

Saturday, June 28.

SECOND DIVISION.

OSWALD AND ANOTHER v. M'CALL
AND ANOTHER.

*Fishing—Salmon Fishing—Illegal Method
—Net and Coble Used as Temporary
Obstruction—“Fleeting.”*

The lessees of certain salmon fishings in the river Nith fished for salmon with net and coble, which they used according to a particular method known as “fleeting.” This method was as follows:—The coble was rowed straight across to the opposite bank, the net paying itself out as it went. The man in the coble then put his foot on the net so as to prevent further paying out, and rowed the coble down stream, keeping its bow close to the bank, while the man with the tow-rope walking on his side drew his end of the net correspondingly down stream, the net thus forming a temporary obstruction from bank to bank. When the man in the coble came nearly opposite the hauling-place he released the net and rowed rapidly across the river to the hauling-place, when the net was hauled ashore. *Held* that the above method of catching salmon was not fair net and coble fishing and was illegal in respect that during the time that the paying out of the net was prevented the net took a grasp of the whole width of the river for a longer time than was required to row round the net, and was a contrivance which prevented the free passage of fish up the river.

Richard Alexander Oswald of Auchincruive, Ayr, and another, *pursuers*, brought an action in the Sheriff Court at Dumfries against James M'Call and another, *defenders*, in which they craved the Court “for declarator that the defenders are not entitled to fish by net and coble on the river Nith, in the district of said river as fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862, for salmon or fish of the salmon kind by the method known as ‘fleeting,’ that is, by making the shot across the river, securing the remainder of the net in the boat, and while the shot portion of the net is stretched across the river *by propelling the boat* or allowing it to float down the stream dragging the net along with it, and so causing it to form an obstruction to the passage of fish for a period longer than is required to row round the shot as in proper sweep-net fishing with net and coble, and for interdict against their fishing in such manner.” [The words printed in italics were added by amendment in the Inner House.]

The pursuers sued as proprietors of certain salmon fishings in the river Nith or its tributaries. The defenders in the spring of 1917 became the tacksmen of certain salmon fishings in the Nith known as the Kirkconnel fishings, on a three years' lease. Since the commencement of the lease the

defenders had fished these fishings by net and coble.

The parties averred—“(Cond. 3) A certain method frequently adopted by the defenders in fishing is claimed to be illegal. That method is thus described—A boat containing a man rowing shoots across the river to the opposite bank, a second man on shore holding the shore end of the net. The man in the boat pays out the net until he gets across the river, when he prevents any further paying out by catching the net and fastening it in the boat. The boat is then allowed to float broadside down the river dragging the net along with it, the man on shore moving parallel with the boat for two or three hundred yards, when the net is released from the boat and the paying out is recommenced, the boat being shot across to the side of the river from which it came. This proceeding occupies usually from ten to twenty-five minutes. No attempt is made to row the shot as in proper sweep-net fishing with a net and coble, or to keep the net moving through the water by the active operation of fishing, and the normal five minutes or so in which the shot should be completed is far exceeded. The net while so secured to the boat is with the boat practically a fixed engine, and forms a complete obstruction to the passage of fish from the time the boatman reaches the opposite bank until he shoots to the bank from which he came. The method described is a perversion of the legal mode of fishing by net and coble, which has been authoritatively defined as taking a grasp of a portion of the river during such time only as is required for the boat to row round the net. The instruments used are perfectly legal in themselves, but they are used in an unlawful manner. (Ans. 3) Denied that the defenders have fished in the manner described. Explained that fishing by net and coble as practised by the defenders is conducted as follows:—The net, after being shot across the river, is drawn down the river towards the landing-place by the man on the shore and by the man rowing the boat. During the whole time the net is under the effectual command and control of the fishermen, and is kept in motion by them in the active operation of fishing and for the purpose of enclosing the fish within its sweep. The net is never at any time fixed or stationary or allowed to hang or drift in the water.”

The pursuers *pleaded, inter alia*—“1. Defenders' method of fishing, involving as it does the stretching of a net across the river for a much longer period of time than is required by the ordinary practice of fishing by net and coble, is illegal in respect abnormal obstruction to the passage of fish is created—the pursuers are therefore entitled to have the defenders interdicted. 2. Defenders' method of fishing, as described in the condescendence, constituting the apparatus with which it is conducted a fixed engine, is illegal.”

The defenders *pleaded, inter alia*—“4. The pursuers' averments so far as material being unfounded in fact, the defenders are entitled to absolvitor. 5. The defenders' mode of fishing by net and coble being

legal, they are entitled to absolvitor with expenses."

On 4th May 1918 the Sheriff-Substitute (CAMPION), after a proof, found it not proved that since entering upon their lease the defenders had fished otherwise than by the ordinary and accustomed mode of net and coble fishing, sustained the fourth and fifth pleas-in-law for the defenders, and assoilzied them from the conclusions of the action.

