Court, and in a summary manner, to adjudge the person so offending to imprisonment for any term not exceeding thirty days; and the sentence awarding such imprisonment shall set forth the nature of such offence."

Argued for the complainer—The conviction did not set forth the nature of the offence, and was therefore bad under the statute—*Soutar* v. *Stirling*, May 26, 1888, 2 Whyte, 19.

Argued for the respondents—The conviction sufficiently set forth the nature of the offence—*Nicholson* v. *Linton*, November 18, 1861, 4 Irv. 115.

At advising—

LORD JUSTICE-CLERK—A decision has been cited by the complainer which seems to me to rule this case. I cannot look upon the leaving out of that which has been declared by the Act of Parliament to be necessary to a conviction of this kind to be a matter of form. It is a matter of substance. It is of the greatest importance, where such an extraordinary power is given by statute to magistrates as the power to send persons to prison without trial, that there should be a statement of that which has actually happened, and upon which the magistrate held himself justified in exercising the power given to him by the statute.

In the case of *Nicholson*, quoted by the respondent, it was clearly stated that the offence consisted in concealing the truth by refusing to answer questions competently put. But here we simply have a statement that the complainer "wilfully concealed the truth" without explanation or statement of how that was done. Without the case of *Soutar* I should have had no hesitation, but that case seems to me to be exactly in point. There is only one difference, viz., that the statute in that case contained the word "shortly," whereas, here there is no such word, but that is a difference unfavourable to the respondent. I think we must suspend the conviction.

LORD YOUNG.—I am of the same opinion. I do not question the wisdom of the Legislature in committing the power to magistrates upon the condition specified by the Legislature that the nature of the offence, meaning the particulars of the offence, shall be set out, but it is a very grave matter indeed that any of the Queen's subjects may be convicted by an inferior magistrate and punished by imprisonment for falsehood without a charge, without anybody to defend him, without having a witness present, and just upon the impression produced upon the magistrate's mind that that person is concealing the truth or prevaricating. All the precautions which the law takes to enable accused persons to defend themselves are wanting. I assume that there are considerations which overcome all this, and induced the Legislature to give this power, but I should be strict in enforcing the conditions on which it is given, and I hope it will be very rarely and only in strong and exceptional places exercised.

LORD RUTHERFURD CLARK concurred.

The Court suspended the conviction.

Counsel for the Complainer—Orr. Agents—Hutton & Jack.

Counsel for the Respondents—Dewar. Agents—Fyfe, Ireland, & Dangerfield, W.S.

COURT OF SESSION.

Wednesday, March 5.

SECOND DIVISION.

[Lord Trayner, Ordinary.

SINCLAIR *v.* THREIPLAND.

Salmon Fishing—Prescription—Rod and Line.

In an action of declarator of exclusive right to the whole salmon fishings in a river including those *ex adverso* of the lands of the defender, the latter produced a title to "fishings," but it appeared from a proof that neither he nor his authors had ever fished *ex adverso* of his lands by net and coble, although this was possible and had been occasionally practised by the pursuer and his authors. The fishing of the defender or those in his right, although practised for more than the prescriptive period, had been limited to rod and line, but this use had neither been continuous nor unchallenged, and had not been made in exercise of asserted right, but rather arose from the fact that for a considerable period the pursuer had imposed little restriction on rod fishing in the river. The river had been watched by the pursuer alone.

Held that the possession of the defender upon his title had not been sufficient to constitute a title to salmon fishings.

Question—Whether where possession of salmon fishings by net and coble is impossible, fishing by rod and line will be sufficient to establish the higher right?

Sir John George Tollemache Sinclair, Baronet, of Ulbster, in the county of Caithness, brought an action of declarator and interdict against William Murray Threipland, Esquire of Fingask, Perthshire, and of Toftingall, in the county of Caithness, to have it found and declared that he was heritable proprietor of and had sole and exclusive right to the whole salmon fishings in the river Thurso, from its source in the parish of Halkirk to the bay of Thurso, and in particular that he was heritable proprietor of and had the sole and exclusive right to the salmon fishings in the said river, in that part thereof where it flows *ex adverso* of the defender's lands, and to the free use of that part of the banks of the said river belonging

to the defender for the purpose of walking upon, fishing with rod and line from, and drawing nets upon, and otherwise, so far as necessary for the due and proper exercise of his said right of salmon fishing, and for the watching and protection of the same, to have it found and declared that the defender had no right or title to fish for salmon or fish of the salmon kind by net and coble, or rod and line, or in any other manner, or to grant licence or leases, or to authorise others to fish for salmon or fish of the salmon kind in any part of said river, and further to have the defender interdicted from fishing for salmon or authorising others to fish for salmon in said river, and from in any way obstructing the pursuer or others in his right in the exercise of their said right of salmon fishing.

