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Saturday, February 2.

SECOND DIVISION.

[Lord Craighill, Ordinary.

GILBERTSON *v.* MACKENZIE AND BEATTIE.

Property—Salmon-Fishing—Public Right of White-Fishing.

The sea-shore between high and low water-mark is subject to the public right of taking white fish, which is likewise a right conferred by Statute 29 Geo. II. cap. 23, and in its prosecution the use of fixed engines is not illegal unless prohibited by statute.

In an action at the instance of a fisherman against the proprietor of the salmon-fishings *ex adverso* of certain lands on the Solway Firth and his tenant to have it found and declared that, as one of the public he had a right to fish for white fish with stake-nets on the shore of the said lands—*held (revg.* the Lord Ordinary, Craighill) that the pursuer had such a right, and that he could only be prevented from exercising it where the injury thereby done to the salmon-fishery was shown to be substantial and material.

Statute, Annan Fisheries Act 1841, *Exercise of Right of White-Fishing under.*

Observed (per the Lord Justice-Clerk) that the Annan Fisheries Act 1841 has no application to the legitimate exercise of the right of white-fishing, but is directed solely against wanton acts of encroachment operating an injurious effect on the salmon-fishing in that river.

One of the defenders in this action, Mr Mackenzie, was the proprietor of certain salmon-fishings in the Solway and in the river Annan, and the other defender, Mr Beattie, was the tenant of these fishings. The river fishings extended from the mouth of the Annan about three miles up the river, and the fishings in the Solway extended from Annan water-foot on the east to Lochar water-foot on the west, a distance of about five miles. The fishings had been known for centuries as the Newbie fishings, and had belonged exclusively to the proprietors of the estate of Newbie, which were possessed at the date of the action by Mr Mackenzie. He held the estate under a deed of entail executed by his brother, and was infeft conform to instrument of sasine recorded 10th April 1852. His title was completed by a Crown charter of confirmation, dated 15th December 1857, in which the "fishings of Newbie" were expressly included.

The pursuer John Gilbertson was a fisherman, residing at Powfoot, in the parish of Cummertrees, upon the Solway Firth, and in this action he sought to have it found and declared that he, as one of the public, had a right to fish for white fish, including flounders and all other kinds of fish except salmon, in the waters and along the shores of the Solway Firth, and in particular opposite to the parish of Cummertrees and that by means of stake-nets or engines fixed on the shore, and further that the defender Beattie should be ordained to remove his salmon stake-net from the "Powfoot Scaur," situated in Powfoot Bay opposite Cummertrees, and should be prohibited from erecting any net except at such places where nets were in use for catching salmon in 1861 or the four years previous.

Mr Gilbertson stated that he had been for a number of years in the habit of fishing for white fish there by means of stake-nets, and that the Solway fishermen had so fished from time immemorial. The nets were erected on the sands between high and low water-mark, being covered when the tide was full, but left dry when it had ebbed. He averred that he had some years before put up a stake-net in the "Powfoot Bay," which was within the Newbie fishings, and that he had till the year 1877 kept two or three stake-nets there. He further averred that one of these nets was placed upon Powfoot Scaur, an artificial Scaur in Powfoot Bay, made and kept up by the fishermen of white fish, and that prior to his erecting a net upon it five years previously it had been occupied by stake-nets belonging to George Graham, farmer, Netherfield, who had fished there for twenty years. The defenders denied that the scaur was artificial, and averred that Graham had never fished during the salmon season.

The pursuer in May 1876 had a stake-net on the said Powfoot scaur, which on the 22d day of that month the defender Mr Beattie removed, erecting a salmon stake-net upon the same spot. The pursuer averred that no salmon-net had ever been erected on this spot before, and that under the English Salmon Fisheries Amendment Act of 1869 (28 and 29 Vict. c. 121) the defenders were not entitled to erect any nets except on the spots where they had them in 1861 or the previous four years. This was denied by the defenders, who stated that they had frequently had nets upon the Powfoot scaur before.

The 1st, 2d, 3d, and 10th articles of the pursuer's condescendence were as follows:—"(Cond. 1) By Act of Parliament passed in the first Parliament of the reign of Queen Anne, dated September 21, 1705, entituled an 'Act for advancing and establishing the fishing trade in and about this kingdom,' 'Her Majesty, with advice and consent of the Estates of Parliament, 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.' (Cond. 2) This Act was confirmed and extended by that of 29 Geo. II. cap. 23, entituled an 'Act for encouraging the fisheries in that part of Great Britain called Scotland.' This statute enacted 'that from and after the 25th 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 £100 sterling, to be recovered in manner hereinafter directed, any law, usage, or custom to the contrary notwithstanding.' These two Acts of Parliament have never been repealed. (Cond. 3) While the Act of Queen Mary 1563, cap. 3, prohibited the use of cruives and yairs where the sea ebbs and flows, it expressly exempted such engines when situated 'upon the water of the Solway.' That exemption still exists, so that fishing by fixed engines is still legal within the district of the Solway. (Cond. 10) The pursuer, along with the rest of the public, have the right of fishing along the shores of the Solway Firth notwithstanding any grant of salmon-fishing rights which may now belong to the defender Mr Mackenzie of Newbie. It has been the practice or custom for time immemorial for the pursuer and the others, the residenters along the shores of the Solway, to fish for flounders and other white fish on the shore and waters of the Solway, and particularly at that part thereof opposite the parish of Cummertrees, by stake-nets similar to that erected by the pursuer on Powfoot scaur, and which was removed by the defender."

