The Court adhered.

Counsel for Claimant Jameson—Lorimer—Macphail. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for Claimant Neilson—M'Kechnie—Lyall. Agent—W. B. Glen, S.S.C.

Friday, March 18.

SECOND DIVISION.

[Sheriff of Ayrshire,
and
[Lord Trayner, Ordinary.

BOWIE *v.* MARQUIS OF AILSA.

Fishing—White Fish—Public Navigable River—Acts, Anne 1705, *cap.* 2—29 *Geo. II. cap.* 23.

Held (1) that a river which up to a dam five hundred yards from the sea rose and fell with the tide, but without leaving any ground dry at low water; which contained floating white fish, though not in quantities sufficient to make their capture of commercial importance; which was more or less salt at high water, and was navigable from the sea by small pleasure-boats at high water, was neither a public navigable river at common law nor a river in the sense of the Acts Anne 1705, cap. 2, and 29 Geo. II. cap. 23; and (2) that the riparian proprietor, whose title was a Crown charter of barony dated 1795, with a clause "cum piscationibus yairis et cruives et salmonum et alborum piscium tam in aquis salsis quam dulcibus," on which possession had followed, was entitled to be *assoilzied* from a declarator of a public right of white-fishing within the five hundred yards thus described.

Sheriff—Jurisdiction—Declarator—Sheriff Courts Act 1877 (40 *and* 41 *Vict. cap.* 50), *sec.* 8.

An action was raised in the Sheriff Court for declarator that the public had the right of white-fishing in the tidal waters of a river with salmon-fishings at its mouth belonging to the defender, who alleged that they would be injured if the public right were sustained, and that the loss would exceed £50 per annum or £1000 of capital value. The value of the right claimed to the individual pursuer was stated by him to be under these amounts. *Question* — Whether the action was within the jurisdiction of the Sheriff Court?

In October 1884 James Bowie, upholsterer, Glasgow, brought an action in the Sheriff Court at Ayr against the Marquis of Ailsa and against Robert Armour, water bailiff to the Marquis, praying the Court "to find and declare that the pursuer, as a member of the public, has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and all other fish which are not salmon, sea-trout, and whitling, or the young of salmon, sea-trout, and whitling, in the river Doon, at least in that part of it within the tidal influence of the sea." There was also a conclusion for interdict.

The river Doon flows into the sea about two miles to the south of Ayr. About 500 yards from its mouth there is a dam-dyke, called in this action the lower dam-dyke. The pursuer claimed that the river up to the dam-dyke was a public river, and consequently that he, as a member of the public, had the right of fishing described in the foregoing prayer up to that point. The defenders denied that the river was a public river, and, founding on the titles of the Marquis (quoted by the Sheriff, *infra* p. 457) and possession thereon, claimed an exclusive right to the fishings from the line of high water-mark.

The detailed averments and pleas of parties were to substantially the same effect as in a Court of Session action subsequently raised (quoted *infra*), except that the pursuer did not found in the Sheriff Court on the Acts of Anne (1705, cap. 2) and 23 Geo. II. cap 23.

There were also the following averments:—"(Cond. 7) The value of the said right and privilege to the pursuer does not exceed the sum of £50 by the year, or £1000 value. (Ans. 7) The privilege of fishing for trout and fish other than fish of the salmon species in the portion of the river Doon referred to is of no value whatever to the pursuer, but if the right of fishing is opened to the pursuer and the public, the defender's salmon-fishings in the Doon will be injured to a much greater extent than £50 by the year, or £1000 value, and that in respect large numbers of salmon and sea-trout fry, and of whitling and sea-trout, will necessarily be destroyed, and the exercise of the right of salmon-fishing by the defender will be seriously interfered with."

A proof was allowed. The nature of the evidence sufficiently appears from the judgments.