The river Thurso has a course of about 30 miles from its source in Loch More to the sea. During the greater part of that course it is bounded on both sides by the lands of the pursuer, but for about five miles it flows through and bounds the defender's lands of Dale.

The pursuer, after a proof had been taken, satisfied the Lord Ordinary that upon his titles and the possession following therein he had exclusive right of salmon fishing in the river. He proved that he, or those in his right, had fished the whole length of the river, and where possible had done so by net and coble. That in this way in certain states of the river they had fished the pool *ex adverso* of the lands of Dale; further, that he had set watches all along the banks, and had paid for them entirely himself; also, that any fishing indulged in by the defender or lessees from him had been by way of sufferance, when owing to cruives at the mouth of the river the salmon fishing was little worth, and that since 1852 the defender's tenant had taken a lease from the pursuer's predecessor or from himself as well as from the defender. The pursuer had challenged the defender's right to fish *ex adverso* of his lands.

The defender maintained that he had exclusive right to the salmon fishing *ex adverso* of the lands of Dale. He relied upon a charter of 1660 which gave him right to the "fishings," and he contended that his possession following thereon for far more than the prescriptive period had been such as to constitute that right into a right of salmon fishing. His evidence was twofold—(1) documentary, including a note of suspension and interdict brought against the pursuer's father in 1852, although nothing was decided thereby, and several leases of the fishings in dispute between 1837 and 1880, as showing that so long ago as the first of these dates he had publicly insisted upon his rights; (2) parole, which proved that he and his authors and others in his or their rights had been in the habit of fishing for salmon, but only with rod and line; that the fishing of the Dale pools was possible by net and coble in certain states of the river, but was not practicable even then, as the bottom and the sides did not admit of drawing the nets with advantage, that often such a mode of fishing was impossible, and that at all times the most effectual and, from a lessor's point of view, the most lucrative method of fishing was by rod and line.

The Lord Ordinary (TRAYNER) pronounced the following interlocutor—"Finds, decerns, and declares in terms of the declaratory conclusions of the summons, and interdicts, prohibits, and discharges the defender as concluded for, and decerns: Finds the defender liable in expenses, &c.

"*Opinion.*—The pursuer claims to be the proprietor of and to have the exclusive right to the whole salmon fishings in the river Thurso, including therein the salmon fishing in the river *ex adverso* of the defender's lands of Dale. The defender disputes the pursuer's claim and maintains (1) that the pursuer's title do not support it, and (2) that he, the defender, has the right to the salmon fishings *ex adverso* of his own lands.

"The defender's title gives him a right to 'fishings,' but this I need scarcely say does not of itself constitute a title to salmon fishings unless possession of salmon fishings has followed upon it. The defender has failed, in my opinion, to establish any such possession. Neither the defender or his authors have ever fished the river *ex adverso* of Dale by net and coble, although the river there admitted of being so fished, and was so fished by the pursuer and his authors although not often. The only salmon fishing in the water in question by the defender or those in his right has been by rod and line. Even of that there has been comparatively little, and it has neither been continuous nor unchallenged. Further, the rod fishing by the defender and those in his right does not appear to me to have been an exercise of the right of fishing under the defender's title or to have been attributed thereto, but was rather the exercise of a privilege enjoyed by the permission or tolerance of the pursuer and his authors, who for a considerable period seemed to have placed little if any restriction on rod fishing in the Thurso. This view obtains support from the fact that the defender and his authors never exercised any of the usual acts of ownership such as watching or letting the fishings.

"With regard to the pursuer's titles I take the same view as that expressed by Lord Benholme in the note appended to his interlocutor of 6th March 1858. Upon that title the pursuer and his authors have possessed the exclusive right of fishing in the Thurso for very much longer than the prescriptive period. So far back as 1659 the pursuer's author let to tenants the 'salmon fishings upon the water of Thurso, from the head of Lochmore to Hollburnhead in the sea,' which included the water now in question, and many tacks have been granted in later times granting the tenants the right to fish the Thurso 'from the tops and fountains thereof to the utmost extent of the same where it runs into the sea at Thurso.' I think the pursuer has established his right to the decree which he seeks."

