[HEARD 29*th July*—JUDGMENT 3*rd August*, 1850.]

HIS GRACE JAMES HENRY ROBERT, DUKE OF ROXBURGH,
Appellant.

MRS. JANE WILLIAMSON RAMSAY, of Maxton, and OTHERS,
Respondents.

Salmon-Fishing.—Fishing for salmon in the River Tweed by nets attached at one end to cairns built on the banks of the river, is not prohibited by 11 Geo. IV., and 1 Will. IV. cap. 54.

Statute.—When a statute, dealing with a particular mode of doing an act, declares the doing of the act in a particular situation to be unlawful, and imposes a penalty upon transgression, the inference is, that the act, not otherwise unlawful in itself, may lawfully be done in other situations.

IN the year 1739, John S. Kerr was infeft in lands lying in the county of Roxburgh, on the south side of the river Tweed. which was described in his infeftment to be "Totas et integras "terras et baroniam de Littledean alias Maxtoun nuncupat, et " burgo baroniæ ejusdem cum turre, fortalicio, maneriei loco " domibus, ædificijs, hortis, silvis, PISCATIONIBUS, molen., " multuris et eorum sequelis, partibus, pendiculis, et pertinen. " earund. quibuscunq.; totis et integris terris et villa de Maxton " cum domibus, ædificijs, PISCATIONIBUS, et alijs partibus, pen- " diculis, et pertinen. quibuscuncq. dict terris de Littledean " contigue adjacen. quemadmodum, Dominus Joannes Ker " easdem possedebat vel ad eas aliquando jus habuit, et similiter " in totis et integris illis terris de Maxtoun vulgo Rutherfurd's " lands nuncupat. cum domibus, ædificijs, hortis, pomarijs, et " omnibus earundem pertinen. quibuscunq., olim per quond.

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" Andream Ker de Littledean proavum dict. Joannis Strother " Ker a quondam Joanne Comite de Traquair conquest. et " acquisit. Totis et integris tribus mercatis terris terrarum eccle- " siasticarum de Lessudden vulgo terris de St. Boswells nun- " cupat. cum earundem PISCATIONIBUS SUPRA AQUA DE " TWEED USITAT. ET CONSUET. cum decimis garbalibus earun- " dem inclusis quæ nunquam a stirpe separari solebant, cum " earundem pertinen.; totis et integris terris ecclesiasticis cum " glebâ et mansione vicariæ de Maxtoun, cum domibus, ædificijs, " hortis, toftis, croftis, et cum decimis garbalibus earundem " inclusis, extenden. ad duodecem acras et dimidium acræ terræ " aut earcirca aliquando ad Jacobum Ker de Newbottle perti- " nen., et per dict. quond. Dominum Joannem Ker ejusq. " tenentes occupat. et possess; totis et integris sedecem acris " terræ cum lie Burnmiln, vulgo St Boswells Miln, nuncupat. " cum domibus et terris molendinarijs, aquæductis, et multuris, " dict. molendini, ac privilegijs ejusdem aliquando ad vicariam " de Lessudden tanqnam illius patrimonij partem pertinen. cum " domibus, ædificijs, toftis, croftis, et decimis garbalibus earun- " dem inclusis aliquando per dict. quond. Jacobum Ker ejusd. " tenentes occupat. integras dict. terras jacen. infra parochias de " Maxtoun et St Boswells, et vicecomitatum de Roxburgh."

In the year 1799 General Walter Ker, the successor of J. S. Ker, put up these lands for sale in two lots. One of them was purchased by Scott, of Harden, and the other was bought in by Walter Ker. These two lots were bounded on the north by the River Tweed, but were not contiguous to each other, as they were separated by a parcel of land belonging to the Appellant, called Maxton or Govan's land, which was also bounded on the north by the River Tweed.

On the 31st of July, 1801, Walter Ker expede a Crown Charter of that lot of the lands which had been bought in by himself, wherein, and in the infeftment upon it, they were described as " Totas et integras terras et baroniam de Little-

