The respondents were repeatedly pressed during the argument to state what deviations from the usual ordinary practice would carry the fishing beyond the defined limits of net and coble. Amongst other suggestions, they were asked whether if, instead of employing a man to carry what may be called the shore end of the line and net down to the hauling point, a coble or any other boat were substituted, this would still continue to be net and coble fishing. If I understood the answer correctly, it was admitted (though with some hesitation) that this would not be such a departure from accustomed practice as to render it a different mode of fishing. But the argument was brought at last to this point, that any fixed machinery of whatsoever description, and however insignificant, was unlawful, and would be found to have been repeatedly condemned by Statutes and by decisions of the Courts; and, therefore, that the pins in the river to which the rope is attached by means of which the Bermoney boat traverses to and fro, being of the nature of fixed machinery, were necessarily illegal. The respondents, however, were not able to adduce any authority for so large a proposition.

Whatever may have been the object of the Statutes, whether to preserve the breed of salmon, or to protect the rights of the upper heritors, or both, the argument can derive no support from them. Some of these Statutes provide against fishing at unlawful seasons; but the greater part of them are directed against the obstructing the river and the passage of the fish by means of cruives and weirs, which obstruction could not be produced merely by a pin or a stake placed in the water. The decisions which have been appealed to establish nothing more than that contrivances for the purpose either of preventing the fish from passing up the river, or for catching them by fixed nets or engines or any other fixed machinery, are illegal. In order to apply these decisions, the respondents had recourse to an ingenious mode of reasoning. They said the pins or stakes fixed in the *alveus* of the river are an obstruction to the navigation, and might therefore have been removed by the respondents as conservators of the river; and that these things being thus illegal in themselves, the respondents, as upper heritors of fishing, have a title to interpose for their interest, and to object to any mode of fishing which a lower heritor carries on by illegal means, and thereby improves his fishing to their detriment. They are, however, told, in the course of this argument, that even assuming the pins used by the appellants to be injurious to the navigation, (of which, however, there is no proof,) they, in their character of heritors, had no right to complain unless the means employed by the appellants rendered their fishing in itself unlawful. The respondents are not at liberty to blend their title as conservators with their rights as heritors, and thus to convert an illegality, which affects them in their public capacity, into the means of protecting their private interests.

The only question that can be raised between the parties in the present proceeding is, whether the use of the pins and the Bermoney boat makes the appellants' fishing illegal. Throughout the argument I have been unable to perceive the substantial difference between the mode of fishing adopted by the appellants, and the fishing by net and coble in its ordinary description. Is the Bermoney boat anything more than a contrivance by which the fishermen with one end of the line and net can be transported, instead of having to wade a certain distance, towards the hauling place, to which the other end of the net is to be brought by the coble? It was admitted by the respondents, that a boat rowed with oars might be employed for this purpose; and it seems difficult to suggest the difference in principle between a boat so moved, and one passing backwards and forwards from one fixed point to another. The banks in the part of the river within the limits of the appellants' fishing, present an impediment to their fishing operations at high water. They are not at liberty, in order to overcome this natural disadvantage, to resort to any contrivance, by which, in the act of fishing, the net shall be fixed instead of being drawn; but if they are able to create a new point of departure for the sweep of the net, and thereby to carry on the same operations during more hours of the day than formerly, I do not think that this can be looked upon as any evasion, or as such a material variation from the ordinary method as to render it substantially different from net and coble fishing.

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

Interlocutors reversed, with the expenses incurred down to the time when the interlocutor first appealed from was pronounced by the Lord Ordinary.

For Appellants, Connell and Hope, Solicitors, Westminster.—*For Respondents*, Maitland and Graham, Solicitors, Westminster.