[*26th August* 1839.]

(Appeal from the Court of Session, Scotland.)

ARCHIBALD HORNE, Judicial Factor, on Cromarty, and COLIN M'KENZIE of Newhall, Appellants.[1] (No. 37.)

[*Sir F. Pollock—Pemberton.*]

The Honourable Mrs. MARIA HAY MACKENZIE of Cromarty and Captain HUGH MUNRO, her Tacksman, Respondents.

[*Attorney General (Campbell)—Buchanan.*]

Salmon Fishing — Statutes 1424, *c.* 11, *&c.* — *Stake Nets — Evidence.*—At the trial of an issue as to whether certain stake nets and other engines were placed in situations prohibited by the statutes regulating the salmon fisheries, the judge in the course of his direction to the jury, after defining estuaries as spaces between the strictly proper river and the strictly proper sea, the waters of which were partly salt and partly fresh, proceeded thus:— "The mere name is of little importance. The thing to "be looked to is the fact of the absence or of the preva- "lence of the fresh water, though strongly impregnated "by salt. Now, where this fresh water prevails, though "in the estuary, these structures are illegal." The Court of Session disallowed a bill of exceptions to the

[1] Rep. 16 D., B., & M., 1286.

direction. The House of Lords reversed this judgment, and remitted the cause with directions to allow the bill of exceptions, and grant a new trial.

Question raised,—Whether it was matter for exception that a witness had been allowed during his examination to use, for the purpose of reference, a printed copy of a report, with certain jottings and calculations recently made thereon, relative to the subject of his testimony, which report he had prepared on the employment of the party adducing him as a witness:—observed, per L. C.—It is clear that for some purpose at least the witness was at liberty to refer to the paper he produced, and that a bill of exceptions could not have been supported on that ground.

1st Division.

Ld. Cockburn, Judge at Trial.

BY a statute of Robert I., A. D. 1318, c. 12., it is enacted thus:—"Item ordinatum est et assensum, quod "omnes illi qui habent croas, vel piscarias, vel stagna "aut molendina in aquis ubi ascendit mare et se re- "trahit, et ubi salmunculi vel smolti seu fria alterius "generis piscium maris vel aquæ dulcis descendunt et "ascendunt, tales croæ et machinæ infrapositæ sint ad "minus de uensura duorum pollicum in longitudine et "triuin pollicum in latitudine, ita quod nulla fria pis- "cium impediatur ascendendo vel descendendo, secun- "dum quod libere possint ascendere et descendere "ubique."

Another statute, in the reign of James I., 1424, c. 12., enacts,—"Item, It is ordanyt that all crufis and yairs, "set in fresche waters quhair the sea fillis and ebbs, the "quhilk destroys the fry of all fisches, be destroyt and "put away for three yeirs to cum."

Another statute, in the reign of James III., 1469, c. 87., enacts,—"Item, for the multiplication of fish,

" salmond, grilsis, and trowtes, quhilk are destroyed by " cowpes, narrow messes, nettes, prynes, set in rivers " that hes course to the sea, within the flude mark of " the sea, it is advised in this instant parliament, that " all sic cowpes and prynes be destroyed and put away " for three ziers."

Another statute, in the reign of James IV., 1488, c. 13., enacts,—" It is statute and ordained, that " all cruffis and fisch-dammys that ar within salt " watyrs quhar the sey ebbs and flows, be utterly de- " stroyed and put down, alswell thai belongis to our " soveregn lord, as utheris throw all the realme. And " as anent the cruiffis in fresche waters, that they be of " sic largnes and sic days keepit as is containit in the " actis and statutis maid thereupon of befor."

Another statute, in the reign of Queen Mary, 1563, c. 3., ratifies the preceding statute, with the following addition :—" That is to say, that all cruives and yairs " that ar set of late upon saunds and schauldes far " within the water where they were not of before, that " they be incontinent, tane doun, and be put away, " and the remanent cruives that ar set and put upon " the water sandis to stand still quhil the first day " of October next to cum, and incontinent after the " said first day to be destroyed and put away for " ever."

In 1828 the respondent, as proprietrix of salmon fishings in the river Conon, and her tacksman, Captain Hugh Munro of Teaninich, applied to the Court of Session, by bill of suspension and interdict, against several proprietors of fishings situated to the eastward of her fishings, on the ground, that they were fishing

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Statement.

illegally within the locality described by the statutes above recited. In support of this application it was averred, that the whole expanse of water between a point at or near the town of Dingwall and the two great headlands called the Sutors, which abut upon the ocean and form the entrance to what is known as the Frith of Cromarty, was subject to the prohibitions in the said statutes.

The application was opposed by Mr. Archibald Horne, accountant in Edinburgh, judicial factor on the estate of Cromarty, situated near the Sutors; and also by M'Leod of Cadboll, Mackenzie of Newhall, and others whose fishings are situated between the Cromarty fishings and those of the respondent. By these parties it was contended, that all the water below the line of lowest ebb tide beyond which the sea never recedes, whatever shape or form the contiguous coast might assume, was excluded from the operation of the prohibitions aforesaid.

The bill of suspension was passed; and a record having been made up, issues were adjusted for all the parties in a corresponding form, but it was agreed that the issue as to the Cromarty fishings should be held as the issue for all the others, mutatis mutandis, and that their interests respectively should be determined by the result of that issue. The following accordingly was the issue sent to trial, viz. "Whether "the defender, Mr. Horne, or his predecessors in "office, has or have wrongfully fished for salmon "in the Frith of Cromarty, opposite to the lands and "estate of Cromarty and others, during the years "1824, 1825, 1826, 1827, and 1828, or any part

" thereof, by means of stake nets, bag nets, yairs, " or other engines, placed in situations prohibited by " statute ?"

The affirmative of the issue was with the respondents, the pursuers of the action. In the course of the trial a witness for the respondents, who had been employed to make a survey of the subjects in dispute, proposed to refer to a printed paper purporting to be a report of his survey, and containing also certain manuscript jottings on the margin. This was objected to by the appellants, but the objection was over-ruled, and the examination proceeded.

After a variety of evidence adduced by both parties, the judge directed the jury in point of law, and a verdict was returned for the respondents.

The above ruling of the judge in respect to the evidence, and certain parts of his direction to the jury in point of law, were then made the subject of a bill of exceptions.

The first ground of exception was thus set forth in the bill:—" The counsel learned in the law for the " said defenders did object to the witness having before " him a printed paper, while giving his testimony. And " the witness being examined as to the said printed " paper, deponed, that it was a copy of a report which " he had made to the pursuers on their employment, " and on the margin of which he had, two days ago, " made a few jottings. The witness stated that he had " his original note-book with him, and these jottings " are not in it, though their materials are. He could, " with a little time, repeat the calculations of which " these jottings consist, but he happened to make them,

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Statement.

" with a view to his own explanations as a witness, on " the margin of the printed copy. His report is dated " 1st November 1836. It is made from his original " notes, but is not a literal transcript of them; but " in substance it is the same. Whereupon the said " counsel for the defenders did object to the said wit- " ness being allowed, while giving his testimony, to " have before him, and refer to the said printed paper, " and notes written thereon, which were not made at " the time of making the survey or observations with " reference to the Frith of Cromarty. But the said " Lord Cockburn, after looking at the said printed " paper and notes, repelled the objection, whereupon " the said counsel for the said defenders did then and " there except to the foresaid judgment of the said " Lord Cockburn, and insisted that the said George " Buchanan ought not, in giving his testimony, to be " allowed to have the said paper and jottings thereon " before him, or to refer thereto, and that such testi- " mony so given could not be received as legal and " competent evidence."

The direction of the judge in point of law was thus set forth in the bill of exceptions: — " Now, assuming " the machines to have been used, the point is, whether " they were so wrongfully? There are many circum- " stances which might have made the use of them " wrongful; but the only ground on which they can be " held to have been so under these issues is, that they " were placed in illegal situations. Hence the full " question put to you is, whether salmon were wrong- " fully fished by means of these engines, 'placed in " 'situations prohibited by law.'"