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" dean alias Maxtoun nuncupat. et burgum baroniæ ejusdem " nunc consisten. de et comprehenden. terras aliaque postea " mentionat: viz. totas et integras terras et villam de Maxtoun " cum domibus, ædificijs, *piscationibus*, et alijs partibus, pendi- " culis, et pertinen. quibuscunq., terris de Littledean contigue " adjacen uti Dominus Joannes Ker easdem possedebat vel ad " eas aliquando jus habuit. Et etiam totas et integras illas terras " de Maxtoun vulgo Rutherfurd's lands nuncupat. per quondam " Andream Ker de Littledean a quondam Joanne Comite de " Traquair conquest. et acquisit." &c. " Totas et integras tres " mercat. terras terrarum ecclesiasticarum de Lessudden vulgo " terras de St. Boswells nuncupat. cum earund. *piscationibus super* " *aquam de Tweed usitat. et consuet.* cum decimis garbalibus " earund. inclusis quæ nunquam a stirpe separari solebant, cum " earund. pertinen. Totas et integras terras ecclesiasticas cum " glebâ et mansione vicariæ de Maxtoun, cum domibus, ædificijs, " hortis, toftis, croftis, et cum decimis garbalibus earund. inclu- " sis, extenden. ad duodecem acras et dimidium acræ terræ aut " eacirca, aliquando ad Jacobum Ker de Newbottle pertinen., " et per dict. quondam Dominium Joannem Ker ejusque " tenentes occupat. et possess. Totas et integras sedecem acras " terræ cum lie Burn Mill vulgo St Boswells Mill nuncupat. " cum domibus et terris molendinarijs, aquæductis et multuris " dict. molendini, et privilegijs ejusdem, aliquando ad vicariam " de Lessudden tanquam illius patrimonij partem pertinen., cum " domibus, ædificijs, toftis, croftis, et decimis garbalibus, earun- " dem inclusis, aliquando per dict. quondam Jacobum Ker " ejusq. tenentes occupat." &c. " Omnes dict. terras, sylvas, " piscationes, decimas, aliaq. supra scripta, una cum quibusdam " alijs terris, alijsque uti expressis in antiquioribus juribus et " infeofamentis dict. terrarum aliorumque in unam liberam baro- " niam unit. baroniam de Littledean nuncupat."

The lands described in this Charter came by regular progress and were now vested in the Respondents.

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On the other hand, the interjected lands of Maxton or Govan's land had been granted to the Appellant's predecessor in 1742, by a Crown Charter, which described them as "Totum et integrum justum et æquale dimidium viginti mercat. "terrarum de Maxton vocat Govan's lands, cum nemoribus "molendinis piscationibus, tenentibus, tenendriis, libereq. tenen- "tium servitijs omnibusq. suis pertinen." and these lands had come by progress, and were now vested in the Appellant.

In the year 1844 the Respondents presented a note of suspension and interdict to the Court of Session against the Appellant, praying to have him, and all acting under his authority, interdicted from fishing for salmon on the south side of the River Tweed, from a point being the western boundary of their lands, to a point being the eastern boundary of the Appellant's lands, or the western boundary of the lands bought by Scott of Harden, in 1799. An interim interdict was granted on this note.

At the same time the Respondents brought an action of declarator against the Appellant, by the summons in which, upon an allegation "That by their titles the Pursuers are infeft "in the lands and barony of Littledean, with the pertinents "and the fishings in the River Tweed, used and wont, and they "and their predecessors have, from time immemorial, and for "a period greatly exceeding forty years, exercised the exclusive "right of fishing for salmon grilse, and trout by net and coble, "net and cairn, rod and spear, and every other legal method, "*ex adverso* of the whole lands on the south side of the River "Tweed, from the western boundary of the lands belonging "to the Pursuers, to the western boundary of the lands which "belonged to Mr. Scott of Harden, afterwards Lord Polwarth, "including the fishings opposite the lands of the Defender, "the Duke of Roxburgh, which lie interjected between the "eastern boundary of the Pursuers' and the western boundary "of Lord Polwarth's lands:" they concluded to have it declared

that they had "the sole and exclusive right of fishing for "salmon grilse or salmon trout by net and coble, net and cairn, "and every other legal mode, on the south or Roxburghshire "side of the River Tweed," between the points mentioned in the prayer of their suspension and interdict, including therein the fishings opposite the interjected lands of the Appellant; and they further concluded to have it found that the Appellant had no right or title, by himself or those authorized by him, to fish for salmon grilse or salmon trout within the bounds before specified, and that he ought to be decerned to desist from so doing for the future, and from disturbing the Respondents in the possession and enjoyment of their right.

The Appellant pleaded, in defence to these actions, which were conjoined together—

"I. The Pursuers have no sufficient title to warrant them "to pursue the present action, in respect—1. That their titles "contain no grant of salmon-fishing; and, 2. That they have "had no possession sufficient, either in character or continu-"ance, to support a title otherwise defective.

"II. Especially the Pursuers have no title sufficient to "warrant possession of salmon-fishing *ex adverso* of lands of "the Defender; and any possession which they have had was "illegal, and therefore incapable of founding a prescriptive right.

"III. The title of the Defender to the fishings, *ex adverso* "of his own lands, is preferable in competition with that of "the Pursuers.

"IV. It is *jus tertii* to the Pursuers to plead, that the "Defender has no sufficient right of salmon-fishing by his "titles, in respect that they themselves hold no grant of fishings "*ex adverso* of the Defender's lands."

The case was sent for trial by jury upon the following issue:—

"It being admitted that the Pursuers are proprietors of "certain lands lying on or near the south bank of the River

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" Tweed, with fishings, as described in the Charter in favour of " Walter Ker, No. 5 of process, and subsequent titles,

" Whether the Pursuers, and their predecessors and authors, "have, by themselves, or others authorized by them, exercised " and possessed the salmon-fishings on the south side of the " River Tweed, opposite to the Defender's lands of Maxton, " called Govan's land, or any part thereof, for forty years prior " to 23d February, 1844, continuously and together, peaceably, " and without lawful interruption therein ?"