The pursuers appealed, and on 6th July 1918 the Sheriff (MORTON) adhered.

The pursuers appealed to the Court of Session, and argued—The Sheriff and Sheriff-Substitute had proceeded on a wrong view of the law which protected the fish, not from fixed engines but from obstruction *per se*. It was only as a particular kind of obstruction, though the most important, that the question of fixed engines came to be considered. The real question was whether there was an obstruction even of a temporary character in the water—*Hay v. Magistrates of Perth*, 1863, 4 Macq. 535, *per* Lord Chancellor Westbury at pp. 543 and 544. The pursuers were prepared to accept the defenders' evidence that the boat was assisted in part by its oars in its passage down the stream. But in any event on the admission of the defenders' witnesses a substantial period of obstruction affected the stream. It was clear that the boat was used, not to close the ends of the net, but to keep it stretched from point to point. This showed that the net was used (1) to block the stream, (2) to sweep the stream, and (3) to sweep and enclose the fish. The first and second operations were directed, not to enclose the fish, but, in combination with the banks and shallows of the stream, to make a receding pool in which the fish were enclosed. The fish were then driven against the shallows at the foot and all free exit was prevented. The illegality consisted (1) in blocking, (2) in sweeping, the natural features in this particular case making it productive. The operation as thus conducted was not fishing with net and coble, which meant using the net to encircle the fish and not to drive them. In *Hay v. Magistrates of Perth*, 1863, 4 Macq. 535, known as the *Bermoney Boat* case, founded on by the respondents, the extent of the sweep was artificially extended, but it was throughout continuous and was as rapid as possible. So long as the net was used for its legitimate purpose of enclosing, it was competent to make the sweep as wide as possible. In other words, a particular part of the river was taken for the purpose of rowing the net round—*Wedderburn v. Duke of Atholl*, 2 F. (H.L.) 57, *per* Lord Chancellor Halsbury at p. 61, 37 S.L.R. 686; and *Hay v. Magistrates of Perth*, *cit. sup.*, *per* Lord Chancellor Westbury at p. 553. No dictum had been cited by the respondents as authority for what had been done in the present case. Grasp of the water, not preparing or enriching the water, was the test.

Argued for the defenders and respondents—The legal propositions of the pursuers were, (1) that the operation of paying out the net must be continuous from start to finish, and (2) that the moment paying

out was finished the fisherman must start to return to the other bank. It was, however, impossible to maintain these propositions on the authorities, or to regard them as necessarily involved in net and coble fishing. Net and coble fishing was not a hard and fast system which admitted of no deviation. On the contrary, there were no limits to the improvements and modifications that might be admitted in it, provided always that the net was kept constantly moving and did not leave the hand of the fisherman, or to put it otherwise, provided the net did not itself fish and do the work of the fisherman—*Maxwell v. Lamont*, 1903, 6 F. 245, *per* Lord Kyllachy at p. 249, and Lord Kinnear at pp. 256, 257, and 260, 41 S.L.R. 202. In the present case a certain confusion was created by the fact that parties were dealing with a narrow stream. The pursuers had not dealt with the question of whether in a broad stream it would have been legitimate to go straight across, but short of the opposite bank, and then straight down. Logically this should be illegal, if the defenders' method was illegal, and yet the latter method had been held to be legal in the *Bermoney Boat* case, *Hay v. Magistrates of Perth*, 1863, 4 Macq. 535. The respondents' method of fishing was within the scope of net and coble fishing as practised in that case, and as described by Lord Ivory and the Lord President (M'Neill), 1861, 24 D. 230, *per* Lord Ivory at p. 238 and the Lord President at pp. 249 and 250. The pursuers' case depended entirely on a single passage in the Lord Chancellor's opinion in that case, separated from its context, and given a forced construction—4 Macq. at p. 544 foot. The contention of the respondents also received support from the opinions of the judges in the recent cases of *Wedderburn v. Duke of Atholl*, *cit. sup.*, and *Duke of Atholl v. Glovers' Incorporation of Perth*, 1900, 2 F. (H.L.) 57, 37 S.L.R. 686. The present case was the first case where it was sought to interdict fishing conducted by net and coble and by net and coble alone, the only special feature being the discontinuity in paying out this net and the keeping close to the opposite bank for a certain space. It was common ground that the net in the present case was throughout in half moon shape, and accordingly the fish were throughout in course of being enclosed. On the evidence there was ample water for the fish to escape to the lower pool. In this respect the case was distinguishable from *Maxwell v. Lamont* (*cit. sup.*). On the other hand the only difference between the present case and the *Bermoney Boat* case (*Hay v. Magistrates of Perth*, *cit. sup.*) was that here the whole river was enclosed. In the present case the Court was being asked to apply the rule against fixed engines to something which was in no sense a fixed engine at all. There were no cases where an obstruction, not fixed, had been held to be illegal with the single exception of the drift net, and that was on the ground that it was a mechanical self catcher. In all the obstruction cases some fixed engine had been employed—*West v. Aberdeen Harbour Commissioners*, 1876, 4 R. 207, *per* Lord President Inglis at p. 211,