" It may naturally occur to you as odd, that a ques-
" tion so much involved in law should be put to you.
" But it was unavoidable. Because, though a Court
" may give the legal rule, which permits or condemns
" these machines, according to circumstances, the deter-
" mination of the circumstances, that is, of the facts, to
" which the rule is to be applied, is the proper province
" of a jury. I shall therefore begin by giving you as
" much of the law as is necessary, and shall then leave
" you, with such observations as may appear to me to
" be proper, to apply this law to what you shall think
" the true import of the evidence.

" I say as much as is necessary: for it is not neces-
" sary, for the determination of this particular case, that
" I should give, or attempt to give you, a catalogue or
" a description of all the circumstances, even of situ-
" ation, under which stake-nets may be lawful, or the
" reverse. Many of them have no application to this
" case; and it is needless to encumber ourselves with
" legal matter that is superfluous. Nor shall I trouble
" you by any observations either on the history or on
" the policy of the law. These may be useful to law-
" yers, by assisting them to put the right construction
" on disputed statutes; but they are of little or no use
" after the construction of these statutes is fixed, and
" least of all to juries, who, without any reasoning on
" the subject, must take the law as they receive it from
" the Court.

" Now I have to lay it down to you, in the first
" place, that the statutes, as explained by decisions,
" make these machines unlawful, if they be placed in
" what is usually known as a river in the ordinary sense
" of this word. You have heard enough in this case to

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Statement.

" let you know that science and investigation may dis-
" cover rivers where the uninformed eye cannot or does
" not trace them. Of this case I shall speak instantly.
" All I now say is, that this apparatus is prohibited by
" law if it be placed in a river.

" In the second place, there are many rivers which
" only join the ocean through a firth or through a long
" land-locked valley, where the fresh and salt waters
" meet. In this situation it will probably depend upon
" external appearances, — whether ordinary observers
" say that the space is occupied by the sea, or by the
" river, or by both. If it shall be so fully and distinctly
" occupied by the flowing fresh water as that it is really
" a river, though the common river features may be
" periodically effaced by the tide, it comes under the
" preceding rule; that is, being still a river, these
" machines are unlawful.

" Moreover, rivers have estuaries, — that is, spaces
" intermediate between the strictly proper river and the
" strictly proper sea. Through these partly fresh and
" partly salt estuaries, though its ordinary river features
" may be impaired, or at high tides even obliterated,
" the river still does in truth exist and operate; though
" its existence be only continued among sands and
" shaulds through which it has to work its way, strug-
" gling with the tide. Now these structures are also
" unlawful in these estuaries. Not that estuaries are
" specially mentioned by name in the statutes, neither
" are friths. But the estuary is a part of the river, and
" is included under this word. The mere name is of
" little importance. The thing to be looked to is the
" fact of the absence or of the prevalence of the fresh
" water, though strongly impregnated by salt. Now,

" where this fresh water prevails, though in the estuary,
" these structures are illegal; and they are not only
" unlawful (meaning always within the ebbing and
" flowing of the tide) when placed in the channel of the
" estuary that is always covered with water, but they
" are so also if they be placed on the sands which are
" left dry by the ebbing of the sea.

" In these two situations, viz. in the river, or in
" its land-locked estuary, the contrivances are illegal.
" There are two situations of a different description in
" which they are lawful.

" For, in the third place, some rivers terminate with-
" out passing through any frith or estuary, and are lost
" in the open ocean almost so soon as they touch the
" salt water. In this case stake-nets are not prohibited,
" if they be placed away from the immediate mouth of
" the river, though situated where the sea ebbs and
" flows. The ebbing and flowing wont of itself render
" them unlawful, because they may be within the sphere
" of this phenomenon, and yet in the pure and un-
" doubted sea.

" In the fourth place, there are examples in which
" the junction of the fresh water and the salt does not
" take place, as in the case last put, at the edge of the
" open ocean, but far up in the land, where the river
" loses itself in arms, or in bays of the sea. These
" portions of the ocean become what are called arms of
" the sea, merely because they happen to be enclosed
" within ridges, which guide their waters into the in-
" terior. But this circumstance does not make these
" arms identical with estuaries. They are the sea. And
" being so, these machines, if placed in or on arms of

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Statement.

" the sea, as distinguished from estuaries of rivers, are " not unlawful. What shall be held to be an arm, and " what an estuary, is a question of fact for you. All " I say as to the rule is, that if there be an arm distinct " from an estuary, then, in that arm, or, in other words, " in that portion of the sea, these fixed traps are not " illegal.

" The substance of these rules is nearly this, that to " make the particular engines, with which we are now " dealing, unlawful, it must be proved that they are in " a river or in its estuary, whether within the channel " or on the sands made dry by the ebbing. It is the " pursuer's business to prove that they are so placed. " If he shall fail, the defenders may have nothing to do. " But if, not content with relying on the pursuer's " failure, the defenders choose, they may shew, and " they have tried to do so, that their structures are " truly in the sea; whether the open sea, or on one of " its arms or bays; and if so, they are lawful.

" In short, a river does not lose its legal protection, " in reference to salmon fishing, merely by being met " by the advancing tide, provided this be within what " are called (though usually by two Latin words) the " jaws of the land, and provided the relative size of the " river and the other circumstances shall satisfy a jury " that, on the whole, the space is river, including in " this term its estuary. And, on the other hand, the " sea does not lose its privileges merely because a river " flows into it, or flows through one of its arms or bays " where the tide ebbs and flows, provided the relative " smallness of the stream and other circumstances shall " satisfy a jury that, on the whole, the space is sea and

" not river, or the continuation of a river through its " estuary."

This direction was excepted to, in the first place, as being in itself erroneous; and secondly, in respect the judge " did not direct the jury, that the prohibitions of " the statutes could not extend lower down than to the " point where the fresh water of the river joined the " salt water of the sea at low ebb tide."

The Lords of the First Division, having heard parties upon the bill of exceptions, ordered cases, and thereafter pronounced the following interlocutor:—" 21st Dec. " 1837.—The Lords direct the cause to be laid before " the judges of the other division of the Court and the " Lords Ordinary, for their opinions upon both the " grounds of exception contained in this bill of excep- " tions, and with that view appoint the parties to put " into the boxes of the said judges printed copies of " said bill of exceptions, record, and cases for the " parties, together with the plan of Mr. Buchanan, and " that quam primum."

The consulted judges thereafter returned in writing the opinions, which are subjoined.[1]

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[1] OPINIONS signed by Lords Justice Clerk (Boyle), Glenlee, Meadowbank, Medwyn, Fullerton, Jeffrey, and Cuninghame.

" We are of opinion, that the first ground of exception, touching the " evidence of Mr. Buchanan the engineer, cannot be sustained; and that " the bill, so far as rested on this ground, should therefore be disallowed.

" As to mere calculations, or statements of averages or general results, " we are clearly of opinion that these might with perfect propriety have " been read from or referred to by the witness, though made out imme- " diately before his examination. If not so made out indeed they " probably must have been framed and reduced to writing while the " examination was going on, to the great delay and embarrassment of the " proceedings.

" With regard again to matters of fact and observation, it is admitted " that the original notes made at the time might have been competently " referred to; and the witness swore distinctly, that the report, to which

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Statement.

The cause having come on, on 30th June 1838, for

" he did refer, was made up entirely from these original notes; and, " though not literally, was 'in substance the same.' The defender did " not attempt to test or discredit this statement, by calling for the original " notes, or by any farther examination; and the statement must therefore " now be taken for true. The result is, that he spoke from a transcript of " the original notes, made carefully by himself.