Upon the trial of this issue the Respondents produced a tack granted by J. S. Ker in 1770, for 21 years, from 1765, to W. Spence, of the lands of Craigover (being part of those in question), " and salmon-fishing upon the River Tweed " for a money payment, " together, also, with twelve good clean salmon, or " kain fish, or one shilling sterling for each undelivered one " thereof." And another tack by J. S. Ker, in 1791, to J: Wight for 21 years, from the date of entry, of the same lands of Craigover, " with the salmon-fishings of Craigover upon " Tweed, belonging to the said John S. Ker," the entry being declared to be Whitsunday, 1790, " as to the houses, grass, and " pasture and salmon-fishing."

The Respondents likewise produced a copy of the Articles of Roup, under which the sale in 1799 had taken place, and in which Lot 1, purchased by Scott of Harden, was described as including *inter alia*, " the lands of Craigover and fishings on " the river of Tweed, presently possessed by John Wight, " tenant therein," and in which Lot 2 was described as including *inter alia*, " the fishing on Tweed effeiring to the lands contained " in this lot, but burdened always with the current tack of said " fishings to the said John Wight, present tenant thereof, and " to the rent whereof, during the subsistence of the said tack, " the purchaser of Lot 1st is to have right, but no longer."

The Respondents also adduced the evidence of S. Spence, the son of W. Spence, the lessee under the tack of 1790, who

swore to his father having fished under the tack between bounds, which included the Appellant's lands; that Ker was his "father's "landlord in fishings, and the Duke made no claim at all." The witness continued; "My father fished sometimes with rod, "sometimes with nets, and sometimes at night with lights and "leister. When with nets, he had them set at the cairns. The "cairns were built, and nets were set into the cairns. The cairns "were upon the banks, and went into the river. Were "built at conveniency (*i. e.* convenient places). The cairn was "on the Duke of Roxburgh's lands. No other cairn in father's "time. My father fished whole of water on south side.

"The Duke of Roxburgh or his people did not fish. "Squire Ker's son used to fish. He was my father's only "landlord. John Wight succeeded my father as tenant.

"The nets were set when water was big, in time of speats. "The nets were made fast. Allowed to remain as long as con- "venient, as water was big. Drawn occassionally. Remained "for two or three hours, and for nights. Were fixed with ropes "to cairns. I used sometimes to row the boat, and lights at "night. We did not use nets in any other way than that "described."

Haliburton, the tenant of the neighbouring fishing during Wight's tenancy of that in question, swore as follows:

"I lived at Maxton for some time. I went there in 1810. "I remained 11 years there. I had all Lord Polwarth's fish- "ings. John Wight was tenant of General Ker's water.

"Wight fished by nets, rod, and whiles by leister. Nets "were cairn-nets.

"Cairn-net is a small net, eight or nine or ten yards long, as "answers hole. It is putten up with floats on top, and sinks below. "Cairn is built on bank. The net will not do without it. It pro- "jects from bank into river. Makes an eddy, which keeps net "bent out into water. Net is fixed to middle of cairn at top, by a "pin and rope; object of rope is to bring the end of the net close

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" to the cairn. The net is thrown out, and the water arranges " it. The off-end goes loose; but from eddy and stream it keeps " a stationary position. Is in dead water between stream and " eddy. The net has bags at both ends. It remained generally " all night; but was looked at, or drawn once at night. Fish " came up by side of cairn in easy water, and then, rounding the " cairn, got into the net. We drew them once or twice, or oftener " in a night. We caught many when water was in order for " these nets; that is, large; four or five caught in one haul, and " several hauls in course of night.

" Wight fished in this way. He had seven cairns or eight " on whole water, and nets for each. Three cairns were on " Duke's lands: uppermost at Kirkback, just below church; " next at east above Webb's; and third at Webb's. The cairn " there was rather in the water, called in-water cairn; but other " two on bank. Wight fished at these three cairns."

Robert Kyle, besides confirming the above evidence, swore: " Water cannot be fished with long net. The channel too rocky." " Cairn-nets was the only way of fishing when water is heavy " and fish were travelling. This mode is common."

John Moffat sworn.—" No one, in right of the Duke, " ever fished there, even with rod, no one fished without leave " of the ladies," meaning the Respondents. " We stopped all." This evidence was also corroborated by other witnesses. And continuous fishing, in the manner described, was proved down to the year 1842.

Upon this evidence the Jury returned a verdict for the Respondents, " subject to the opinion of the Court whether, " in point of law, the mode of fishing proved is sufficient to " support the issue."

The Court, on hearing parties, *vivâ voce*, pronounced the following interlocutor—"Apply the verdict of the Jury in the " conjoined cases: In the process of suspension and interdict, " suspend the letters *simpliciter*, and declare the interdict per-

" petual: And in the process of declarator, find and declare in " terms of the conclusions of the libel, and decern."

This interlocutor was the subject of the appeal.