The defenders averred that it had never been the practice to fish for white fish with stake-nets during the open salmon season, although they on several occasions had been obliged to apply to the Sheriff for interdict against parties doing so. They also founded on a case between the Earl of Mansfield and his tenants, and William Neilson, then proprietor of Newbie, and his tenants, tried in the Court of Session, in which the Lords, by decree of this date (February 13, 1811), "found, and hereby find, that the decreet of declarator in the year 1777 founded on does not give any exclusive right to the said William Neilson, Esq., of catching white fish; but found, and hereby find, that the Earl of Mansfield and his tenants when fishing for white fish must adopt such mode as not to encroach upon or anyways injure Mr Neilson's sole and exclusive right of salmon-fishings within the bounds and limits now fixed and ascertained to him." They also founded on the following sections of the Annan Fisheries Act of 1841. By section 28 of that Act it was provided — "That if any person shall beat the water, or place or set any white object, or any bar-net or other net or nets, or other thing whatsoever, in, over, or across the said river Annan, or in, over, or across any stream or water, mill-pool, mill-lead, mill-dam, sluice, cut pond, or other pool which runs into or otherwise communicates with the said river, or within the shores or sea-coast adjacent to the mouth or entrance of the said river, or shall do any act or thing so as to prevent or for the purpose of preventing the said fish from entering the said river or places aforesaid, or from going up and down the same, every person so offending shall forfeit any sum not less than 10s., and not exceeding £5, together with the costs of suit and conviction for and in respect of each such offence."

By section 33 of said Act it was further enacted—"That if any person not being the owner or occupier of any fishery in the said river Annan, or in any stream or water running into the same, or on the shores or sea-coast adjacent to the mouth or entrance to the said river, shall at any time take, fish for, or attempt to take, or assist in taking, fishing for, or attempting to take, in or from the said river Annan, or any stream or water, or any mill-pool, mill-lead, mill-dam, sluice, pond, or cut which runs into or otherwise communicates with the said river Annan, or in the shores or sea-coast adjacent to the mouth or entrance of the said river, any salmon, grilse, sea-trout, bull-trout, whitling, herling, or other fish of the salmon kind, or shall trespass in or upon the said river Annan, or any stream or water which runs into or otherwise communicates with the said river, or in or upon the ordinary bed, bank, or course of the same, or within the shores adjacent to the mouth or entrance of the said river, with intent to take or kill any such salmon, grilse, sea-trout, bull-trout, whitling, herling, or other fish of the salmon kind, or the smolts, spawn, or fry of any such salmon, every such person shall for every such offence forfeit any sum not exceeding two pounds sterling, together with costs of suit and conviction." By section 46 of the said Act the defenders' fishings were included within the limits of the shore affected by the Act.

The defenders further averred that the pursuer's net was well adapted for catching salmon, being similar to a salmon stake-net, only not so high, and that it did in fact catch salmon, and besides injured the defenders' fishing by obstructing the free run of fish.

The pursuer pleaded, *inter alia*, as follows:—"(1) The pursuer and his predecessors and others, residenters along the shores of the Solway Firth, having, by means of stake-nets or fixed engines, fished for and taken white fish in the said Solway Firth, and in particular from that part of it opposite the parish of Cummertrees, for time immemorial, and the defenders having no right or title to interfere with their doing so, the pursuer is entitled to decree of declarator in terms of the libel. (3) The pursuer, by virtue of the Acts of Queen Anne, 21st September 1705, and 29th Geo. II. cap. 23, as well as at common law, has a right to fish for white fish in the waters and along the shore of the Solway by means of stake-nets or fixed engines, and the defenders have no right to interfere with them in the exercise of that right."

The defenders' pleas were, *inter alia*—"(2) The pursuer's statement is irrelevant and insufficient in law to support the conclusions of the summons. (3) The pursuer's net which the defender Mr Beattie removed, being at the time—that is, during the salmon-fishing season—injurious to the defender's right of salmon-fishings, was illegal, and the defender was entitled to remove it."