" As to the separate objection, that the witness referred only to a " printed copy of the report, and not to the original, and that there might " have been variances or errors, in printing or transcribing, we are of " opinion that the defenders have not put themselves in a condition to " insist on this objection, inasmuch as they have not sought to ascertain, " from the witness himself, or otherwise, in what way the accuracy of the " copy had been tested. The witness expressly swears, that the print " before him was a copy of the report prepared by him from his original " field notes; and we are of opinion this must now be taken to mean that " it was a correct copy; and that, if he had been farther interrogated on " the subject, he would have proved this, by specifying the collations or " other means by which its correctness had been established. The de- " fenders, we think, having proposed no such interrogatories, are not now " entitled to hold that, in positively swearing that it was a copy, the " witness was swearing to a fact which he had no sufficient means of " knowing, or to assume the existence of variances or errors, without " proof, either of their actual existence, or even of its being possible, " from the way in which the copy was prepared, that they might have " existed.

" The report, it should also be observed, was not laid before the jury as " a piece of documentary evidence, in which case the law as to primary " and secondary evidence might have applied, but was merely referred to " by the witness to refresh his memory, the only proper evidence on the " matters which it might contain being his own oral deposition, and " nothing more.

" As to the argument in the case for the defenders, that they were at " all events entitled to see the paper referred to, and to cross-examine the " witness on its contents, it seems to us to be a conclusive answer, that it " is nowhere stated in the bill of exceptions that they ever asked to see " that paper, or proposed to go into such cross-examination; and the " bill being necessarily held to set forth all the facts on which exceptions " are to be raised, it is plainly incompetent for the court now to go into " any other averments, even if their truth were admitted (as it is here " positively denied) by the opposite party.

" We are therefore clearly of opinion, that none of the grounds of " exception as to Buchanan's testimony have been established; and that " the bill as to these should be dismissed.

" 2. With regard to the second ground of exception, or that relating " to the directions in point of law which the judge addressed to the jury " on the merits of the cause, there may, at first sight, appear to be a little

advising upon these opinions, the following judgment

" more difficulty; but, on the fullest consideration, we have come to " the opinion, that the defenders have failed on this point of the case also, " and that the bill ought therefore to be disallowed in toto.

" If we were satisfied, indeed, as the defenders have contended, that the " true import of the whole direction in point of law was, that wherever a " river terminated in an estuary the only thing to be looked to, in deter- " mining whether stake-nets placed in such estuary were legal or illegal, " was, whether there was a preponderance of salt or of fresh water at the " place, we should certainly have had great difficulty in finding this to be a " correct exposition of the law. But we think it manifest, that such is " not the import of the direction; and that it never can be supposed that " the jury took this to be its meaning.

" In the first place, there is nothing whatever in the passage referred " to, as to the comparative prevalence or predominance of salt or of fresh " water in a river estuary, affording the only true criterion of the legality " or illegality of stake nets in such a situation. What the judge says is to " be looked to is, the absence or prevalence of the fresh water only. We " think it quite impossible to hold, that prevalence here means presence " only; especially when such a substitution would make the direction " more questionable than as it stands. The word prevalence, in fact, is " too plain to admit of interpretation; and the judge told the court in " consultation, that he meant it in its natural and plain sense, as equiva- " lent to predominance.

" Now, even if we could hold (as we certainly do not) that this single " passage contained the only direction in law which the judge gave to the " jury, and that it could not be qualified or explained by what went " before or came after, we are not prepared to say that it would have been " absolutely unsound or erroneous. It was confessedly applied only to " the case of a river terminating in an estuary, intra fauces terræ; and is " supposed to have been given as a criterion for judging whether that " estuary was sea or river, in the sense of the laws about salmon fishings. " Now if, in such an estuary, there is absolutely no sensible admixture of " fresh water whatever, when the tides are ebbing and flowing (and it " is plain that this is the only thing that could be meant by the absence of " fresh water), we can scarcely conceive a more decided proof that an " estuary of such a description could not be considered as a river, in the " sense of the laws referred to. On the other hand, if, during the ebbing " and flowing of the tides, and in the average condition of the waters, " the fresh water actually predominates, or forms more than a half of the " whole, it seems almost as difficult to hold that such an estuary could " ever be regarded as the sea, or an arm or branch of the sea.

" But the substantial ground on which we have come to think that this " exception must be disallowed, is, that this part of the direction must " clearly be taken along with all that relates to the same matter in the " context; and that, when so taken, it is quite plain that the absence or " prevalence of the fresh water is not meant to be held as the only thing

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Statement.

was pronounced by the Lords of the First Division:—

" to be looked at, but only as a very material circumstance to be attended " to, along with all the other circumstances from which the jury were " to form their own conclusion as to the question of fact, Whether, on the " whole matter, the estuary in question partook more of the character of " a river or of the sea?

" That this is the way in which such a direction is to be dealt with can " admit of no doubt. Detached words are not to be separated from the " context, nor inaccurate or imperfect expressions catched at, to obscure " or apparently contradict, what every one must have seen to be the clear " meaning of the whole, when taken together. There are other instances, " perhaps, of such expressions in the direction now in question; as, where " the judge, after describing estuaries merely as spaces intermediate " between the proper river and the proper sea, and where salt and fresh " water are mingled, says generally, and apparently without limitation, " that such engines as the defenders' 'are unlawful in these estuaries.'— " But though this seems to be absolutely stated as law, it is plain from " what follows, that nothing more is meant than that they may be un- 'lawful in such situations; for very soon after comes the passage so " much relied on, where it is said that they are only unlawful, though " in an estuary, if the fresh water prevails or preponderates, but not " unlawful if there are indications of any fresh water, though in an " estuary. The correction or qualification of the inaccurate expression " follows here a little more closely after that expression than in the " case now in dispute; but we think it is, in the last case, if possible, " still more complete and decisive.

" In the first place, the judge states distinctly, in the very begin- " ning of his exposition, that the law 'permits or condemns those " 'machines according to circumstances; and that the determination of " 'these circumstances is the proper province of the jury.' He then informs " them, that in a proper river they are clearly unlawful; and proceeds to " state the effect of their being in an estuary, in the way already referred " to. He then speaks to the case of an arm of the sea, which has this " much in common with an estuary, that it is intra fauces terræ; and " distinctly tells them that what should be held to be an arm of the sea, " and not an estuary, is a question of fact for them. But the most " important and decisive passage is that which closes the whole direction, " and in which, professedly resuming the whole substance of what had " been previously said, and apparently for the very purpose of removing " ambiguities or supplying defects, he again recurs, though in a different " form of expression, to the absence or prevalence of the fresh water, but " takes care, in this final summing up, to state, twice over, that it is not " the only thing to be looked to, but is always to be taken along with the " whole other circumstances of the case. The words are: 'In short, a " 'river does not lose its legal protection merely by being met by the " 'advancing tide, provided (1) that this be within what are called the " 'jaws of the land, and provided (2) that the relative size of the river,

" 10th July 1838. The Lords disallow the bill of " exceptions, but find no expenses due."[1]

HORNE and another *v.* MACKENZIE and another.

26th Aug. 1839.

Judgment of Court, 10th July 1838.

" ' and (3) the other circumstances, shall satisfy a jury, that on the " ' whole the space is river, including in this term its estuary; and on " ' the other hand, the sea does not lose its privileges merely because a " ' river flows into it, or flows through one of its arms or bays, where the " ' tide ebbs and flows, provided (1) the relative smallness of the stream, " ' and (2) the other circumstances, shall satisfy a jury, that on the whole " ' the space is sea, and not river, or the continuation of a river through " ' its estuary.'

" After this, it seems to us impossible to doubt that, when it was pre- " viously said that ' the thing to be looked to ' was the absence or " prevalence of fresh water, it was only meant, and must have been under- " stood by all who heard the direction to the end, that it was ' the great " ' or principal thing,' but to be taken into view along with all the " other circumstances; not, in short, a legal or exclusive criterion, but " merely a very important element in judging of the complex question of " river, estuary, or sea. It is to be observed, that it is not said, even in the " previous passage, to be the only thing to be looked to, but simply that it " is the thing—a form of expression quite common for signifying the " chief thing; as, when it is said that the thing to be looked to in a " witness is veracity, or in a lawyer skill or learning; these expressions " certainly could never be conceived to imply, that intelligence or exact " memory was of no consequence in the former, or honour or honesty in " the other, If the passage therefore stood unexplained by any other we " should think that this was its fair meaning; but when the whole " direction is resumed and summed up, in the anxious and accurate " words which we have cited, we think there is not even a pretext for " saying, that there could be any doubt or mistake about the matter.

