HOUSE OF LORDS.

Monday, May 28.

WEDDERBURN *v.* DUKE OF ATHOLL.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, and Lord Brampton.)

(*Ante*, March 3, 1899, 36 S.L.R. 477, and 1 F. 651.)

DUKE OF ATHOLL *v.* GLOVER INCORPORATION OF PERTH.

(Before the Lord Chancellor (Halsbury), Lord Macnaughten, Lord Davey, and Lord Brampton.)

(*Ante*, March 3, 1899, 36 S.L.R. 481, and 1 F. 658.)

Salmon-Fishing — Fixed Engine — Net — Toot-and-Haul-Net — Hang-Net — Drift-Net.

The only legal method of net-fishing for salmon in a river or estuary is by means of a draft or sweep-net, which is used solely as such, and any method of net-fishing in which the net is used not merely as a sweep-net, but partly or solely as a stationary obstruction, however temporary, to the free passage of the fish, is illegal.

Held, in accordance with this principle (1) (*aff.* judgment of First Division), that "toot-and-haul" nets were illegal, and (2) (*rev.* judgment of the First Division) that "hang" or "drift" nets were illegal.

Rules laid down in *Hay* v. *Magistrates of Perth*, May 12, 1863, 4 Macq. 535, *explained* and *applied*.

Masters of Allan's Mortification v. *Thomson*, Nov. 14, 1879, 7 R. 221; and *Earl of Wemyss* v. *Earl of Zetland*, Nov. 18, 1890, 18 R. 126, *overruled*.

These cases are reported, *ante, ut supra*.

In the first case the defenders Wedderburn and others, and in the second case the pursuers the Duke of Atholl and others, appealed to the House of Lords.

The defenders in the case of the *Glover Incorporation of Perth* abandoned the plea of *res judicata* which had been maintained by them and repelled in the Court below.

LORD CHANCELLOR—In both these cases the question is, whether the mode of catching salmon in the Tay pursued by those who are described in the two cases as fishing is a mode which may be lawfully pursued, and I am of opinion that both modes are unlawful.

The case known as the Bermony Boat case brought to a definite issue of principle what is or is not lawful in the use of a net, and I think the distinction may be compendiously stated as the result of the cases concluded by the case to which I have referred, is that a fixed net is unlawful, while a net used by a fisherman in the act of fishing is lawful. I cannot help thinking that some ingenious person has carefully considered the exact words used by Lord Westbury in the case in question, and has sought to evade the pressure of his words by colourable alteration of the method in which the net is treated, but *qui hæret in litera hæret in cortice*. The nets in both these cases seem to me to be fixed engines. The mode in which they operate is not an act of fishing at all. It is a wall of net suspended across the stream—not to operate to catch a fish in the ordinary mode by which a net is used to catch fish, but fixed and operating as an obstruction through which the fish attempts to get and entangles himself by his efforts to get through the net and so is caught. This, doubtless, is the way in which fish are caught when herring-nets are in some places put into the sea, but such an operation is not to my mind an act of fishing at all, and the evidence as to the effect of a succession of nets used in this way all up the stream shows what an enormous obstruction to the ascent of the fish is thus created, and undoubtedly this is one of the reasons which led the Scottish Parliament to enact that fixed engines were unlawful.

Of course a net, however used, is in itself an obstruction, but there is all the difference in the world between the temporary use of a net in the act of catching a fish and what I have described as a wall of net, remaining and intended to remain for a considerable time motionless, and in that sense fixed. And it appears to me that by a long line of decisions the broad distinction has been insisted upon and, to my my mind, unanswerably concluded by the judgments in *Hay* v. *The Lord Provost of Perth*. Lord Westbury described the mode of fishing which he held to be lawful, and which he said came within the principle of ordinary net-and-coble fishing, because it was a mode of fishing which exists only and takes the fish only while 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. And Lord Chelmsford, in the same case, described the decisions which had been quoted to him as establishing that contrivances for the purpose either of preventing the fish from passing up the river or catching them by fixed nets were illegal.