On 30th June 1885 the Sheriff-Substitute (Orr Paterson) pronounced this interlocutor—"Finds in fact that the highest point reached by the ordinary spring tides in the river Doon, in the present state of the lower dam dyke, is the point marked A A on the Ordnance Survey map, immediately at the dam dyke: Finds in law that the public have an inalienable right to fish for trout, flounders, eels, and other floating fish which are not salmon, sea-trout, or whitling, or of the salmon kind, within this the tidal portion of the river Doon: Therefore finds and declares, in terms of the first conclusion of the petition, that the pursuer, as a member of the public, has a right of fishing with single rod and line for trout, flounders, eels, and other floating fish which are not salmon, sea-trout, or whitling, or the young of salmon, sea-trout, or whitling, or fish of the salmon kind, in that part of the river Doon within the tidal influence of the sea, viz., from the mouth up to the lower dam dyke: Assoilzies the defender from the conclusion for interdict, &c.

"*Note.*—In two recent cases in the Court of Session (*Sutherland*, 6 Macph. 199, and *Gilbertson*, 5 R. 610), in which the nature of the right to floating fish other than salmon in the sea along the coast of Scotland came under consideration, opinions were reserved on the question whether by Crown grant this right could be alienated and acquired by the grantee to the exclusion of the public. That question is directly raised by the present action, and the Sheriff-Substitute has decided it in the negative, being of opinion that the balance of authority in the law of Scotland is in favour of the principle that the right of white

fishings in the sea is vested in the Crown, not as a patrimonial right, which may be conveyed and appropriated, but as a *res publica*, held in trust for behoof of the lieges, and of which they cannot be deprived. Lord Cairns (Chancellor) seems to assume this when he says (*Lord Advocate* v. *M'Dowall*, 2 R., H.L., 55)—'Beyond all doubt the law in Scotland is that white fishing in the sea round the whole coast of Scotland is perfectly free. It is impossible that that right, existing as it does in Scotland, could have been a right of which the people of this locality were ignorant. They must have known perfectly well that they had the right to fish for white fish in the sea, and that no person had a right to prevent them.' This right (it is thought) extends as far up a river as the tide ebbs and flows, and there seems to the Sheriff-Substitute to be no sufficient ground for distinction between yellow trout which inhabit tidal waters and the other floating fish in these waters which are not of the salmon kind. If this principle be sound, the defender's Crown grant of barony, with the fishings both of salmon and of other fish, both in salt and fresh water, is not sufficient to exclude the public right. Exclusive prescriptive possession of white fishing under the defender's grant has not been proved; but such possession would not, it is thought, be effectual to deprive the public of their rights, as 'no right common to mankind 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' (Ersk. ii. vi. 6).

"The determination of the nature of the public right to fish in tidal waters is sufficient for the decision of the declaratory conclusion of this action; but as questions of the public right of access from the banks to the river are raised on the proof, it is perhaps expedient to express an opinion on the effect of that evidence. The Sheriff-Substitute is of opinion that the pursuer has not proved that the footpath which ran close along the margin of the river was a public footpath which the public have acquired the right to use. This footpath was made and maintained for the use of the fishermen in dragging their nets. Its use by the public arose from the banks of the river being unenclosed, and was by tolerance, not of right. The public road adjoining the river ran between the same points as this footpath, and was in every respect more convenient for the public use of passage, which is the appropriate, if not the exclusive, object of a public right-of-way.

"The Sheriff-Substitute is further of opinion that there is no right of access for fishing the river from the public road. The banks of the river are the property of the defender, or at least private property, and all along the course of this public road, as shown on the plans, a strip of ground of varying width intervenes between the road and the river. The public could not, without tresspasing, go upon this strip or cast line across it, and they are not entitled to invade private property in order to exercise the right of fishing in the tidal portion of the river. There appears, however, to be no practical difficulty in getting access from the sea in boats at certain stages of the tide, or from the seashore by wading.

"The Sheriff-Substitute has not thought it necessary to expressly qualify the finding of the public right to white-fishing, as it is only the legitimate exercise of the public right of white-fishing which is protected.

"This right will not be allowed to be made a pretext for the destruction of the salmon fry or injury to the salmon-fishings. In respect that the pursuer was not white-fishing in the tidal portion of the river when interfered with, and of other obvious considerations, the conclusion for interdict has not been granted."