Mr. Bethell and *Mr. H. J. Robertson* for the Appellant. Salmon-fishing, when it is carried on within sea-mark, or where the sea ebbs and flows, or where the fishing is with coble or trail net, is a *jus regale*, and requires express disposition to pass it, Leslie *v.* Ayton, *Mor.* 14249; Gairlies *v.* Torhouse, *Ibid.* If it be not so conveyed, it may be acquired under a charter of lands, accompanied by a forty years' possession; but in such a case the charter must either expressly give the fishings in the particular river, or bestow a general grant of fishings, for without a *prima facie* title, no length of possession will give the right, Hunter *v.* Maule, 5 *S.* & *D.* 222. In the present instance neither the possession nor the titles of the Respondents are such as to give them the right claimed.

The charters founded on give only a general grant "pisca- " tionum," not "piscationum salmonum," and that only of the fishings appurtenant to the lands conveyed—the grant is "*cum* " *earund. piscationibus.*" These expressions will not give the grantee any larger right than to the fishings of the particular lands; but here the claim asserted by the Respondents is not confined to the fishings, *ex adverso*, of their own lands, but extends to embrace those, *ex adverso* of the Appellant's lands, to the exclusion of any enjoyment by him, a claim for which the deeds offer no foundation. But even if the charters could be the basis of a prescriptive title to such a right, the nature of the fishing, whether of salmon or of white fish only, would have to be ascertained by the nature of the possession which had been enjoyed.

The only possession proved was fishing by cairns and cairn-nets, by rod, and by spear, and lights. With regard to the two last, they are not sufficient possession to support the

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right, as was long since found in Forbes *v.* Udney, *Mor.* 7813, and again in Chisholm *v.* Fraser, *Mor.* App. Sal. Fish., No. 1. Sutherland *v.* Ross, 14 *Sh.* 960. See also Abercrombie *v.* Breadalbane, 5 *Co. of Sess. Ca.* 1393.

The only other possession proved or founded on was that by means of cairns and cairn-nets, but that is a mode of fishing contrary to the general policy of the law, which will not allow any mode which, in its operation, is either destructive of the fish, or prevents their free passage up or down the river. Cruives and yairs are prohibited by 1424, cap. 11; 1427, cap. 6; 1429, cap. 22; 1477, cap. 73; 1489, cap. 15; 1563, cap. 68; and 1581, cap. 11. The Act 1457, cap. 86, prohibits any man to "set ony uther ingine to let *i. e.* hinder the schmoltes to go "to the sea." The Act 1469, cap. 37, re-enacted by 1685, cap. 20, forbids fishing in a variety of ways, "or any uther "manner of way," tending to the destruction of the fish, which has been found sufficient to authorize the prohibition of a mode of fishing which, though not mentioned in the statute, had the tendency to that destruction which it was the object of the statute to prevent. And notwithstanding it had been followed for upwards of forty years, Fife *v.* Gordon, *Mor.* Sal. Fish. App. p. 2. And the Act 1696, cap. 33, which prohibits the erection of mill-dams in salmon rivers, "discharges all "fishing at such miln-dam dykes with nets stented or other-"ways, or any other engines whatsoever." In Colquhoun *v.* Montrose, *Mor.* 12827, and 14283, fishing by stented nets and stakes stretching nearly across the mouth of a river, was held to be illegal, "being of a very destructive nature, and impos-"sible to be regulated in the manner of a cruive fishing, and "cannot be sanctioned by any usage." In Queensberry *v.* Annandale, *Mor.* 14729, the Court prohibited particular modes of fishing, because they were intended for "preventing or "obstructing the fish from passing up the river, and are not "only prejudicial to the superior heritors, but destructive of

" the fishing." And in Dirom *v.* Little, *Mor.* 14282, the Court prohibited the Defenders " from erecting any engines, or using " any method not for the purpose of catching fish, but for " obstructing or preventing them from passing up the river, " and in particular from using the stent-nets, or hang-nets of " any sort or denomination," although the mode complained of had been used from time immemorial. In Atholl *v.* Wedderburn, 5 *S.* & *D.* 150 the Court interdicted fishing " by any " other than the ordinary way of net and coble;" so also in Grey *v.* Sime, &c. 13 *S.* & *D.*, 1089, fishing by nets, having one end fastened to the shore, and the other moored in the water, was interdicted.

In all of these cases fishing by any other mode than net and coble was interdicted upon the general principles laid down in Atholl *v.* Maule, 5 *Dow.*, that at common law, upper proprietors are entitled to prevent operations by lower heritors tending to obstruct the progress of the fish, and that the statutes were intended not merely to preserve the breed of young salmon, but to prevent excessive destruction of the fish generally. Accordingly, in Sime *v.* Johnstone, the interdict was against using nets made fast to the shore by one end, and having the other fixed by a mooring in the river and remaining stationary, " so as to obstruct the passage of salmon, and force or decoy " them into courts or inclosures of netting, within which they " are caught," and with a view best to insure the object of the law, it was assumed that any other mode of fishing than by net and coble was illegal.

But the mode of fishing practised by the Respondents is in direct opposition to the statutory enactments and to the decisions of the Courts, for the cairn is built on the bank running out into the stream, and the net is attached to the end of the cairn, and is thence drawn out into and allowed to hang in the stream, and so effectually interrupts the passage of all fish to the extent to which the net protrudes into the river.

