COURT OF SESSION.

Friday, December 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MAXWELL *v.* LAMONT.

Fishing—Salmon-Fishing—Lawful and Unlawful Mode of Fishing—Method of Fishing Necessary to Establish Prescriptive Right under Habile Title—Scooping Salmon out of Natural Pool by a Net Hung between Two Poles.

A proprietor of lands under a title *cum piscatione in aqua de Clouden* brought an action of declarator against a neighbouring proprietor infeft under a title flowing from the Crown, and containing an express grant of salmon-fishings in the Water of Clouden, concluding, *inter alia*, that the pursuer had a good title to fish for salmon in a pool in the Water of Clouden, and that the defender had no title to fish in the pool. The pool in question, which was about 20 feet long by 12 feet wide, had been hollowed out of the rocks by a fall, and was surrounded by precipitous ledges of rock. It was proved that the pursuer had for more than the prescriptive period fished the pool for salmon in the following manner—Two men armed with two poles about 22 feet long, having a net hanging between and attached to them for about half way up, pushed the net down into the pool as far as possible perpendicularly and then pushed it along the bottom of the pool to its upper end, when the poles were crossed, and the net was raised and turned over on to the rocks. The net while being used was not stationary, and did not leave the hands of the fishermen. Between the successive shoves of the net it was the general practice to stir up fish lurking in the crevices or corners of the pool by means of a third pole, so that these fish might be caught at the next shove of the net.

Held (1) that this method of fishing was unlawful, and (2) that, the method of fishing being unlawful, the continuous practice of the pursuer to fish the pool by this method for the prescriptive period did not establish his right of salmon-fishing under his title.

Opinion (*per* Lord Kinnear) that the only lawful mode of fishing with nets, and the only effective mode of possession for the purpose of prescription, is by net and coble.

Fishings—Salmon-Fishings Title—Title with Fishings — Express Grant of Salmon-Fishing.

In a question as to the right of salmon-fishing in a river A produced a title to lands "*cum piscatione*" in the river "*secundum morem et consuetudinem;*" B produced an express grant of "the salmon-fishing and other fishing" in the river. Both titles flowed from the Crown. *Held* that A's title required to be fortified by proof of prescriptive use, whereas B's title was in itself sufficient.

Maxwell Hyslop Maxwell of The Grove and Glengaber, in the stewarty of Kirkcudbright and the county of Dumfries respectively, brought this action against Henry Lamont, shipowner, proprietor of the estate of Gribton, in the county of Dumfries, and against His Majesty's Advocate, as acting under the statute 20 and 21 Vict. c. 44, on behalf of His Majesty, and on behalf of the Commissioners of His Majesty's Woods, Forests, and Land Revenues, for declarator that the pursuer had right and title to fish for salmon and other fish of the salmon kind by all legal methods in a portion of the river Clouden referred to as the Fourmerkland Water, in the parish of Holywood, including the two pools known as the Fourmerkland Pool and the Gaff Pool, and that he had the sole and exclusive right to the salmon-fishings in the said Fourmerkland Water, and that the defender had no right or title to fish for salmon or other fish of the salmon kind in the said Fourmerkland Water, or to interfere with the pursuer fishing in the said Fourmerkland Water for salmon or other fish of the salmon kind, and that for the purpose of exercising his said right of fishing in the said Fourmerkland Water the pursuer was entitled to obtain for himself and his servants and others having his authority, access to and from the river bed through the property of Gribton belonging to the defender, lying on the north or left bank of the said river in a manner described; and further, that the defender should be interdicted from obstructing the pursuer's access to said Fourmerkland Water in the manner described, or interfering with the pursuer in his exercise of his right of fishing for salmon therein.

The defender Lamont was the only compearing defender.

The pursuer was the proprietor of the Grove, situated on the south, and of Glengaber, situated on the north, of the river Clouden, but neither of these properties actually abutted on the stream.

The pursuer's title to the estate of Glengaber included a Crown charter of resignation and sale dated December 20th 1826, which conveyed property described as the Threemerkland or Fourmerkland "cum piscatione in acqua de Clouden secundum morem et consuetudinem." Upon this charter the pursuer's predecessor in title obtained sasine and was infeft in 1827.

The pursuer averred (Cond. 5) that the fishings in the Water of Clouden mentioned in this charter were the salmon-fishings in that portion of the river Clouden referred to in the summons as the "Fourmerkland Waters," embracing two pools called the Fourmerkland Pool and the Gaff Pool. "These pools have been hollowed out by the action of the water in the river-bed, which at the part in question and for some

distance below is of a rocky nature, bounded on either side by precipitous banks. The pursuer and his predecessors and authors have from time immemorial, by virtue of their charters and infeftments, had exclusive possession and enjoyment of the salmon-fishings in said Fourmerkland Water. The engine they have invariably and regularly employed has been a shove-net, which is a rectangular net 16 feet long by 12 feet wide, and having a depth of 6 feet when lowered into the water. It is attached to two poles and is worked by a couple of men, who have it constantly in motion during the time the act of fishing is in progress. There is no other practicable method of fishing the said Fourmerkland Water for salmon. The character of the river-bed within the limits of said Fourmerkland Water renders impossible the use of net-and-coble, while the height and precipitous nature of the banks are such as to prohibit the effective use of rod and line. In an average season the catch is inconsiderable, and is no more than sufficient to supply the pursuer's own household."

The pursuer also averred, that his lands not being at any point contiguous with the river he was unable from his own lands to obtain access to the river for the purpose of fishing the Fourmerkland Water, and that he and his predecessors and their servants had been in use from time immemorial to obtain access through the defender's lands to the river for the purpose of fishing the said water for salmon. The pursuer further averred that the defender had no right or title to fish for salmon in the portion of the river in question; that he had challenged the pursuer's right to fish for salmon in the Fourmerkland Water; and that he had obstructed the access by which the pursuer and his servants had been in use to approach the river to fish for salmon.

The defender's lands of Gribton extended for a distance of over two miles along the north bank of the Water of Clouden, the lower extremity of the estate ending at the lower end of the Fourmerkland Pool. The defender was infeft in the estate of Gribton under titles flowing from the Crown, and in particular a charter of adjudication and confirmation dated March 3rd 1699 conferring an express grant of salmon-fishing in the Water of Clouden. In 1790 the estate of Gribton belonged to a predecessor of the defender, who was infeft conform to instrument of sasine dated May 6th 1790, the said title containing an express grant of "the salmon-fishing and other fishing in the said Water of Clouden belonging to all or any part of the lands" disponed.