The Lord Ordinary (CRAIGHILL), after a proof, on 8th June 1877 pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators on the closed record, productions, and proof, and having considered the debate and whole process, In the first place, finds, as matter of fact—(1) that the salmon-fishings in the Solway opposite the parish of Cummertrees belong to the defender Mr Mackenzie,

and are possessed as tenant by the other defender Mr Beattie; (2) that these fishings for time immemorial have been fished by stake-nets fixed on the shore betwixt high and low water-marks; (3) that the pursuer and other inhabitants of Cummertrees, as well as other persons living in that neighbourhood, have for time immemorial fished in the Solway for flounders and other white fish opposite that parish, also by means of stake-nets fastened on the shore between high and low water-marks; (4) that this fishing was carried on chiefly in that part of the year which was close time for salmon, but was sometimes practised also in the open season, though upon occasions opposition to this extension was offered by the defenders and their predecessors, the owners and tenants of the said salmon-fishings; (5) that the net fixed by the pursuer on the Powfoot Scaur in April 1876, and with which he continued to fish till it was removed by the defender Mr Beattie on or about 22d May of that year, was injurious to the salmon-fishery of the defenders then in the course of prosecution, both because salmon and fish of the salmon kind were caught in that net, and because others and greater numbers were obstructed by it in their course to and diverted from the salmon-nets of the defenders; (6) that the pursuer fixed his said net on the Pow Scaur, and fished with it till it was removed by the defenders in the face of declared opposition on the part of the pursuer. In the second place, finds, as matters of law, the facts being as above set forth—(1) That the pursuer was not entitled in the open season for salmon-fishing to place the stake-net on the said Pow Scaur of which the defenders complained; and (2) that he is not entitled to place a stake-net in the open season, or on any other part of the shore of the Solway between high and low water-mark opposite the parish of Cummertrees calculated to be injurious to the said salmon-fishings of the defenders: Therefore sustains the third plea-in-law for the defenders: Assoilzies the defenders from the conclusions of the summons, and decerns, &c.

"*Note.*—There is no doubt that the pursuer and all others are entitled to fish for white fish in the ordinary way in the Solway as well as in all the seas and estuaries of the kingdom. If an Act of Parliament was necessary to make this certain, the Legislature has given what was required, for there have been passed, and there are still in force, the Act of Anne, quoted in article 1, and the Act of Geo. II., quoted in article 2 of the condescendence. But fishing by stake-nets for white fish, though long practised in the Solway, is hardly known elsewhere, and the Lord Ordinary does not consider that the right to fix stake-nets or other fixed machinery on the shore is an accessory of the right to fish for white fish. Neither of the statutes referred to supports such a claim. On the contrary, it is discountenanced in that part of the Statute of Anne which enacts that for 'their greater conveniency fishermen are to have the free use of all ports, harbours, shores, forelands, and others for bringing in, pickling, drying, unloading, and loading the same, upon payment of the ordinary dues where harbours are built.' Here, it will be noticed, the use of 'shores' is one of the privileges conferred, but not for every purpose, and assuredly not as a locality on which for the prosecution of white-fishing stake-nets or other fixed machinery may be placed. Great confusion and unthought of consequences might ensue if the pretentions now set up by the pursuer were to be recognised. For it will be seen from the conclusions of the summons that an absolute right—one at least equal to the right possessed by the owner of a salmon-fishery—is what is sought to be declared. There is, the Lord Ordinary thinks, no warrant in the law of Scotland for sanctioning such a claim. The Crown is the owner of the foreshore, though there are on or over it certain rights to the exercise of which the public are entitled. But of these fishing by stake-nets for white fish is not one. On the other hand, when a right of salmon-fishing is given a right of the use of the foreshore is implied, and it almost necessarily follows that when stake-nets for white-fishing cannot be used without injury to salmon nets, the latter must be found to be illegal. The Lord Ordinary thinks that both the law and the reason of the thing are presented in the decision of the old case quoted in the defenders' statement — *Earl of Mansfield* v. *Neilson of Newbie*, February 13, 1811, not reported, by which it was found that 'the Earl of Mansfield and his tenants when fishing for white fish must adopt such a mode as not to encroach upon or anyways injure Mr Neilson's sole and exclusive right of salmon-fishing within the bounds and limits now fixed and ascertained to him.' Neilson was the predecessor of the defender Mr Mackenzie, and Lord Mansfield and his tenants represented the public. The shore or ground in dispute was the *locus* covered by the conclusions of the present action, and consequently what was there decided was the very question which the present pursuer has again presented for the judgment of the Court.

"Entertaining the views of the law of the case which have been explained, the Lord Ordinary thinks that the length of time during which fishing for white fish in the Solway was practised by means of stake-nets is not a material consideration. Prescription is not required to give a right to fish for white fish, and the use of stake-nets on the shore as the machinery by which such is to be prosecuted is not an accessorial right. Possession, however long continued, can be of no avail where the existence of a title is not even alleged."

The pursuer reclaimed.

The arguments for the parties and the import of the proof sufficiently appear from the Judges' opinions.