" We are also very clearly of opinion, that the law as suggested in the " bill of exceptions is not that which it was the duty of the judge to state " to the jury as applicable to the case before them.

Lords Moncreiff and Cockburn added the following concurrence in the foregoing opinion.

Lord Moncreiff.—" I entirely concur in the first part of the above " opinion.

" I also concur in the second part of it, but with the following explana- " tion: Taking the charge as an entire whole, and looking to the sub- " stance and result of it, I think that it amounts to this, that in this " question the estuary of a river is to be considered as a part of the river; " that stake-nets placed in such an estuary are illegal; and that the ques-

[1] Further OPINIONS at advising (30th June 1838), by Judges of First Division:—

Lord President.—Two points were raised on this bill of exceptions: (1.) one in regard to Buchanan's evidence; in regard to it we all agree; but

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Statement.

" tion, whether the particular place or part of the water condescended on is " in the estuary of the river or in the sea, is a question of fact for the " consideration of the jury, depending on all the various circumstances " which may have been brought before them in evidence. Viewing it in " this light, I have come to be of opinion that the observations made, or " the mere form of expression employed, in pointing out any of the " particular circumstances requiring attention, ought not to be regarded " as laying down to the jury any unbending rule of law, in opposition to " the whole scope and very precise conclusion of the charge, so as in any " manner to control or fetter the judgment of the jury on the question " of fact expressly left to their determination on the whole evidence; and " therefore that supposing that there may be some inaccuracy of expres- " sion, according to the opinion of the court, in the particular passage of " the charge excepted to, in so far as the learned judge may seem to have " attached more weight than is justly due to one particular circumstance, " as a test of the stake-nets being in the estuary of the river and not in the " sea, that does not afford a good ground of exception to the charge " generally, in so far as it is a charge on the law of the case.

" But I think it necessary to qualify my concurrence by observing, " that in so far as it may be held to be laid down or strongly implied in " the above opinion, that if that part of the charge wherein it is said, that, " in the question whether it is the estuary of the river or not, ' the thing " ' to be looked to is the fact of the absence or prevalence of the fresh " ' water, though strongly impregnated by salt; now, where this fresh " ' water prevails, though in the estuary, these structures are illegal,' had " stood alone as the substance of the charge, it would not have been " liable to exception. I cannot agree in that opinion, because I think " that the fact thus rested on is both in its nature exceedingly loose, as " affording any legal or decisive rule in the question, and even when " definitively ascertained is not such a test as could invariably or in all " circumstances lead a jury to a correct result.

" But being on the whole inclined to think that that particular part of " the charge ought not to be so considered, I am, on full consideration, " of opinion that the exception should be disallowed:

" I have no doubt that the law suggested in the bill of exceptions is not " that which, consistently with the decisions, it could be the duty of the " judge to lay down to the jury."

Lord Cockburn.—" I have only to state, that the construction put upon " the charge in the preceding opinion gives it the meaning which it was " intended to convey; and that, thus understood, I have not seen ground " for thinking it wrong."

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there is another question, viz. (2.) as to the law contained in the charge. As to it, seven judges adhere, and Lord Moncreiff concurs, with an explanation, and Lord Cockburn adheres to his previous opinion.

Lord Gillies.—As the judge who presided at the trial has explained his

Appellants.—(1st exception.) Although the appellants admit that Mr. Buchanan was entitled to refresh

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meaning to be, that in using the expression "prevalence" of fresh water he meant by it predominance, I agree in the main with him; but if he had meant, as I understood it from the charge, to be mere presence of fresh water, I certainly could never agree, because in that way any body of salt water must be held to be a river, if the presence of any portion of fresh water could be detected. We could not stop short after that, and refuse to call the Frith of Forth a river; and indeed in that way the Mediterranean would become a river, or estuary of the Nile.

Lord Mackenzie.—On the whole, I am inclined to adhere to the opinions delivered.

Lord President.—I have gone over the whole of the statutes referred to. Some of them talk of salt waters, and others of waters, and fresh water that ebbs and flows, and so much confusion prevails in the mode of expression, that it is exceedingly difficult to make sense of any one act.

Lord Corehouse.—I certainly agree with the opinions of the consulted judges, but under the explanation given by Lord Moncreiff. It did not appear to me that it would be just to set aside the verdict of the jury because the charge referred to the prevalence of fresh water, as I did not consider that the prevalence of salt or fresh water was the chief circumstance to be regarded, and I don't think that this was decided in the Tay or other cases. There were other matters in the charge, on which the jury may have proceeded. Therefore, with the caution contained in the charge, I am inclined to hold that we cannot allow the exception to the law; for I consider the law in the charge to have been properly ruled, and it appears to me that the charge is exceedingly well expressed, and I agree that it was a most fitting question for a jury.

Lord Mackenzie.—I concur with what has just been expressed by Lord Corehouse; and I ought to have said previously, that it is entirely under the explanation given by Lord Moncreiff that I coincide in the opinions of the other judges. I think the explanation of Lord Moncreiff is very necessary.

Dean of Faculty moved for expenses.

Lord Gillies.—This has been a question of very great difficulty indeed. So I do not see why you should get your expenses. It is not the ordinary case where you would be entitled to expenses. Indeed, I consider that the result is contrary, not only to justice, but it is contrary to common sense, to make a river of the Cromarty Frith.

Lord Mackenzie.—I certainly am against allowing expenses, for it was a question attended with great difficulty.

Lord Corehouse.—I should rather be inclined to give expenses. There was a very ingenious argument by Mr. Solicitor General, but I think after the decision in the Tay case it was clearly made out to my mind that the law in the charge was well laid down by the presiding judge. So I think expenses should be given, and that too where the judges are so unanimous.

HORNE and another *v.* MACKENZIE and another.

26th Aug. 1839.

Appellants Argument.

his memory in regard to the observations made by him while employed in his survey, he could only do so from authentic sources. It was not competent for him to refer, in regard to this matter, to an elaborate report prepared by him at the distance of months. He neither consulted, nor proposed to consult, his field-book, or even his original report. All that he looked at was a printed paper, of which the appellants neither knew nor were allowed to know any thing, but which they were told was a printed copy of the report. To sanction a reference to such a document by a witness when under examination is a latitude hitherto unknown in practice. There are many intermediate stages between the principal copy and the print, in all of which there is much likelihood of error; a manuscript copy must, in the first place, be made from the principal, and a printed copy from the manuscript. It is impossible to tell how many errors there may have been in the manuscript, and how many additional errors in the print. There was not a

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Lord Gillies.—I cannot think that the case was so clear, for we took the opinions of the other judges after ordering cases. I cannot think it is right to say that the case was clear.

Dean of Faculty.—They may be reserved till the issue of the motion for a new trial; but the practice has always been to give expenses to the gaining party where the exceptions in a bill are disallowed.

Lord Mackenzie—I am not for laying it down as a rule abstractly, that in no circumstances should we allow expenses after advising a bill of exceptions; but certain circumstances may arise in consequence of which we may take the reason of the thing into view, and I don't think here that we ought to give expenses, from the difficulty attending the case.

Lord Corehouse.—I am far from laying down any inflexible rule; but it did appear to me that the law was clear, and that after an unanimous opinion of the whole judges sustaining the charge expenses should follow.

Lord President.—I rather concur with Lord Corehouse, that the expenses should be given, as I was inclined to think that the matter was decided in the Tay case.

Lord Mackenzie.—I must say I am against giving expenses.