The defender averred—"(Ans. 5) . . . The pools referred to by the pursuer are not truly salmon pools at all, but are small deep pots hollowed out by the action of the water in the river-bed, which at that point is of a rocky and shelving character. The fishing at that point is not the fishing mentioned in the pursuer's titles. . . While the pursuer's titles relate to a different part of the stream, . . . he and his predecessors in title have taken salmon from the part of the stream now in question, but neither he nor his predecessors ever had exclusive possession of the salmon-fishing at the part of the river in question. The defender and his predecessors in title have from time immemorial, in virtue of their said titles, from time to time, by themselves, their servants, and others, used and enjoyed the salmon-fishings in the said portion of the river, as well as in the other portions thereof *ex adverso* of the lands of Gribton, by rod and line, which is the only practicable and legal mode of fishing it. . . . Any possession exercised hy the pursuer and his predecessors has been of an entirely illegal character, and is incapable of founding or supporting any right to the fishing. Two methods of fishing have been followed. According to one method a large ladle with a bag-net attached is held at the bottom of a run, and the fish in the run are then frightened and driven into it. The other method is to use a large double-handed landing or shove-net consisting of a net about 18 feet deep and 10 or 12 feet wide stretched between two poles over 20 feet long. The instrument is made to fit the deep pots in the part of the stream in question, and is worked by two men, each of whom takes one of the poles. The men stand on the same side of the pot, and lowering the landing net to the bottom of the pot, one pole being put into the near side and the other into the far side, they then push the net rapidly forward, cross the poles and raise it, thus scooping out whatever is in the pool. The methods of fishing above described are destructive and unsportsmanlike. Similar methods of taking salmon are a common mode of poaching in certain parts of Scotland, and if they were generally adopted they would lead to the extermination of salmon in the upper reaches of rivers and streams. At the point in question their use is specially injurious to the upper riparian proprietors, including the defender, owing to a fall in the stream immediately above, which prevents the fish from ascending except in certain states of the water, and accumulates them in great numbers in these pots. The methods of fishing in question differ entirely from and are in no sense a mode of fishing by net and coble. They are in contravention of the policy and provisions of the statutes regulating salmon-fishing in Scotland generally and in the tributaries of the Solway in particular, and are illegal. The defender has remonstrated, but without success, against their use by the pursuer. No other method of fishing has ever been used at the point in question by the pursuer or his predecessors sufficient to found the right which he claims, and he is not entitled to found on the illegal use above described for any purpose whatever."

The defender admitted that the pursuer's servants had recently made a practice of getting access to the river through the defender's lands, but denied that the pursuer or his predecessors and their servants

had from time immemorial used said access. He admitted that he had challenged the pursuer's method of fishing and had erected a gate for the purpose of preventing access to the river for the purpose of such fishing. He averred that the pursuer had no right to fish the water at all, and that the defender's unquestioned right to the salmon fishing in the stretch of water immediately above was seriously prejudiced by the rights and methods of fishing claimed to be exercised by the pursuer.

The pursuer pleaded, *inter alia*, as follows —"(1) In respect of his titles and possession following thereon as condescended on, the pursuer is entitled to decree of declarator of his right to the salmon fishings in question as concluded for. (2) The defender Henry Lamont having no right or title to the fishings in question, the pursuer is entitled to obtain decree of declarator to that effect as concluded for. (3) The pursuer being proprietor of the salmon-fishings in the portions of the river Clouden in question, is entitled to obtain reasonable access thereto from the lands of the defender Henry Lamont *ex adverso* thereof."

The defender pleaded, *inter alia*, as follows—"(1) No title to sue. (2) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (3) The pursuer not being entitled to the salmon fishings in question in respect either of his title or of possession following thereon, the defender should be assoilzied, with expenses. (4) Any possession had by the pursuer or his predecessors of the salmon fishings in question is, in any view, inept and insufficient to fortify his title by prescription, in respect (1st) that the methods employed were and are illegal. . . . (7) In any event, the methods of fishing adopted by the pursuer being illegal, the defender was entitled to prevent the pursuer's access to the river for such a purpose, and should be assoilzied from the conclusion for interdict and expenses."

A proof was led, the purport of which sufficiently appears from the opinion of Lord Kyllachy and Lord Kinnear *infra*.

On February 27, 1903, the Lord Ordinary (KYLLACHY) pronounced an interlocutor assoilzieing the compearing defender from the conclusions of the summons, and finding the pursuer liable to expenses.

Opinion.—"In this case there has been a lengthened proof which was quite properly directed to a number of facts on which the parties were at issue. There has also been a long argument upon the import of the proof and of the titles of parties. In the view, however, which I have come to take of the case, it falls to be decided upon a comparatively narrow ground.

"I think I may say that my judgment would have been substantially for the pursuer had I been satisfied that his method of fishing was a legal method. At least it would have been so as regards the subject mainly in controversy, namely, the fishing in the pool known as Fourmerkland Pool. I see no reason to doubt the sufficiency of the pursuer's title as a basis for prescription. I think also he has proved that in virtue of that title he and his authors have for time immemorial fished for salmon in, at all events, the upper part of the Fourmerkland Pool; and that he has done so by a method which, if legal, involves the fullest possible possession. I think he has also proved that, so far back as the evidence goes, he and his authors possessed, and have not lost by non-user, a right of access through the defender's lands to the pool in question. I do not think he has proved any possession of the Gaff Pool, or of any water except the upper part of the Fourmerkland Pool. Neither do I think that he has displaced, by an examination of the defender's title, the right of the latter to challenge his (the pursuer's) title and criticise his possession. As regards that matter I am disposed to be of opinion that the defender's title is sufficiently good, and that in any case the right of access claimed through his lands removes any difficulty on that point. But, subject to these qualifications (and to perhaps some further qualification connected with the regulation of the right of access), I should, as I have said, have been in the pursuer's favour if only I had been able to hold that, according to the law of Scotland, the net which he and his authors have used is a legal appliance for the capture of salmon.

"But after a full, and I hope careful, examination of the authorities, and having regard especially to the opinions of the majority of the learned Lords who delivered opinions in the recent case of the *Duke of Atholl* v. *Glovers of Perth* (2 F. (H.L.) 57) I have come to the conclusion that the pursuer's method of fishing is not according to the law of Scotland a legal method.

"There is, I think, no room for doubt as to what exactly the pursuer's method is, or as to the particular conditions under which it is practised. The method is this. Two men stand at the foot of a pool or pot which forms the upper portion of the Fourmerkland Pool, and has been hollowed out of the rocks by the action of a fall or cascade about 16 feet up. This pool or pot is about 20 feet long by 10 to 15 feet wide, and is surrounded on all sides (except at the foot, where there is a narrow passage into the lower pool) by a more or less perpendicular ledge of rock—a ledge about 9 feet high, and which rises when the water is fishable to within about 2½ feet of the surface of the river. The men are armed with two poles about 22 feet long, having a net hanging between, and attached to them for about half way up. Being so armed, the men first push the net down as far as possible perpendicularly, and then push or shove it along the bottom of the pool to its upper end, when the poles are crossed, and the net is raised and turned over on to the rocks. There is some conflict—even between the pursuer's witnesses—as to whether the pool is swept in each shove, and also as to whether between successive shoves the men change their position. But that is probably not very material. The net is certainly not stationary, nor does it leave while it is being used the hands of the fishermen.

But in the interval between the successive shoves it has been the practice (generally, but not universally) to use a third pole, by which the bottom of the pool is searched, and any fish lurking in crevices or corners not reached by the net are stirred up so as to be caught at the next shove. The shove, which is in itself very rapid, is generally repeated two or three times, and perhaps oftener. And when the water is suitable, and there are fish lying in the pool, it is sometimes very successful. That is, I think, a fairly accurate description of the pursuer's method, and of the conditions under which it is worked and workable.