Authorities—*Murray* v. *Earl of Selkirk*, July 6, 1821, 1 Shaw 106, and H. of L. 2 Shaw's Ap. 307; *Little and Powell* v. *Grierson*, December 7, 1824, 3 Shaw 370; *Lord Kintore and Others* v. *Forbes and Others*, May 31, 1826, 4 Shaw 641; *M'Whir* v. *Oswald and Others*, March 8, 1833, 11 Shaw 552; *M'Douall* v. *Lord Advocate*, June 13, 1873, 11 Macph. 688, H. of L. 16 April 1875, 2 R. 49; *Fraser* v. *Duff*, November 13, 1829, 8 Shaw 14; *M'Kenzie* v. *Rose*, May 26, 1830, 8 Shaw 816 (Lord Cringletie); *Somerville and Others* v. *Smith, &c.*, December 22, 1859, 22 D. 279; *Nicol* v. *Blaikie*, December 23, 1859, 22 D. 335; *Hall* v. *Whillis and Others*, January 14, 1852, 14 D. 324 (Lord Justice-Clerk and his quotation from Balfour's Prac. c. 58, p. 626); *Duchess of Sutherland* v. *Watson and Others*, January 10, 1868, 6 Macph.

199 ; *Duke of Argyll* v. *Robertson*, December 17, 1859, 22 D. 261 ; *Agnew* v. *Lord Advocate*, January 21, 1873, 11 Macph. 309 ; *Carmichael*, November 20, 1787, M. 9645 ; *Magistrates of Dumbarton* v. *Graham*, January 16, 1813, F.C. ; Act of Queen Anne, quoted *supra ;* 2 Geo. III. c. 31 ; 31 and 32 Vict. c. 45, secs. 41 and 71 ; Bell's Prin. sec. 641-642, 3, 4, 5, and 6 ; Ersk. Inst., ii. 1, 5, and ii. 6, 6 ; Stair, ii. 1, 5, and ii. 3, 69 ; Stewart on Fishing.

At advising—

Lord Ormidale—This case involves some questions of importance, not only to the parties immediately concerned, but also to the public at large, or at least to that portion of the public interested in salmon and white fishings in the Solway Firth and on the shores thereof.

According to the contention of the pursuer, he, as one of the public, has as good a right to fish for white fish by stake or other fixed nets along the shores, betwixt high and low water-mark, of the Solway Firth, as the defenders to fish by the same means for salmon. On the other hand, the defenders, as I understood their argument at the debate, maintained that, while they by regular and undisputed title from the Crown had a right to fish for salmon by means of stake-nets along a considerable portion of the shore opposite to Cummertrees, the pursuer had no right at all to fish there for white fish by stake-nets of any form or description, and, at any rate, had no such right during the salmon close season.

According to the Lord Ordinary's interlocutor under review, especially as explained in his note, the pleas in defence have been substantially sustained, and the defenders have been entirely assoilzied from the conclusions of the pursuer's summons.

That the effect of the Lord Ordinary's judgment, standing as it does at present, will be to exclude and prevent the pursuer, as well as the public generally, from fishing for white fish by stake-nets, of any form or description, on the shores of the Solway Firth in the open season, is inevitable, having regard to the express terms of his Lordship's findings in point of law ; and that it might also have that effect, not only in the open season for salmon fishing, but in all seasons, is obvious from the note which accompanies the interlocutor. In that note the Lord Ordinary, while he recognises the defenders' right, in virtue of their Crown grant of salmon fishings, to use the shore for stake-nets as undoubted, seems to hold that the pursuer has no right at all to use stake-nets in catching white fish, and that "the length of time during which fishing for white fish in the Solway was practised by means of stake-nets is not a material consideration." It was in conformity with this view that the defenders stated explicitly at the debate that it was not of right, but merely by tolerance, that the pursuer and others had been allowed to fish for white fish by stake-nets on the shore in the winter, or during the close season for salmon.

It is therefore of much importance to ascertain, before entering into the specialties of the present case, what are the rights of the pursuer and others engaged in white fishing in the Solway Firth, especially in reference to the defenders or other parties holding grants of salmon-fishing. Have the white-fishers any right at all to fish by means of stake-nets of any form or description on the shores of the Solway, either with or without immemorial use to do so? and, supposing they have such right, how far, if at all, may they be prevented from exercising it to the prejudice of the defenders' salmon-fishing.

As a general proposition, I take it to be clear that to fish white fish is a right common to all. Whether it may not, to some extent and in certain specified places, be appropriated and secured by royal grant accompanied with immemorial use, is a question which does not seem ever to have been precisely and authoritatively determined, and a determination of such a question in the present case is not called for, as neither the pursuer nor the defenders claim any such exclusive right. The pursuer merely claims the right, as one of the public, to fish for white fish in the Solway Firth and along its shores in common with all others Her Majesty's subjects. And neither do the defenders say that they have by grant from the Crown or otherwise an exclusive right, or any right at all other than that which the pursuer and the public generally have, to fish for white fish. So far therefore there is and could be no dispute. But what the pursuer claims, and the defenders dispute, is the right to fish for white fish by means of staked nets on the shores of the Solway Firth, whether within or without the bounds of their, the defenders', salmon-fishing. The defenders do not, however, say—and so far as I can discover they have no ground for saying—that their grant of salmon-fishing contains or expresses any exclusion of the right of white fishing belonging to the pursuer. Nor do the defenders say, nor have they proved, that they have by immemorial possession excluded the pursuer and others of the public from white fishing by stake-nets or otherwise within the limits or bounds of their salmon-fishing. But the defenders did maintain at the debate that the pursuer had no right by royal grant or otherwise to fish for white fish by means of stake-nets on the shores of the Solway Firth within the bounds or their salmon-fishing, in respect that he could not do so without injury to their salmon-fishery. Accordingly, it will be observed from the proof that the defender Mr Beattie, when examined as a witness for himself in the cause, expressly states that it is not possible for anyone to fish for white fish on the shore betwixt high and low water-mark without doing serious injury to the salmon-fishing. The result will therefore be, that were the Lord Ordinary's judgment to stand as it now does, there can be no white fishing at all by means of stake-nets of any kind or description on the shores of the Solway Firth within the bounds of the defenders' salmon-fishery, at least during the salmon season. Whether a judgment leading to such a result can be sustained is the question now to be determined by the Court ; and this question depends very much, if not entirely, upon the nature of the rights which the pursuer and the defenders respectively have in and to the shores on the Solway.