14 S.L.R. 147. The early cases on obstruction supported this view—*Duke of Queensberry v. Marquis of Annandale*, 1772, M. 14,279; *Dirom v. Little*, 1797, M. 14,282; *Sir J. Colquhoun v. Duke of Montrose*, 1793, M. 12,827 and 14,283 and 4 Pat. App. 221. In the pursuers' proof "fleeting" was nowhere properly defined. A conclusion for interdict must be expressed in such terms as to enable the person interdicted to understand what he was prohibited from doing. In that respect the crave in the present case was inadequate.

At advising—

LORD JUSTICE-CLERK—The question in this case is whether the mode of fishing as practised by the defenders is legal.

That mode may be thus described. The man with the tow-rope proceeds from the point where the net is begun to be shot with the tow-rope down to the hauling-place in the ordinary way. The coble carries the other end of the net across the river (paying out the net as it goes) till the coble is close to the opposite shore, when the shot is interrupted before the whole of the net has been paid out by the rope carrying the net being fixed round a pin in the coble or prevented from running out further by the foot of the fisherman being placed upon it and holding it fixed. In my opinion it is immaterial which of these methods is adopted. The man with the tow-rope is meantime proceeding down towards the hauling-place, and the man in the coble while the net has ceased to be paid out does not proceed to complete the shot by rowing towards the hauling-place, but allows the coble to go down with the current, whether aided by the oars or not, and whether the coble goes down broadside on to the current or with the bow kept angled into the bank being in my opinion immaterial. The important point is that the paying out of the net is deliberately stopped for a substantial period of time, during which the coble is kept hugging the shore while it drifts either by the force of the current alone or aided to some extent by the oars, but not as rapidly as would be done if the oars were used in the usual way to take the coble as in an ordinary sweep to the hauling-place. After the coble has moved down a not immaterial distance the paying out of the net from the coble is resumed, and the coble makes for the hauling-place and the shot is completed. The result is that while there may be a small part of the water between the man with the tow-rope and the shore not obstructed by the net, and similarly a small part of the water between the end of the net near the coble and the opposite shore not obstructed by the net, the greater part of the channel is completely obstructed by the net from the time when the paying out of the net ceases till it is resumed and the coble begins to make across the river to the hauling-place.

By this mode of fishing these three features are brought into play—the shot is interrupted for an appreciable and important length of time, the sweep is thus not made as rapidly as possible, and the net is made

to obstruct nearly the whole of the channel for considerably longer than is necessary to row the net round so as to complete the sweep, while the small open spaces at either side of the river are disturbed by the man with the tow-rope and the coble with the "splashing" of the oars on each side respectively.

In my opinion this is not a legal mode of fishing by net and coble.

In considering the decided cases I do not think it necessary to go further back than the *Bermoney Boat* case except to quote a sentence from the opinion of Lord Justice-Clerk Hope in *Ramsay*, 10 D. 661, where at p. 669 he says—"The common law will reach all kinds of obstruction in and across the river to the run of salmon and all practices either destructive to the breed of the salmon or so noxious to their tastes and instincts as to deter them from ascending higher than suits the interests of the party using such practices, e.g., the sheet covered with pitch. But modes of fishing not obstructing the passage of the salmon and not noxious the common law will not reach or put down."

In *Atholl v. Wedderburn*, 1 F. 651, the Lord Ordinary (Stormonth Darling) quotes and approves of what Lord Westbury spoke of in *Hay* as "the distinctive peculiarity" of net and coble fishing, that it takes a grasp of a portion of the river during such time only as is required for the boat to row round the net, and the Lord President accepts this view. He says—"An examination of the case in which those words were uttered makes it plain that they express the principle of the decision and that they are the deliberate statements of a rule of law." Lord Chancellor Halsbury in the same case in the House of Lords (2 F. (H.L.) p. 61) says—"Of course a net however used is in itself an obstruction; but there is all the difference in the world between the temporary use of a net in the act of catching a fish and what I have described as a wall of net remaining and intended to remain for a considerable time motionless and in that sense fixed. And it appears to me that by a long line of decisions the broad distinction has been insisted upon, and to my mind unanswerably concluded by the judgment in *Hay v. The Lord Provost of Perth*. Lord Westbury described the mode of fishing which he held to be lawful, and which he said came within the principle of ordinary net and coble fishing, which exists only and takes the fish only while the net is kept in motion, and which preserves all the distinctive peculiarities of fishing by net and coble, namely, taking a grasp of a portion of the river during such time only as is required for the boat to row round the net. And Lord Chelmsford in the same case describes the decisions which had been quoted to him as establishing that contrivances for the purpose either of preventing the fish from passing up the river or catching them by fixed nets were illegal." The Lord Chancellor adds at p. 62—"Now it seems to me that both the hang-nets and the toot-and-haul nets are illegal within the principles laid down by all the cases. In neither case