The principle, I think, is established also by the judgment of the Lord President in the earlier stages of the same case. One passage seems to me to put the matter very clearly. The Lord President said—"The judgment of the House of Lords is quite clear as to stent nets. There, in the case of *The Duke of Queensberry* v. *The Marquis of Annandale*, it was fixed nets for obstructing the passage of the fish, used (as the judgment states) not for the purpose of catching fish, but for preventing or obstructing them from passing up the river, and therefore" it is found "that the methods used of stenting nets across the river, either reaching altogether from side to side or overlapping each other in the

manner mentioned in the proof," &c., are illegal. Fixed nets which would prevent altogether the passing of the fish I hold to be unlawful, whether the engine be a fixed net or fixed stakes stationary in the water. In the case of *Dirom* v. *Littles* it was a hang-net; in the seaside case it was a stake net; in the *Duke of Atholl* v. *Wedderburn* it was toot-nets and stake-nets, and stent-nets alleged to be of the nature of stake-nets. Then in the case of *Cunningham* v. *Taylor* it was a dyke erected; in the case of *Mackenzie* v. *Houston* it was the case of stent-nets, the one end of the stent-net being fixed by an anchor in the stream and the other end on shore, and the net so fixed was left standing stretched into the river—a fixed engine for catching the fish."

Now, it seems to me that both the hang-nets and the toot-and-haul nets are illegal within the principles laid down by all the cases. In neither case is it an act of fishing. It is a fixed net, and although fixed but for a time its operation is that of an obstruction. It remains, as nearly as the person managing it can procure it to do, perfectly still, and its operation when thus still is simply obstruction. When a fish strikes it it is true the fisherman then does something to catch the fish—most commonly by gaff, but its operation is what I have said.

Under these circumstances it appears to me that the use of these nets in both the cases and upon the admitted facts is illegal, and I accordingly move your Lordships that the judgment in the first case should be affirmed, and in the second case be reversed, with the usual result as to costs in each case.

LORD MACNAGHTEN—I agree with my noble and learned friend in both cases.

In the course of the argument, which was marked by great learning and great research, the attention of your Lordships was called to several ancient statutes, and to many interesting cases decided before *Hay* v. *The Magistrates of Perth* was brought up to this House in 1863. But I do not think it at all necessary to discuss those cases, or to inquire whether the law as to net-fishing in Scotland has been deduced by a process of liberal interpretation permissible in Scotland, and not altogether unknown in England, from enactments, in some cases at any rate, rather limited in their scope, or whether those ancient statutes are to be regarded merely as examples and instances of particular cases in which the Legislature thought fit to interpose by special prohibition, for the purpose of checking practices growing up here and there in contravention of the common law. However that may be, it seems to me that the law on the subject is now finally settled by the decision of the House in *Hay* v. *The Magistrates of Perth*. and that nothing would be gained by trying to go behind that decision. And looking for a guide in the opinions delivered in that case, I must say, speaking for myself, that I rather prefer the simple test proposed by Lord President M'Neill, and adopted by Lord Chelmsford, to the more elaborate disquisition of Lord Westbury, which led that noble and learned Lord incidentally to the conclusion that fishing with a casting-net was very much the same thing as fishing with a draft-net, and which in the case of *Allan's Mortification* v. *Thomson* contributed in some degree to a decision not, I think, in accordance with established principle.