Now, I apprehend it to be undoubted that the shores of the Solway, as elsewhere, belong to the Crown for certain public uses, and, in the words of Professor Bell in his Principles (sec. 645), "of these uses navigation and fishing are the chief." And I am not aware of any authority or reason for holding that a distinction in this respect must be

made between white and salmon-fishing. On the contrary, white fishing seems to be fully more the favourite of the law than salmon-fishing. Accordingly, among other enactments, the Act of Queen Anne, passed in 1705, referred to in the pursuers condescendence, expressly "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 by the subsequent Act of 29 Geo. II. cap. 23, passed in 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 in Scotland;" and certain penalties are imposed upon persons hindering or obstructing such fishings.

As these statutes are still in force, there can be no question of the pursuer's right to prosecute white fishing in all parts of the Solway as well as elsewhere, and that too at all times and seasons alike.

Nor is there in the statutes referred to or elsewhere, so far as I know, or so far as was stated at the debate, any particular mode prescribed for prosecuting white fishing. There are, no doubt, enactments against the use of stake-nets and other fixed engines in rivers and estuaries, but these enactments have no application, as was admitted at the debate, to the Solway Firth. On the contrary, while the Act of Queen Mary 1563, cap. 3, referred to in article 3 of the pursuer's condescendence, expressly prohibits the use of cruives and yairs where the sea ebbs and flows, it expressly exempts such engines when situated "upon the water of the Solway."

But then it was argued for the defenders that in respect of immemorial usage the pursuer must be held to be restricted in white-fishing in the Solway to the close season for salmon-fishing, and also, that by certain judicial proceedings, and by the Annan Fisheries Act of 1841, the pursuer is excluded from fishing for white fish by means of stake-nets within the bounds of the defenders' salmon-fishings. In place, however, of the usage being in favour of the defenders, as contended by them, it appears to me on the proof that the evidence greatly preponderates to the effect that white-fishing has been prosecuted by stake-nets time out of mind by the pursuer and others of the public without let or hindrance, except when under the pretence of white-fishing they designedly and intentionally fished for salmon. The pursuer's proof is undoubtedly to the effect that the white fishers have prosecuted their calling at all seasons just as suited their own convenience; and the defenders' proof, as I read it, is not in reality different. The defender Mr Beattie himself says that "the white fishers have fished all along without objection in the winter time," and that he remembers "the pursuer setting nets on the Powfoot Scaur in 1874," and using "these nets during the open salmon season;" and again he says—"I may have seen five or six white fish-nets in operation at one time during the salmon season, two of them perhaps belonging to one man." And when he is specially asked "if he could tell whether in any particular season between 1851 and 1859"—and Mr Beattie could not from his age be expected to speak to the usage further back than 1851—and indeed he does not appear to have had any connection with the fishings even so far back—"there was not a single net set within the limits of your fishery during the salmon season," he answers, "they might be a mouth into the spring, and they might be a month before the close of the fishery season." Robert Thomson, an old man, and for some time back foreman to the defender Mr Beattie at the Newbie salmon fishery, says—"The white fishers began about forty years ago to fish in the summer time"—that is the salmon season—"and then gave it up, and afterwards started again." And this witness also says that thirty years ago he has seen many nets similar to that used by the pursuer set by the white fishers during the salmon season. The defenders' next witness, John Wilson, says that he has seen about a dozen or more such nets set by the white fishers in their, the defenders', salmon-fishings during the summer months. And two police officials Walter Thorburn and David Poole were examined as witnesses for the defender, and the evidence of them both, I think, shows that white-fishing has always, during the time they speak to, been going on by stake-nets within the boundaries of the defenders' salmon fishery, and were only interfered with when it was found they were catching salmon. In short, on a close examination of the defenders' proof it satisfies me that the pursuer and his witnesses are correct in saying that white fishing by stake-nets has been always to some extent carried on within the bounds of the defenders' salmon fishery at all times and seasons without interruption, except to prevent, under the cover and pretence of that description of fishing, the taking of salmon. It is indeed difficult to understand how, in the words of Mr Erskine (ii. 6, 6), "a right common to all can be taken away from one and acquired by another by interrupting particular persons from the use of it for the longest course of time." Besides, the pursuer and the public generally have, as has been already shown, a statutory right and title conferred on them by the 29th Geo. II. cap. 23, to fish for white fish in all places and in all seasons, which no alleged usage to the contrary can take away, and which does not require the support of any usage.