is it an act of fishing; it is a fixed net, and although fixed but for a time its operation is that of an obstruction. It remains, as nearly as the person managing it can procure it to do, perfectly still, and its operation when thus still is simply obstruction. When the fish strikes it it is true the fisherman then does something to catch the fish, most commonly by gaff, but its operation is what I have described." In the same case Lord Brampton says (p. 69)—"Although it may be said that the net in this case is not stationary in one spot for any length of time, still used as it is chiefly in slack water it is in a perpendicular position when first paid out and is retained in that position for as long a time as is possible; and so long as it so floats gradually down the current it remains a continuous obstruction." I shall refer later on to the point as to the net being constantly in motion.

Lord Westbury in *Hay's* case said—"The operation in order to be effectual must of necessity be as rapid as possible, for any one conversant with that mode of fishing knows well that the great object is to make your sweep with great rapidity and to bring the ends of your net together as quickly as possible, otherwise the fish strike away in the interstices which are still open to them in the net and escape being comprehended within the haul of the net."

The *Bermoney Boat* case was not concerned at all with what happened at the coble end of the net. It was solely taken up with what was done at the towing end of the net.

But it is said the net here was always in motion, and therefore no objection can be taken to the legality of the mode of fishing followed. That seems to have been the view which determined the decision in *Allan's Mortification*, 7 R. 211, which was followed in *Earl of Wemyss v. Earl of Zetland*, 18 R. 126, but this was just the reasoning which was rejected in *Atholl's* case when I think *Allan's* case was overruled.

The rubric in *Allan's* case is—"A net about 200 yards long and from 6 to 7 feet deep, made of very fine twine with meshes from 2½ to 3 inches wide, was used for catching salmon in the estuary of a river. The net was paid out from a boat rowed across the stream and afterwards kept in position by floats and sinkers. The end of the net was then attached to the boat by a rope so as to keep the net as much as possible stretched across the stream, the boat only moving enough to keep the net floating with the tide. The fish were caught, not by being enclosed but being entangled in the meshes of the net and immediately drawn up into the boat. Held that the net so used was not a fixed engine and that the mode of fishing was not illegal." Lord Mure describes the method followed there thus:—"This mode of fishing therefore is plainly carried on by a net and coble. And the distinction between it and the ordinary mode of fishing by net and coble appears to consist mainly in this—that while by the ordinary mode the net with a tow-rope attached is paid out shortly after the

coble leaves the shore, and while it is being rowed out and sweeps round to the hauling-ground to which the fisherman with the tow-rope in hand goes down to assist in hauling in the net, the boat in the present case is rowed out into mid-river before the net is paid out, and when that is being done is rowed slowly back towards the shore with one end of the net attached to it, and leaving the further end to be floated round with the current till it comes to be parallel with the shore. It is in the course of this gradual sweep of the net, produced partly by the action of the current and partly by the motion of the boat that the fish are entangled and caught, while the net is being kept constantly in motion and without the use of any fixed engine or fixture of any kind." He quotes with approval the passage in which Lord Westbury refers to the "distinctive peculiarities of fishing by net and coble, namely, taking a grasp of a portion of the river during such time only as is required for the boat to row round the net." Lord Shand too, at p. 228, treats the fact that the net was always in motion as conclusive in favour of legality. It seems to me that that reasoning was completely rejected by the House of Lords in *Atholl's* case.

I am therefore of opinion that the mode of fishing complained of in this case is illegal, because it prolongs the obstruction of the river by the net beyond the time that is necessary to row round the net by interrupting the shot and making the net drag practically the whole width of the river, and for a time materially longer than is required to complete the sweep, and so, as Lord Kinnear said in *Maxwell*, 6 F. at p. 260, deprives the fish of "the ordinary chances of running fish to escape a draught net."

The pursuer's counsel asked leave to amend the prayer of the initial writ by inserting the words "by propelling the boat or" after the word "river." I do not think it very material whether this amendment is made or not, but I would allow the amendment to be made and grant decree of declarator and interdict as concluded for in the amended prayer.