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Such being the general principles and policy of the law in regard to the fishing for salmon in the rivers of Scotland generally, there is nothing which makes the River Tweed an exception. In all the earlier statutes down to 1597, the enactments are general in their terms, not mentioning, and still less excepting the Tweed. No doubt in the Acts 1597, cap. 265, and 1600, cap. 11, probably from deference by King James to Queen Elizabeth, the River Tweed was excepted from their provisions, but that exception was taken away by the Act 1606, cap. 5, and thenceforth the Tweed was under the same statutory regulation as the other rivers of Scotland. That this is the case is established by express decision in Roxburgh *v.* Home and Tankerville, 1 *Haile*, 249, in which case this House found that the Act 1696, cap. 33, applied to the River Tweed, where both its banks were within Scotland, and also to one half of its channel, when one bank alone was within that country.

But it is said the Act of 11 Geo. IV & 1 Will. IV., cap. 54 does, by implication, give authority for the mode of fishing in question, a consequence which would hardly be anticipated, and which a Court will be very unwilling to draw, inasmuch as it will be in direct opposition to all previous legislation or jurisprudence upon the subject.

That statute, in its 10th sect., enacts,

"And be it further enacted, that from and after the passing "of this Act, if any person or persons shall beat the water, or "place, or set any white object, or any bar-nets, or other net or "nets, or other thing whatsoever, in, over, or across the said "River Tweed, or in, over, or across any river, rivulet, brook, or "stream, mill-pool, mill-lead, mill-dam, sluice, cut, pond, or "other pool which runs into, or otherwise communicates with "the said River Tweed, or within the mouth or entrance of the "said River Tweed, so as to prevent, or for the purpose of pre-"venting the said fish from entering the said River Tweed, or "from going up and down the said river, or any river, rivulet,

" brook, or stream, mill-pool, mill-lead, mill-dam, sluice, cut, " pond, or other pool, which runs into or otherwise communi- " cates with the said River Tweed, or shall in any other way, or " in any other manner, prevent the said fish from entering the " said river, and going up and down the said rivers and waters " before-described, every person so offending shall, for the first " offence, forfeit and pay any sum not less than 10*l.* and not " exceeding 20*l.*; and any sum not less than 20*l.* and not " exceeding 40*l.*, for every subsequent offence: Provided always, " and be it further enacted, that nothing herein contained shall " be deemed or construed to alter or affect the modes or " methods for taking and killing fish in the said rivers and " waters, other than such as are by this Act specially pro- " hibited."

Now, nothing can be plainer than that this statute prohibits the setting of any net " in, over, or across the said River Tweed," " so as to prevent, or for the purpose of preventing the fish " from going up and down the said river," except that a cairn-net, used in the mode proved in this case, is a net " set in the " river," which " prevents," or is placed " for the purpose of pre- " venting the fish from going up or down the river." And if the statute had stopped there, the question would be at an end.

But the statute, in its 26th sect., enacts.

" That it shall not be lawful for any person or persons to " affix any net, commonly called a cairn-net, to any islet or " cairn, not connected with, or adjoining to, the banks of any " of the said rivers or streams, nor to build any cairn in any " part of any such river or stream, which cairn shall not adjoin " the bank thereof; and any person or persons found guilty of " any such offence, shall forfeit a sum not less than 1*l.* and not " exceeding 10*l.* for the first offence; and not less than 2*l.* and " not exceeding 20*l.* for every subsequent offence, besides " forfeiture of any such net or nets so placed or set."

And this, it is said, by prohibiting nets to be affixed to any

cairn *not* connected with the bank, by implication authorises the affixing such a net to a cairn which *is* connected with the bank. But that is a very violent reading of the statute. The mode of fishing in question is opposed to the policy of the law and to the express terms of the older statutes as applied to the other rivers of Scotland. There is no repeal of these statutes in this Act, and the words of the 10th sect. are quite broad enough to prohibit this particular mode of fishing in the Tweed, assuming the previous statutes and decisions not to have had that effect; the terms of this 10th sect. and the general law cannot be set at nought then, because the 26th sect., while it does not legalise the particular mode of fishing, declares another mode, viz., by nets affixed to cairns erected *in* the stream to be illegal; all that the 26th sect. had in view was *ob majorem cautelam*, to declare illegal by itself and to impose a specific penalty, upon a particular mode of fishing, which is more injurious and more opposed to the policy of the law than the other modes which would be embraced by the general expressions used in the 10th sect., including among them the mode of fishing, viz., by cairns erected *on* the banks of the river.

But even if it were to be conceded that the 26th section of this statute did legalize by implication the fishing from cairns upon the banks, still that mode of fishing having been illegal prior to the statute, the position of the Respondents would be but little advanced, for the operation of the statute could not draw back to legalize that which had previously been illegal. The possession of the Respondents, then, till the passing of the statute, would have been according to a mode not permitted by law, and their possession by a legal mode would be confined to fourteen years, viz., to the period since the passing of the statute; but possession by an illegal mode is no foundation of a prescriptive title, and possession for fourteen years by a legal mode is insufficient as to length of time. The result then is, that the mode of fishing practised by the Respondents and their authors has

been either insufficient in degree to give the character of possession, or illegal in its mode, and that there is nothing which can raise up their title to *fishings* only into a right to *salmon* fishing.