In regard to the judicial proceedings by way of interdict, upon which the defenders found, these do not, I think, affect the present dispute. The pursuer did not, as I understood his argument, maintain that he has any right—under the cover or pretence of fishing for white fish—in reality to take salmon. He would not be allowed to do so. Neither could he be permitted nimiously to set his nets close to the defenders' nets, or otherwise in a position necessarily and intentionally to injure the defenders' salmon fishery, any more than the defenders would be entitled unfairly and designedly so to set their salmon-nets as to destroy or injure the pursuer's right of white-fishing. How far, if at all, the acts and

conduct of either party may be unfair and improper in these respects is a question which cannot, I think, be determined apart from or irrespective of the circumstances of each case as it arises. When in any particular case it is established by the one against the other that there has been an unlawful or improper interference with either the salmon or white fishing, it may be stopped by interdict or other legal process; and no more than this was done, or intended to be done, as it appears to me, by the judicial proceedings upon which the defenders found. Thus, in the case of *The Earl of Mansfield* v. *Nelson*, (not reported, 1810, Session Papers, Blair Collection vol. 80) judgment of the Court of Session was not that it was illegal to fish for white fish within the bounds of a salmon-fishery, but merely to do so in such a manner as to encroach upon or injure the salmon-fishing. And, in like manner, the Annan Fisheries Act does not declare that white-fishing may not be carried on within the bounds therein prescribed, but only that it shall not be carried on (sec. 28) so as to prevent, or for the purpose of preventing, the said fish of the salmon kind from entering the river Annan; and (sec. 33) that unauthorised persons should not fish within certain prescribed bounds, "with intent to take or kill any such salmon, grilse, sea-trout, whitling, herling, or other fish of the salmon kind, or the smolts, fry, or spawn of any such salmon." While such are the enactments of the Annan Act of 1841, which seemed to be relied upon by the defenders as conclusive in their favour, it is not a little remarkable that they do not, as I read their statements in the record, although they quote these enactments, go on to allege that the pursuer has contravened them. All they say is—after mentioning that the pursuer has recently erected a net similar to the salmon ones within the bounds of their salmon-fishery, which are the bounds to which the enactment in question relates, that "the pursuer's net is well calculated for catching salmon as well as white fish, and in point of fact did catch salmon, and, besides, greatly injured the defenders' fishing by obstructing the free run of the fish towards the defenders' nets." I doubt much whether this is such an averment, even if proved, as would constitute a contravention of the Annan Fishing Act. But at anyrate the averment, such as it is, has not, in my opinion, been sufficiently proved, for I cannot hold that the catching occasionally of a salmon in the stake-nets of the white fishers, accidentally and without design—and nothing more has, I think, been shown to have occurred—is proof of misconduct or violation of the law on the part of the pursuer.

In the meantime, however, I have to remark that whatever may be the nature of the right of the Crown on the shore—whether it be patrimonial or only fiduciary for the use of the public—certain it is that the defenders have no such right on the shores of the Solway as to exclude or prevent the pursuer from using them in the fair and legitimate prosecution of white-fishing. The defenders do not in the record aver that they have any such right, or any right at all, in the shores beyond what is implied by their grant of salmon-fishing. They do not even aver that their landed estate is bounded by the sea, and they have neither produced or referred to any title in their favour containing such a boundary. Even if such a title had been produced, it could not, I think, give the defenders any right to the shore except subject to the public uses, and in this I think I am supported by, amongst other cases, those of *The Officers of State* v. *Smith*, July 13, 1849, 6 Bell's Appeals, 487, and *Hall* v. *Whillis and Others*, 14 D. 324. The latter case, although it related merely to the right of fishermen to take limpets and other shell-fish from the shore below high water-mark *ex adverso* of a barony with right of fishing in salt as well as in fresh water, has, in respect of the observations which fell from the Judges in deciding it, a very important bearing on the present dispute. The Lord Justice-Clerk, (Hope), who gave the leading opinion in that case, said—"I adhere to the doctrine which is stated in Balfour, (Practicks 626) that it is leasum to all our soverane lord's lieges to use and exerce ony industrie within the flude mark of the sea, *quia usus littoris est communis omnium*; and thairfoir gif ony man has ony landis lyand adjacent and contigue to the sea, he may not stop nor mak impediment to ony persoun to gather wilkis, cockles, limpettis, muscles, and uther small fish, or bait, for taking of fish upon the sandis or craigis within the flude mark foiranent his landis." This doctrine, his Lordship added, "has been adhered to in all the Courts, and held to be the undoubted law of Scotland." All the other Judges seem to have concurred, and so the fishermen succeeded in their contention in that case.