Net and coble in practice seems to be nothing more than the ordinary method of working a draft-net or seine, where owing to the breadth of the water or some other cause it is impossible to make use of both banks of the stream for drawing the net. One end is taken down by a man walking or wading along the shore, the other end by a man in a boat. In the case of Mrs Hay's fishings it was inconvenient or impossible for a man to make his way along the shore, and so the shore-end of the net was brought down by a boat. There was nothing special about the boat except its name, taken apparently from the place where it was used. The boat is spoken of as the "Bermony Boat"; and the case of *Hay* v. *The Magistrates of Perth* is commonly referred to as the "Bermony Boat Case," as if there was something peculiar about the construction of the boat or its use. In reality there was nothing of the sort. The boat was an ordinary boat moved to and fro by means of a rope attached to a pin in the bed of the stream. Some stress was laid on the existence of this pin—a fixture it was called, and an obstruction. But an anchor would have served the purpose just as well, and the particular way of moving the boat had nothing whatever to do with the use of the net as a means for catching fish. It was contended, however, that the substitution of this boat for a man walking or wading along the shore was such a departure from the ordinary and accustomed mode of net-and-coble fishing as to make the fishing illegal. It is very difficult to see any substance in the objection. But the majority of the learned Judges in the Court of Session gave effect to it. Lord President M'Neill alone dissented from his colleagues, and this House agreed with the dissentient Judge. "The judgment of the Lord President," observed Lord Chancellor Westbury, "expresses correctly the rational interpretation of the law." "I think," said the Lord President, "the question may be put in this form, is this net-and-coble or is it not? That is the real question apart from the other question as to putting obstructions into the *alveus* of the river. Is this a fair exercise of the right of fishing by net and coble or is it not?" "I think," added his Lordship in a subsequent passage of his opinion, "that improvements upon the net-and-coble mode of fishing, so long as it is fair net-and-coble, are just as lawful as improvements upon anything else." The view of the Lord President was adopted in substance by Lord Westbury, and in terms by Lord Chelmsford. "The only point to be determined," said Lord Chelmsford, "is whether the mode of fishing employed by the appellant falls under the description of

net-and-coble fishing, or is such an addition to and variation from the sort of fishing understood by that denomination as to render it a distinct and different kind." Both the noble and learned Lords who heard the case were agreed that net-and-coble fishing in the ordinary way did not admit of the use of a fixed net.

Of course people may fish illegally with net and coble just as people may fish illegally with rod and line. The instruments used may be perfectly legal in themselves, but they may be used in an unlawful manner. The point, I think, was very well put by the Lord President in some observations, which are not without a bearing on both the cases now under consideration. "I do not say," said his Lordship, "that a party may not use a net and use a coble in a way that is a mere evasion of the right of net-and-coble fishing, For example, a party puts a fixed net across the river, and he has a coble behind it in which he goes to take out the fish when they are caught, he is using both net and coble, but that is not what is meant by fishing by net and coble. That is a perversion and evasion of net-and-coble."

So the question seems to be, Are these two nets—the toot-and-haul net in the one case, and the drift or hang-net in the other—fair net-and-coble or not?

The toot-and-haul net is what is called in some parts of the country a fixed drift-net. Instead of being drawn as soon as it is shot, the net is set across the stream, the staff at the far end being fastened to a rope attached to a windlass on shore. The net is held in position by a boat at anchor about 20 yards or so from the end of the net which is turned back towards the shore so as to form a bend or hook. The man in the boat remains on the look-out and in touch with the net. When he becomes aware of the presence of fish within the bounds and grasp of the net, he signals to the man on shore, and sets the net free for them to haul it in at once. As far as regards the paying out and the hauling in the net is fair net and coble. There is no question about that. But in the interval, and as long as it is set, the net is a fixed engine held in position for the very purpose of obstructing the run of the fish and barring their progress. So the toot-and-haul net really performs two different and distinct functions. If those two functions were performed by two different nets, no one could doubt that the operation was illegal. Nets stretched or stented across the channel of a river, or any part of the channel, for the purpose of obstructing the passage of salmon, have invariably been held illegal. The illegality is none the less because the same net is used for a legal as well as for an illegal purpose. This mode of fishing, to use Lord Chelmsford's words, is, as it seems to me, "such an addition to and variation from the sort of fishing understood by the denomination of net-and-coble as to render it a distinct and different kind." It is in fact an illegal addition to a legal method of fishing.