LORD DUNDAS—The pursuers, appellants, upper proprietors of salmon fishings in the Nith, seek by this action to prevent the defenders, respondents, who are tacksmen of salmon fishings at Kirkconnel, lower down the river, from fishing for salmon with net and coble by the method and in the manner described in the prayer of the initial writ. The learned Sheriffs have assolzied the defenders. I have come to the conclusion, though not without hesitation, as the case seems to me to be a narrow one, that the pursuers are entitled to prevail.

As the proof stands, and as the arguments were presented at our bar, I do not think that any disputed question of fact arises for decision. The mode in which the defenders fish may be briefly described as follows—The coble is rowed straight across to the Dumfries side, the net paying itself out as it goes; the man in the coble then puts his

foot on the net so as to stop further paying out, and rows the coble down stream, keeping its bow or "nose" close to the Dumfries bank, while the man with the tow-rope, walking on the Kirkconnell side, draws his end of the net correspondingly down stream. When the coble comes nearly opposite the hauling-place, the man in it releases the net, and rows swiftly back to the Kirkconnell side, where the net is hauled ashore. On record the pursuers averred that when the net had been carried across the river it was allowed to float down stream with the current, unassisted by the oars, until the process of paying it out was resumed, no attempt being made to keep it moving through the water by the active operation of fishing. The pursuers' senior counsel, however, conceded in argument, and I think rightly, looking to the tenor of the proof, that we must take the case on the footing that when the net has been carried across the river the boat is propelled down stream by the oars, dragging the net after it. Further, while there is evidence for the pursuers that the portion of the river covered by the cast or sweep, as executed by the defenders, was sometimes as long as 700 yards, it was conceded—again I think rightly—that the length of the cast should be taken at not more than about 300 yards.

The case turns, therefore, upon a question of law. It is, I think, now settled, in accordance with the judgments in *Hay v. Magistrates of Perth*, 1863, 4 Macq. 535, and *Duke of Atholl*, 1900, 2 F. (H.L.) 57, that, as Lord Davey put it in the latter case, "net and coble fishing is the type, and the exclusive type, of all lawful fishing for salmon with nets, and although other modes of fishing may conceivably be invented differing in some details and in form from net and coble fishing as at present practised they must conform to that mode of fishing in substance." The question which we have to determine is whether the mode of fishing which the defenders are proved and claim right to exercise "falls within the description of 'net and coble fishing,' or is such an addition to or variation from the sort of fishing understood by that denomination as to render it a distinct and different kind"—*per* Lord Chelmsford in *Hay's* case, 4 Macq. at p. 555. It is clear, on the one hand, that the mere fact that a net and coble are used will not by itself sanction a mode of fishing; these instruments, though perfectly legal in themselves, may be employed in an unlawful manner, so as to amount to a "perversion and evasion" of proper net and coble fishing. On the other hand, it has been made equally plain that, as the Lord President put it in *Hay's* case, with the subsequent approval of the noble and learned Lords on appeal, "improvements upon the net and coble mode of fishing, so long as it is fair net and coble, are just as lawful as improvements upon anything else"—see Lord Macnaghten's opinion, 2 F. (H.L.) at foot of p. 63.

The decision in *Hay's* case was arrived at by the House of Lords upon plain and simple grounds. The Lords dispelled all mystery connected with the special name

"Bermoney Boat," holding that there was in the case before them no "peculiar system" distinct from the ordinary mode of fishing by net and coble. A short and clear description of the working of the Bermoney boat will be found in the English report of *Duke of Atholl*, [1900] A.C. at pp. 408, 409. The mode of sweeping the net really differed in no way from that ordinarily practised, except that the man with the tow-rope instead of walking down the tow-path sat in a boat which he could move along mechanically hand over hand. Instead of walking on dry land or wading along a submerged towing-path he was furnished—the water being too deep to permit of wading—with an artificial, moving tow-path in substitution for one upon the land. The House of Lords held that this peculiarity in no way rendered illegal the operation which was otherwise identical with ordinary net and coble fishing. In pronouncing judgment, however, the noble and learned Lords laid down general principles or rules which have ever since been held to be of conclusive authority. Lord Westbury, L.C., stated as "clear law" that "it is illegal to fish for salmon with any net or with any species of machinery devised or constituted for catching fish which is a fixture, which is at all fixed or permanent, even for a time, in the water"—4 Macq. at foot of p. 544. In a later passage (at p. 552) he emphasised the importance of the facts that "the net still continues in the hand of the fisherman; the net still continues in motion; the net is not fixed for any period during the time of the operation." It seems to me that the present defenders' mode of fishing fairly complies with the first and second of the requisites thus postulated for legal fishing. The net, if not actually in the fisherman's hand, is subject to his direct command and control, and while it is in the water it continues to move through and not merely with the water. But whether the defenders' method complies with the third postulate is not so clear. The pursuers' counsel founded forcibly upon a passage (at p. 553) in Lord Westbury's opinion, approved and adopted in subsequent cases, where his Lordship describes "the distinctive peculiarities of fishing by net and coble, namely, taking a grasp of a portion of the river during such time only as is required for the boat to row round the net." The pursuers' counsel contended that the defenders' mode of fishing has not these "distinctive peculiarities," and is manifestly illegal because it takes a grasp of a portion of the river during a much longer time than would be required for the boat to row round the net in a properly performed sweep. The operation of the sweep is deliberately checked so long as the paying out of the net is suspended and the boat kept close to the far bank, and the net is used not to enclose but to obstruct (completely or almost completely) fish in their upward passage, and is in that sense, if not "fixed," at least "permanent . . . for a time in the water." Now it is plain that a more rapid sweep of the net could be made than that which the defenders are in the habit of making. But I think the defenders' counsel