Lord Gillies.—So am I; and as that is the case the point will require to be sent to the consulted judges.

vestige of evidence to show that either the manuscript or the print had been compared with the original or with each other. What apology was there for Mr. Buchanan reading from a document, which, as regards authenticity, was utterly worthless, more especially as it must be presumed that the best evidence, viz. the field-books and original notes, were within his reach? The very circumstance that the report contains a detail of many observations and many results in numbers, is one of the strongest reasons that can be urged for the strictest enforcement of all the rules as to authentication. It cannot be supposed that Mr. Buchanan could carry in his memory all those numerical results, and it was therefore impossible for him to check the accuracy of the copy. Blunders might pass unnoticed, and he might give in evidence with the utmost bona fides, on the strength of the printed report, results and observations totally at variance with the truth. It would be dangerous in the extreme to put testimony in jeopardy by such laxity of procedure. Even supposing the report had been duly authenticated, it cannot be regarded otherwise than a plan, a book, or a deed, and ought to have been produced eight days before the trial.[1] In this way it might be made evidence, but it would be both unwarrantable and inexpedient to allow a witness to give his testimony from what ought (if admissible at all) to have been treated as documentary evidence. It gives him an advantage which no witness whatever is entitled to claim. The ordinary rules of evidence afford the strongest analogy on this subject. There is no rule in practice better settled, than that secondary evidence will not be admitted, where the best may be obtained. And

[1] Act of Sederunt, 29th Nov. 1825, s. 29.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Appellants Argument.

it is a familiar illustration of this rule, that the copy of a document can never be given in evidence, when the principal document is within reach, or at all events, never without a due authentication of the copy. Thus, if a party tendered in evidence a printed copy of a charter, without any verification of it, while the principal could have been obtained without difficulty, is it not a matter of trite law, that it would be instantly rejected? A common case is that of a shorthand-writer's notes. To prove what occurred on a former occasion, one is not bound to produce his notes; but the usual course is, to call the shorthand-writer, and ask him if he had made a transcript from the original. If the opposite counsel object to the transcript, the shorthand-writer must read from the original. The same may be said in regard to entries made in a ledger from a waste-book. Whatever a person sees, and commits to writing, either in his own or the handwriting of another, at the time when the transaction is fresh in his mind, may be used. But a witness cannot refer to a paper made subsequently to the time when the matter was under his consideration. The question is not, as put by the consulted judges, whether the copy is accurate or not accurate, but between a copy and the original. A witness who is compelled to apply to documents in order to aid his memory is as apt to be misled by errors in an unauthenticated copy, which may give a false colour to his whole testimony, as where the documents themselves are tendered as matters of direct evidence to the jury.

(2d exception.)—The direction is objectionable in respect it lays down that stake nets are forbidden in estuaries, and at the same time defines or attempts to define the forbidden locality as consisting in the pre-

valence of fresh water, although neither the term nor definition used are to be found in any of the enactments on the subject. The question is not within what locality is there the presence, the prevalence, or the absence of fresh water; but the question is, what is meant by the term aquæ, as distinguished from the term mare, i. e. what is the aqua within which the sea ascendit et se retrahit. The meaning of the term has been established, by a totally different criterion from that given by the learned judge, by our standard institutional writers.[1] But not only so; in the Don case[1], the Lord Chancellor, in reviewing the salmon fishing statutes, comes to the following conclusion:—"Taking "the latter acts in connexion with the earlier acts, and "the whole subject together, construing one with the "other, I think I am justified in recommending to "your Lordships to come to the conclusion that the "whole body of the acts, taken together, refer not to "the sea coast, but to rivers and to continuations of "rivers. And therefore I should recommend to your "Lordships to confirm the judgment of the Court, as "far as relates to the construction of those acts of par-"liament."

That the term aquæ denominates the river can therefore no longer be disputed. But it also includes the continuation of the river; and what is the continuation of the river, as distinguished from the river, but that part of the river which continues to flow after the sea has receded from it. This definition corresponds precisely with the term ostium fluminis, which, in the Spey case (as stated by Lord Kames)[1], this House judged to

[1] Post, p. 1017.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Appellants Argument.

comprehend the space betwixt the lowest ebb and the highest flood mark. Even if the learned judge, in using the term estuary, meant to indicate the ostium fluminis, his definition was clearly at variance with the legal one. A river ceases to be a river or the continuation of a river when it ceases to descend to the level of the sea. [*Lord Chancellor.*—At low or high water?] At low water.

But again, there is a further criterion by which to determine the forbidden territory. The statute says also, "ubi salmunculi," &c.[1] The avowed object of the prohibition was to protect the fry. This demonstrates how anxiously the attention of the legislature had been directed to this subject. They had observed, that the cruives and yairs set in rivers were very injurious to the salmon fry in their descent to the sea. This was the great evil complained of. But farther, the other facts connected with the natural history of salmon could not have escaped their observation. At first the fry keep the shallow water about the sides of the river; but as their strength increases they are seen on the middle of the river descending with the stream. The first flood or fresh which occurs at this period hurries them to that part of the river affected by the tide which is protected by the statutes, where for a time they remain in the tide-way, ascending and descending with the flux and reflux of the tide, till, having gained additional strength, they at once sink down into the bed or channel of the sea or firth, and go off to the ocean. They do not swim about the shallow parts of the firth, but proceed at once to the ocean from the place where the river joins the sea

[1] Ante, p. 978.

at low ebb. Their natural instinct seems to lead them to select the deep water at that point, because they are more secure from interruption or disturbance, occasioned by the ripple arising from the constant flux and reflux of the tide. Experience and observation would shew to the early Scottish legislators that yairs or other stationary engines could not obstruct the descent of the fry below the line of low ebb tide.

Looking to the declared object as well as to the express provisions of the statute, — to the habits of the salmon as well as to the leading features connected with the flux and reflux of the tide,—that no line can be pointed out, the boundaries of which quadrate so nearly with the enactment, as that contended for by the appellants. Below the line of low ebb tide the sea never recedes. It never withdraws itself. It constantly occupies and holds possession of that space Above that point the contending influence of the river becomes apparent. There is a periodical balance between the force of the ascending tide and that of the descending fresh water stream, which maintains the river in a state of comparative quietude, certainly favourable to the motion of the fry, "ascendendo et descendendo "ubique." Within that locality it may be said that the fishings are in aquis ubi ascendit mare et se retrahit; and it may be said, with equal truth and accuracy, that they are situated ubi salmunculi vel smolti ascendunt et descendunt; and where such fry and smolts, when they approach the sides, would be interrupted in their course and destroyed.

Much reliance seemed to be placed by the respondent on the statute of James IV., 1448, c. 13.[1] The parti-

[1] Ante, p. 979.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Appellants Argument.

cular sorts of apparatus mentioned in that statute of themselves sufficiently indicate the local situations referred to. It is on all hands admitted as the very essence of a cruive-fishing, that there be a mound or dike stretched across the river from side to side, and it follows of course that such fisheries must be peculiar to rivers properly so called. The same thing is equally true of what are called fisch dammys. A dam is a mole or bank to confine water. A fish dam is therefore a mound erected across the stream for the purpose of intercepting and catching the fish, by means of some apparatus of the nature of a cruive inserted into it. But such an erection, it is obvious, could be made only in rivers by cutting the stream across from bank to bank. When, therefore, by this statute it was ordained that all cruives and fish-dams should be destroyed, "that "ar within salt watyrs, quhar the sey ebbis and flowis," the epithet "salt" must have been introduced merely for the purpose of contradistinguishing those fisheries from the "cruiffis in fresch waterys;" that is, in the higher parts of rivers where the tide does not reach, to which a different class of regulations were to be applicable. In this view the lower portion of a river, ubi ascendit mare et se retrahit, may, without any violence or impropriety, be denominated the salt part of a river; for with every return of the tide, its own proper fresh water is not merely re-stagnated, but is also strongly impregnated with the salt water of the ocean, which then flows into it. That "the salt waters" of this statute do not mean the salt waters of the sea itself, is abundantly obvious from the structure of the remaining clause, "quhar the sey ebbis and flowis." It is impossible, indeed, to read the whole clause, without being

satisfied that these words are used in contradistinction to each other. They cannot be read as implying the same thing, without involving an absurdity. To say that cruives and fish dams are prohibited in the sea where the sea ebbs and flows, is ludicrous; for it is the characteristic of all sea, that it is always in a state of ebb or flow. It is clear, therefore, that the term "salt "waters" was employed to denote something different from the sea; and it is equally clear that this prohibition cannot extend below the line of low ebb-tide; because the engines here denounced cannot, from the very nature of their construction, be erected below it.

