proceed with the arbitration in terms of the foregoing decision, and decerned.

Counsel for the Appellants—Horne, K.C—Dykes. Agent—Robert Miller, S.S.C.

Counsel for the Respondent—J. G. Robertson. Agents—Paterson & Salmon, Solicitors.

Wednesday, January 18.

SECOND DIVISION.

[Sheriff Court at Dumfries.

DUKE OF BUCCLEUCH AND ANOTHER *v.* SMITH AND OTHERS.

Fishings—Salmon Fishing—Public Right of White Fishing—White Fishing with Fixed Nets in Solway—Paidle Nets—Act of Queen Anne 1705, *September* 21—29 *Geo. II, cap.* 23, *sec.* 1.

Circumstances in which *held* that paidle nets situated in the Solway Firth within the limits of the district of the river Nith, as defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862, had been erected and used for the purpose of capturing salmon, and were injurious to the rights of the proprietors of salmon fishings in the river Nith and its tributaries; and interdict *granted* at the instance of such proprietors against the defenders erecting and using within the district stake nets, paidle nets, and other fixed engines fitted to capture salmon.

Interdict—Proof—Injury to Salmon Fishings—Complaint Directed against the Use of a Certain Kind of Net.

Proprietors of salmon fishings sought to interdict white fishermen from using within the fishery district paidle nets fitted to capture salmon. *Held*, distinguishing such a complaint from one directed against persons catching salmon or poaching, that it was unnecessary for the pursuers to prove actual killing of salmon in order to get interdict.

Opinion by the Lord Justice-Clerk that in order to get interdict against any particular defender it was unnecessary to prove against him individually actual killing or even enclosure in his nets.

The Duke of Buccleuch and another, proprietors of certain salmon fishings in the river Nith and its tributaries, brought an action in the Sheriff Court at Dumfries in which they craved the Court "to interdict defenders from erecting and using stake and paidle nets or other fixed engines on the river Nith and estuary thereof, and upon the sands and shores between high and low water-mark within the limits of the district of the river Nith, fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862, or at least to interdict defenders from erecting and using stake nets, paidle nets, or other fixed engines for the purpose of catching salmon or fish of the salmon kind, or of such size and construction, or in such situations, or used in such manner and at such times as to prejudice, interfere with, or injure the pursuers' rights of salmon fishings on the river Nith or estuary thereof, and upon the sands and shores between high and low water-mark within the limits of the district of the river Nith, fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862, and to find defenders liable in expenses and decern therefor."

The pursuers pleaded, *inter alia*—"(1) The stake nets of the defenders being illegal, interdict should be granted against defenders from erecting and using stake and paidle nets or other fixed engines on the river Nith and estuary thereof, and upon the sands and shores between high and low water-mark within the limits of the district of the river Nith fixed and defined as aforesaid. (2) In any event, the nets in question being illegal as being injurious to the proprietors' salmon fishings, the defenders should be interdicted from erecting and using them or any of them, or from erecting and using stake nets or other fixed engines within the district stated of such a construction and in such situations or manner as to prejudice or injure the pursuers' rights of salmon fishing."

The defenders pleaded, *inter alia*—"(1) The defenders, in erecting and using the nets in question, having acted in pursuance of their just and legal rights, are entitled to be assoilzied from the conclusions of the action. (2) The defenders are entitled to be assoilzied from the conclusions of the action in respect that (*First*) they have not erected or used the nets in question for the purpose of catching salmon or fish of the salmon kind; (*Second*) and the said nets are not of such size or construction, or so situated or used, as to injure the pursuers' rights of salmon fishing to any substantial or material extent."

The facts are given in the note of the Sheriff-Substitute (CAMPION) (see also opinion of Lord Ardwall), who on 14th December 1909 pronounced this interlocutor—"Finds that the nets in question in this action belonging to the defenders respectively are fixed stake nets or paidle nets, and (excepting those belonging to the defender James Swan) are fixed and erected on the river Nith or estuary thereof, and upon the sands and shores between high and low water-mark within the limits of the district of the river Nith as fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862: Finds therefore that the said nets are illegal: Finds further that the said nets have been erected and used by the defenders for the purpose of capturing salmon and fish of the salmon kind, and that the capture of salmon and fish of the salmon kind by the said nets is injurious to the rights of the pursuers as proprietors of salmon fishings in the river Nith and its tributaries: Therefore inter-

dicts said defenders (except the said James Swan) and each of them from erecting and using stake nets, paidle nets, and other fixed engines fitted to capture salmon or fish of the salmon kind on the river Nith or estuary thereof, or on the sands and shores between high and low water-mark within the limits of the district of the river Nith before mentioned, and decerns."

Note.—"The real question here seems to me to be whether this case is not practically the same as the one decided by Lord Trayner in the action of declarator and interdict in 1886.

"The defenders are not the same defenders, and it is further contended that the circumstances under which the fishing is carried on are now different, and on that point we have a lengthy proof. We have the same plan that was produced in the 1886 case, which admittedly shows the position of the nets in 1886 and to-day to be practically the same, these nets being on the river Nith or estuary thereof, and within the limits of the district of the river Nith, as fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862.

"The agent for the defenders contended that it was beyond the powers of the 1862 Commissioners to fix any such line. This line, however fixed and defined in 1862, has since been recognised as the limits, and was so recognised by Lord Trayner in his judgment. If there is anything in such a contention, some appropriate process should be adopted to get rid of the limits as defined by the 1862 Commissioners, but I cannot here entertain it even if this plea had been formally raised on record.

