to me in the course of the discussion—and further consideration has confirmed it—that unless the City of Edinburgh succeeded in the contention upon the two Road Acts the minor contention which they made would not in any way avail them. Looking at the two Road Acts themselves, the matter seems to me to be comparatively simple. The General Turnpike Act of 1831 gave certain powers. The Roads and Bridges (Scotland) Act 1878 imposed two conditions upon these former powers, but appended a qualification to these conditions, and the sole question is whether that qualification governs both conditions or governs the latter of them alone. Reading the passage in the statute in its natural sense, I do not think it is possible to contend that the qualification does other than govern both of these conditions. I have endeavoured to find from the statute itself, because I think it is not from outside speculation but from inferences to be drawn from the statute—and by the statute I include of course not only the Act of 1878 but also that of 1831—whether there is any necessary inference on a consideration of the statute to lead one to any other conclusion or to the conclusion which the town seek to maintain, namely, that the qualification governs the latter condition only, but I am entirely unable to find any reason from the statute itself to make any distinction between those two conditions, and on this ground I entirely concur with your Lordship. But I would desire to say this, that I am not perfectly satisfied that we are in a position to give a distinct judgment on the subject of transit by tramway, for another reason than that mentioned by your Lordship, because we do not know what is meant by tramway. Tramway is a very wide word which would cover anything from the old tramway up Liberton Brae to the cable tramway in Princes Street or the electric tramway in Leith, and I can quite conceive that the old-fashioned tramway might be allowable, while anything like road haulage would not be so.

LORD MACKENZIE—I am of the same opinion as your Lordships, and have nothing to add.

LORD KINNEAR did not hear the case.

The Court answered the first and second questions of law in the affirmative and the third in the negative, and decerned.

Counsel for First Parties—Cooper, K.C. —Hon. W. Watson. Agent — Thomas Hunter, W.S.

Counsel for Second Parties—D.-F. Scott Dickson, K.C.—Macmillan. Agent—A. G. G. Asher, W.S.

Saturday, July 22.

SECOND DIVISION.

[Sheriff Court at Dumbarton.

CAMPBELL'S TRUSTEES *v.* SWEENEY.

River—Navigable Non-tidal River—Public Right of Navigation — Mooring and Anchoring—Right of Member of Public to Moor Permanently, to Bank or Alveus, Boats Kept for Hire.

Held that though the public right of navigation of a navigable non-tidal river includes as a reasonable incident thereof the right to moor or drop anchor in the course of such navigation, a boat-hirer was not entitled, in virtue of his rights as a member of the public, to keep permanently attached to the bed of such a river a raft used by him for the purposes of his business, or to moor permanently to the bed or bank boats kept for hire, and *interdict* against his so doing *granted* at the instance of the proprietor of the bank and bed of the river.

James Alexander Campbell and others, trustees of the late James Campbell of Tullichewan, raised an action in the Sheriff Court at Dumbarton against John Sweeney, concluding for (1) decree ordaining the defender "to remove from the foreshore on the west bank of the river Leven, or from the portion of the bed of the said river to the middle thereof, *ex adverso* of the said foreshore forming parts or portions of the estate of Tullichewan belonging to the pursuers, (*a*) an iron rod or pin placed by him, or others acting for him or under his instructions, in the said foreshore or in the said portion of the bed of the said river; and (*b*) any steam-launch or steam-launches, and motor, rowing, and/or other boats, house-boat or boat-house, or pontoon belonging to or used by the defender, attached to or resting on any portion of the said foreshore, or attached to any part of the said portion of the bed of the said river, or to the said iron rod or pin, or to any fixture which may be substituted for the said iron rod or pin"; and (2) interdict against the defender fixing any rod or pin or any other fixture in the said bank or bed of the river, or mooring or fixing to the said bank or bed, or any fixture therein, any steam-launch or launches, &c.

The pursuers averred that the estate of Tullichewan included the bank and the bed of the river to the middle thereof at the place in question, which was near Balloch, and pleaded, *inter alia*—"(2) The defender, or others acting for him or under his instructions, having, without the authority of the pursuers, fixed the iron rod or pin condescended on in the foreshore on the west bank of the river Leven at or near Balloch, or on or to the portion of the bed of the said river *ex adverso* of the said foreshore forming parts or portions of the estate of Tullichewan belonging to the

pursuers, and having fixed or attached to the said iron rod or pin or to the said foreshore or bank or to the bed of the said river the house-boat or boat-house or pontoon and other boats, all as condescended on, decree of removal and interdict should be granted as craved, with expenses."