The Tay case [1] proceeds on specialties. One important specialty is, that it went entirely upon the terms of the statute 1581, c. 15., which, in appointing conservators for the protection of the fishings, fixed the limits within which this protection was to extend. Another important specialty was the fact of the bar of the river being below the Drumly Sands; whereas, in the present case, there is no bar or alluvial deposit below the town of Dingwall. The non-existence of yairs in the Tay was also strongly relied on. The extent therefore to which fishing by yairs has been carried in the Frith of Cromarty, while it demonstrates the general understanding in favour of their legality in these localities, serves to distinguish it from the case of the Tay in one of its most important features. The last but not the least important of these specialties is rested on the title deeds of the several proprietors. If the Court had not been satisfied as to the position of "the natural bar of the river," and if there had not been before them any evidence of the existence

[1] Post, p. 1017.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Appellants Argument.

of a special office of conservator for the protection of the salmon of the river, and if in other respects the case had been presented as a perfectly pure and abstract case of legal construction on the statutes themselves, who can take it upon him to say what would have been the decision of the Court in the Tay case? None of the other decisions referred to in the slightest degree interfere with the interpretation of the prohibited locality above contended for. But, apart from this, the respondents have examined the whole of the cases with the utmost minuteness, and they affirm, without fear of contradiction, that throughout these multifarious processes, beginning with the Tay and proceeding onwards to the South-Esk, the Don, the Beauly, the Dornoch, and the Nith[1], there is not a finding in any interlocutor, or even the opinion of a single judge, which sanctions the notion now promulgated as law for the first time, that the absence or prevalence of fresh water is the thing to be looked at in determining what waters fall under the statutory prohibitions. In not one of them was it laid down that this was the test to be adopted.

But again, the arguments of the respondents, as well as the proceedings on the bench in considering the bill of exceptions, show distinctly that it will admit of a doubt whether the expressions used by the learned judge import presence or prevalence of fresh water. If this be so, the direction given was not a fitting direction for a jury. From its obscurity it was calculated to mislead them. What was stated had been so misappre-
hended, that reference was actually made to the learned judge for an explanation of his meaning. But the jury

[1] Post, p. 1017.

had got no such explanation; and who can tell what construction they had put upon the expressions?

(2d branch.)—If the interpretation of the statutes above contended for be the true one, it follows of course that the learned judge should have directed the jury that the prohibitions of the statute could not extend lower than the confluence of the river with the sea at low ebb tide.

Respondents. — (1st exception.) The objection to Mr. Buchanan's examination clearly rests upon an attempt to confound the different objects and purposes for which a witness may refer to a manuscript. Reference to manuscript to enable a witness to speak correctly as to facts, is altogether different from the object and purpose Mr. Buchanan had in view, and hence the authorities referred to on the other side do not apply. Measurements, soundings, &c., are not occurrences or facts as to which a witness is to speak from recollection. Whether the witness saw strata or rocks of a particular character in the course of his survey, whether he found sea-weed or marine plants, &c., in different parts of the frith, these may be matters of fact as to which he is either to speak from recollection or from notes made at the time. But measurements, soundings, analyses of water, &c., are not matters of recollection at all. They are the witness's experiments, and if the witness has before him that which he depones to be the record of such experiments, it is not for the purpose of refreshing his recollection that he refers to the paper, but of enabling him to report to the Court the experiment made by the witness, and which the court and jury could not see made.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Respondents Argument.

Again, if from a variety of soundings an average is to be struck and stated, such calculation is not the recollection of an occurrence, and in using materials for giving that calculation, the witness is not refreshing his memory, but he is reporting to the court and the jury that which he himself had previously done, instead of making the calculation on the spot. In fact the calculation was not made at all at the time of making his survey and taking his field notes. The rule that a copy of a document cannot be taken when the principal document exists, has no application to this case. There is no question as to the admissibility of documents; there is no document sent to the jury; there is a witness before the jury. He has before him a report or document entirely of his own creation, made for the sake of accuracy, and as the result of scientific inquiry. He has with him the original rough notes from which that report is prepared; and why should he not refer to that which is in substance the same, and which for the sake of convenience and ready reference has been printed? It is ridiculous to liken this to the tender of a printed copy of a charter instead of the charter itself. That would be a muniment wholly independent of the witness. The notes and report, on the other hand, were made by the witness for the sake of giving evidence. It is of the very nature of this kind of evidence that it must be so got up. The notes are not the evidence, like the charter; they are ancillary to the testimony of the witness given by parole, which parole testimony is the matter, and the only matter put in evidence. The witness speaks partly by recollection and knowledge, abstracted from his notes and report, and partly from the aid of that report. He knows

the truth of his statement, and he knows the accuracy of his report. He may have erred in his calculations when he made them on the field,—he may have erred when he checked them in his closet. But this is nothing more than an observation on his accuracy, which it is quite open to make to the jury, or in the motion for a new trial, but is wholly unavailing as matter of legal exception.

(2d exception.)—The Spey case [1] has no bearing whatever upon the present discussion; the question there was not as to the interpretation of the statutes, but as to the meaning of a term used to denote the boundary of certain fishings in a river by private grant. Assuming that the term "ostium fluminis" was rightly defined in that case, it merely denotes the termination of the river proper; there is an expanse of water between the proper river and the sea; i. e. between the ostium fluminis and the sea proper, which is also part of the forbidden territory. It may be true, as has been stated, that in the Don case [1] this expanse of water has been denominated the continuation of the river; but it does not on that account follow, that it is not distinguishable from the river proper. So far as that case went the question was just as open as before, what is and what is not the continuation of the river. The words used in the statute are, not "in rivers," but "in "aquis." This is something different from the river proper, and the defenders are right in saying that it was fixed in the Don case [1] to be something different from the sea proper. It is in waters where the sea ascends and draws itself back. Surely this does not mean the point of low water ebb. It means in waters where the sea is filling and ebbing. There must be river, and

[1] Post, p. 1017.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Respondent's Argument.

there must be sea. But if there be both in the valley or channel, and if the sea is ebbing and flowing within that valley, this is all that is required to characterize the prohibited ground. The statute is intended to describe the space both upwards and downwards, and if it be water where the sea ascends and descends — ebbs and fills — this is all that the act requires. The sea proper is excluded, because although it ebbs and flows upon the open coast, "ascendit et se retrahit," it does not ebb and flow "in aquis."

But, say the appellants, it is not only where the sea fills and ebbs, it is also "ubi salmunculi,[1]" &c. Now, how can this apply to the point of the lowest ebbing of the tide? It is where not only salmon fry, but the fry of all other fish, whether of the sea or of the fresh water, descend and ascend. The fry of salmon, in point of fact, never ascend. When the salmon come up to spawn, or when the fry come down, they regulate their motions in no degree by the point of the lowest ebb. On the other hand, do the fry of sea fish, which are equally protected by the statute, come up where they could not exist.

Again, in the statute 1488, c. 13.,[2] the expression "salt" is used in contrast to the "fresche watteris." The salt water cannot mean the river, it clearly means something different from both the river and the sea proper. In which of the statutes is it set forth, that the confluence of the river and the salt water at the low ebb is the boundary of the prohibited territory towards the sea? Had an inflexible rule been fixed, such as that contended for on the other side, the matter ought not to have been settled by a jury trial at all. Besides, the point fixed on by the appellants is one to be disclosed by the ingenuity

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[1] Ante, p. 979. [2] Ante, p. 979.

of modern science, not known or capable of being acted on in a comparatively rude age, when the statutes on this subject were passed; and it would lead to results of a most startling description, as applicable to various rivers,—results for which no reason either in law or sound policy can be assigned.