"It may be that the channel changes every year, and that there are what is described as drastic changes in the surroundings such as the Blackshaw Bank, which from the evidence appears to be improving as a favourite feeding ground for both salmon and white fish. But all the subjects are to-day practically as they were when the action was raised and decided by Lord Trayner in 1886. It is clear that after the case was decided against the fishermen in 1886, there was a great change made in the methods used by the fishermen. For years there was only a very odd net on, called the 'raise' net. The 'raise' net is not one objected to as likely or adapted to capture salmon. Gradually, however, the nets have drifted back to what they were before 1886—the paidle nets which were interdicted in 1886. The only difference from the net used before 1886 being that the present nets have a cover which makes them all the more deadly. The witness Superintendent Fleming, who has had wide experience, is clear that this cover is not there for the purpose of catching white fish or flounders.

"After carefully considering the evidence, it is impossible to arrive at any other conclusion than that the nets now sought to be interdicted are similar in position, in height, in purpose, and in effect to the nets interdicted by Lord Trayner in 1886.

"The pleas stated for the defenders must therefore be repelled. In erecting or using the nets in question the defenders are not within their just and legal rights, as the nets are erected for the purpose of catching salmon or fish of the salmon kind, and said nets are of such size and construction, and are so situated, as to injure the pursuers' rights of salmon fishing to a substantial and material extent. As to the plea that the pursuers have neither title nor interest to object to the erection or use of such nets as are situated further up the Solway Firth than the line taken by salmon or fish of the salmon kind on entering or leaving the river Nith, the evidence which I think is most to be relied upon is to the effect that the salmon feeding at high water on Blackshaw Bank and neighbourhood would at ebb-tide drop back towards the channel, when a very large proportion would be captured in the defenders' chain of nets. In *Gilbertson* v. *Mackenzie*, decided in 1878, the Lord Justice-Clerk remarks that as a general rule the right of white fishing must be so used as not to interfere with or injure the right of salmon fishing, it being at the same time pointed out that before the white fisher can be prevented from the exercise of his calling in a particular locality the injury to the salmon fishing must be substantial and material. I think the most reliable evidence points strongly to the injury done by the defenders' nets to the pursuers' salmon fishery being most substantial and material.

"As Lord Trayner pointed out in his opinion such a decision does not in the least affect the defenders in the legitimate exercise of their right to fish for white fish. Not only in that case but in every case decided upon the question of Solway fishings has regret been expressed if any restriction reached would interfere with an industry which is an important contribution to the resources of a small village community. Whether the industry is or not a self-supporting one, as the Commissioners of the Solway White Fishery Commission point out in their report, 'it should be borne in mind that the nets fish themselves and only require to be visited at low water, the owner being at liberty in the interval to prosecute other modes of fishing or other industry.' Whether by legislation, agreement, or otherwise, any mode can be devised by which the unfortunately ever-conflicting interests on the Solway may be carried on harmoniously and to respective advantage may be matter for the consideration of others. I have only to follow what I take to be the principles arrived at in the Superior Court whenever that Court has had to deal with questions similar to those raised in this case."

On 31st January 1910 the Sheriff (FLEMING) adhered.

Note.—"I heard a careful argument in support of the appeal, and have re-read the evidence and productions, but have been unable to find any circumstances favourable to the appellants which differentiate this case from that decided by

Lord Trayner in 1886. That decision is therefore binding on this Court. I need add nothing to the Sheriff-Substitute's note, with which I entirely agree."

The defenders appealed, and argued—The defenders' right as members of the public to fish for white fish was undoubted—Act of Queen Anne, 1705, cap. 2; 29 Geo. II, cap. 23, section 1. They were, moreover, entitled to fish for them with stake nets—*Gilbertson* v. *Mackenzie, &c.*, February 2, 1878, 5 R. 610, 15 S.L.R. 334. When the right of white fishing came into conflict with the right of salmon fishing it must not be assumed that the former right was subservient to the latter. On the contrary the public right was the major right. The interdict craved would prevent the defenders catching a single white fish. The pursuers had failed to prove that their rights had been invaded or were likely to be. They had only shown that a few fish of the salmon kind had been enclosed in the nets, but, as it was proved in regard to all these instances that the fish had been liberated, this was not equivalent to proof of taking or capture—Stewart's Rights of Fishing, 2nd ed., p. 188. In any event there was no reliable evidence that any considerable quantity of salmon had even been enclosed, and taking an occasional salmon was not sufficient ground for granting interdict—*Gilbertson* v. *Mackenzie, &c., cit. sup.* The important question was the purpose for which the nets were set, and it was proved that this was to catch white fish and not salmon. The white fishing was a *bona fide* industry and a profitable one, even if no salmon were ever caught. The nets were placed in a different position and were of a different construction from those interdicted in the case of *Buccleuch and Others* v. *Herries and Others*, December 1886, unreported—*vide* Lord Trayner's opinion *infra*. If the cover constituted the ground of objection to the defenders' nets they should have had notice of that on record. In any event it was proved that the cover was put there for the purpose of catching white fish, and that white fishing could not be carried on profitably by means of nets without a cover. *Mackenzie, &c.*, v. *Murray, &c.*, December 1, 1881, 9 R. 186, 19 S.L.R. 157, was distinguishable in respect that most of the white fishermen admitted that they took all the salmon enclosed in their nets, which were placed quite near to the salmon nets, and the quantity of salmon taken was proved to be considerable; while in *The Duke of Buccleuch* v. *Kean*, May 30, 1890, 17 R. 829, 27 S.L.R. 695, the interdict craved was much more restricted than in the present case. In any event the Court would not grant interdict, a breach of which would involve penal consequences, against any particular defender except in respect of acts done by that defender himself. The pursuers therefore could only get interdict against such of the defenders as were proved to have killed salmon by means of these nets. That had not been proved against any of the defenders.