I am therefore of opinion that amongst the uses of the shores from which the public cannot be excluded by any private person in the exercise of a private right, having no statutory authority and no exclusive possession for the prescriptive period, is that of white-fishing. The statutory enactments passed for the encouragement of white-fishing, and the other authorities which have been referred to, put this, I think, beyond all question. And most assuredly the defenders have not shown, and neither have they even averred, any right or title to exclude the pursuer and others of the public from the use of the shore in a reasonable and legitimate way for carrying on their right of white-fishing. But neither do I think, having regard to the defenders' right of salmon-fishing, and to the provisions of the Annan Fisheries Act, that the pursuer is entitled to fish for white fish on every part of the shores of the Solway he pleases, and that by means of stake-nets of every form or description, altogether irrespective of the defenders' right of salmon-fishing and the provisions of the Annan Fisheries Act. And in order to prevent any misunderstanding in this respect, or any abuse by the pursuer of his right of white-fishing, the judgment to be pronounced ought, I think, to be expressed in the terms to be immediately explained.

In these circumstances, the pursuer is entitled, in my opinion, to get the interlocutor of the Lord Ordinary, except as regards its first three findings, recalled, and in place thereof to have decree of declarator pronounced to the effect that he, 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-nets or engines fixed on the shore, in such places and of such a description as not to injure

the defenders' salmon-fishings; and that accordingly the pleas in defence, so far as opposed to such decree of declarator, ought to be repelled; 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 rights of fishing. And in regard to the action in its other conclusions, I think it ought to be dismissed, and indeed those other conclusions were not pressed on the Court for judgment by the pursuer. A judgment in the terms now suggested may possibly, in its practical effect, prevent the pursuer fishing for white fish by any form or description of stake-net on the shores of the Solway within the bounds of the defenders' salmon-fishery, or the bounds of the Annan Fisheries Act; but I am not at present satisfied that this must necessarily be the result. And at anyrate I have thought it right to endeavour to avoid saying or sanctioning anything that might be construed to the prejudice of the pursuer and others engaged in the legitimate exercise of their undoubted right of fishing for white fish.

Lord Gifford—I concur entirely in the opinion which has just been delivered, and only desire to add that I should have preferred to have gone further in the case had the state of the process allowed me to do so. Both parties have a right of fishing, and the difficulty is to reconcile the two so that the one may be exercised without detriment to the other. We cannot determine that at present, and possibly could not do so without a reference to a man of skill.

Lord Justice-Clerk—I concur in all respects in Lord Ormidale's opinion, and sympathise with Lord Gifford as to the difficulty of reconciling the rights of parties. I only add a few general remarks on the important question raised in this action. I could have wished that the state of the process had enabled us to come to a more specific conclusion on some of the points raised, but to the extent to which the proposed judgment goes I think it entirely well founded.

I agree that the right of taking white fish is one possessed by the public at common law, and has been expressly recognised by the Act of Queen Anne, 1705, and that as a general proposition the sea-shore between low and high water-mark is subject to the uses of this public right. We have no question raised here in regard to the right of property in the sea-shore. But unless confronted by some superior patrimonial right of property or occupation, I consider the right of drawing of nets and otherwise using the shore for the purposes of white-fishing an allowance of public law.

The mode in which this right is to be exercised must to a large extent be determined by use and wont. But it is enough for this case to say that the use of fixed engines on the shore for the purpose of taking white fish is, unless prohibited by statute, not in itself illegal. In the present case the practice of using these engines on the coast of the Solway has existed from time immemorial. Probably the exemption of the shores of the Solway from the general legislation regarding fixed engines in rivers and estuaries has led to this result; nor am I prepared to say whether, if the use of such engines were prohibited for the purpose of taking salmon, the right could be maintained as regards white-fishing. Practically these engines have been used for taking white fish for more than a hundred years, interrupted no doubt by occasional proceedings at the instance of the proprietors of the salmon-fisheries against individual fishers, but in the main continuous from long before 1777. I have gone carefully through the proceedings in the case which occurred with the Marquis of Annandale, then proprietor of the fishing of Newbie, in that year, as well as the process between Mr Neilson of Newbie and Lord Mansfield, proprietor of the adjoining fishings in 1808–11, in which many of the questions which were argued in the present case are discussed with great ability. But in both these processes it is made perfectly clear that the mode of fishing by stake-nets was universally practised along these shores; and the interlocutor of Lord Craig in the latter case, which was adhered to with an addition by the Inner House, finds in these terms—"That the decreet of declarator in 1777 founded on does not give any exclusive right of catching white fish, but finds that the pursuer Lord Mansfield, when fishing for white fish, must adopt such mode as not to encroach upon nor in any way injure Mr Neilson's sole and exclusive right of salmon-fishing within the bounds and limits fixed and ascertained to him by said decreet of declarator." By a second interlocutor these bounds were fixed, and the defender Mr Neilson was "assoilzied from the whole conclusions of the action of declarator and amendment of the libel thereof except as to white-fishings."

I think, therefore, it cannot be contended that the use of fixed engines for the capture of white fish is illegal. It has been maintained, and an attempt has been made to prove it, that it is only during the close time that it has been customary to use such engines. I think the defenders have failed to prove this, but the contention is conclusive as to the use of these engines being legal in itself.