The general position contended for by the appellants, was expressly and solemnly overruled in the Tay case.[1] It was so completely overruled, that the Court, finding that there was no exclusive test, were obliged as a jury to enter into consideration of the whole circumstances of the case, and to fix the boundaries as to that frith, within which the stake-nets were illegal. That case has been regarded ever since in Scotland as a leading case on this subject. The same rule was followed in the case of the Clyde in 1813[1] — of the South Esk[1] — of the Beauly[1] and the Dornoch[1] in 1817 and 1818,—and then followed the Don[1] case, in which it was held that stake-nets were not illegal in the sea proper, as contrasted with rivers, friths, or estuaries, or continuations of rivers. The whole train of decisions, therefore, has conclusively fixed that stake-nets, although legal in the sea, are unlawful in rivers or estuaries; and whether any particular place is to be held as forming part of a river or frith, estuary, or continuation of a river, on the one hand,—or part of the sea proper on the other,—is a question depending on a variety of circumstances connected with the locality, which question is fitted for the determination of a jury. It has been ruled over and over again, that there is no fixed and absolute criterion which in law determines whether the place be a prohibited place or not, and it

[1] Post, p. 1017.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Respondents Argument.

has been specially determined that the meeting of the salt and fresh waters at low ebb is not a criterion which is adapted for determining the legality or illegality of the position of stake-nets.

The presiding judge properly and legally directed the jury to take into view the whole circumstances proved in evidence. His Lordship treated it throughout as a question of circumstances. He did not state that the absence or presence of fresh water, although a circumstance of material importance, was to form the rule, or to exclude from consideration other material circumstances. The direction throughout was abundantly clear and explicit, and in no respect whatever calculated to mislead. It was the duty of the judge to give the jury some direction to guide them in their finding, whether the places in question were within the estuary of the Conon or not. The consideration of the quality of the water, whether salt or fresh, its existence in certain quantities, more or less, — was but an ingredient in the investigation, and had only been so put to the jury. No difficulty had been raised by the jury. It did not appear that the judge was asked by the court to give any explanation of the sense in which he had used the expression, in order to solve any doubt which the consulted judges had as to the sense in which the words were used, or as to the jury rightly apprehending the import and meaning of the words, coupled with the whole charge, but rather with the view of satisfying their own minds by the authoritative declaration of the judge as to the actual res gestæ on the trial.

(2d branch.)—Had the learned judge directed the jury in the terms suggested by the appellant, it is clear from what is above stated, that his direction would have

been directly at variance with the established law of Scotland.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Ld. Chancellor's Speech, 16th April 1839.

LORD CHANCELLOR.—My Lords, this case seems to be one of very considerable importance, both as to the question upon the evidence, and upon the merits.

As to the point of evidence, this case lays down a rule which will have the effect of securing a uniform practice, in the course of proceeding in the courts of Scotland, similar to that which prevails in the courts in this country. The results of this case however do not depend upon this rule.

With respect to the principle which has been discussed in reference to the main question, it is one of very considerable importance, and the property in these salmon-fisheries is of very considerable magnitude. I cannot but think that a great deal of difficulty has arisen from the introduction of terms very difficult of definition, nowhere to be found in the statute. Arguments are used, and discussions take place, upon the meaning of the word "estuary," and even upon what is the meaning of the word "river;" and neither of these words is to be found in the statutes. The matter of law involved is neither more nor less than the construction to be put upon the statutes; and to that extent the party had a right to have the opinion of the learned judge. Whether the particular water in question in the particular suit does or not come within the definition, (if any definition can be found,) is matter very properly within the province of the jury.

The first question will be, whether your Lordships can, by any reasonable rule of construction, drawn from the statutes themselves, at once ascertain whether the

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Ld. Chancellor's Speech.

learned judge has accurately explained to the jury the definition to be fairly inferred from the provisions of these statutes. If your Lordships find that has not been the case, however desirable it may be to lay down the rule, it is not the province of your Lordships to do so, and it may not be safe to attempt it. The point is, whether the rule laid down is the proper rule, within the meaning of the act.

If there had been no decisions of your Lordships House, and it had been a new question, and merely turned upon the observations of the learned judge, compared with what appears to have been the objects of the statutes, your Lordships might not feel it necessary to postpone the further consideration of this matter. But, my Lords, that is far from being the fact: much litigation has taken place; and your Lordships House has proceeded to adjudication upon cases similar to the present; and, in any course your Lordships may think fit to take, it is undoubtedly most important to ascertain the course adopted by this House when the former cases were brought before it.

In order to proceed accurately in the examination of what has been done upon this subject, I should propose to adjourn the further consideration of this case to a future day.

Further consideration adjourned.

Ld. Chancellor's Speech, 26th Aug. 1839.

LORD CHANCELLOR.—My Lords, this appeal is from a judgment of the Court of Session disallowing a bill of exceptions. The whole case, therefore, must be found within the bill of exceptions; and the question is, whether the direction of the learned judge to the jury was right in law.

The issue was: "Whether the defender, or his pre-
" decessors in office, has or have wrongfully fished for
" salmon in the Frith of Cromarty, opposite to the
" lands and estate of Cromarty and others, during the
" years 1824, 1825, 1826, 1827, and 1828, or during
" any part thereof, by means of stake-nets, bag-nets,
" yairs, or other engines, placed in situations prohibited
" by statute."

These latter words comprehend the whole question; viz., what are the situations prohibited by statute? If it was the duty of the House to lay down a rule upon this subject, and to prescribe the principles upon which this question ought to be tried, it would be necessary to consider carefully, not only the words of the statute, but the various decisions which have taken place. That, however, is not, at this stage of the cause, the duty of this House, nor would it be proper to do so. All that this House has to consider is, whether the rule, as laid down to the jury by the learned judge, was correct.

That learned judge, after mentioning that estuaries were spaces intermediate between the strictly proper river and the strictly proper sea, and that they were partly fresh and partly salt, stated that the structures in question were unlawful in those estuaries, and then proceeded thus: "The thing to be looked to is the fact of
" the absence or of the prevalence of the fresh water,
" though strongly impregnated by salt. Now, where
" this fresh water prevails, though in the estuary, these
" structures are illegal."

The learned judge, when the case came before the court upon the bill of exceptions, stated, that by the word "prevails," he meant "predominates;" but the question is, not what he intended, but what the terms

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Ld. Chancellor's Speech.

used were calculated to impress upon the jury. The word "prevalence" is put in opposition to "absence;" if it meant "predominates," why were the words added, "though strongly impregnated by salt?" In speaking of the predominance of one thing over another, the presence of the minor is assumed; but absence and predominance are not properly put in contradistinction. Predominance, therefore, if necessary to the proposition, should have been distinctly expressed in terms.

That the jury understood the term to mean presence I have no doubt, for such is the natural construction of the sentence; and the respondents, in their printed case[1], (signed by three most learned persons,) insist that such is the true construction of the sentence. After quoting the sentence, inter alia, they say, "In doing "justice to the meaning of these sentences, it is plain, "from the context, that the word prevalence must mean "presence, which is one of the most common and most "appropriate significations of the word, as opposed to the "expression absence; and the meaning of the whole is "just this, that in estuaries, where these structures "are unlawful, there is always some portion of fresh "water."

The word prevalence then, as used by the learned judge, was by the respondents understood as presence; the consulted judges however say, that it is quite impossible to hold that prevalence means presence only; Lord Gillies says expressly, that if prevalence was to be understood as mere presence, he could not agree to the direction.

From this, I think, it may be assumed, that if the

[1] See page 26 of printed Appeal Case for respondents.

word presence had been used instead of the word prevalence, the court would have held the direction to be erroneous, as, beyond all doubt, it would have been. But the judges seem to have been influenced by the explanation of the term used by the learned judge who directed the jury, as if the question were, whether the judge was right in his view of the law, instead of being, what it really and solely is, whether the direction was in terms calculated to lead the jury to a right understanding of the law. I have no doubt but that the jury understood the word prevalence to mean presence, and that, so understood, the direction was erroneous. Let it, however, be assumed that it means predominance, I think it scarcely less erroneous.