Argued for the pursuers (respondents)—The pursuers were seeking to restore the state of matters existing when effect had been given to the interdict granted in *Buccleuch and Others* v. *Herries and Others, cit. sup.*, in 1886. The nets complained of were fixed engines, and not being privileged fixed engines it was illegal to use them in the Solway for the purpose of catching salmon—Salmon Fisheries Act 1861 (24 and 25 Vict. cap. 109), section 11; Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97), section 33; Solway Salmon Fisheries Commissioners (Scotland) Act 1877 (40 and 41 Vict. cap. ccxl), section 3. They were salmon nets and were placed in such positions as salmon fishers would choose, and as regards construction and position could not be favourably distinguished from the nets interdicted in *Buccleuch and Others* v. *Herries and Others, cit. sup.* In point of fact they were more objectionable in both respects. There was a series of cases in which the paidle net had been considered by the Court and had been held to be an engine dangerous to salmon—*Coulthard, &c.*, v. *Mackenzie*, July 18, 1879, 6 R. 1322, 16 S.L.R. 768; *Mackenzie, &c.*, v. *Murray, cit. sup.*; *Duke of Buccleuch* v. *Kean, cit. sup.* If it were being used in any river in Scotland it would be held to be illegal as a fixed engine. It was not necessary for white fishing and was peculiarly adapted to salmon fishing, and if even a few fish were found caught in such nets it constituted an invasion of the pursuers' rights. In the *Duke of Buccleuch* v. *Kean, cit. sup.*, the proof upon which interdict proceeded was that two salmon had been found in the nets of one of the defenders. In any event it was proved that considerable quantities of fish of the salmon kind had been caught by these nets. The white fishing was not a *bona fide* industry, and if no salmon were taken it would not be profitable. The interdict which the pursuers sought was not directed against killing salmon or poaching, but was to prevent the use of an illegal engine. The Court would therefore grant interdict against all the defenders using it even although actual killing was not proved against them individually.

At advising—

LORD JUSTICE-CLERK—The proceedings in this case are brought to obtain interdict against certain persons who profess to exercise the industry of white fishing in the tidal waters of the Solway. The case which is made against them is that while they ostensibly are engaged in fishing for flounders, the nets which they use, in the positions in which they place them, are illegal, in respect that they are nets which in these situations capture and are intended to capture fish of the salmon kind, to the detriment of the rights of the proprietors of salmon fisheries further up from the sea. The case resembles in many particulars a former one relating to the same locality in which a judgment was pronounced by Lord Trayner, whose opinion the Court

has in full in one of the official Blue Books produced in this case.* That decision was pronounced so long ago as 1886, and since that time there have been various official inquiries held and reports made to Parliament. It appears that the nets now in use are of the same general construction as those dealt with by Lord Trayner, and I am satisfied that the positions in the bed of the Firth are in no way substantially different from what they were in the case which he decided. The Sheriff-Substitute says that in his opinion on the evidence before him the case is practically the same as that of 1886, and after full consideration I have come to be of the same opinion, both as regards the nets and the positions, in so far as this latter is possible in the case of a channel which in some degree changes its position from time to time.

The engines used in and prior to 1886 were described by the late Mr Young, a gentleman of great experience, as "practically immature stake nets, not having such great killing power as ordinary stake nets, from the stakes being lower, but so far as they go they are on precisely the same principle, and calculated to take salmon, and must inevitably take salmon, until they have three or four feet of water over them."

The question thus really comes to be whether in the nets now in use, there is any substantial difference which can be held to make them less capable of capturing salmon than were those of 1886. In my opinion there is no such difference.

The present net is a stake net set as high as were those of the past. It is a net more likely to be deadly than those described by Mr Young in his former report, seeing that the inner chamber of the net is not open, but is covered over by netting so that any fish entering it cannot possibly escape, even when the water rises high over the net. It is true that in the older nets there was what was called a fly or fringe over the net, and this was to a certain extent a hindrance to the escape of salmon after they had entered the net. But it was not

**Note.*—Opinion of Lord Trayner *in causa Buccleuch and Others* v. *Herries and Others*, December 1886:—"The pursuers complain that the nets licensed by the defender Lord Herries, and used by the other defenders under such licence, are stake nets, and being placed on the river Nith or estuary thereof are illegal; and, at all events, that said nets are erected and used by the defenders for the purpose and with the effect of capturing salmon and fish of the salmon kind to the prejudice and injury of their (the pursuers) rights of salmon fishing in the river Nith. The defenders, on the other hand, maintain that the nets in question are on the waters of the Solway and are not illegal; that they are erected and used for the capture of white fish; and that the capture of salmon or fish of the salmon kind is only occasional and accidental; and that in any view no injury is done to the pursuers' fishings, because any salmon captured by said nets are not fish that would go up the Nith.

"The proof led by the parties is conflicting, to some extent at least, on every one of the points on which there is any controversy, but notwithstanding that conflict I have come to hold a very distinct opinion as to what is the truth of the matter regarding each of these points.

"1. As to the Character of the Nets.—They are certainly not so large as the ordinary salmon stake nets, but they are constructed on the same principle, and are, when covered by less than three or four feet of water, just as deadly. The evidence of Mr Young (an authority of great weight on such a matter), is, to my mind, conclusive, even were it not corroborated by other evidence.

"Mr Young says—'They are practically immature stake nets, not having such great killing power as ordinary stake nets, from the stakes being lower, but so far as they go they are nets on precisely the same principle, and calculated to take salmon, and must inevitably take salmon until they have three or four feet of water over them.'

"This evidence proceeds upon an examination of the nets themselves, and not merely upon an examination of the model produced by the pursuers. It is, therefore, not affected by any observation which may be made on the correctness or incorrectness of the model, although on that point I am of opinion that the correctness, generally speaking, of the model is quite sufficiently established.

"2. The Position of the Nets.—This is shown on the plan, and on that plan, and on the evidence adduced in relation thereto, I have no difficulty in coming to the conclusion that the defenders' nets are placed on the river Nith and estuary thereof, and within the limits of the district of the river Nith as fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862.