It was, however, argued that the patrimonial right of salmon-fishing is higher and more potential than the public right of white-fishing, admitting, as I think it must be admitted, that both are rights recognised by law, and to be protected within their legitimate exercise. I think in the main that the contention is true, and 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. The difficulty is, where and in what way to draw the line. I doubt, although it is not necessary so to decide, whether the right of salmon-fishing will entitle the proprietor to usurp and occupy stations on the shore in use to be occupied by the white-fishers, at least if that be done emulously or without reasonable prospect of advantage. Nor do I think it sufficient to allege that now and then a salmon may be accidentally taken in the white-fishing net, or that results happen which are inseparable from the honest and legitimate exercise of the right of white-fishing by fixed engines. Before the white-fisher can be prevented from the exercise of his calling in a particular locality, the injury to the salmon fishery must be substantial and material.

The only element of hesitation which I have found in this case rests on the provisions of the Local and Personal Act, called the Annan Fisheries Act, 1841. I do not wish to give an absolute opinion on the question regarding it which has necessarily arisen in this process, but I am inclined to read that statute as not having any application to the legitimate exercise of the right of white-fishing, which is not once referred to in it from beginning to end of its provisions. I read it as directed solely, not against the exercise of other and admitted rights, but against wanton acts of encroachment without a title, intended to have a direct and injurious effect on the salmon-fishing. The 28th section, on which so much stress was laid, refers solely to devices used by poachers and others, whether successfully or not, to prevent and obstruct the passage of fish; and without going through its terms in detail, I think it is plain from its phraseology that such is its sole intention. I am not disposed to read a private, a local and personal, Act, which bears no express relation to the subject, as taking away an acknowledged right in the public which has been uniformly possessed and exercised both before and after the statute. There is one clause in the Act which of itself seems to lead to this conclusion. It is the 31st section, which provides—"That nothing in this Act contained shall be deemed or construed to alter, demolish, or destroy any stake or raise net, fish-lock, coop, bag, or other work which shall have been or may hereafter be lawfully erected in or upon the shores or seacoast aforesaid adjacent to the mouth or entrance of the said river Annan, provided also that such stake or raise net, fish-lock, coop, bag, or other work, are rendered incapable of taking fish after the 25th day of September annually, and are removed wholly from off the shores aforesaid until the 10th of March," &c. It will be observed that there are no words whatever confining this clause to nets or engines intended for the taking of salmon, and yet it is perfectly clear that neither in the enactment nor in the proviso are the stake-nets which are used in white-fishing included.

I am aware that in one instance, at least, the contrary has been found, in a possessory case in the Sheriff Court of Dumfries. If I were of opinion that the 28th section of the Annan Fisheries Act included the right of white-fishing by stake-nets, I should have come to a different conclusion in this case. No doubt stake-nets may be constructed, as any other lawful act may be done, in such a way as to come within the provisions of the clause. If indeed the right of white-fishing is only used as a pretext for doing the acts prohibited by the statute, such an abuse of the right will come within its provisions. But while the right is exercised in good faith and legitimately, it is in no respect abridged by the passing of the Act.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutor of the Lord Ordinary reclaimed against, as regards the three first findings: *Quoad ultra* recal said interlocutor, and in place thereof 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, except-ing 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 in the shore, in such places and of such a description as not to interfere with the defenders' salmon-fishing; and repel the defenders' plea 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 rights of fishing; and in regard to the action otherwise, dismiss the same, and decern: Find the pursuer entitled to expenses since the date of the Lord Ordinary's interlocutor, and find no other expenses due to or by either party; and remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer (Reclaimer) — Mair—Rhind. Agent—W. Officer, S.S.C.

Counsel for Defenders (Respondents)—R. Johnstone—Keir—J. D. Dickson. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, February 5.

FIRST DIVISION.

[Lord Young, Ordinary.

STEEL & CRAIG *v.* STATE LINE STEAMSHIP COMPANY.

Expenses—Process—Where a New Trial was Granted owing to Omission in the Conduct of the First.

In a maritime case an issue was adjusted and a special verdict taken at the trial and applied by the Court without any question as to the unseaworthiness of the vessel having been raised, the whole argument being directed to the effect of the clauses of the bill of lading applicable to the cargo, the injury to which upon the voyage had led to the raising of the action against the shipowners. The House of Lords, on an appeal against the judgment of the Court of Session ordering the verdict to be entered for the defenders, remitted the case for a new trial on the question of seaworthiness. At that second trial the jury found for the pursuers, and the verdict was entered for them. *Held* that the pursuers, being alone to blame for the omission which had taken place, were liable in the expense of the first trial and of the discussion following thereon.

This was the sequel of the case reported *ante*, March 16, 1877, vol. xiv. 432, 4 R. 657, and in the House of Lords, July 20, 1877, vol. xiv. 734, As directed by the House of Lords, the case was sent for a new trial to determine the question of seaworthiness, and on that question the jury found for the pursuers.

The averment in the 5th article of the condescendence, referred to in the Lord President's opinion (*infra*) and said to raise the question of sea-