It was urged that the toot-and-haul net was sanctioned by immemorial usage. The evidence is not altogether satisfactory on the point. Assuming, however, the fact alleged to be established, it is clear law that "no length of possession can sanction an illegal mode of fishing, or give an available right to continue it when complained of."

The drift-net or hang-net, the legality of which is challenged in the next case, is not used after the manner of a draft-net. Nor is it adapted for any such purpose. It is not strong enough or deep enough for that. The mode in which it is used is this—It is shot across the river when the water is slack at the turning of the tide. It is then cast adrift and left to move with the moving water without dragging along the bottom until the current swirling and eddying as it grows stronger and stronger throws the net out of fishing order. Fish are not caught in a drift-net by being enclosed and drawn to land. The net is of very fine texture, and made of very light material, so that it may not scare and turn the fish. It is scarcely perceptible in the water, and the fish swimming about with the tide strike against it and become either gilled or hung in the meshes, or rolled and entangled in the loose and yielding folds with which they come into contact. The net as it drifts is attended by a man in a boat. When the attendant judges from the motion of the corks that there is a fish in the net, he goes and either lifts up a bit of the net and tosses the fish into the boat or secures his catch by a gaff. Apart from the use of the gaff, which is apparently illegal when used as auxiliary to net-fishing, it seems to me to be clear that this mode of fishing is not fair net-and-coble, but an evasion and perversion of net-and-coble, and something substantially different from it. Indeed, I think it would be impossible to find two sorts of net more different the one from the other than the ordinary draft-net and the ordinary drift-net.

I therefore concur in both the motions which have been proposed. Both nets are I think illegal.

My noble and learned friend Lord Morris, who is unable to be present this morning, has reqnested me to express his concurrence.

Lord Davey—I had not the advantage of hearing the arguments in the case of *Wedderburn* against the *Duke of Atholl* which is now before your Lordships for judgment, and I therefore express no opinion upon the decision in that case.

With regard to the other case, that of the *Duke of Atholl* against the *Glover Incorporation of Perth*, I agree with my noble and learned friends who have preceded me in thinking that some confusion has been introduced into this branch of law by a misunderstanding of a passage in Lord Westbury's judgment in the case in this House of *Hay* v. *Magistrates of Perth*. The noble Lord is there reported as saying (I quote from Patterson)—"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 the net continued in the hand of the fisherman. The net must not quit the hand, and the net must be in motion in the operation of fishing." Now, I do not think that those words should be interpreted in a narrow or literal sense. The mere fact that the fisherman is holding one end of the net whilst the net is left to catch or impede the passage of the fish of itself is not what was meant. And on the other hand the fisherman might conceivably attach the end of the net to his boat and move the net by towing the boat, and yet be within the rule. What I understand to be meant is, that the net must be under the effectual command and control of the fisherman, and be kept in motion by him for the purpose of enclosing the fish within its sweep, or, in other words, the fisherman must be fishing with the net and not merely regulating its position in the stream so as to catch the fish of itself.

I think the effect of the decision in *Hay's* case (as very clearly expressed in Lord Chelmsford's judgment) is that net-and-coble fishing is the type, and the exclusive type, of all lawful fishing for salmon with nets, and although other modes of fishing may conceivably be invented differing in some details and in form from net-and-coble fishing as at present practised, they must conform to that mode of fishing in substance. Tried by this standard, I think that the mode of fishing practised by the respondents, as disclosed by the evidence, is unlawful, and the appeal should consequently be allowed.

LORD BRAMPTON—The Duke of Atholl and others, proprietors of salmon-fishings in the river Tay, sought in this action to obtain a decree against the defenders, who are proprietors or lessees of fishing on the estuary of that river below the fishings of the pursuers, to restrain them from fishing for salmon with nets known as "toot-and-haul" nets, or other nets of a similar kind.