"3. The Purpose and Effect of the Nets.—There can be no doubt whatever as to the effect of the nets, as it is proved by the defenders themselves that they capture salmon and fish of the salmon kind. The extent to which such capture is made is perhaps the part of the case on which any serious difficulty arises, for on this the evidence is most conflicting. The evidence of the pursuers shows that a very large number of salmon and fish of the salmon kind are captured by the nets in question every season, and that the white fish captured by the same nets is very trifling both in extent and value. The defenders, on the other hand, give and lead evidence to the effect that the white fish is plentiful, is captured in comparatively large quantities, and that the salmon and fish of the salmon kind captured are comparatively few in number. I accept the evidence for the pursuers as the more correct view of the matter.

"The evidence adduced by them is that of persons, chiefly police constables, who speak from personal knowledge and observation, fortified by notes made at the time of their observation, and at the time reported to their superiors. They have no interest, so far as I can discover (and none was suggested by the defenders) to mis-state or exaggerate the result of their examination of the nets in question. That there may have been a mistake made either in their observation or in the writing out of their reports is, of course, possible; but I take their statement as to the number of salmon and fish of the salmon kind caught in these nets to be substantially correct.

"The defenders and their witnesses (fishers like themselves) are interested, and have an obvious motive for minimising the number of salmon caught, for on that (in one view of the case) depends whether they are to be allowed to continue the use of the nets.

"Further, they all speak from memory, having kept no note which can now be produced of the salmon or fish of the salmon kind captured by their nets. They also, in my opinion, undoubtedly exaggerate the quantity and value of the white fish taken by their nets, their motive for that being again obvious.

"The evidence given as to the capture of white fish by the defender Fergusson struck me as being very unsatisfactory, and any value to be put on his evidence

so closed as to make escape impossible. The nets objected to in this case are nets from which there is no escape at the top as the cover is over the whole top, and is of net of such mesh as must prevent escape of salmon.

The next question is, Do the nets in point of fact capture salmon? Of this, upon the evidence, there can be no doubt; salmon are found in them. Naturally those who set the nets minimise to the uttermost the take made of such fish, but in my opinion the evidence proving that there is substantial injury to the pursuers is to be accepted.

It would appear that for some time after the judgment of 1886 this paidle net fishing, as it is called, was not used, but that gradually the condition of things has come to be very much what it was at the time of Lord Trayner's judgment. There is only one material difference from what was in use to be done in these earlier years, and what is done now, viz., that, as I have mentioned already, the nets are now so covered in that a fish which has found its way into the end chamber of the stake net is finally captured. It is said that the excuse for this close trapping of the fish is because the flounders, for which professedly the nets are used exclusively, rise over the nets and escape if there is no imprisoning cover. I am not satisfied on the evidence that this is true. It is said that flounders are found caught by the gills some distance up the sides of the net, and that this shows they would get over the top if there was no cover. I do not consider that it is made out that this catching by the gills at a height occurs in any substantial degree. There is no evidence of flounders being caught by the gills in the net covering the top or for some distance down. But even if flounders did escape, the contention that engines may be placed to catch flounders, and covered in to prevent them from occasionally escaping, although the certain effect is that salmon are caught, is one which must be rejected as a legal contention. The right to use fixed engines to catch white fish must be exercised by whatever means so as not

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is seriously damaged when that evidence is compared with his returns to the Fishery Board. I am prepared to accept it as proved that the Blackshaw Bank is fairly good feeding ground for flounders and other white fish, and that such fish, especially flounders, are to be found there. But I am satisfied that if nothing was captured on that bank except the white fish to be found there, the whole nets would soon be discontinued—indeed, would have been discontinued some time ago.

"I think also that the purpose for which the nets are erected and used is to catch salmon and not white fish. Mr Young says—'They (the nets) can and do take flounders, but that does not suggest itself to me as the reason of their existence. I think it is the ostensible reason of their existence, but the real reason is to take salmon. That is a thing of which I am convinced from my examination of them.' 'If I were putting down salmon stake nets on Blackshaw Bank, and close to the channel of the Nith, I should place them precisely in the same position as that occupied by the paidle nets.'

"This view is corroborated by the fishermen themselves. It appears that the site for the nets of the respective fishermen is obtained by their drawing lots for the choice, and it is clear that the choice is influenced by the fitness of the locality for the capture of salmon, and not white fish. Thus the witness Fleming (at one time a fisherman and now a police constable) says—'In choosing the sites of our nets my neighbours and I drew lots for the best places. We were anxious to get a nice clean bank and a gutter from the foreshore, so that there would be something to gather the fish into the net. Our anxiety was not affected by the white fish we could get.'

"A statement so frank and explicit as that could hardly be expected from any of the present fishermen. But it is practically admitted by the defender Ferguson, and by James Curran. Nor is it a matter of surprise that this should be so, because the white fish captured on Blackshaw Bank would never repay the fisherman for his expense and labour. He could not make a livelihood out of the white fish.

"I am of opinion, therefore, (1) that the nets in question are placed on the river Nith and estuary thereof, and not in the waters of the Solway. (2) That being stake-nets, they are illegal in the position in which they are placed. (3) That the nets are erected and used for the capture of salmon, and fish of the salmon kind, and are not *bona fide* erected or used for the capture of white fish; and (4) that the capture of salmon and fish of the salmon kind in said nets is to the injury and prejudice of the pursuers as proprietors of salmon fishings in the river Nith. With regard to this last finding, I would add that the defenders have failed to show that the salmon captured by them would not in any case go up the Nith. The evidence on this matter is not very great on either side, but the preponderance of it is in favour of the pursuers.