were right in saying that there is no authority for holding that the paying out of the net must be absolutely continuous and uninterrupted. If such a rule existed it would obviously be difficult, if not impossible, to enforce it in practice. And the rapidity with which the sweep must be made seems to be a question of circumstances; the average duration of the defenders' casts is not proved to exceed that of a normal sweep by more than a few minutes. But then one must consider this further element in the case, that the defenders admittedly carry their net at the outset of the cast right across the river to the opposite bank. I do not think that this fact could by itself render the method of fishing illegal. There would, I apprehend, be no necessary illegality in so conducting the sweep that the further shore should constitute, so to speak, a tangent to the arc of the net for a few moments of its circuit. But when it is proved that on reaching the opposite bank the net is purposely prevented from further paying out, and the boat kept as close as possible to the Dumfries side for a considerable period of time and of space with the deliberate object and effect of blocking for that period the whole width of the river, it seems to me that different considerations arise. The obstruction to the upward passage of fish during the period indicated is almost complete—quite complete, I think, to all practical intents and purposes. This feature of the defenders' method sins, in my judgment, against Lord Westbury's rule that in fair net and coble fishing the net must take a grasp of a portion of the river during such time only as is required for the boat to row round the net, and to amount *pro tanto* to a contrivance for preventing the free passage of fish up the river (see Lord Chelmsford's opinion, 4 Macq. at foot of p. 557). In *Maxwell v. Lamont*, 1903, 6 F. 249—the latest reported case on this branch of the law—Lord Kyllachy said that "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 deliberate interruption by the defenders of the sweep of the net while stretched, for practical purposes, completely across the river for a period considerably larger than is required for the enclosure and capture of the fish by a normal sweep, appears to me to deprive the fish of their "natural freedom," and to amount to illegal obstruction of their passage. The net, if not "fixed," is, I think, "permanent for a time"—an undue length of time—"in the water." The defenders' method of fishing is therefore in my judgment illegal because it is in the respect I have indicated not "fair net and coble fishing," and is "such an addition to and variation from the sort of fishing understood by that denomination as to render it a distinct and different kind." I think therefore that as practised it must be stopped, and that the pursuers are entitled to decree of declarator and interdict in terms of the prayer of the initial writ as amended at our bar.

LORD SALVESEN—In this case the pur-

suers ask the Court for a declarator that the defenders are not entitled to fish by net and coble on the river Nith for salmon or fish of the salmon kind by the method known as "fleeting." There is some controversy in the evidence as to the mode in which the defenders actually fish in the two pools of the river Nith with which we are concerned, and whether the definition of "fleeting" which is given in the prayer of the petition actually describes the defenders' operations. In my opinion the definition is substantially correct subject to a slight modification, and the defenders' operations come within it. The Nith at the place where the fishing complained of is carried on is a comparatively narrow stream. The fishing as practised by the defenders is as follows—the ordinary net used in net and coble fishing, with a towing-rope and hauling-rope attached to each end, is placed in a rowing boat in such a way that the net is paid out as soon as the boat leaves the bank. One of the fishermen takes hold of the towing-rope and the boat is then rowed rapidly across the full breadth of the stream, the net being paid out as the boat proceeds. As soon as the boat touches the opposite bank the boatman puts his foot upon the remainder of the net and thereafter he continues rowing the boat with its nose pointed to the bank either at right angles or at an oblique angle but so as continuously to obstruct the passage of the fish and to keep the net stretched across the river. At the same time the man on the other bank walks slowly down parallel to the boat with the towing-rope over his shoulder. The necessity for rowing the boat arises from the fact that the current in the centre of the river is stronger than it is at the sides, and if the boat were simply allowed to float with the current it would be hauled towards the middle of the stream, with the result that a large part would be left free for the passage of salmon, which is what the defenders desire to prevent. By the boat being continuously rowed the end of the net attached to it is kept a little in advance of the centre, and the same result is aimed at by the fisherman who is operating the towing-rope. Substantially, however, the motion of the net depends on the rate at which the current is running down the river. The net is kept in the position I have already described for a distance of 200 or 300 yards until it is nearing the lower part of the pool. The boatman thereupon takes his foot off the net, rows rapidly across the river towards the position which the man with the towing-rope is approaching and the fish are thus encircled. The operation is completed by the two ends of the net being hauled up on the same side of the river.