"Now, upon this description I think one thing is clear. This is not net-and-coble fishing, or any modification of net-and-coble fishing. It is not, in my opinion, anything like net-and-coble fishing. It is not only that net-and-coble fishing is only practicable under entirely different conditions—particularly that it cannot be practised in a pool or pot of narrow dimensions—but requires a certain expanse of open water. Apart from that, the two modes of fishing differ, I think, in principle. The principle of net and coble is that of a draught net working with a prolonged sweep and directed against fish which until caught have their natural freedom. The principle of the shove net, on the other hand, is really that of the gaff or landing net, by which fish already under restraint are pulled or scooped out of the water. It is vain, as it seems to me, to suggest that the two poles are just the counterpart of the two haul ropes, and that the shoving of the net and the subsequent crossing and lifting of the poles are just counterparts of the paying-out and hauling-in which are characteristic of net and coble. I say nothing against the fairness of the pursuer's method. In a river where cruives exist, and I suppose are lawful, there is not much room for considerations of that kind. But whatever may be its merits, and whatever may be the result in law, I hold, and am not able to doubt, that the pursuer's method is not net-and-coble fishing or anything like it.

"But that being admitted, is there authority for the proposition that any net fishing for salmon, otherwise than by net and coble, is recognised by our law as legitimate? I know of no decision which affirms the legality of any other mode. Nor prior at all events to the *Bermoney Boat Case* (*Hay* v. *Magistrates of Perth*, 4 Macq. 535) do I know of any judicial opinion which can be quoted to that effect. The pursuer, however, says that if not by the decision, at all events by the grounds of judgment in the *Bermoney Boat Case*, the old rule in this matter, if it was a rule, was displaced, and that this has been recognised in at least some of the opinions in the recent case of the *Duke of Atholl* v. *Glovers of Perth*.

"The question therefore comes really, I think, to be what is the true import of these two decisions (*Hay* v. *Magistrates of Perth*, *Duke of Atholl* v. *Glovers of Perth*), having regard to the grounds on which they were respectively decided.

"Now, it humbly appears to me that neither the judgment nor the grounds of judgment in either of the two cases go further than this. Given a mode of fishing fairly answering the description of net and coble, there is, with respect to such mode of fishing, no limit to the improvements and modifications which may be admitted, provided only that the net is kept constantly in motion and does not leave the hand of the fisherman, or, to put it otherwise, provided always that the net does not itself fish and do the work of the fisherman. It is, of course, possible to read Lord Westbury's observations in the earlier case, and those of the present Lord Chancellor in the later case, as laying down or favouring a more general doctrine. But judicial opinions must, of course, always be read with reference to the concrete facts to which they apply, and having that in view I am not able to hold that a more general doctrine was really intended.

"I cannot overlook that in the *Bermoney Boat Case* Lord Colonsay's judgment in the Court below was expressly approved by Lord Westbury, and endorsed, or rather re-expressed, in terms almost identical by Lord Chelmsford, and there can certainly be no doubt as to Lord Colonsay's opinion and ground of judgment. What he said was this—'I think 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?'

"That I must hold expresses the true test of legal fishing as accepted and applied in the *Bermoney Boat Case:* and if there remained any doubt on the subject it must, I think, be displaced by an examination of the judgments in the recent case of the *Duke of Atholl* v. *Glovers of Perth*. For in the decision of that case five of the learned Lords took part, and while of those two perhaps may be held to have proceeded upon other grounds, the remaining three beyond doubt adopt without qualification Lord Colonsay's statement of the rule. Lord Macnaghten said this—'However that may be, it seems to me that the law on the subject is now finally settled by the decision of this House in *Hay* v. *Lord Provost of Perth*, and that nothing would be gained by trying to go behind that decision. And looking for a guide in the opinion 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 the *Master of Allan's Mortification* v. *Thomson* (7 R. 221) contributed in some degree to a decision not I think in accordance with established principle.' Lord Morris concurs with Lord Macnaghten, and Lord Davey, who also concurred, ends his judgment thus—'I think the effect of the deci-

sion in the *Bermoney Boat Case* was (as expressed in Lord Chelmsford's judgment) that net-and-coble fishing is the type, and the exclusive type, of all lawful salmon-fishing with nets, and although other modes of fishing may conceivably be invented differing in some details and in form from net and coble as at present practised, they must conform to that mode of fishing in substance.'

"That appears to me to be the law of the matter, and holding as I do, for the reasons which I have assigned, that the pursuer's method of fishing does not in any reasonable sense answer the description of fishing by net and coble, I consider I am bound to hold that the pursuer's method is unlawful, and that his possession cannot therefore avail for purposes of prescription.

"The result is that the defenders will be assoilzied with expenses."

The pursuer reclaimed and argued—(1) *Title*—The pursuer's title to the property described as Fourmerkland "cum piscatione in acqua de Cluden secundum morem et consuetudinem" was at the least a sufficient basis for prescribing a right of salmon-fishing in, *inter alia*, the Fourmerkland Pool, and he and his predecessors had from time immemorial fished for salmon in that pool in the fullest and most open manner possible, and had possessed a right of access to the pool through the defender's land. On the question of title the Lord Ordinary, as he expressly stated, would have been with the pursuer if only he had been of opinion that the pursuer's method of fishing was legal. On the other hand, the defender had failed to connect himself with the Crown grant of salmon-fishings, and had had no possession of the salmon-fishing in this pool. (2) *Legality of Mode of Fishing*—The mode of fishing practised by the pursuer was both legal in itself and also sufficient to establish the right of a proprietor infeft *cum piscationibus* to salmon-fishing. This might be said to be a matter of express decision in *Ramsay* v. *Duke of Roxburgh*, February 9, 1848, 19 D. 661, where the mode of fishing was by cairn net. The legality of fishing and taking salmon by means of salmon-cruives, and the sufficiency of that mode of possession to establish prescription, were recognised in *Lord Advocate* v. *Lord Lovat*, July 12, 1880, 7 R. (H.L.) 122, 17 S.L.R. 421, *præsertim per* Lord O'Hagan at p. 153, and *per* Lord Justice-Clerk Moncreiff at p. 134. The judgment in *Hay* v. *Magistrates of Perth* (*Bermoney Boat Case*), May 12, 1863, 4 Macq. 535, was in favour of the legality of the net there in question. The net as used in the present case satisfied the criteria of legality laid down by Lord Westbury in the *Bermoney Boat Case* at p. 553, viz., that the net should continue in the hand of the fisherman and should be in motion during the operation of fishing. In *Wedderburn* v. *Duke of Atholl* and *Duke of Atholl* v. *Glover Incorportion of Perth*, May 28, 1900, 2 F. (H.L.) 57, 37 S.L.R. 686, the ground of judgment was that the modes of fishing there practised involved an illegal obstruction to the passage of salmon up the river prior to the time of capture. As explained by Lord Macnaghten (at p.64) the net there used when set was a fixed engine held in position for the purpose of obstructing the run of the fish. The net here in question was not an obstruction of that kind. It could not take fish automatically, but only when in motion like an ordinary sweep net, and during the act of fishing it was constantly in motion. There was no other practicable method of fishing this pool for salmon, for net and coble was rendered impossible by the small size of the pool and the nature of the river-bed, and the use of rod and line was impracticable owing to the precipitous banks. The defender's case came to this—that no other mode of fishing was legal except by net and coble. This view of the law found no support in the early cases—*Colquhoun* v. *Duke of Montrose*, 1804, M. 14,283; *Duke of Atholl* v. *Wedderburn*, December 16, 1826, 5 S. (N.S.) 139, (O.S.) 153; *Gray* v. *Syme*, July 9, 1835, 13 S. 1089; *Mackenzie* v. *Houston*, May 25, 1830, 8 S. 796, in which the legality of toot-and-haul nets, and modes of fishing other than net and coble, was affirmed or not disputed. Nor did the statutes prohibit fishing by such a method as that used by the pursuer. The statutes only struck at engines which obstructed the passage of fish or which were of the nature of a yair — *Duke of Queensberry* v. *Marquis of Annandale*, 1771, M. 14,279; *Dirom* v. *Littles*, 1797, M. 14, 282; *Colquhoun* v. *Duke of Montrose*, 1793, M. 12,827, 1801, 4 Paton 221, 1804, M. 14,281; *Kinnoull* v. *Hunter*, 1802, M. 14,301, 1804, 4 Paton 561. The case of *Erskine* v. *Magistrates of Stirling*, 1763, M. 14,268, was a decision under the Act 1698, c. 3, applying to the Forth, which expressly prohibited the use of "pock and herry water" nets. (For the nature of "herry water" nets see Jamieson's Dictionary, *sub voce*). The pursuer did not employ any fixed engine or fixture of any kind within the principle of such cases as *Grant* v. *M'William*, 1846, reported in note at 10 D. 666; *Stuart* v. *M'Barnet*, July 21, 1868, 6 Macph. (H.L.) 123, 5 S.L.R. 704; *Earl of Dalhousie* v. *M'Inroy*, July 20, 1865, 3 Macph. 1168; *Trustees of Allan Mortification* v. *Thomson*, November 14, 1879, 7 R. 221, 17 S.L.R. 113. It was enough for the pursuer's case to show that his mode of fishing was not clearly illegal, *i.e.*, that it was not such as a proprietor having a right of salmon-fishing would be prohibited from using. The essential point was that his mode of fishing should clearly show possession under his title. A method of fishing, even though illegal, if pursued in assertion of a right, would found a prescriptive right. The pursuer's mode of fishing was at least an open assertion of his right to take salmon from the pool in the only way in which salmon could be taken from the pool—*Mackenzie* v. *Renton*, June 12, 1840, 2 D. 1078; *Mackenzie* v. *Davidson*, February 27, 1841, 3 D. 646; *Duke of Richmond* v. *Earl of Seafield*, February 16, 1870, 8 Macph. 530, 7 S.L.R. 359, and that was