"It was urged upon me that to order the removal of the nets in question, or to subject them to other restrictions than those already imposed by their licences, would inflict great injury on the defenders, and deprive them of their means of livelihood by diminishing 'the take of white fish.' I should be very sorry if this were so. As I have already said, I do not think the white fishing alone, even as the nets now exist, affords a livelihood for the fishermen; but however that may be, if the nets are illegal, as I think they are, I have no alternative but to order their removal.

"Nor am I entitled to allow the fishermen to continue what they have been doing improperly to the detriment of the rights of others. The white fishing may still be carried on by nets of proper construction, and probably with more success, if the best places for white fishing are chosen, instead of the best places for salmon. I was anxious to make a remit to some man of skill in order to see if and how the white fishing could be carried on by fixed nets without injury to the pursuers' rights; and I would have done so had I seen my way to help the defenders effectually thereby. But on consideration I have thought it better to dispose of the case as presented on the evidence by both parties, as that decision does not in the least affect the defenders in the legitimate exercise of their right to fish for white fish.

"I wish to add, in conclusion, that the defender Lord Herries, by the licences issued by him from time to time, seems to have adopted any restrictive measure which appeared to him available, to protect the rights of the pursuers from encroachment or injury by the fishermen.

"His restrictions and conditions, however, I fear, have been largely disregarded, and it is open to doubt whether those who were charged with the duty of seeing those conditions and restrictions enforced have been as careful and energetic in the performance of that duty as they might have been."

to be damaging to the interest of the salmon fishery proprietors by capturing salmon, to which those capturing them have no right. If it is clear that salmon do get caught in these nets, and have no reasonable chance of escape, then the net is illegal, and its use cannot be excused on the plea that it is a more efficient engine for taking white fish than it would be if so set that the salmon would be able to escape from it.

I am satisfied that these covers on the nets are used for the purpose of capturing salmon; that in no way can they be less effective for doing so than the nets of 1886; indeed it seems to me clear that they must be more efficient for that purpose than those of the earlier period.

The Sheriff Substitute has found that the objection to the pursuer's interest because of the position of the nets not being on a line taken by salmon making for the district of the estuary of the river Nith is not a sound objection, the evidence proving that many fish would be captured whose ultimate destination is or may be the Nith, and I see no reason to doubt the correctness of his conclusion.

It appears that much attention has been given by the authorities and by inquiries by commission to find how white fishing in these waters can be prosecuted without interference with salmon fishing rights. Whether this can be effected or not is not the question here, but one thing is certain, that no suggestion has been made in any of the inquiries or deliverances of commissioners by which such engines as are in question here could be used for the one class of fishing without substantial injury to the other.

In argument it was strenuously maintained for the white fishermen that as the demand of the pursuers is for interdict, which if granted would involve penal consequences in the event of infringement, it is necessary that each separate defender must be judged on the evidence as it affects him individually. It was maintained that against some of the individual defenders the proof was meagre and insufficient, that there was little or no proof of actual enclosure and capture of fish of the salmon kind against them as regards their own nets. It was further argued that the pursuers had failed to prove any killing of such fish caught in the nets in question. It is to be observed that this is not a case of poaching, where only the individuals doing the acts of poaching, or being art and part in doing them, can be dealt with. The attack of the pursuers is against the use of a particular make of net which had been already declared to be illegal in 1886, and the defenders having all made common cause on the issue, proof of individual cases of capture or of killing is unnecessary against them, collectively or otherwise. Looking at the facts as brought out in the evidence, it is plainly not easy for the pursuers to prove actual killing by the defenders. In the presence of the police, of course, no such fish are killed, and the evidence discloses that from the flatness of the shore it is not possible to approach the nets without the fishers having ample warning of their coming. Proof by sale to fishmongers by the fishers is also made difficult, if not impossible, by the fact that the fishermen are allowed to capture salmon by what are called "haaf nets." But the case turns, as I have said, not upon the acts done, but upon the illegal character of the nets employed. The nets are certainly as objectionable from the legal point of view as those of 1886, being if anything more likely to capture salmon than the former ones.

If a net could be invented which would suit for taking white fish and not be open to the objections which prevailed in 1886, a different case might arise. The white fishing is, of course, quite lawful. Everyone must sympathise with those engaged in the industry, and the right of any member of the public to fish for white fish in the sea is express under Acts of Parliament of the reigns of Queen Anne and George II (Anne, 1705; 29 Geo. II, cap. 23). In the latter Act severe penalties may be incurred by anyone obstructing or hindering the fisher for white fish. But it is different with fish of the salmon kind, the fisheries for such being *inter regalia*, and the rights to which being rights of grant, the law is bound to protect them against injury by such engines being used by white fishers as shall illegally affect the salmon rights possessed under title.

That such need of protection occurs in this case I have no doubt. Before 1886, when a judgment was given as to similar nets to those now placed in the Solway waters, there were several decisions in the Courts by which the law was well defined and laid down. I would specially refer to the most recent of these cases in 1881 (*Mackenzie* v. *Murray*, 9 R. 186), where the whole matter was most carefully gone into, after a remit made to one of the highest authorities on fishing questions, Mr Anderson, who made an elaborate report and declared that fishing could be carried on "without material injury," and specified the form of nets by which, in his opinion, this could be accomplished, but reported emphatically that "nets such as those complained of should not be permitted on the stations in question at any time." This view the Court gave effect to, and the judgment of Lord Trayner followed in 1886.

I would move your Lordships to find in terms of the Sheriff-Substitute's interlocutor and to affirm his judgment granting interdict.

LORD ARDWALL—This action is raised by two of the upper riparian proprietors of the river Nith, who have rights of salmon fishing in the said river, to have the defenders interdicted from erecting and using stake, paidle nets, or other fixed engines on the river Nith and the estuary thereof within the limits of the district of the river Nith, or at least to interdict them from erecting and using stake nets, paidle nets, or other fixed engines for the purpose of catching salmon or fish of the salmon kind;

and after taking evidence in the case the Sheriff-Substitute granted interdict in these or similar terms, and his decision has been affirmed by the Sheriff on appeal.