During the period that the net is kept straight across the river the only opening for the salmon is under the keel of the boat, but as the boat is constantly being rowed the splash of the oars frightens the fish and tends to send them into the centre of the river where they are effectually stopped by the net which hangs perpendicularly in the current. The object of the defenders is in this way to bring down the fish in the

upper part of the pool to the lower portion, where as many as possible are enclosed by the rapid sweep that takes place as the boat is rowed to the bank from which it originally started.

I do not doubt that this method of fishing differs substantially from the net and coble fishing as ordinarily practised. This was defined by Lord Chancellor Westbury in the case of *Hay*, 4 Macq. 553, as "taking a grasp of a portion of the river during such time only as is required for the boat to row round the net." Now if that be held to be a complete definition of the only legal method of fishing by net and coble, then the defenders in my opinion do not bring themselves within it. They take a grasp of a portion of the river for an appreciably longer time than is required for a boat to row round the net. This is specially the case when the current in the river is not strong. I think it is conclusively proved that whereas a complete sweep of the net may be made in five or ten minutes the defenders on various occasions occupied twice or even three times as long in completing their sweep, and that for ten or fifteen minutes the net was being used not for the purpose of enclosing the fish but in order to drive them down to the lower part of the pool, where their capture was effected.

My chief difficulty in the case is in reconciling the opinions of the noble Lords in *Hay's* case with the facts as they are disclosed in the session papers. It was pointed out by counsel for the defenders that the stakes or pins fastened in the bed of the Tay between which the Bermoney boats were hauled were distant from each other 300 yards or 400 yards; and it was said that the defenders had not been proved to have exceeded this distance in the exercise of their fishing. Perhaps, however, the current in the Tay is so strong that the operations of enclosing the fish cannot be effected in a shorter distance; and if so one can understand that the operations complained of in *Hay's* case would not present the same objectionable features as the mode of fishing carried on by the present defenders. If we were to hold "fleeing" to be a legal method of fishing, it would seem to follow that it may be practised in pools of far greater length than those with which we are immediately concerned, and that the operation of enclosing the fish might occupy a very much longer period than even twenty minutes. This in the case of a river which is so narrow that it can be completely obstructed without putting out even the whole of the net ordinarily used in net and coble fishing would be a serious matter and might tend greatly to depreciate the upper fishings. No doubt the net is kept constantly in motion by the current and is operated by the continuous exertion of a fisherman at each end. So far it is not open to objection; but if, as I assume, it must be further predicated of a legal net and coble fishing that it takes a grasp of a portion of the river during such time only as is required for the boat to row round the net, then it is plain the defenders did not

satisfy this condition. On the whole matter therefore I agree with your Lordships in holding that we must grant interdict substantially in terms of the prayer of the petition.

LORD GUTHRIE—I agree with your Lordships that the pursuers are entitled to decree in the terms stated by your Lordships. As I read the evidence in this case it establishes, *first*, that in the respondents' fishing the net is kept constantly in motion; *second*, that during the whole process the net is under the control of the fisherman; *third*, that the fisherman's boat is continuously rowed by him down the stream from the moment when the boat reaches the opposite bank from which it started, and the paying out of the major portion of the net is stopped; and *fourth*, that from that moment the boat is so rowed down the river as for a longer or shorter period thereafter to obstruct the whole passage of fish over substantially the entire area of the channel from bank to bank.

In these circumstances it is said by the respondents that they come within the rule extracted by Lord Kyllachy in his opinion as Lord Ordinary in *Maxwell v. Lamont*, 6 F. 245, from the judgments and dicta in the cases of *Hay v. Magistrates of Perth*, 4 Macq. 535, and *Duke of Atholl v. Glovers' Incorporation of Perth*, 2 F. (H.L.) 57. "It humbly appears to me," his Lordship says, "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 that the net does not itself fish and do the work of the fisherman." If my two first findings are warranted by the evidence, as I think they are, it is said by the respondents that their mode of fishing must be held legal. But Lord Kyllachy in the statement above quoted postulated that the mode of fishing in question must fairly answer the description of net and coble. I am of opinion, by reason of the practice described in my fourth finding, that the respondents' mode of fishing does not fairly answer that description. In every case the process of net and coble fishing must involve some obstruction to the passage of fish. Improved devices may for their possible exercise involve a certain increase in the amount of obstruction. But in this case there are no improved devices. The only change from the ordinary method of net and coble fishing is that instead of the amount of obstruction being minimised to the utmost extent consistent with successful fishing by net and coble, the mode of fishing practised indefinitely prolongs the obstruction. I do not think the decision of this case turns on the time taken or the area covered on any particular occasion or occasions. These will vary with weather, current, tide, the character and breadth of the