enough to constitute the kind of possession necessary to prescription.

Argued for the defender and respondent —*Title.*—The defender was infeft in the lands of Gribton, abutting on the Clouden, *ex adverso* of the water in question, under titles from the Crown containing an express grant of the salmon-fishings in the water of Clouden "belonging to all or any part of the lands disponed." The defender's right under such an express Crown grant could be excluded only by a special title of the same kind or by exclusive possession for the prescriptive period under a *habile* title—*Mackenzie* v. *Davidson*, February 27, 1841, 3 D. 646. Further, the fact that the pursuer also sought declarator of a right of access to the water through the defender's land was in itself sufficient to give the defender a title to dispute the pursuer's right. On the other hand, the pursuer had no right of salmon-fishing *ex facie* of his titles, for a grant of land *cum piscationibus* did not carry a right to salmon-fishing unless it was construed to cover such fishing by lawful possession for the prescriptive period. *Legality of the Mode of Fishing.*—The mode of fishing by the pursuer was illegal both at common law and by statute. It was a destructive and unsportsmanlike method which might be described as scooping the fish out of the pool with a net specially adapted to the pool. In *Erskine* v. *Magistrates of Stirling*, 1763, M. 14,268, it was expressly decided that even proprietors with a right to the estate of salmon-fishing were not entitled to fish with pock-nets, herry water-nets, or stoop-nets. These nets, as described in the case, were similar to the net used by the pursuer. It was true that this decision rested on the Act 1698, c. 3, which applied in terms to the Forth. But it had been clearly stated by Lord Corehouse in *Grant* v. *M'William*, 1846, 10 D. 666, in dealing with the effect of the old Scots Acts on this subject, that the Act 1698, c. 3, applied to the rivers of Scotland as a whole. *Vide* also *per* Lord Westbury — *Hay* v. *The Magistrates of Perth* (*Bermoney Boat Case*), *supra*. The Salmon Fisheries (Scotland) Acts, 25 and 26 Vict. c. 97, sec. 11, and 31 and 32 Vict. c. 123, secs. 15 and 17, also struck at the mode of fishing practised by the pursuer. Thus the use of any instrument for "dragging" for salmon. was expressly prohibited by 31 and 32 Vict. cap. 123. sec. 17. The instrument used by the pursuer might fairly be so described. The cases, too, established the principle that net and coble used fairly and together was the only legitimate mode of fishing by net—*Colquhoun* v. *Duke of Montrose*, 1804, M. 14,283; *Duke of Atholl* v. *Wedderburn*, December 16, 1826, 4 S. 153; *Mackenzie* v. *Houston*, May 25, 1830, 8 S. 796; *Gray* v. *Syme*, July 9, 1835, 13 S. 1089; *Duke of Sutherland* v. *Ross*, June 11, 1836, 14 S. 960; *Duke of Atholl* v. *Wedderburn*, May 28, 1900, 2 F. (H.L.), 57, 37 S.L.R. 686. It was clear that the pursuer's mode of fishing could not by any stretch be described as net and coble, or any modification of net and coble. The natural formation of the pool, taken in connection with the instrument used, was a relevant consideration — *per* Lord Blackburn in *Duke of Sutherland* v. *Ross*, April 15, 1878, 5 R. (H.L.) 137, 15 S.L.R. 532. Here the pool and the net so fitted each other that the fish had no chance of escape. If the pursuer's mode of fishing was unlawful the continuance of such unlawful fishing for the prescriptive period would not make the pursuer's right effectual —*Ramsay* v. *Duke of Roxburgh*, *supra*; *Mackenzie* v. *Renton*, Feb. 27, 1841, 2 D. 1098; *Mackenzie* v. *Macdonald*, June 12, 1840, 3 D. 646; *Duke of Richmond* v. *Earl of Seafield*, February 16, 1870, 8 Macph. 530, 7 S.L.R. 359; *Warrand's Trustees* v. *Mackintosh*, February 17, 1890, 17 R. (H.L.) 13, 27 S.L.R. 393; *Duke of Argyll* v. *Campbell*, July 9, 1891, 18 R. 1094, 28 S.L.R. 813. It was said that this pot or pool was not capable of being fished in any other way than by the pursuer's method; if that were so it was impossible to acquire a right of salmon-fishing there by prescription.