The Lord Ordinary pronounced such decree in favour of the pursuers. On appeal to the First Division of the Court of Session the judgment of the Lord Ordinary was unanimously affirmed, upon the ground that the Court was bound by the principle and rule of law enunciated by Lord Chancellor Westbury, and concurred in by Lord Chelmsford, in this House, in the case of *Hay* v. *Magistrates of Perth*, 4 Macq. 535. In this view I entirely agree, and applying that principle to the present case I find it impossible to escape from the conclusion that the use of the toot-and-haul net in the manner described both by the pursuers and defenders was and is illegal.

The essence of Lord Westbury's judgment consists in those words, "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 he went on to say, "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 cannot think that by those latter words it was intended to convey that any slight departure from a literal compliance with these requirments would render the fishing illegal, but that the net must practically be kept incessantly in motion, as it would of necessity be in an ordinary case of fishing by net and coble, where the hand of the fisherman only is employed.

The appellants deny the finality of that judgment so far as regards the principle upon which this case is to be determined, alleging that the rule of law as enunciated by Lord Westbury was not necessary for the decision of the case then before him, that it was inapplicable to the facts and the question now before this House, and that his Lordship misapprehended the case of the *Duke of Atholl* v. *Wedderburn* cited before him, in assuming that toot-nets had been in that case condemned as illegal. This last point I do not think this House could entertain. The first two, however, are matters it is bound to satisfy itself upon. I have therefore given them my earnest consideration, with this result: that I am strongly confirmed in the opinion I entertained at the close of the argument that toot-and-haul nets as used in this case were and are illegal, from whatever point of view they are looked at. To appreciate this it is necessary to have a clear and distinct understanding of the character of the net, with all its appliances, and the mode of working it—all which will be found stated with sufficient accuracy in the third condescendence and the answer thereto in the appellant's case.

It is somewhat difficult to assign to the toot-net its true office. In the appellant's case it is "admitted that the toot-and-haul nets are adapted for, and have been used by the defenders for, the purpose of catching salmon and fish of the salmon kind;" but I find this passage—"The most important point about the action of this net is, the appellants maintain, that it does not capture fish while in its stationary position. If left in the water unattended, it would neither catch nor obstruct fish. There is nothing to prevent fish swimming round the net, just as they may and frequently do swim round or back from the sweep-net; and they are caught by being surrounded by the net after it has been cast loose and hauled on shore by the fisherman."

Now, it cannot be denied that *per se* the toot-net, the use of which is objected to, is not, when extended and stationary, adapted for capturing salmon, for it has no bag or trap attached to it into which the salmon might enter in trying to clear the net, but from which once in it could not extricate itself. During such time it could only operate as an obstruction to check the fish in its onward progress up the stream, until such time as the net should be freed from the boat and hauled on shore. It is very

obvious that such was the purpose for which it was designed; the hook or cleet very much assists the attainment of this object, for if a fish obstructed by the extended net at right angles with the shore, attempted to make its way round the end of the net, instead of finding his way clear he would find his progress impeded by the hook or cleet and held within the ambit of the net until the haul was made. This, to my mind, is very strong evidence that the sole object of the stationary extended net is to obstruct, and the keeping the extended net stationary across the flow of the river for three or more hours waiting for a fish to come, is confirmation irresistible that obstruction was the object, that is, to keep the fish below the line occupied by the net, and to capture him by releasing the net from the boat, and so then converting it into a sweep-net or draft-net from below that line until the fish was landed on the shore.

Until the net is freed from the boat, except in shape and mesh, it has none of the character of a sweep-net, but from that time the freed net hauled by the boat performs an operation similar to that which would be legally performed by a simple net-and-coble mode of fishing.

In order to determine whether the fishing by toot-and-haul is legal or illegal, the whole process from the moment the net is placed in position until it is finally hauled on shore must be treated as one operation, for every part of that process is directed towards the one object, viz., the capture of the fish, to check its progress by the net until the net is closed around it, and then to secure its capture by that same net put to a totally different use as a haul-net. During the first part of the operation the net is admittedly stationary until the fish is actually obstructed and is within the range of the net which is to complete its capture.