Mr. Rolt and *Mr. Anderson* for the Respondents.—It is too clear to admit of dispute that a Crown Charter *cum piscationibus* is a sufficient foundation for a title to salmon-fishing by prescriptive possession of forty years, *Ersk.* II, 6, 15, even against a grantee of the salmon-fishing by express disposition not followed by possession, Queensberry *v.* Stormont, *Mor.* 14251. In the present case the Appellant neither has a grant of the salmon-fishing *ex adverso* of his lands, nor pretends that he ever possessed the fishing.

The question, then, is truly one of possession alone. The length and extent of the possession is not disputed, but the point made is, that the possession was illegal as to its mode, and therefore cannot give a title; but however noxious a possession may be, it is not the less possession. In the present instance the complaint is, that the possession is too ample—that it shows too large possession—but that can never be reduced to no possession at all. The possession may be illegal and may be put an end to in proceedings properly constituted for that purpose, but until so interrupted, the party is entitled to continue the possession, and to draw every advantage which may be consequent upon the fact of its subsistence. It is not declarator of a right to fish by cairn and net alone which the Respondents ask, but of fishing by that "and every other legal "method." If fishing by cairn and net be illegal in the Tweed it may very well be that the illegality will prevent the continuance of that particular mode, and yet its past exercise may constitute such a possession as will give the party a right to declarator of a title to be enjoyed hereafter by some other legal mode. At all events, as the Appellant does not allege any

possession by himself of the fishing in question, he has no title to complain of the illegality of the mode of fishing used by the Respondents, *Chisholme Mor. Appx. Salmon-Fishings; Munro*, 7 *Co. of Sess. Cases*, 358; Sutherland *v.* Gilchrist, 14 *Sh.* 960.

But fishing by cairn and net neither comes within the policy of the restrictions upon the mode of salmon-fishing generally, nor is it expressly prohibited by any statute. The policy of the legislation upon this subject has been to prevent obstruction to the free passage of the fish, and their undue destruction by means of fixed machinery or apparatus, but the evidence in the present case shows that the cairns used are not built in the bed of the river, and do not extend into it, but are erected upon the bank, while the net stretched from them does not exceed 30 feet in length, the river being more than 100 feet broad. Such a contrivance is not within the letter of the old statutes, and is not, except to a very small degree, if at all, opposed to the policy of the legislature, while on the other hand it is proved that fishing by net and coble, the acknowledged legal mode, is impossible at this part of the Tweed by reason of the rapidity of the current.

Further, the Tweed, together with the Solway, are in a different category from the other rivers of Scotland. These two rivers were expressly excepted from the general statutory enactments for the protection of the fish, for an obvious reason, viz., that their course running partly between England and Scotland, it was not possible, while the two kingdoms remained separate, so to devise a restriction upon the course of fishing in them as that, while the inhabitants on the Scotch bank observed the restriction, those on the English bank should do so likewise; and therefore, as the likely effect of any restriction would be to benefit the English at the expense of the Scotch, it was thought better to except the Tweed and the Solway, or Annan, from the enactments passed from time to time. There

is an express exception to this effect in the Acts 1431, cap. 131; 1457, cap. 85, and 1597, cap. 265, and the whole scope of the other Acts shows that it was not intended to apply to the Tweed and Solway the regulations which were made for the other rivers, but that the mode of fishing in these two rivers was left to use and possession.

Accordingly, the 9th of Geo. IV. cap. 39, which for the most part superseded all the ancient statutes upon the subject of fishings in the rivers of Scotland generally, and put these fishings under a series of new regulations, contained, like the more ancient statutes, an express exception "of the fisheries in the River Tweed."

It was not until some time after the kingdoms had been united, that the fisheries in the Tweed became the subject of legislation. In 1771 an entirely new course of legislation commenced, which in its terms was confined exclusively to the Tweed, viz., 11 Geo. III. cap. 27; 15 Geo. III. cap. 46; 37 Geo. III. cap. 48, 47 Geo. III. cap. 29. None of these Acts refer to the Scotch Acts as applying to the River Tweed, and in none of them is fishing by cairn and net in that river declared to be illegal. On the other hand, the evidence in the present case shows that that mode of fishing has been practised in the Tweed for time immemorial, and has been recognized as lawful by the decisions of the Court. In Scott *v.* Kerse, 11 Dec. 1812, F. C., the mode of fishing there complained of was by cairn and net, and the complaint was dismissed. So in an action in 1814, at the instance of the Respondent's author, Ramsay against Lord Polwarth, the successor of Scott of Harden, for the purpose of having the right to the fishing now in question established against his Lordship, (the decree in which was produced in the Court below,) the mode of possession proved and not objected to as illegal was by cairn and net.