The questions raised in this case are of some importance, though I think the decision really comes in the end to depend upon the question of fact, viz., whether the nets erected and used by the defenders are of such a construction and placed in such positions as to catch salmon or fish of the salmon kind, and thereby inflict material injury upon those in right of the salmon fishings within the Nith Salmon District.

Accordingly in the present case the Court has to decide between the exercise of two legal rights which unfortunately have come into conflict in the present case, namely, the right of fishing for white fish and the right of salmon fishing, and it may not be without use to examine shortly the law and decisions on the subject.

In the ordinary case the habits of white fish and of salmon are so diverse, and the methods of capturing them are also so different, that such a conflict does not often arise. The reason why it does arise in the Solway is this—The Solway Firth as defined by Acts of Parliament, and more especially that part of it above a line drawn from Southernness Point over to Silloth, consists largely of immense sandbanks. Many of these extend over several square miles and are dry at low water of ordinary tides. These sandbanks are full of worms, sand eels, and small shellfish, and are often frequented by shrimps and other crustaceans, all which constitute good food for fish of all kinds. The fish which frequent these banks are mainly salmon and flounders. The salmon on their way to the mouths of the various rivers and streams which discharge their waters into the Solway frequent these banks for the purpose of feeding and come and go all over them with the tide; and probably the same fish remain about these banks for weeks or even months till floods of sufficient magnitude and duration tempt them to ascend the rivers. The flounders, again, also frequent these banks for the purposes of feeding, and the Solway, with these banks, is peculiarly adapted for flounders. They are caught in great quantities and of a large size. There are hardly any other white fish in this part of the Solway Firth, at all events in any great quantities, as the long reaches of sand are not suitable for them either as feeding grounds or otherwise, and accordingly it may be said that in this part of the Solway the flounder is the important white fish. Now these flounders cannot be fished for by any of the ordinary methods adopted for the capture of white fish. It would be impossible to work long lines, or to attempt to catch them by bait resting on the bottom of the sea. It is equally impossible to take them by ordinary nets of any kind owing to the size and flatness of the banks, and the only method by which they can be conveniently captured is by fixed engines in the shape of small stake nets. It is owing to the erection of these for the ostensible purpose of catching flounders that the difficulties have arisen between the white fishers and the proprietors of the salmon fishings. I wish, however, to emphasise the fact that there is really only one way of capturing flounders over this large extent of water and foreshore, and that if that required to be given up altogether it would put an end to white fishing in the Solway Firth at and about this place, and lead to the loss of a cheap and valuable food supply.

As to the public being entitled to fish for white fish on the shores of the Solway, there can, I think, be no doubt. These shores belong to the Crown for certain public uses, and in the words of Professor Bell in his Principles, section 645, "of these uses navigation and fishing are the chief." White fishing seems to be a favourite of the statute law. The Act of Queen Anne, 21st September 1705, "authorises and empowers all her good subjects of this kingdom to take, buy, and cure herring and white fish in all and sundry seas, channels, bays, firths, lochs, rivers, &c., of this Her Majesty's ancient kingdom, and islands thereto belonging, wheresoever herring or white fish are or may be taken;" and the Act 29 Geo. II, cap. 23, sec. 1, provides—"From and after the twenty-fifth day of June 1756, all persons whatsoever, inhabitants of Great Britain, shall, and they are hereby declared to have power and authority, at all times and seasons, when they shall think proper, freely to take, buy from fishermen, and cure, any herrings, cod, ling, or any other sort of white fish, in all and every part of the seas, channels, bays, firths, lochs, rivers, or other waters, where such fish are to be found, on the coasts of that part of Great Britain called Scotland, and of Orkney, Shetland, and all other islands belonging to that part of Great Britain called Scotland, any law, statute, or custom to the contrary notwithstanding: And if any person or persons whomsoever shall presume to obstruct or hinder any person or persons from fishing as aforesaid, ... every such person shall, for every such offence respectively, forfeit the sum of one hundred pounds sterling, to be recovered in manner hereinafter to be directed, any law, usage, or custom to the contrary notwithstanding."

Neither of these enactments has been repealed, and therefore there can be no question as to the defenders' right to prosecute white fishing in all parts of the Solway as well as elsewhere and at all times and seasons.

Rights of salmon fishing have been so often discussed and are so well known that I need not enter upon a consideration of the law regarding them further than to notice that salmon fishings are private property, founded on grants derived from the Crown and forming separate feudal tenements. The pursuers are proprietors of salmon fishings within the Nith district, and in that capacity are entitled to pursue the present action.

This is by no means the first time that

this conflict of rights has been raised in actions at law. The first case I would notice is that of *Gilbertson* v. *Mackenzie*, 5 R. 610, which was brought by a fisherman for the purpose of declaring his right to fish for white fish, and there the Court pronounced the following findings—"Find and declare that the pursuer as one of the public has right to fish for white fish, including flounders and all other kinds of fish excepting salmon and fish of the salmon kind, in the sea and along the shore of the Solway Firth, and, in particular, in that part thereof opposite the parish of Cummertrees, and that by means of stake or other nets or engines fixed on the shore, in such places and of such a description as not to interfere with the defenders salmon fishing; and repel the defenders' pleas so far as opposed to this declaratory finding, under reservation, however, of the right of the parties respectively to take such legal proceedings the one against the other, as may be competent for preventing all undue or improper encroachment on or interference with his or their respective right of fishing."