At advising—

LORD KINNEAR—The question in this case is whether the pursuer has established a good and undoubted right and title to fish for salmon in a certain pool in the river Clouden which is known as the Fourmerkland pool. The declarator asked embraces other portions of the river. But there is no longer any serious controversy that the right, if proved at all, must be limited to the particular pool just mentioned. The right is founded on a title to a property described as the Threemerkland or Fourmerkland "cum piscatione in aqua de Clouden (secundum morem et consuetudinem)." The defender on the other hand is infeft in his estate of Gribton under titles flowing from the Crown and containing an express grant of "salmon fishings and other fishings in the water of Clouden belonging to all or any part of the lands disponed." The controversy therefore resolves into a competition between an express Crown grant of salmon-fishings and a general grant of fishing, which is said to have been converted by possession into a valid and effectual right to salmon-fishing. The pursuer however maintains in the first place that the defender Mr Lamont has no title to challenge his alleged right. I agree with the Lord Ordinary that the defender's title is perfectly sufficient. It is admitted that the water in question is situated *ex adverso* of the defender's property; water so situated falls *prima facie* within the description in the title; and he has in fact fished the river both above and below the pool in dispute. But the true ground is, that he has an express grant of salmon-fishing which requires no proof of possession to support it. It is of no consequence whether he has fished the particular pool in dispute or not, because "the right established by his Crown grant is *res meræ facultatis* and can only be excluded by a special title of the same order or by exclusive possession under a habile title for the years of prescription"—*Mackenzie* v. *Davidson*, 3 D. 656. There can be no question there-

fore of his title to dispute the validity of the pursuer's title or the sufficiency of his possession. But I further agree with the Lord Ordinary that if that were doubtful, all difficulty would be removed by the pursuer's claim to a right of access through the defender's lands. The pursuer has no such claim except as a pertinent of his alleged estate of salmon-fishing; and the defender therefore is entitled to meet his demand for access by denying that he has any such estate.

The question therefore comes to be, whether the pursuer has established prescriptive possession on a habile title. I agree with the Lord Ordinary that the pursuer's title *cum piscatione* would be sufficient if it were followed during the prescriptive period by full and continuous possession of the character necessary to establish prescriptive right. But I can hardly assent to the Lord Ordinary's way of putting it when he says that "in virtue of his title the pursuer and his authors have for time immemorial fished the pool; and that he has done so by a method which, if legal, involves the fullest possible possession." The question is, whether the possession has been lawful or sufficient; because an ambiguous grant can have no virtue to support an unlawful or an irrelevant possession. I think it important to keep in mind the difference between the titles of the two parties. An express grant of salmon-fishing constitutes a right which is perfect in itself. But a grant of land *cum piscationibus* confers no right to the estate of salmon-fishing at all. It may be made equivalent to a grant of such estate; but it has no efficacy as an independent grant, unconnected with lawful and sufficient possession; and therefore if the possession be, as the Lord Ordinary thinks, unlawful, it cannot be brought into connection with the title at all. I think, therefore, that the only concession which can be made to the pursuer at this stage of the inquiry is, that the acts of possession on which he relies, whatever virtue be ascribed to them, have been continuous and uninterrupted for forty years.

The Lord Ordinary holds that the pursuer's method of fishing is not according to the law of Scotland a legal method; if that is correct it is enough for the disposal of the case. What then is the pursuer's method of fishing? I take the Lord Ordinary's description of it, because it seems to me to be perfectly accurate, and I cannot put it into better words "There is I think no room to doubt as to what exactly the pursuer's method is, or as to the particular conditions under which it is practised. The method is this. Two men stand at the foot of a pool or pot which forms the upper portion of the Fourmerkland Pool, and has been hollowed out of the rocks by the action of a fall or cascade about 16 feet up. This pool or pot is about 20 feet long by 10 to 15 feet wide, and is surrounded on all sides (except at the foot, where there is a narrow passage into the lower pool) by a more or less perpendicular ledge of rock—a ledge about 9 feet high, and which rises when the water is fishable to within about 2½ feet of the surface of the river. The men are armed with two poles about 22 feet long, having a net hanging between, and attached to them for about half-way up. Being so armed the men first push the net down as far as possible perpendicularly, and then push or shove it along the bottom of the pool to its upper end, when the poles are crossed, and the net is raised and turned over on to the rocks. There is some conflict—even between the pursuer's witnesses—as to whether the pool is swept in each shove, and also as to whether between successive shoves the men change their position. But that is probably not very material. The net is certainly not stationary, nor does it leave, while it is being used, the hands of the fishermen. But in the interval between the successive shoves it has been the practice generally (but not universally) to use a third pole, by which the bottom of the pool is searched, and any fish lurking in crevices or corners not reached by the net are stirred up so as to be caught at the next shove. The shove, which is in itself very rapid, is generally repeated two or three times, and perhaps oftener. And when the water is suitable, and there are fish lying in the pool, it is sometimes very successful. That is I think a fairly accurate description of the pursuer's method, and of the conditions under which it is worked and workable."

The question is, whether the method so described is lawful or not. The only case cited as an express decision that it is an illegal method in the sense of a method prohibited by law, even when practised by persons having an undoubted right of salmon-fishing, is *Erskine* v. *Magistrates of Stirling*, Mor. 14,268. In this case certain proprietors of salmon-fishings on the river Forth brought an action against the upper heritors for declarator that they, as having right to certain salmon-fishings on the Forth, were entitled to fish within their respective bounds with pock-nets, stoop-nets, cobles, and other engines not expressly discharged by law, and that they ought not to be molested by the defenders. The defenders contended that it was not allowable for the pursuers to exercise their right of fishing by making use either of herry water-nets, pock-nets, or what the pursuers called stoop-nets, and they founded in support of this defence upon the Act of 1698 prohibiting "all salmon-fishing whatsoever in the river Forth above the Pow of Alloa with pock-nets, herry water-nets, or other engines not expressly allowed by law," and empowering the Sheriff "to suppress the foresaid unlawful and prohibited manner of fishing," and to punish the users of "the foresaid unlawful engines" by fine or imprisonment, "and to destroy all the foresaid unlawful engines." The pursuers described the nets to which their declarator applied in terms which, so far as the instruments themselves are concerned, exhibit a remarkable resemblance to the net used by the pursuer in this case. The pock-net they say is a small net fixed to two

staves with which the fisher goes into the river, and putting the two staves to the ground he holds the net there till he finds a salmon striking it, he then closes the staves, goes to the shore, and carries it off. The stoop-net was a much larger net, with the mouth of it fastened to three pieces of wood fastened in the form of a triangle. To this triangle is fixed a large pole by which a person in a boat holds it while he is fishing. The Court found "that the stoop-net being a species of the pock-net, the pursuers and all the heritors are debarred by the said Act from fishing on the said river above the Pow of Alloa with pock-nets, stoop-nets, or herry water-nets," and assoilzied from that branch of the declarator, and this judgment was affirmed in the House of Lords. The judgment admits the legality of the fishing by net and coble, which was also within the scope of the declarator, and the point of the decision for the present purpose is, that it marks the distinction between net and coble as the lawful engine and all the other kinds of net described as unlawful and forbidden. It must be allowed that there is a material difference between the use of the instruments held to be unlawful in that case and the pursuer's use of the net now complained of, whatever be the similarity of the instruments themselves, for according to the description both the pock-net and the stoop-net seem to have been held in position by the fisherman until the salmon should strike them, so as to bring them for the moment within the category of stationary or fixed engines, whereas the pursuer's net is in motion throughout the operation of fishing. But on the other hand it is not any particular method of using the net but the net itself that is prohibited by the statute, which condemns the engines described as unlawful and appoints them to be destroyed. It must also be observed that even in its use the pursuer's net may be open to objection inasmuch as it is used in connection with a permanent barrier though not an artificial one. A difficulty which might have arisen from the application of the Act in terms to the river Forth alone is obviated by the decision of Lord Corehouse in *Grant* v. *M'William* (10 D. 666, note), that the use of cairn-nets was prohibited in the Spey on the ground that "the Act must be held as declaratory of the law as to the other rivers in Scotland." The general principle on which this decision is rested is confirmed by Lord Westbury's *dictum* in *Hay* v. *The Magistrates of Perth* (*Bermoney Boat Case*) (1 Macph. (H.L.) 41, 4 Macq. 535), and its application to the particular statute seems to be in conformity with the language of the statute itself, which assumes that the devices which it prohibits in a particular locality are already disallowed by law.