The appellants in their case make this statement — "At common law there is nothing to prevent a proprietor of salmon-fishing catching fish by any manner of nets he pleases, so long as he *bona fide* attempts to capture the fish, and does not merely block their passage up the river in order that he may catch them otherwise below the obstruction. Such an obstruction could, it is believed, be suppressed at common law, or perhaps by an equitable extension of the Act relating to fishing at mill-dams across rivers, or the statutes dealing with rivers which are illegal unless when used by proprietors having a right to cruive fishings in fresh water, in which case they are legal obstructions subject to statutory regulations."

I cannot entertain a doubt of the soundness of the judgments of the Courts below. I think therefore that this appeal should be dismissed, with costs.

With regard to the appeal in the case of the *Duke of Atholl and Others against The Glover Incorporation of Perth and Others*, this is an appeal from a judgment of the First Division of the Court of Session in Scotland, declining to declare the illegality of fishing for salmon with what are known as hang-nets in the river or estuary of the Tay, following the decisions of the First and Second Divisions in the cases of *The Masters of Allan's Mortification* v. *Thomson* and *The Earl of Wemyss* v. *The Earl of Zetland*, which the Court felt were binding upon it.

I can see no substantial distinction between this case and that of *Wedderburn* v. *The Duke of Atholl*, just decided by this House. The hang-net and the method of using it may, I think, be thus described with practical accuracy—The net itself is an oblong net made of very light material, from 80 to 150 yards long, and from 5 to 6 yards deep, fitted on the upper side throughout its length with a light cord and floats to keep it up to the level of the surface of the water, and on the lower side with a thick rope sufficiently heavy to sink it, when used for the purpose of fishing, as low down in the water as the net is deep. It is paid out for its full length from an ordinary coble boat at a right angle across the current, and when so paid out forms to that extent a perpendicular barrier of network across the current. There is nothing required beyond the weight of the rope to fasten the net either to the bottom or the side of the river. It hangs freely in the water floated and weighted as I have described. No doubt the action of the current upon the net is calculated more or less to shift the position of it, and so from time to time to make it necessary to gather it up and re-shoot it to restore it to its perpendicular position, which is the object of the fisherman, for so long as it can be maintained in that position it is a continuous slowly-floating barrier at a right angle with the current, offering quite as effective and serious an impediment to fish proceeding upwards as if it were stationary, keeping many of them below the line of the net in the stream, so that they may be captured from the boat, which remains in attendance on the net, in their endeavours to get beyond it, or be secured by the gaff, which is mostly used, and the use of which for such purposes is illegal.

I do not say that there is any absolute obstruction which would render it impossible for a fish to proceed upwards or downwards beyond the net, for there is mostly a space between the bottom of the net and the bed of the river if the fish should chance to be swimming low down, or perchance it might find its way to the side of the net so as to get round it. The object of the fisherman, however, is to do that which the perpendicular net is calculated to do, namely, to arrest the progress of fish, whether going up or coming down the river, so as to afford the fisherman an opportunity of landing them with a gaff into the boat.

If I had before me simply the evidence of Maxwell, one of the defender's witnesses, I could come to no other conclusion than that the object of the hang-net was not to capture fish in the ordinary mode as by net and coble, but to impede the progress of the fish whether going up or down the river, to keep them on that side of the net they might chance to be approaching until

they became unable to escape from the gaff, whether they previously had become entangled in the net or not.