The defender, who carried on a boat-hiring business at the place in question, denied that the bank and bed of the river there formed part of Tullichewan, and pleaded, *inter alia*—"(3) The river Leven being a public navigable river, the defender as a member of the public is entitled to navigate the same and moor his boats therein, and the defender's actings which are complained of being proper incidents of the right of navigation, he should be assoilzied, with expenses. (4) The public having from time immemorial and beyond the memory of man, and in any case for more than forty years, been in use to moor their boats in said river and land and embark from the banks thereof, the defender has right so to do, and the pursuers are not entitled to interdict and removing as craved."

On 23rd June 1910 the Sheriff-Substitute (BLAIR), after a proof, pronounced the following interlocutor—"*Finds in fact* . . . (4) that the river Leven is a public navigable river . . . (11) that . . . the portion of the foreshore (at the point in dispute) . . . does not belong to the pursuers . . . (13) that boat-hiring on the river Leven at this point with the use of the foreshore . . . has been carried on for more than forty years without let or hindrance by members of the public; (14) that from time immemorial the public have been accustomed to moor rowing and other boats in the bed of the river Leven *ex adverso* of the foreshore in question; (15) that such right is one of the incidents of navigation in a public navigable river . . . *Finds in law* (1) that the pursuers have failed to prove that they have any right to the *alveus* of the river *ad medium filum ex adverso* of the foreshore in question; (2) that they have no right to that portion of the foreshore other than as members of the public; (3) that the river Leven being a public navigable river the public have a right as one of the incidents of navigation to keep boats for hire, and to moor such boats in the bed of the stream without the consent of the pursuers: Accordingly refuses the prayer of the petition, refuses the interdict craved against the defender, finds the pursuers liable to the defender in expenses, . . ."

Note.—". . . There is no doubt whatever that the river Leven is a public navigable river (4 R. (H.L.) 116); and with that decision is carried to the public all the rights incident to navigation, whatever these may be. It is claimed by the trustees that being owners of the lands of Tullichewan, bounded, they say, throughout by the river, the *solum* of the stream *ad medium filum* belongs to them, and that they are entitled to interdict any person from mooring boats in the stream. There is, as far as I know, no direct case in Scotland where this question has been raised, and I cannot say that I am surprised, for I should have imagined that navigation on any water, tidal or otherwise, is impossible without the right to drop anchor in the stream navigated. In my opinion, therefore, the right to moor or anchor a boat is one of the incidents of navigation with which the pursuers or those who derive a title from them cannot interfere—*Attorney-General* v. *Wright*, 1897, 2 Q.B., p. 318.

"So also with the question of boat-hiring. This river has been used for navigation purposes from time immemorial in the course of trade and pleasure, and I do not see what concern it is of the pursuers whether those who have a right so to use the stream make profit out of it or not. It is, in my opinion, immaterial whether these persons carry goods or passengers for hire. . . ."

The pursuers appealed, and argued—(1) The pursuers' title, at all events as explained by possession, established their property in the bank and *alveus, ad medium filum*, of the river at the disputed point. There was, in any event, a presumption in their favour—*Hindson* v. *Ashby*, 1896, 2 Ch. 1. That gave them a title to object to any interference with the navigation of the river—*per* Cairns, L.C., in *Lyon* v. *Fishmongers Company*, 1876, 1 A.C. 662, at p. 673. (2) The river was admittedly navigable, but that did not make it public for all purposes—*Grant* v. *Henry*, January 12, 1894, 21 R. 358, 31 S.L.R. 263, *per* Lord Kinnear, Lord Kyllachy (Ordinary); *Orr Ewing & Company* v. *Colquhoun's Trustees*, July 30, 1874, 4 R. (H.L.) 116, 14 S.L.R. 741, *per* Lord Blackburn at p. 122, p. 746. The alleged dedication to the public of the bank at the place in question was not proved, and in any case was irrelevant. The defender therefore could found only on his right as a member of the public to navigate the river and on anything that was incidental thereto, *i.e.*, incidental to his own navigation and not that of others —*Denaby and Cadeby Main Collieries, Limited* v. *Anson*, 1911, 1 K.B. 171. Now, mooring the raft or pontoon permanently to the bed of the river and attaching thereto or to the bank or bed boats kept for hire was not an incident of navigation by the defender as a member of the public. On the contrary, the permanent mooring of the pontoon and boats in the river was just such an obstruction to the navigation of the river as not even a riparian proprietor, much less a member of the public, was entitled to cause—*Orr Ewing & Company* v. *Colquhoun's Trustees, cit.; Attorney-General* v. *Terry*, 1873, 9 Ch. App. 423; *Booth* v. *Ratté*, 1890, 15 A.C. 188. The public right of navigation of such a river was similar to the public right of user of a highway, and that certainly did not include the right to station a vehicle permanently on the highway. The pursuers were therefore entitled to interdict in the terms craved, or in such modified form as to give effect to their contentions. [In the

course of the argument Lord Dundas referred to *Houston* v. *Barr*, 1911 S.C. 134, 48 S.L.R. 262.]