This is a judgment that certain methods are unlawful, even when practised by persons having an undoubted right of salmon-fishing. But the decisions proceed upon the same principle whether they regard the absolute legality or illegality of various uses of fishing, or their sufficiency to establish prescriptive rights.

In *Forbes* v. *Udny* (Mor. 7 and 12) it was found that possession for forty years by angle spear and wand was not sufficient to establish a right to salmon-fishing. In *Colquhoun* v. *Smollet* (not reported), in a competition between a Crown grant of salmon-fishings in the river Leven and a grant of lands *cum piscationibus*, it was held that proof of fishing by the rod was not sufficient to constitute a right although the title on which it was alleged to have followed would have supported a good right by prescription. In *Chisholm* v. *Fraser* (Mor. Sal. Fish. App.) an infeftment *cum piscationibus* followed by forty years' possession of killing salmon by the rod and spear was held not to be a sufficient title to insist in an action for regulating the cruive-fishings of a lower heritor, notwithstanding a plea that the pursuer's infeftment would have entitled him to fish with net and coble if the shallowness of the river had admitted of this mode of fishing. The importance of the decision is, that since every proprietor of salmon-fishings in the river has a title to insist for the due regulation of cruives, the Court could not refuse to allow an action complaining of illegal cruives at the instance of a pursuer alleging a right to salmon-fishings except on the ground that he had no legal right at all. The case decides that forty years' possession by the methods practised is not sufficient to make a prescriptive right even in water where net-and-coble fishing cannot be successfully practised. All these cases were considered in *The Duke of Sutherland* v. *Ross*, 14 S. 960, where it was again held that a right of salmon-fishing could not be constituted by a grant *cum piscationibus* and subsequent possession by means of rod-fishing and fishing with a hand-net. The cases of *Forbes* v. *Udny*, *Smollet* v. *Colquhoun*, and *Chisholm* v. *Fraser*, together with a fourth case of *Leith* v. *The Heritors on The Don*, of which no report has come down to us, were held as fixing the rule. Lord Medwyn says—"These decisions concur in establishing the principle that the use of the rod and spear is not the kind of possession which is required to constitute a custom of fishing. And it may be observed that the symbols of the net and coble used in the conveyance of salmon-fishings show the nature of the fishings which the law had in view." It seems to have been maintained that a limited right of fishing by the rod only might be acquired by grant, or by possession of that kind of fishing on a clause *cum piscationibus*. The Court had no hesitation in rejecting that claim, holding that there could be no right of angling for salmon except in virtue of a right of property of salmon-fishing; and the real question therefore was, whether rod-fishing or fishing by means of a hand-net was sufficient possession. Lord Medwyn's observations just quoted indicates that the modes of fishing alleged were distinguished by the Court from net and coble, as the one mode re-

cognised by law, but at all events it was held that acts of possession of the kind described could not found a prescriptive right because they did not necessarily import an assertion of title. Other cases might be cited of the same kind. But it is unnecessary to multiply authorities, and I go on to the decisions in which the legal method of salmon-fishing has been expressly defined to be by net and coble. This was the view taken by Lord Corehouse in *Grant* v. *M'Williams*, where, with reference to cairn-nets in the Spey, that very high authority says—"This is a mode of fishing entirely different from net and coble, to which alone the chargers have right." Again he says—"The general rule has been repeatedly laid down that fishing by means of any fixed machinery or apparatus whatever, or in any way except by net and coble, is illegal." The same doctrine was laid down and embodied in a formal judgment in the *Duke of Atholl* v. *Wedderburn*, 5 S. 153, where on an application for interdict against the use of nets called toot-nets and others of a similar description, the Court granted an interdict against "any other mode of fishing than the ordinary way of net and coble." An interdict in similar terms was granted in *Gray* v. *Sime* (13 S. 1089), in which proprietors of salmon-fishings on the Tay complained of sole-nets and poke-nets and other fixed machinery. The Lord Justice-Clerk, referring to the previous case of the *Duke of Atholl* v. *Maule* (March 7, 1812, F.C.), said—"The true import of the judgment was that no devices or contrivances in order to circumvent fish are allowable except the legal mode by net and coble." Lord Glenlee says—"There is a fixed prohibition against any fishing except by net and coble, and the respondents admit that their mode of fishing is different from net and coble;" and Lord Medwyn, agreeing with the other Judges, says—"General interdicts against the use of fixed machinery are not sufficient, for the slightest change may give cause for saying that the machinery is not fixed." The Court accordingly interdicted the respondents from "using any fixed machinery for catching salmon, or any other mode of fishing than the ordinary mode by net and coble." In *Mackenzie* v. *Davidson*, 3 D. 646, issues were adjusted for trying the question of right in a competition between a proprietor infeft under the Crown *cum aquis et salmonum piscatione in lie* Bay of Gruinard, and a proprietor of lands lying along the shore of the loch in which he was infeft *cum piscationibus*, and who claimed a right of salmon-fishings in the loch *ex adverso* of his own lands. The latter was allowed an issue whether for forty years and upwards he and his predecessors and authors, proprietors of the lands, had fished for salmon opposite his said lands between certain specified points. But Lord Moncreiff, who gave the opinion of the Court, said—"I have had doubts whether the mode of fishing should not be inserted. But I rather think it is sufficient without that. It will be implied in the words that it must be fishing by a mode which is in law sufficient to make prescriptive possession. Fishing by spear, rod, or hand-nets will not do," and his Lordship refers to the *Duke of Sutherland* v. *Ross*. This judgment implies that one mode of fishing was so clearly fixed as the lawful mode that there was no need to define it in sending the case to a jury; and I do not think any other mode can be suggested as answering that description excepting net and coble. It is true that in the *Duke of Atholl* v. *Wedderburn* and in *Gray* v. *Sime* the mode of fishing condemned as illegal was the use of fixed and stationary nets, and the pursuer may be entitled to say that it does not follow that his net is illegal also. But the opinions cited and the formal orders of the Court strike not merely at fixed machinery but at any other mode of fishing than the ordinary mode of net and coble. *Dicta* to the same effect might be found in many other cases. But I do not wish to rest my opinion upon *dicta* which did not determine a judgment. I desire, however, to call attention to a statement of the law by Lord Neaves, even although it may go somewhat beyond what was indispensable for the decision of the point actually before the Court, because it is the opinion of a Judge of great authority, and because it was necessary for the purpose of the case to lay down a general principle. The question was whether a grant of barony, including an island in the sea, "with power of taking and catching all manner of fish in and about the island," carried a right to fish for salmon; and Lord Neaves says—"There are but two ways in which the estate of salmon-fishing can be acquired. First, it may be conveyed by express grant of the right to take salmon by their proper and usual designation. Secondly, though the grant is ambiguous, if it is followed by forty years' uninterrupted possession by net and coble, the only proper possession of salmon-fishing, the right will be acquired. For here we have the concurrence of two things, a title though ambiguous from the Crown, and open possession on the part of the grantee." (*Lord Advocate* v. *Commissioners of Northern Lighthouses*, 1874, 1 R. 950, at p. 952, 11 S.L.R. 538).