These findings, I think, may be considered as embodying the law with regard to the respective rights of white and of salmon fishing in the Solway. But there are some other decisions which may be noted. The case of *Coulthard*, reported in 6 R. 1322, turned on a decision of the Solway Commissioners, and does not touch the general question. That question, however, was again raised in the case of *Mackenzie* v. *Murray and Others*, 1881, 9 R. 186. That case was brought by a proprietor of salmon fishings craving interdict against white fishers erecting or continuing to use stake nets during the open salmon fishing season, and the Court, after considering a proof and reports by a man of skill to whom of consent a remit was made, granted interdict applicable to certain specified places, and ordered the nets which had been erected there to be removed. In that case a valuable suggestion was made by Mr Anderson, the skilled reporter, which I shall afterwards have occasion to refer to. The parties, however, in that case did not wish to take advantage of his suggestions, and so the nets were removed.

The next action was raised in December 1886 by the Duke of Buccleuch and others against Lord Herries and others, Lord Herries having granted licences to white fishers to erect stake nets on the foreshore *ex adverso* of his estate of Caerlaverock. This action dealt with practically the same defenders as those in the present action. There was a long proof taken in the case, and on a review of the whole evidence Lord Trayner ordered removal of these nets. The importance of that decision in the present case is that the stake nets there dealt with and ordered to be removed were, after allowing for shifting of the water channels and banks at this part of the Solway, in practically the same position as regards the run of fish as the nets now complained of; and the nets themselves were of practically the same construction as those now in question; indeed those now in question are more deadly as engines for the capture of salmon, in this respect, that they have a cover all over the top of them, whereas the nets in question in 1886 had only what were called fringes or flies over the top. Lord Trayner's decision was not brought under review, and being a decision in the Outer House is not binding upon this Court, although we must attach much weight to the decision of so eminent a judge as Lord Trayner. This case is not reported, but a copy of Lord Trayner's opinion will be found in the Appendix to Part I of the "Report of the Commissioners on the Fisheries of the Solway Firth," 1896. I may take the opportunity of drawing attention to the valuable suggestions of that Commission regarding white fishings in the Solway on pp. 15 and 16 of the above report, Part I.

The last case I shall refer to is that of the *Duke of Buccleuch* v. *Kean*, 17 R. 829, where, proceeding on the law laid down in the findings in *Gilbertson's* case, the Court granted interdict against the use of certain stake nets on the Solway and ordered removal of them, finding that they were illegal. In that case the evidence was of the same character which satisfied the Court in the case of *Mackenzie* v. *Murray*, 9 R. 186, that they were illegal as being materially injurious to the salmon fishings. The nets in that case also were of a similar character to those in question in the present case.

In view of these decisions and of the findings in *Gilbertson's* case the question really raised for our decision in the present case is, as I have already said, a question of fact, whether the defenders' nets are of such construction and so placed as to catch salmon in considerable numbers, and so materially interfere with the pursuers' rights of salmon fishing. I have read through the evidence with considerable care, and have come without difficulty to the conclusion that these nets now in question are so constructed as to capture salmon and fish of the salmon kind; that they are placed in such situations as to capture salmon; that in point of fact they do capture them in the sense of enclosing them in considerable numbers, and thus materially interfere with the right of salmon fishing possessed by the pursuers and the other proprietors within the Nith Fishery District.

First, as to the construction of the nets, they may be described as miniature stake nets, with a leader stretching out towards the shore, and chambers into which the fish are led by the leaders and from which it is next to impossible for them to escape. They are called paidle nets because, in addition to the two ordinary chambers of a stake net, they have a small bag or paidle at the foot of one side of the net, which is practically of the same construction as a stake net, with a mouth open into the bag, and ending in such a fashion as practically to prevent any fish finding their way in from getting out again. The nets are, as a rule, apparently from 4 feet 6 inches to 4 feet 8 inches in height; but

then the height being lower than the ordinary salmon stake nets which are from 6 to 10 or 12 feet high, does not make it an easier net than the ordinary salmon stake net for salmon to get out of, because the chambers of the nets are covered over at the top, so that if a salmon is once into these chambers it cannot get out by jumping over the top as it might otherwise do.

As to the position of the present nets, they are proved to be placed in the position which is best suited for catching salmon as well as flounders, and in the position where they would be put if they were intended to catch salmon only.

Then as to the proof of their catching salmon, that is to be found in the tabular return of fish; and there is abundance of evidence that as might be expected they did constantly capture salmon, although in the instances recorded by the police constables in the present case they were taken out of the nets and restored to the sea.

I am therefore of opinion that the evidence shows that the nets in this case are practically of the same description as those which were ordered to be removed in the several cases I have above quoted, and that there is nothing to differentiate them favourably from any of the nets dealt with and ordered to be removed by the Court in these cases.

I think it is matter of great regret that the white fishers have never adopted any of the suggestions which have been made in the reports of the Royal and Parliamentary Commissions and in other reports on this matter. I would specially advert to the recommendation made by Mr Anderson in the case of *Mackenzie* v. *Murray*, which seems to me to be a very valuable one. It is in these terms—"At the same time the reporter is of opinion that white fishing could be carried on without material injury to the complainers during the salmon fishing season, provided the nets did not exceed four feet in height at any part, and that there should be no 'covering' whatever on any part of the nets or the 'runaways' attached thereto, and that no paidle or barrel should be attached thereto . . .; that they should have no covers, and no leaders longer than thirty yards; and that there should be a space or distance of at least thirty yards open between each net or range of nets. During the close salmon season, nets of the above description, having an open space of thirty yards between them as above mentioned, might be erected on any part of the shore or stations without material injury to the salmon fishings of the complainers; but, in the opinion of the reporter, nets such as those complained of should not be permitted on the stations in question at any time."

It appears to me that if nets of the description here set forth were used, there might be little objection to them, because it might not be sufficient cause to render them illegal that salmon were only occasionally captured by them.