The defender appealed, and argued—He

had exercised his right of salmon fishing in the fullest way practicable and had done all necessary to vindicate his right to fish for salmon. Where net and coble were only sometimes possible and never advisable it was not necessary to keep nets and a coble and employ that method merely to assert that right—*Stuart* v. *M'Barnet*, July 21, 1868, 6 Macph. (H. of L.) 123, opinions of Lords Chelmsford, Westbury, and Colonsay; *Duke of Richmond* v. *Earl of Seafield*, Feb. 16, 1870, 8 Macph. 530; *Duke of Roxburghe* v. *Waldie's Trustees*, Feb. 18, 1879, 6 R. 663, Lord Curriehill's note, p. 667; *Lord Advocate* v. *Lord Lovat*, July 12, 1880, 16 S.L.R. 418, and 7 R. (H. of L.) 122; *Buchanan and Geils* v. *Lord Advocate*, July 20, 1882, 9 R. 1218; *Mackintosh*, 15 R. 833, Lord Young; Rankine on Land Ownership, p. 261, and cases there cited. As to the expenses of watching, the proportion falling to be borne by the proprietor of Dale was so trifling the pursuer had not thought it worth asking for, otherwise it would have been paid.

Argued for the respondent—The defender's possession since 1852 was immaterial for it had not been adverse. The fishing tenant had taken leases from both parties. The defender must prove prescriptive possession before that date. But he had cancelled that; at no time had he or his authors ever used net and coble. In the circumstances rod and line fishing was not sufficient to convert a right of fishings into a right to salmon fishings. In some cases it might be. The respondent did not require to dispute that. Here he (the respondent) had himself fished with net and coble in those very pools to which the appellant was laying claim, and in which he maintained such mode of fishing was impracticable.

At advising—

LORD JUSTICE-CLERK—The pursuer seeks to have it found and declared that he has the sole and exclusive right to salmon fishing in the river Thurso from its source to the bay of Thurso. He seeks also to interdict the proprietor of Dale from fishing with net and coble or rod and line *ex adverso* of the lands of Dale, these lying on one side of the river. The proprietor of Dale has not disputed that the pursuer has a right throughout the whole river. He only says that he has the right to fish opposite his own lands. There was a long argument upon a bulky proof. It is unnecessary to go over all the argument in detail, but I may state that the rights of the pursuer have, to my mind, been satisfactorily made out. First, he has a good title to the salmon fishing from the source of the river to the sea. He has established that he has exercised the rights in the practical ways in which they can be exercised. He has let out the right of fishing to tenants without dispute, giving those tenants the whole right to fish in all parts of the stream. It appears that the river has been fished in the best places and in the best way for the exercise of that right, which has generally been by rod and line, although occasionally the whole river has been fished by net and coble wherever there was a pool that could be fished with any chance of success, and without obstruction to the nets. But I do not think that the exercise of a right of salmon fishing must necessarily be by net and coble where the right is most conveniently and profitably exercised by rod and line. In addition to that the pursuer and his predecessors have watched the river for the purpose of protecting the fishing, including those parts of the river opposite the estate of Dale. I have no doubt on the titles and evidence that not only has the pursuer established his right to fishing, but that under his titles he has had possession, and possession which cannot be said to have been substantially disputed.

That brings me to the case of the defender. The case for the defender is that although he has not an express grant of salmon fishings under his titles, he has a right of fishing under his titles, and that he is entitled to interpret the meaning of that expression of fishing by prescriptive possession into a right of salmon fishing, and he maintains that for the prescriptive period he has been in the exercise of the right of fishing for salmon opposite his lands of Dale. I am not satisfied that he has proved anything of the kind. In the first place, he has not shown any occasion, so far as I am aware after reading the proof, when an attempt has been made to fish opposite Dale by the usual mode of salmon fishing, if that mode is practicable, namely, by net and coble. I am satisfied on the evidence that it is practicable to fish by net and coble. If that mode is practicable, it is the distinct and recognised mode of establishing the right—the way in which the assertion of the right is exhibited to all others who are interested—and to abstain from that mode and use another mode only is not, in my opinion, a justifiable way of establishing a right to fish by prescription. It is said that a right of salmon fishing in a stream may be established by rod and line only. My own impression would be that as a general proposition that is perfectly sound, although I cannot say I am able to discover that it has ever yet been decided, and I agree with some observations that fell from Lord Young during the discussion that the symbolic mode of exercising the right must depend not so much on fishing by some particular mode, as upon what is the practice of the time with which you are dealing, and also what is the nature of the stream with which you are dealing; and I should be inclined to say that if on a stretch of a river it was impossible to fish with net and coble at all, that would not preclude the right of a proprietor on the bank of the stream from prescribing a right of fishing by the only practicable mode, viz., by rod and line. And undoubtedly in regard to this river it has become very much a rod and line fishing stream of late years, for it has turned out to be a great deal more profitable to exercise the right of fishing by letting it out for rods than to exercise the right of fishing by net and coble. Then I