All of these authorities, except the last, and other authorities to the same effect, were before this Court and the House of Lords in the important cases of *Hay* v. *The Lord Provost of Perth* and the *Duke of Atholl* v. *The Glovers of Perth* (2 F. (H.L.), 57); and I agree with the Lord Ordinary that it is very material to see how the rule for distinguishing between legal and illegal fishing was treated in the House of Lords in these cases. The first is not in itself a direct precedent for the present purpose, because what was decided was that the method there challenged was only a fair example of net-and-coble fishing. But it was found necessary to discover a definite standard for determining the question of legality, and Lord President Colonsay states the question thus:—"I think the question may be put in this form—Is this net and coble or is it not? That is the real question." I will venture to observe, in

passing, that that very eminent Judge was exceedingly cautious in formulating any general opinion beyond what he thought indispensable for the decision of the matter in hand; and we may be certain that he would not have put the question in terms so absolute unless he had been satisfied of the necessity for a perfectly exact and definite standard, and also that the standard he proposed was in conformity with settled law. Lord Westbury in the House of Lords suggests a test involving a more elaborate specification of detail, but he approves of the Lord President's opinion as "expressing correctly the rational interpretation of the law." Lord Chelmsford puts the question in the same way as the Lord President — "The only point to be determined is whether the mode of fishing employed falls within the description of net and-coble-fishing. . . . It is clearly established that from very early times fishing by net and coble was a well understood description, and that a grant of salmon fishing without more would entitle the grantee to this species of fishing only." The whole question was reviewed after a full discussion of the authorities in *The Duke of Atholl* v. *The Glovers of Perth*; and I agree with the Lord Ordinary that the opinions delivered by the noble and learned Lords on that occasion are of the highest importance. Their Lordships consider the law to be finally settled by the judgment of the House in *Hay* v. *The Lord Provost of Perth*. Lord Macnaghten says that looking for a guide he prefers "the simple test proposed by Lord President M'Neill to the more elaborate disquisition of Lord Westbury;" and Lord Davey says —"I think the effect of the decision in the *Bermoney Boat Case* was (as expressed in Lord Chelmsford's judgment) that net-and-coble fishing is the type and the exclusive type of all lawful salmon-fishing with nets; and although other modes of fishing may conceivably be invented differing in some details and in form from net and coble as at present practised, they must conform to that mode of fishing in substance." The Lord Ordinary observes very justly that judicial opinions must be "read with reference to the concrete facts to which they apply;" and it must be noted that in the cases cited the nets challenged by the Duke of Atholl as unlawful were held to be in fact fixed engines. It may be open therefore to the pursuer to argue that the true distinction in the minds of the noble Lords whose opinions I have quoted was the broad one between nets used by the fisherman in the act of fishing and nets which operate as a mere obstruction to the passage of the fish. Nevertheless we must I think accept the language employed according to its plain meaning. It was necessary to find a general rule which should be simple and distinct; the conflict of decision which had followed *Hay* v. *The Lord Provost of Perth* showed the value of Lord Colonsay's rule, which had already been enounced over and over again by this Court; and it could hardly have been adopted, as it was in terms of decision, if it had been thought that such cases as, for example, the earlier case *The Duke of Atholl* v. *Wedderburn* and *Gray* v. *Sime*, where exactly the same doctrine was expressed and enforced by way of interdict, had not been rightly decided.

The result of all these authorities would seem to be that the only lawful mode of fishing with nets, and the only effective mode of possession for the purpose of prescription, is net and coble; but it may be proper to consider whether there is any contrary authority. I have examined all the cases cited by the reclaimer's counsel, and I cannot find any that raises a serious difficulty unless it be *Ramsay* v. *Duke of Roxburgh* (10 D. 661). This is said to be a contrary authority, because it was held that a proprietor infeft *cum piscationibus* had established a right to salmon-fishing in the Tweed by a prescriptive use of cairn nets. But the judgment was rested on a ground which does not shake in the least the conclusion suggested by the previous authorities, but on the contrary goes to confirm it, because it was held that rights of salmon fishing in the Tweed are regulated by a totally different law from that which governs all the other waters in Scotland. The Lord Justice-Clerk says—"The defender pleads that fishing by net and coble is the only method which has hitherto been treated as sufficient to give prescriptive possession of the *jus regale* when the right was disputed and rested on a general title. I am quite sensible of that, and many more authorities might have been quoted to show that net and coble alone has been sufficient." But his Lordship goes on to explain that the Scotch statutes "as to close time, fixed nets, cairns, and so forth," has never been extended to the Tweed because the lower part of the river could not be subjected to the law of Scotland, and that in consequence the mode of fishing in the Tweed had either not been regulated at all or regulated by special statutes, and those chiefly of the British Parliament. On consideration of these statutes the Court was satisfied that cairn-nets were recognised by Parliament as legal on the Tweed. The judgment therefore distinguishes between the Tweed and other Scotch rivers, and leaves the law as to the latter undisturbed. Nor do I think that any difficulty is created by certain *obiter dicta* of Judges of high authority in the House of Lords as to the possibility of establishing a prescriptive right under certain conditions by the use of fishing with the rod. If the question arose for decision these *dicta* would be entitled to weight, and it might very probably be found that changes in social habits and increased facilities for communication between different parts of the country had gone far to displace the grounds on which in former times angling with the rod was thought to be insufficient. Angling was always perfectly legal, and the only reason why it was held not to prove right was simply that as matter of fact it was more naturally ascribed to tolerance than to assertion of title. Lord Auchinleck, for

example, in *Smollet* v. *Colquhoun* says that "angling is a mean sort of fishing which persons living in a good neighbourhood are permitted to use." This would hardly be an accurate account of the custom of the present day. I suppose there can be no question that the increased value both in money and otherwise of the right of angling for salmon has led to a more rigorous preservation of fishing-water than formerly obtained, and may thus be supposed to give a different complexion to this kind of possession. But however that may be I think the observations referred to have no bearing on the question in hand. Whatever may be said about angling, there is no indication of opinion that any other mode of fishing would be sufficient.

I think two questions arise upon the authorities I have considered. The first is whether the pursuer's mode of fishing is absolutely prohibited by law, and the second is whether, even although not prohibited, it is sufficient in law to create a prescriptive right.