Argued for the defender (respondent)—(1) The pursuer had not established property in the bank and bed of the river at the disputed point. Even if the estate were bounded there by the river, that would exclude the bed and the bank so far as used for purposes connected with navigation, just as in the case of boundary by a canal with a towing path—*Fleming* v. *Baird*, January 12, 1841, 3 D. 1015. (2) Even if the pursuers' titles could be construed as including the bank and the bed of the river, they had become public in virtue of the use by the public from time immemorial—*Duncan* v. *Lees*, June 20, 1871, 9 Macph. 855, 8 S.L.R. 564, *per* L.P. Inglis. At all events, the use by the public of the bank and the bed at the place in dispute must be taken into account in considering what the rights of the defender were, especially where the pursuers were founding on alleged possession to explain their titles. Rights of ferry, the right to put mooring posts in the bank of a river, and other rights connected with the use of a public navigable river, might be acquired by user—*Duke of Montrose* v. *Macintyre*, March 10, 1848, 10 D. 896, *per* L.C.J. Hope, at p. 900; *Carron Company* v. *Ogilvie*, 1806, 5 Pat. 61; *Colquhoun* v. *Loch Lomond Steamboat Company*, 1853, 2 Stuart 214—and possession was a good basis for a right claimed and used as an incident of navigation—*Attorney-General* v. *Wright*, 1897, 2 Q.B. 318. But independent altogether of possession the respondent's use of the bank and bed of the river was entirely within his rights as a member of the public. The channel of a navigable river was *juris publici*—*Colquhoun* v. *Duke of Montrose, &c.*, 1793, M. 12,827, at p. 12,829—whether the bank and bed were private property or dedicated to the public, and the public had a right to use the river for purposes of navigation and all purposes incidental thereto—Stair, ii, i, 5 (5); Rankine, Law of Landownership, 4th ed., p. 281. The respondent therefore as a member of the public had a right to navigate the river, and it made no difference whether he used that right for profit or for pleasure. Mooring or anchoring was clearly an incident of navigation, and in virtue thereof the respondent was entitled to have the pontoon moored where it was, and the other boats attached thereto or moored to the bank or bed of the river, provided, as was the case here, no unreasonable obstruction to navigation was caused, and the use made of the river was for a public purpose—*Rex* v. *Russel*, 1827, 6 B. & C. 566. Even if the respondent was not entitled to have the "pontoon" moored where it was, he could not at all events be interdicted from mooring his boats when not in use.

At advising, the opinion of the Court was delivered by

LORD DUNDAS—The pursuers in this case are the testamentary trustees of the late James Campbell of Tullichewan in Dumbartonshire, and as such proprietors duly infeft in that estate. The defender, who is an employee in a turkey-red dye company, carries on in his spare time a boat-hiring business on the river Leven near Balloch. The pursuers allege that their title as proprietors in trust of Tulliechewan extends to and includes the bank and *alveus* of that river *ad medium filum* at the place where the defender's said business is exercised. The object of their action, shortly stated, is to interdict him from mooring to the river bank (which they say is their property) a floating raft used for the purpose of his boat-hiring concern, or the steam-launches and motor or other boats which he keeps for hire, and to have him ordained to remove from the bank any attachments used by him for such purposes. It is the fact, as established by judicial decision in the Court of last resort, that the Leven at and for some distance below the point in question is a non-tidal public navigable river. The issues involved are, I think, clear and simple, but a large element of confusion has been occasioned by the introduction of the word "foreshore" as applied to this portion of the bank of the Leven. The river being here non-tidal, has of course no foreshore. But the unfortunate use of the word not only permeates the pursuers' prayer and their whole pleadings, but also those of the defender, the evidence of the witnesses, and even the interlocutor of the Sheriff-Substitute. This is not a mere misuse of language, but has involved, I fear, a substantial confusion of thought on the part of all concerned in the Court below; and one must in approaching the case discard absolutely and expressly the idea that we are here concerned with any such questions as might arise where public rights in a foreshore are at issue. It seems to me that the only two points in the case are (first) whether or not the pursuers have sufficiently established, as in a question with the defender, that their title includes the property of the river bank and *alveus ad medium filum* at the place in question; and if so (second) whether the defender has any legal right as a member of the public to do the acts which are objected to by the pursuers. I have come, without a great deal of difficulty, to the conclusion that these questions must be answered substantially in favour of the pursuers. [*His Lordship then dealt with the question of the pursuers' title, on which the case is not reported.*]

One comes, then, to the next and (as I think) the only other question in the case, viz., whether the defender has any right to do the things complained of or any of them, and I approach this question on the footing that the river bank and *alveus* at this part are the property of the pursuers. I shall deal presently with what seems to me to be the only possible basis of this part of the defender's case—his alleged right as a member of the public to do the acts complained of, in exercise of or as lawful concomitants to the undoubted public right of navigation in the river.