am not satisfied either, in the second place, that there has been an attempt on the part of the proprietor to maintain any such salmon fishing as can be held to be fishing in the exercise of his right, and having carried it on for the prescriptive period, to have the word "fishing" in his title read as salmon fishing. In the earlier period dealt with in the proof the rod and line fishing seems not to have been treated as of much consequence, and I do not think, so far as I can judge after reading the proof, that there is any evidence whatever of a satisfactory nature to show that such rod fishing was carried on by the proprietor of Dale as in the exercise of a right at all. It seems to have been rather the case that along this stretch of water for a considerable time there were no restrictions at all, and that many people did fish who had no right of fishing at all; it was left very much open. But I presume in consequence of the immense change that has taken place on the productiveness of salmon rivers—I suppose owing to precautions now taken to protect the fish in the spawning season, and to prevent acts which are destructive of the fish altogether—the salmon fishing on that river has become of such enormous value that a rod on this stretch is let for as much as £250. It is now a very valuable subject indeed, and if it had been proved to our satisfaction that for the prescriptive period rod and line fishing had been carried on in the exercise of a right—an asserted right—and carried on peaceably and without interruption, and if it had been further proved that either in the circumstances of the particular side, or from the nature of the banks and bottom of the river, net and coble could not be fished or would not be in ordinary circumstances practicable, then I would have had no difficulty in holding the right established by rod and line. But there is no evidence to satisfy me on that point, and therefore on the whole matter I agree with the interlocutor of the Lord Ordinary by which he has decerned and interdicted the defender.

Lord Young concurred.

Lord Rutherfurd Clark—I also concur in thinking that the interlocutor of the Lord Ordinary is right. I do so on these grounds—I think the pursuer by his title and possession has shown that he has property in the entire fishings as a whole, and I think the defender has not shown by his possession that he is proprietor of the salmon fishings *ex adverso* of the lands of Dale.

Lord Lee.—Not having heard the argument I give no opinion.

The Court adhered.

Counsel for the Pursuer and Respondent—D.-F. Balfour, Q.C.—R. Johnstone—Low. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Defender and Appellant—Graham Murray—Dickson. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, March 5.

FIRST DIVISION.

PARNELL *v.* WALTER AND ANOTHER.

(*Ante*, p 1.)

Expenses—Reserved Expenses.

Special circumstances in which it was *held* that the general rule that reserved expenses were carried by the general finding of expenses in favour of the successful party should not be followed.

Expenses—Skilled Witness—Fees to English Counsel.

In an action for £50,000 as damages for slander, English counsel were brought by the defenders from London to give evidence on certain questions of English law. The proof lasted one day.

In the account of the defenders, who were found entitled to expenses, the fees charged were £322, 17s. 6d. for the senior, and £275 for the junior counsel (exclusive of consultation fees and travelling expenses). The Court *allowed* fees of 100 guineas for the senior, and 70 guineas for the junior (exclusive of consultation fees and travelling expenses).

In this action the Lord Ordinary (Kinnear) on 6th November 1888 allowed the parties a proof of their averments on the question of jurisdiction.

The defenders having reclaimed, the Court on 24th November refused the reclaiming-note and reserved the question of expenses.

The case then went back to the Lord Ordinary, and the proof, which lasted one day, was taken, and on 5th February 1889 the Lord Ordinary sustained the first plea-in-law for the defenders, dismissed the action, and decerned; found the defenders entitled to expenses, allowed an account thereof to be lodged, and remitted the same to the Auditor to tax and report.

The pursuer reclaimed, but did not insist in his reclaiming-note, and on 26th February 1889 the Court, in respect that the reclaimer did not insist in his reclaiming-note, refused the same, found him liable in additional expenses, and remitted the account thereof to the Auditor to tax and report.

The Auditor taxed the defender's account at £439, 19s. 10d. sterling, "reserving for the determination of the Court the question of liability of the pursuer for the expenses of the reclaiming-note by the defenders against Lord Kinnear's interlocutor of 6th November 1888, amounting (after taxation) to £18, 16s. 2d. included in the taxed amount now reported.". . .

"*Note.*—The reclaiming-note referred to was wholly unsuccessful, but the interlocutor of the Court refusing it reserved the question of expenses. The final interlocutor of the Court, pronounced on 26th February 1889, refusing the pursuer's reclaiming-note against Lord Kinnear's interlocutor of 5th February 1889, and finding him liable in additional expenses, takes no notice of the