I can discover no satisfactory distinction between the use of the hang-net and the operations complained of in the cases of *The Duke of Queensberry* v. *The Marquis of Annandale* and *Dirom* v. *Littles*, referred to in the appellant's case in *Wedderburn* v. *The Duke of Atholl*, and I think it falls within the principle and rule of law laid down by Lord Westbury in the case of *Hay* v. *The Magistrates of Perth*, with the concurrence of Lord Chelmsford, "that it is illegal to fish for salmon with any net which is a fixture, which is at all fixed or permanent even for a time in the water," a decision which met with the approval of Lord Blackburn in *The Duke of Sutherland* v. *Ross*, 3 App. Ca. 746, for although it may be said that the net in this case is not stationary in one spot for any length of time, still, used as it is chiefly in slack water, it is in a perpendicular position when first paid out, and is retained in that position for as long a time as is possible, and so long as it so floats gradually down the current it remains a continuous obstruction. I think this brings it within the spirit of the decision, having regard to the mode in which the capture of fish is effected.

I think, then, that the use of the hang-net as described is illegal, and that the judgment appealed against should be reversed, with costs.

Appeal in the case of *Wedderburn dismissed*, and judgment affirmed with costs.

Appeal in the case of the *Glover Incorporation of Perth allowed*, and judgment, so far as appealed from, *reversed* with costs.

Counsel for the Pursuers the Duke of Atholl and Others—Lord Advocate (Graham Murray, Q.C.)—Solicitor-General (Dickson, Q.C.)—C. N. Johnston. Agents—Stibbard, Gibson, & Co., for Thomson, Dickson, & Shaw, W.S.

Counsel for the Defenders Wedderburn and Others, and Glover Incorporation of Perth and Others—Dean of Faculty (Asher, Q.C.)—Dundas, Q.C.—Blackburn. Agents—Grahames, Currey, & Spens, for Dundas & Wilson, C.S.

Monday, May 28.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Davey, and Lord Brampton.)

GRANT *v.* LANGSTON (SURVEYOR OF TAXES.)

(*Ante* June 24, 1898, 35 S.L.R. 815, and 25 R. 1040.)

Revenue—Inhabited-House-Duty—Stat. 48 *Geo. III. cap.* 55, *Schedule B—Stat.* 57 *Geo. III. cap.* 25, *sec.* 1—*Stat.* 5 *Geo. IV. cap.* 44, *sec.* 4—*Stat.* 14 *and* 15 *Vict. cap.* 36, *secs.* 1 *and* 2 *of Schedule—Stat.* 41 *and* 42 *Vict. cap.* 15, *sec.* 13, *sub-sec.* (2).

The proprietor of premises consisting of two storeys occupied the upper storey as a dwelling-house, and in the lower storey carried on the trade of a licenced retailer of exciseable liquors. There was no internal means of communication between the two storeys, each having a separate entrance from the street. *Held* (*rev.* judgment of the First Division) that he was not liable for inhabited-house-duty in respect of the storey which was used as a public-house—*per* the Lord Chancellor and Lord Brampton, on the ground that it was not an inhabited dwelling-house within the meaning of 48 Geo. III. cap. 55, and 14 and 15 Vict. cap. 36; *per* Lord Brampton, also upon the ground that even if it was to be regarded as a tenement severed from a larger house and assessable under 48 Geo. III. cap. 55, Schedule B, it was exempted from inhabited-house-duty by 41 and 42 Vict. cap. 15, sec. 13 (2), as being solely devoted to trade; and *per* Lord Macnaghten and Lord Davey, on the ground that even if it was assessable under the Act 48 Geo. III. cap. 55, it was exempted from inhabited-house-duty as being either a separate "house" or a separate "tenement" occupied solely for the purpose of trade within the meaning of 41 and 42 Vict. cap. 15, sec. 13 (2).

The case is reported *ante, ut supra.*

Grant appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—I think this is one out of many similar cases in which the difficulty of construction arises from an alteration in things which, notwithstanding alteration, retain their original names, while the Legislature in retaining the original name in a statute legislates by using words in a wholly artificial sense.

A hundred years ago there was not much difficulty in saying what was a "house," but builders and architects have so altered the construction of houses, and the habits of people have so altered in relation to them, that the word "house" has acquired an artificial meaning, and the word is no longer the expression of a simple idea; but to ascertain its meaning one must under-