channel, the length of the net, and the judgment of the fisherman. It is the mode of fishing which is in question, and the illegality of the mode of fishing practised by the respondents seems to me to consist in their proved practice, in accordance with their assertion of legal right, to obstruct the passage of fish in this river at the place in question for an illegitimate purpose, namely, not to catch the fish which their net would naturally catch, but these fish plus fish which had the river not been obstructed by their method of fishing would have escaped, either because these fish were never within the sweep of the net, or because although within the sweep when the sweep begins the fish were able to escape to an unobstructed part of the river. The respondents' mode of fishing does not appear to me to possess the "distinctive peculiarity of fishing by net and coble" mentioned by Lord Westbury in *Hay's* case (4 Macq. 553), namely, "taking a grasp of a portion of the river during such time only as is required for the boat to row round the net." I am not ignoring the points made in favour of the respondents, that their mode of fishing has been practised apparently without serious question for many years, and that there is no evidence that they in fact catch any abnormal number of fish. But I do not think these considerations can affect the legal result.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutors of the Sheriff-Substitute and the Sheriff dated respectively 4th May 1918 and 6th July 1918: Find in fact (1) That the pursuers are upper proprietors of salmon fishings in the river Nith or its tributaries as certified by the clerk of the Nith District Fishery Board by list No. 2/1 of process; (2) that in the spring of 1917 the defenders became the tacksmen of certain fishings in the Nith known as the Kirkconnel fishings; (3) that the method of fishing practised by the defenders is as follows, namely—the coble is rowed straight across to the Dumfries side of the river, the net paying itself out as it goes, the man in the coble then puts his foot on the net so as to prevent further paying out and rows the coble down stream keeping its bow or 'nose' close to the Dumfries bank, while the man with the tow-rope walking on the Kirkconnel side draws his end of the net correspondingly down stream; the net thus stretched across the river completely obstructs for practical purposes the passage of fish up the river; when the coble comes nearly opposite to the hauling-place the man in it releases the net and rows swiftly to the Kirkconnel side, when the net is hauled ashore: Find in law that the said method of fishing is not fair net and coble fishing and is illegal in respect that during the period when the paying out of the net is prevented and coble kept close to the Dumfries side the net takes a grasp of the whole width of the river during a longer time than is required for the coble to row round the

net, and is a contrivance which prevents the free passage of fish up the river: Therefore grants decree of declarator and interdict in terms of the prayer of the initial writ as amended."

Counsel for the Pursuers and Appellants—Moncrieff, K.C.—Scott. Agents—Dundas & Wilson, C.S.

Counsel for Defenders and Respondents—Chree, K.C.—MacRobert. Agents—Webster, Will, & Co., W.S.

Friday, June 20.

FIRST DIVISION.

[Sheriff Court at Dumbarton.]

WOODILEE COAL AND COKE

COMPANY, LIMITED v. ROBERTSON.

Master and Servant—Workmen's Compensation—Arising Out of and in the Course of Employment—Serious and Wilful Misconduct—Added Peril—Workman Lighting his Pipe in Firey Mine—Coal Mines Regulation Act 1911 (1 and 2 Geo. V, cap. 50), secs. 32 and 35—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1) and (2) (c).

In a firey mine it was an offence against the Coal Mines Regulation Act 1911 to be in possession of matches or to light a match, and that regulation was posted up and in force at the colliery, and was known to a miner there who at the customary knock-off on the afternoon shift struck a match to light his pipe. An explosion occurred by which he was killed. The miner's dependants claimed compensation. *Held* that the accident was due to a risk not reasonably incidental to the workman's employment, but which was added by the workman's own act, and that the accident therefore did not arise out of the employment.

The Woodilee Coal and Coke Company, Limited, *appellants*, being dissatisfied with an award of the Sheriff-Substitute at Dumbarton (W. J. KIPPEN, K.C.) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought against them by Mrs Annie Campbell or Robertson, for herself and as tutrix and administratrix-in-law of her pupil children, *respondent*, appealed by Stated Case.

The Case stated—"The following facts were established:—1. That the claimant Mrs Annie Campbell or Robertson is the widow, and the claimants Christina Robertson and Letitia Robertson are the pupil children, of the late Kenneth Robertson of 5 Ledgate Street, Kirkintilloch, and are his only dependants. 2. That the said Kenneth Robertson was a miner in the employment of the Woodilee Coal and Coke Company, Limited. 3. That on Friday, 27th September 1918, while on the back (afternoon) shift in the Meiklehill Colliery of the said company, he was personally injured by an explosion