Fishing by cairn and net having thus been practised for time immemorial in the Tweed, the statutes applicable to other

rivers not having application to the Tweed, and the statutes expressly applicable to the Tweed not forbidding the practice: then come the 11 Geo. IV., and 1 Will. IV., the last and governing statutes in regard to the Tweed. That Act, in its 16th sect. declares that if "any net or engine or device whatso-"ever" shall be left "or placed *in* the said river," during the close time, with the intent of taking salmon (which intention with respect to nets shall be implied "from their being left "or placed during the said close time in the state in which "such nets are ordinarily used," in fishing), it shall be lawful for the water-bailiff to seize and burn the same.

These expressions assume the existence of modes of fishing by fixed nets of some kind or other; and then comes the 26th section, which prohibits fishing by cairns "not connected with "or adjoining to the banks." It declares this mode of fishing as for the first time to be unlawful, and prohibits it under a penalty. The obvious inference is, that the other mode of fishing from cairns, viz., from those which *are* connected with and adjoining to the banks, as it is not declared to be unlawful, though known to exist, is permitted to continue, and is considered to be lawful, more especially as the 10th section declares that it should not be deemed to affect the modes of fishing in the river, "other than such as are by this Act specially pro-"hibited."

With regard to the reported cases, they are all applicable to other rivers than the Tweed. In Fife *v.* Gordon, *Mor. App. Sal. Fishery;* Colquhoun *v.* Montrose, *Mor.* 14283; Queensberry *v.* Annandale, *Mor.* 14,279; Dirom *v.* Little, *Mor.* 14282; and Forbes *v.* Smith, *Wils. & Sh.* 583, the question was as to the legality of erections either within or stretching across the river. In Athol *v.* Wedderburn, 5 *S. & D.*, 153, and Gray *v.* Seine, 13 *D. & B.*, 1089, the question regarded the use of particular kinds of nets in the river Tay, but neither in these nor in the other cases was any question raised about cairn-nets,

or was it proved that the use of net and coble was impossible, as it is in the present case.

Mr. Bethell, in reply.—The prohibition of this particular mode of fishing is part of the general law, and there is no exception of the Tweed from its operation. The object of the 11 Geo. IV. and 1 Will. IV. was *ex abundanti cautela,* to make illegal, *per expressum,* a practice which up to that time had not been regarded in that light, to abolish that which fell within the reason, but might be said not to fall within the letter of the law. Scott *v.* Kerse is only an authority for saying that the mode of fishing complained of did not fall within the particular statute under which the complaint was made, and that Commissioners for enforcing a statute were not entitled to complain of any thing not within the statute.

[*Lord Brougham.*—If previous statutes declare a thing to be illegal, and a new Act imposes a penalty upon the doing of one of the things that won't take away the illegality of doing the other things. But that is not this case. The Act of 1830, as if for the first time, makes cairn-nets fixed in islets to be illegal, and imposes a penalty, saying nothing of cairns upon the banks.]

Cairns connected with the banks were already illegal, and the 10th sect. continues the illegality by prohibiting the setting of any net in, over, or across the river.

LORD BROUGHAM.—My Lords, In this case I shall not ask your Lordships to give judgment at once, because there are one or two things which I wish more fully to look into than I have had an opportunity of doing either formerly or during the course of the argument at the bar.

The interlocutor under appeal is apparently, no doubt, the unanimous decision of all the four Judges who dealt with the cause. But when you come to look at it more nearly, there is a considerable difference in the manner in which their Lord-

ships give their opinion, a circumstance always tending very much to make the Court in the last resort give particular consideration to the arguments adduced. One of the learned Judges, Lord Medwyn, states, in what may be considered a modest form of expression, that which, perhaps, hardly amounts to a clear and decided opinion either way; it rather leans for the Appellant than against him, and it leaves a doubt on our mind whether he can be said to have agreed with the learned Judge who preceded him, the Lord Justice Clerk; for the reason I have already stated in the course of the argument, it should seem that Lord Medwyn does not meet the reasons urged, at least chiefly argued, by the parties.

But much is to be said upon the connection between the 10th section and the 26th section of the 11 Geo. IV, chap. 54, and it is with the view principally of considering these that I recommend to your Lordships the allowing time for moving the judgment. If the 10th section must be regarded as incapable of any other construction than that put upon it by the learned Counsel; and if the 26th section is capable of no other construction (and indeed I doubt whether any other construction can be put upon the 26th section), I must say, of all the inartificial pieces of legislation I have ever had occasion to see, this is the most inartificial; for it is hardly possible that these two sections can stand together if the construction contended for by Mr. Bethell in the latter part of his reply be the pure one. The 26th section declares, under a penalty, a certain kind of dealing with nets to be unlawful, namely, putting them "in the river," that is, upon the bed of the river; and it adds, "and not "adjoining the land," so that plainly the subject-matter of the 26th section not only embraces principally nets upon islands and islets, but positively excludes nets upon the land, for it says "which cairn shall not adjoin the bank thereof." But then it is said that the 10th section makes it quite unnecessary to deal with that proceeding, because the 10th section had