I think it is said by some witnesses in this case, and it was certainly said by counsel at the bar, that if the cover was taken off the top of a net 4 feet 6 inches in height the flounders would all escape. I have difficulty in believing this (although it may be so). I can find no evidence in this case to show that nets without covers would not capture flounders in approximately the same numbers as nets with covers. It is, of course, different with salmon, which would leap out of the nets. I do not think the flounders would try to go over at the top of the nets till the water was much lower than four feet. Flounders, as a rule, always swim on their under sides close to the sand and mud. There is some evidence that flounders have been seen caught by the gills two feet up some of these nets, but this just shows that these had failed to escape, although they had risen a little way from the bottom of the water.

Of course it is said against the white fishers that the white fishing would not pay unless they occasionally caught salmon in the nets, but I see no reason why this should be so. At all events, I think we must hold it settled that the method of fishing for white fish here under consideration is such as to catch salmon in considerable quantities, and thus materially to injure the salmon fishings, and if this is so it must be stopped. This is apart altogether from the question as to the legality or illegality of catching salmon by means of uncertificated fixed engines on the Solway contrary to the provisions of the Solway Acts.

Perhaps I should notice an argument which was used against the granting of an interdict at all; and that was that, as breach of interdict involves penal consequences, interdict should not be pronounced against persons who are not proved to have killed salmon by means of these nets, and that *de facto* that is not proved against the respondents. This argument, I think, proceeds upon an erroneous reading of the interdict sought by the pursuers and granted by the Sheriffs; it is not directed against the defenders catching salmon or poaching, but against the use of a certain kind of net. And it may be pointed out that if interdict was only to be granted against parties who could be proved to have taken and killed salmon, there would be very great difficulty in establishing any case of the kind, because when members of the police force are present, as they were on most if not all of the occasions spoken to in the evidence, of course the fishermen let all the salmon out, and only kept the flounders. Then it is quite impossible for the police to make what might be called surprise visits to the nets, because, owing to the great extent of the sands, the fishermen would see them a mile or more off, and let out any salmon that happened to be in their nets. Lastly, it would be next to impossible to convict fishermen of taking salmon by the evidence of fishmongers to whom they sold them, because it appears that almost all the fishermen in question practice the right which they

have at that part of the coast of fishing with haaf nets, and they might attribute their possession of the salmon to the exercise of that right.

Accordingly I think that the pursuers acted quite rightly in directing their interdict not against the killing and taking of salmon by means of the nets, but against the use of such nets themselves.

On the whole matter I am of opinion that the nets in question, both by their construction and position, are calculated to capture and do capture salmon and fish of the salmon kind in large quantities, and thus materially interfere with the rights of salmon fishing possessed by the pursuers; that they are really in no different position from the nets against which judgments of interdict or removing have been granted in former cases; and that therefore the judgments of the Sheriffs ought to be affirmed.

Notwithstanding this judgment, however, it will be quite open to the defenders or other white fishers, by altering the character of their nets as recommended in the various reports of commissions and experts which I have above alluded to, to raise a different question from that now decided, although of course it is impossible to foretell what may be the effect of such alterations, and whether with such alterations the nets would or would not still interfere materially with the right of salmon fishing. I wish to guard myself against saying that anything short of a material interference with the right of salmon fishing would justify an interference by the Court with the prosecution of white fishing on the Solway. Both rights are recognised by the law, and a trifling interference with the one by the exercise of the other would not, in my opinion, justify the interposition of the Court.

LORD DUNDAS—I have carefully considered this case, which is an important one to the parties, especially perhaps to the defenders, and have come to the same conclusion as your Lordships. I have no desire therefore to elaborate the matter further on my own account. It is, to my mind, clearly established that the nets now complained of are, both in construction and position, substantially the same as (or at all events not less open to objection than) those which have already been declared by the Court to be illegal; and that appears to me to make an end of the case at present before us.

LORD SALVESEN—I concur. I should be sorry indeed if our judgment interfered with the legitimate prosecution of the white fishing industry in this part of the Solway. I am satisfied that it will not do so, because I think the nets complained of can be so modified as to be substantially as efficient in the capture of white fish as they are at present, and so as not to infringe upon the rights of the salmon proprietors. To my mind the most objectionable—I do not say the only objectionable—feature of the nets that are complained of in this action is the cover. On the evidence I am satisfied that the cover is not necessary in order to prevent the escape of flounders, because I do not believe that these fish have the agility that is ascribed to them by the defenders. No case has ever been proved of a flounder escaping over a four feet net, and the fact that some flounders have been caught two feet above the bottom of the net seems to me, not to suggest that they have leaped two feet up, but that they have been entangled by the gills in the net while the water was at that level. I think it would be desirable that parties should endeavour to arrange some form of net which the white fishers might use in the legitimate exercise of their calling and on the footing that it should not be considered objectionable because it might entrap an occasional salmon. I entirely agree with what Lord Ardwall said, that in order to make the prosecution of the white fishing by fixed engines illegal it must be shown that it materially interfered with the rights of the salmon proprietors. I think it would be consistent with good sense that an arrangement should be made under which the flounder fishers might be permitted to retain an occasional salmon which found its way into the nets, provided that the nets they used were such as were not calculated in the ordinary case to capture salmon.

The Court pronounced this interlocutor—

"Dismiss the appeal and affirm the interlocutors appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor of 14th December 1909: Therefore of new interdict the defenders (except James Swan) and each of them from erecting and using stake nets, paidle nets, and other fixed engines, fitted to capture salmon or fish of the salmon kind on the river Nith or estuary thereof, or on the sands and shores between high and low water-mark within the limits of the district of the river Nith as fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862, and decern . . ."

Counsel for the Pursuers (Respondents)—Blackburn, K.C.—Lord Kinross. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders (Appellants)—Morison, K.C.—Malcolm—A. M. Laing. Agent—William C. Morris, Solicitor.