The consulted judges say, that if they were satisfied that the true import of the whole direction, in point of law, was, that the only thing to be looked to was, whether there was a preponderance of salt or of fresh water at the place, they should certainly have had great difficulty in finding it to be a correct exposition of the law; and the Lords Moncreiff and Cockburn say, that if the sentence had stood alone as the substance of the charge, it would have been liable to exception; and Lords Corehouse and Mackenzie say, that they did not consider that the prevalence of salt or fresh water was the chief circumstance to be regarded.

I quite agree with the consulted judges and others, who thought, that if the direction was to be considered as implying, that the fact of the absence or predominance of fresh water was the only thing to be looked to, or, in other terms, was the thing upon which in their opinion the verdict was to be founded, it would be erroneous; but I totally differ from them in thinking

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Ld. Chancellor's Speech.

that such is not the natural and obvious construction and meaning of the words used. The question is, not what was the meaning of the author of these words, to be collected from different passages, but what effect the words spoken were calculated to produce upon the jury. And when we find that they were told, that the thing to be looked to was the fact of the presence or of the prevalence of fresh water, it must be assumed that they understood that such was the test upon which they were to try the question between the parties.

But were it otherwise, if the words imported only that this was an important subject for consideration, I could not agree hat the direction would be sound in point of law. I see nothing in the statutes, or in any authority, to justify the putting the legality or illegality of the act upon such a test; and on principle there is nothing to support it. If this were the test, the legality of the act at any particular place would depend upon the state of the tide, and the right of fishing would belong to one party at high tide, and to another at low tide. Suppose a small river flowing into a large estuary, at low water there might at any particular place be scarcely any salt water, whereas at high water the presence of fresh water might be scarcely perceptible. Whereas in a large river the fresh water might predominate long after the junction with the sea. The large rivers of America are perceptible at a great distance from the shore, and in the Mediterranean ships take in their water from the Rhone in the open sea. The test suggested is therefore, I think, erroneous, whether it be treated as exclusive, or as an important ingredient in the consideration of the question.

If your Lordships should agree with me in this view

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Ld. Chancellor's Speech.

of the direction of the learned judge, it follows that the bill of exceptions ought to have been allowed, and that the judgment of the court below ought therefore to be reversed. It is therefore unnecessary, and would be improper, to pronounce any opinion or decision as to what ought to have been the direction. But as there is much of uncertainty in the decisions which have taken place, and much doubt appears to exist as to the proper rule to be followed, I think it may be useful to throw out some suggestions, to which those who may have to decide upon the merits of this and other similar cases, in the first instance, will give such weight as they may think them entitled to.

The statute of Robert the First, in the year 1318, speaks of waters in which the sea rises and falls, and in which the fish descend and ascend. The waters mentioned must be distinct from the sea, and this the Don case[1] has established. They must also be waters above the level of the sea, at least at low water, because otherwise the sea could not rise in them, nor would the fish, having the level of the sea, be said to ascend in such waters.

In the subsequent statutes the expressions vary, but it being decided that none of these include the sea proper, I do not apprehend that they in fact extend the limits beyond those prescribed by the statute of Robert the First.

In those waters which are above the point at which the river reaches the level of the sea at low tide, all the circumstances described in the statute of Robert the

[1] Earl of Kintore v. Forbes and others, post, p. 1017.

HORNE and another v. MACKENZIE and another.

26th Aug. 1839.

Ld. Chancellor's Speech.

First concur, but in no others. Down to the point of low tide the waters of the river descend, but no further. Into these waters the sea rises, and the fish ascend, which cannot be said of any part beyond that point. This also is a point capable of being ascertained with much precision. The definitions in Lord Stair, Lord Bankton, and Mr. Erskine, coincide very much with this view of the case; and the decisions of the House of Lords, in the case of the Earl of Moray v. the Duke of Gordon, (Spey case,) deciding that the "ostium fluminis" comprehended that space betwixt the lowest ebb and the highest flood mark, and in Lord Kintore v. Forbes, (Don case,) seem strongly to confirm their authority. Finding, however, that the learned judges of the court below rejected this as the proper rule, I abstain from expressing any opinion upon the subject.

If your Lordships shall concur with me in thinking, that upon these grounds, there must be a new trial, it is unnecessary to come to any decision upon the point of evidence raised by the bill of exceptions. I am, however, clearly of opinion, that for some purpose at least the witness was at liberty to refer to the paper he produced, and that the bill of exceptions could not have been supported upon that ground.

I therefore move your Lordships that the interlocutor appealed from be reversed, and the bill of exceptions allowed.

The House of Lords ordered and adjudged, that the said interlocutor complained of in the said appeal be, and the same is hereby reversed; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland,

with directions to allow the bill of exceptions, and to grant a new trial, and to proceed further in the said cause as shall be just, and consistent with this judgment.

HORNE and another *v.* MACKENZIE and another.

26th Aug. 1839.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.

APPELLANTS AUTHORITIES.—(1*st Exception.*) Robertson, 2 Murr. Rep. 304. 368; Lindsay, 3 Murr. 99; Oswald, 5 Murr. 8; Graham's Trustees, 5 Murr. 99; Graham, 5 Murr. 75; Jones, 2 Carr. & Pay. 196; Starkie on Evid. 154; Burton v. Plummer, 2 Ad. & El. 341, and 4 Nev. & Man. 315; Doe v. Perkins, 3 T. R. 749; Adam on Trial by Jury, 171. 238. 306.

(2*d Exception.*) Balfour, voce Fishings; Stair, b. ii. tit. iii. sec. 70; Ersk. b. ii. tit. vi. sec. 15; Bank. b. ii. tit. iii. sec. 70; Earl of Moray v. Duke of Gordon, (Spey Case,) 16th April 1728, Mor. 12797; Earl of Kintore v. Forbes, (Don Case,) 31st May 1826, F. C., 4 Sh. & D. 641, or 648 new edit., S. C., 11th July 1828, as affirmed, 3 W. & S. 265; Oswald v. M'Whir, (Solway Case,) 11th March 1837, F. C., 15 D., B., & M., 873: Statutes, (Scots Acts,) see Thomson's edit., Robert I., 1318, c. 12; James I., 1424, c. 12; 1427, c. 6 or 116; 1429, c. 22 or 131; James II., 1457, c. 34 or 66; James III., 1469, c. 13 or 87; 1477 or 1478, c. 6 or 73; James IV., 1488, c. 13 or 16; 1489, c. 16; 1503, c. 17 or 72; James V., 1535, c. 16; Mary, 1563, c. 3; James VI., 1579, c. 27; 1581, c. 15; 1685, May 30; William III., 1696, c. 35; 1698, c. 3; Anne, 1705, c. 12.

RESPONDENTS AUTHORITIES.—(1*st Exception.*) 1 Phillipps on Evidence, 289 (7th edit.); Starkie on Evidence, 155 (2d edit.); Tait on Evidence, 372 (2d edit.); Bell's Princ. 653.

(2*d Exception.*) Bell's Princ. 296, 8; Bell's (Wm.) Digest, voce Salmon; Earl of Kinnoul v. Hunter and others, (Seaside Case,) 26th Jan. 1802, Mor. 14301; Duke of Athol and others v. Maule, (Tay Case,) 7th March 1812, F. C. and Buchanan's Rep. 254; S. C. 5 Dow, 282, 4th Feb. 1817, F. C.; Magistrates of Dumbarton v. Colquhoun, (Clyde,) 16th Jan. 1813, F. C.; Carnegie's Trustees v. Erskine and Ross, (South Esk,) 1812, not rep.; Carnegie, (South Esk,) 7 S. & D. 284; Fraser v. Grant and others, 5th Dec. 1817, (Beauly,) not rep.; Fraser, 13th Nov. 1829, (Beauly,) 8 S. & D. 14; M'Kenzie and others v. Magistrates of Tain, 7th Mar. 1817 and 5th June 1818, (Dornoch,) not rep.; M'Kenzie v. Houston, 26th Feb. 1831, (Dornoch,) not rep.; Sir James Colquhoun v. Duke of Montrose, Mor. 14283; Duke of Queensberry v. Marquess of Annandale, Mor. 14279.