already declared it to be illegal. Now, what does the 10th section say? I think that also is clumsily and inartificially framed, but I still conceive one can see what is meant, for it says, "And be it further enacted, that from and after the pass-"ing of this Act, if any person or persons shall beat the water "or place, or set any white object or any bar-nets, or other net "or nets, or other thing whatsoever." Then if the 26th section had not been here you would have said that this 10th included nets tied to any island or islet, as well as those tied to the shore. But what does the 10th say? Not only "over "or across," which would be sensible and consistent with the 26th section, for "over or across" by force of the terms means from shore to shore; but the words are "in, over or across "the said River Tweed" which shall tend to prevent the fish coming up. Now, is not a net in an island or islet something in the Tweed which has that tendency; and yet the one section deals with it in one way and the other in another? The 26th speaks upon that subject as if it had never been contemplated by anything going before.

I shall look fully into this point of construction, and also into the other arguments adduced, because I agree with the learned Counsel in thinking that the question is not at all an immaterial, but one of considerable importance; I therefore move your Lordships to postpone the further consideration of this case to a future day.

3rd August, 1850.

LORD BROUGHAM,—My Lords, I have fully considered this case since the hearing. I have examined the statutes cited, and looked into the cases referred to, which do not, however, at all vary the opinion I formed during the argument upon the import of the statutes, and I am prepared to move your Lord-

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ships, without entering minutely into the argument, that the interlocutor appealed from be affirmed.

This was a judgment pronounced by four learned judges,—by two of them, Lord Moncrieff and Lord Cockburn, without any hesitation, by the Lord Justice Clerk, who, in addition to his observations, stated that it was a question of great nicety, and that he gave his opinion with hesitation; and by Lord Medwyn, upon the mistaken ground which is set forth in the course of his argument. He does more than merely express a doubt—he expresses a strong inclination of opinion respecting the construction of the Act as to legal modes of fishing, observing that prescription must be by user, and that it must be by a legal user. Spearing and rod fishing would not raise the point, but cairn fishing is the mode in question, and you must believe it to be a lawful user, or it will not form any ground of prescription. His Lordship thinks that, by the Tweed Act, 1830 (the 11th George IV.), cairn fishing is not recognized to be a legal mode of fishing. It is enacted by the 24th section, "That it shall not be lawful to affix any net, "commonly called a cairn-net, to any islet or cairn not con-"nected with, or adjoining to the banks of the said river," under a penalty. Now his Lordship says, the argument on this is that by stating one mode of fishing to be liable to a penalty, the Legislature tacitly admitted, though not by words, that another mode of fishing, not declared to be subject to a penalty was legal—"that this is implied in the prohibition of doing it "(that is, fixing the cairn-net) to cairns not connected with the "bank, which clearly was illegal before. But is this so? To "set cairn-nets in the Tweed is unlawful. A statute is passed, "imposing a penalty upon them in a particular situation, "where we may suppose they are peculiarly destructive, and "giving a convenient jurisdiction for enforcing it, does this at "once legalise them in all other positions in the river, which "are not so much as noticed from one end of the statute to the

" other ?" I take leave, with great and unfeigned respect for that very learned judge, to say that such is really not the argument, nor the accurate statement of what the 24th section of the statute enacts. If all that the 24th section did had been to say,—Whoever affixes a net to an islet, or to a part of the land in the bed of the river not adjoining to the side, shall pay a penalty, I should entirely have agreed with his Lordship that this would be only affixing a penalty to a particular act, and would not show that any act other than that against which the penalty was denounced, was legal. But that is not what the statute does. The 26th section says, " That it shall not be " lawful for any person or persons to place"—what?—" to " place or set any net or nets nearer than 50 yards above or " below any dam-dyke," and so on, " or to affix any net, com- " monly called a cairn-net, to any islet or cairn not connected " with, or adjoining to the banks of any of the said rivers or " streams, nor to build any cairn in any part of any such river " or stream, which cairn :" it does not say not to build any cairn at all in any part of it—no such thing—it shall not be lawful " to build any cairn in any part of any such river or stream, " which cairn shall not adjoin the bank thereof." The intention is perfectly clear. It is under a penalty, no doubt. But this is not merely affixing a penalty to that which was declared illegal before; it is declaring its illegality; it is constituting its illegality; it is creating its illegality; it is creating an illegality of a new description, and that illegality is confined to the building of a cairn upon an islet, or some part of the channel of the river, " which cairn shall not adjoin the bank thereof." I formerly, at the hearing pointed out the use of the word " in" by the 10th section as strongly supporting this view of it, and therefore I take leave to think that my Lord Medwyn is in error in the comment which he makes upon the argument arising on the statute. In all sound construction of statutory provisions, declaring an illegality rather than dealing with a penalty, we are to take the

rule which his Lordship does not adopt, from, I think, not duly regarding the object and frame of the enactment.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellant do pay or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful and necessary.

RICHARDSON, CONNELL, and LOCH—GRAHAME, WEEMS, and GRAHAME.