But I must first discuss some matters which bulked largely in his counsel's argument, and were introduced (as I understood) as separate from or collateral to the public right of navigation. I cannot help thinking that this part of the argument was attended with some confusion of ideas, for I must repeat that we have nothing here to do with the law of foreshores or the proprietary rights of the public over lands lying between high and low water-mark of ordinary spring tides. It was reiterated again and again by the defender's counsel that the bank at this part is and has from time immemorial been a "public place." The phrase is to my mind inapt and misleading. It occurs in the books mainly, I think, in connection with cases of public right-of-way, where the point has necessarily been to establish that the way in dispute had a "public place" at each of its *termini*. No question of that sort is here involved. If this river bank is a "public place," it must, I apprehend, be so because of some dedication of it to the public by way of implication from immemorial usage, for it has certainly never been expressly so dedicated. I must say that I have great difficulty in grasping the legal theory upon which a claim can be based that private property has become by force of user dedicated to the public; but however this may be, I cannot find any sufficient evidence in the proof to support such claim in fact. [*His Lordship dealt with the evidence.*]

Having summarised—I hope with no injustice to the defender's case—the points his counsel relied on as establishing some sort of public right in or dedication of the river bank at this place, I confess I am unable to see that they in any way aid or strengthen the defender's position. I think his case, if he has one, must depend upon his right as a member of the public to navigate the river, and upon nothing else.

Now if that be so, it does seem to me very clear that to moor a raft—or as the parties, erroneously as I think, persist in calling it, a pontoon—to the bank is neither an act of navigation nor an incident of navigation at all. It may be a convenience to navigators, in the sense that it is easier to get into or out of a boat by means of a raft than without one; but even so, it can scarcely be said to be incidental to the defender's own navigation of the river. The "pontoon" is not itself a boat; it is rather a floating shed or boathouse; and it is incapable of being navigated in any reasonable sense. It takes up a permanent situation—I know it can if necessary be detached and removed, but that is not its object—on a part of the river; and whatever else may be said of it, its use cannot to my mind be regarded as a use of the Leven by a member of the public for purposes of navigation. So far, therefore, as the "pontoon" is concerned, I think decree of interdict and removal must be granted.

For the rest I do not think the defender is in much better case. He claims right to moor or attach his pleasure-boats for public hire to the bank or to the "pontoon," or anchor them in the *alveus*. It may be assumed that right to moor or drop anchor is one of the incidents of the right to navigate a public river. But that right itself is essentially one of passage, not dissimilar to the public right of user of a highway; and I apprehend that the subordinate privilege of anchoring or mooring can only be exercised as a reasonable incident in the course of such passage or navigation. The permanent mooring of pleasure-boats for hire seems to me to be plainly outside the limits of that category, even assuming (what may be doubted) that a boat-hirer in the exercise of his trade can be fairly regarded as a member of the public engaged in navigating the river. I think, therefore, that the pursuers are entitled to decree of interdict and removing generally, as well as in the particular case of the "pontoon," though the wide language of their prayer must be limited, as their counsel conceded, so as to confine it to the more or less permanent mooring or anchoring of pleasure-boats for the purpose of the defender's hiring business.

I have not thought it necessary to refer to any of the cases, Scottish or English, which were cited to us, though I have considered them, as well as others. There is not, I think, much room for dispute about the general principles of law affecting the matter, and no one of the cases seemed to be so directly in point as to justify special allusion to it.

In conclusion I must say that I feel considerable sympathy with the defender, of whom personally Mr Campbell speaks in very kindly terms, and whose real enemy in the matter appears to be the railway company. I venture to express the hope that no unnecessarily harsh use will be made against him of the decree which as matter of law I feel that it is our duty to pronounce.

LORD ARDWALL was absent.

The Court found in law (1) that the pursuers had sufficiently instructed, in a question with the defender as a member of the public, that the bank and bed of the river *ad medium filum* at the place in question was part of Tullichewan; and (2) that the defender, as a member of the public having right to navigate the said river, is not entitled to attach to the bank or *alveus* of the river at that part the raft or pontoon condescended on, or to beach, moor, anchor, or attach to the said raft or to the said bank or *alveus* steam launches or motor or other boats for the purpose of hiring the same; and granted decree of removing and interdict in accordance with the opinion *supra*.

Counsel for Pursuers (Appellants)—Blackburn, K.C.—D. Anderson. Agents—Graham, Miller, & Brodie, W.S.

Counsel for Defender (Respondent)—J. C. Watt, K.C.—Christie. Agents—Simpson & Marwick, W.S.