If the first question depends upon whether it is net-and-coble fishing or not there can be no hesitation as to the answer. The Lord Ordinary says, and I think with perfect justice—"This is not net-and-coble fishing nor any modification of net-and-coble fishing." But in order to determine whether it is lawful or not I think it is necessary to consider not only the character of the net and the method of using it, but to consider these things with special reference to the peculiarity of the place where it is used. It is practised, as the Lord Ordinary points out, in a pool or pot of narrow dimensions where the ordinary working of a net and coble is impracticable. "The principle of net and coble is that of a draught-net, working with a prolonged sweep, and directed against fish which until caught have still their natural freedom. The principle of the pursuer's net is that of a landing-net, by which fish already under restraint are pulled out of the water." I think the Dean of Faculty described the nature of the pool quite accurately when he said that it was simply a natural cruive without the statutory provisions for free passage which are required in artificial cruives. The fish are imprisoned in the pool and cannot ascend the river until the water rises. They have not the ordinary chances of running fish to escape a draught net, and while they are entrapped they are dragged out by the pursuer's contrivance. This method has none of the characteristics of ordinary fishing by net and coble. Lord Blackburn suggests in the *Duke of Sutherland* v. *Ross* (5 R. (H.L.) 137) that an artificial work not in itself prohibited may be so connected with the mode in which the fish are caught as to come within the extensive terms of being siclike with the enumerated modes of fishing which are prohibited. It is the combination of the net and its operation with the structure which in this view creates the illegality, and it seems to me that the principle may very well apply to a contrivance for taking the same kind of advantage of a natural barrier by which the fish are detained for a time. Again it seems to me that if the Act of 1698 has been rightly held to be of general application its terms are sufficiently comprehensive to include a contrivance of this kind. The precise force of the terms "devices not expressly allowed by law" may possibly be open to question. But they most certainly, in my opinion, cover a device which is not mentioned as lawful in any Act of Parliament, or in any decision or institutional writer, which is not named in any charter, and is altogether unknown to conveyancing and to practice. There is certainly no express law in its favour if it cannot be brought within the rule of net and coble.

If the pursuer's method is unlawful, there is an end of the case, because I take it to be clear in law that no length of time can sanction an illegal mode of fishing or give an available right to persist in it. But I do not think it enough for the pursuer to say that his device is not clearly illegal, or that it could not be put down if it were practised by a proprietor having an undoubted right on the estate of salmon-fishing. To convert his title from a grant, in its own nature defective, into a valid and effectual right, he must prove full and continuous possession by a method recognised by the law and commonly known to be lawful. His possession must be of such a character as to show at once that it is not precarious or a thing to be tolerated, but is enjoyed as in the exercise of an undoubted right; and therefore such as to lead to an immediate challenge as soon as it is exercised. The characteristics of net and coble, which make it evidence of full possession as of right, are perfectly clear. In the first place, it is the general and well-known method of exercising the right. If a man has an express Crown grant of salmon-fishing it is either described in terms as a grant of fishing by net and coble, or if not so described in the words of conveyance, the warrant for infeftment which under the older law made it effectual was a warrant for delivery of net and coble. Everybody therefore must be supposed to know that if water in which he has fishing rights is fished by another with net and coble, an adverse right is being openly asserted. And secondly, as the Lord Justice-Clerk points out in the *Duke of Roxburgh* v. *Ramsay*, it involves the most complete and decided adverse possession of the bank of the river, with the consequent subjection of the bank to the purposes of another right altogether separate and apart from the property of the land. For these reasons it cannot be imputed to tolerance. But in both of these significant characteristics the pursuer's possession fails. In the beginning, at all events, it may very well be accounted for by tolerance. The occasional use of the bank for access was not burdensome, and the practice of fishing itself may not at the first have been burdensome either. The pool was impracticable for net and coble, and it was hardly possible, if it were possible at all, to

fish it with the rod. The defender's author therefore may very probably have been unwilling to challenge the operations of a neighbour with whom he was on friendly terms, and prevent him taking fish out of a pool which he did not himself desire to fish, so long at least as the unauthorised fishing was not injurious. A very different question would arise when it was found to be so destructive as it is shown to have been of recent years. It may be said, further, that the owner of an undoubted estate of salmon-fishing was not called upon to challenge the pursuer's practice as soon as it began, because he was not bound to assume that it implied the assertion of an adverse right. A practice which is not commonly known to be rightful can hardly be said to import of necessity the assertion of a right. But I do not think the question depends upon reasoning of this kind. If I am right in my understanding of the law laid down in the last case in the House of Lords, it is concluded by authority. But apart from what was expressly laid down as law, there is a great body of authority, which was certainly not called in question on that occasion, to show that possession to establish a prescriptive right of fishing with nets must be possession by net and coble. We should be going against a *series rerum judicatarum* extending over more than a century if we were to hold the pursuer's practice of fishing sufficient to create a valid and effectual right. For these reasons I think we must adhere to the Lord Ordinary's interlocutor.

LORD ADAM and LORD M'LAREN concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—H. Johnston, K.C. — Hunter. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defender — Dean of Faculty (Asher, K.C.)—Dundas, K.C.—Constable. Agents—Blair & Cadell, W.S.

Tuesday, January 12, 1904.

FIRST DIVISION.

M'LACHLAN *v.* NELSON & COMPANY, LIMITED.

Process—Reclaiming Note—Principal Copy without Record Appended—Competency—Court of Session Act 1825 (*Judicature Act*) (6 *Geo. IV. c.* 120), *sec.* 18—*A.S. 11th July* 1828, *sec.* 77.

A Lord Ordinary having dismissed an action after hearing parties, the pursuer reclaimed, but failed to append to the principal copy of the reclaiming-note a copy of the record. The printed copies containing reclaiming-note and record were properly boxed. In the Single Bills the respondents moved the Court to refuse the reclaiming-note as incompetent, the principal copy received by the Clerk of Court having no copy of the record attached to it.

Held that as the conditions of appeal, under section 18 of the Judicature Act, had been satisfied, the reclaiming-note was competent, although the rule of Court, in terms of section 77 of the A.S. directing that a copy of the record should be attached to the reclaiming-note, had not been observed.

The Court of Session Act 1825 (Judicature Act) enacts (section 18) "that such party (the reclaimer) shall, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers to be perused by the judges, a note reciting the Lord Ordinary's interlocutor . . . and if the interlocutor has been pronounced without cases, the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before . . ." By A.S. 11th July 1828 it is provided (section 77)—". . . Provided always that such notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute, if the record has been closed."

Mrs Agnes Baxter or M'Lachlan, widow, residing at Kirkintilloch, raised an action against Nelson & Company, Limited, tea merchants, Edinburgh. On 10th December 1903 the Lord Ordinary (Low) issued an interlocutor sustaining the first plea-in-law for the defender and dismissing the action.

The pursuer printed and boxed a reclaiming-note against this interlocutor, to the printed copies of which a copy of the record was appended, but failed to attach a copy of the record to the principal copy, which was however received by the Clerk of Court together with a printed copy.

In the Single Bills the defenders objected to the competency of the reclaiming-note on the ground that a copy of the record was not appended to the principal copy, viz., the one signed by counsel. and argued—The provisions of the Judicature Act and of the relative A.S. were imperative, and rendered this reclaiming-note incompetent. The record was an indispensable appendage of the reclaiming note, without which it could not be received. The fact that it has been received by the Clerk could not be held to displace the statutory provisions, failure to comply with which was fatal to the note.—Judicature Act 1825 (6 Geo. IV., c. 120), sec. 18; A.S., 11th July 1828, sec. 77; *M'Evoy* v. *Braes' Trustees*, 16th January 1891, 18 R. 417, 28 S.L.R. 276; *Wallace* v. *Braid*, 16th February 1899, 1 F. 575, 36 S.L.R. 419.

The pursuer argued—The Judicature Act specially refers to complete printed copies being boxed to the Judges. Here these prints have been properly boxed. With the copy of the reclaiming note signed by counsel there was also lodged as usual a printed copy, here complete. The pro-