On appeal the Sheriff (BRAND) on 30th January 1886 pronounced this interlocutor:—"Recals the interlocutor of 30th June 1885: Finds in point of fact—(1) That under his titles the defender is owner of the lands on both banks of the river Doon, including the margin of the said banks between Doonfoot Bridge and the sea, and that there is no public right-of-way along the river on either bank west of the said bridge, save and except the public road near the right or north bank, between the said bridge and the Slaphouse Burn, all as marked on the plan: (2) That the defender's rights of fishing and the mode of exercise in the Doon stand on these words in the Crown charter of Barony, dated 5th July, and written to the Seal and registered 2d September 1793, viz., 'una cum piscationibus yairis et cruives et salmonum et alborum piscium tam in aquis salses quam dulcibus cum cymbis in mari et escis in arena ad capiendos pisces ex adverso dict. terrarum ac cum cymbis una vel pluribus pro piscatione salmonum in flumine de Doon vel in mari inter locum de Greenan et Ecclesiam Sancti Joannis in Ayr et integra piscatione dict. fluminis de Doon ex utraque rissa ejusdem ad altissimam partem dict. terrarum de Greenan:' Finds therefore that the defender has the exclusive right of fishing for all kinds of fish in the said river Doon (see also precept from Chancery of 26th April 1847): (3) That the point marked A A on map at the lower dam-dyke is the highest reached by ordinary spring-tides in the Doon in the present state of the said dam-dyke, but finds it not proved that the ebb and flow of the tide is such as to leave space available for walking along either bank of the river between the water-edge and flood-mark: (4) That the Doon is not a navigable but a private river, and that the defender and his predecessors have from time immemorial used and enjoyed the exclusive right of fishing therein, and in exercise of his said right he or his said predecessors have let said fishings to tenants or tacksmen from year to year at large rents from 1835 down to 1881; that said tacksmen have been in use to watch the river and protect the fishings by means of bailiffs, and to stop those found fishing, whether by single rod and line or otherwise, unless doing so with leave, and that the inhabitants of the locality have acquiesced in this exercise of right, and have not asserted any public right of fishing in the said river: (5) That the Doon between the said bridge and the sea is a favourite resort of salmon fry, which swarm there at certain seasons, and pass out and in with the ebb and flow of the tide, while they gather strength to proceed seaward; and finds that fishing by single rod and line, if carried on to any considerable extent, even if those angling had no intention or desire to hook such fry, would inevitably result in seriously disturbing them, and in destroying large numbers: (6) Finds that whitling and sea

trout also frequent the river at the said place: (7) That some years ago many yellow trout in the Doon were destroyed by an accidental inflow of tainted water from a coal-pit, and that since then this species of fish has not been found in the river in any considerable numbers; and finds that such fish as eels, flounders, seath, lythe, and mullet are not to be found within the tidal portion of the river in any such numbers or of such size as to render their capture of moment to anglers or to the public: (8) That on 23d July 1878 the defender caused to be issued the following hand-bill, headed 'NOTICE TO FISHERS.—All parties found fishing in the lower portion of the river Doon without written permission from the Marquess of Ailsa, will be prosecuted,' &c. &c.: (9) That on 12th September 1879 the pursuer received under the defender's hand a written permission in the following terms:—'James Bowie has leave to fish with the rod and fly in the river Doon between the Low Bridge and the sea, subject to whatever regulations had been or may be made by the Fishery Board of Heritors of the river Doon;' that the pursuer fished the Doon under the authority of that permission; that he knew that others had 'got leave for asking, and that Lord Ailsa's officers hindered people from fishing who had not leave:' Finds that the pursuer admits in evidence that the said leave only continued for the then season, 'but was withdrawn by public advertisement in the following season;' that since the said withdrawal the pursuer has not had any permission whatever to fish, but has on various occasions fished without permission, and that he 'occasionally got whitling when fishing for trout:' (10) That whitling begin to ascend the Doon about the beginning of August, and go on till the end of the season, and that the pursuer was well aware of the habitude of the fish: (11) That late on the night of 11th August 1884 the pursuer went to fish the river between the said dam-dyke and the bridge, and therefore above the highest point to which the tide reaches, with single rod and line, equipped with flies which to his knowledge were well adapted to kill sea trout and whitling at night, and that the said part of the river where he went to fish was 'a good place for whitling:' (12) That between twelve and one on the morning of the 12th August he was found wading and fishing with rod and line in the said part of the river by the witness Robert Armour, a water bailiff, and his assistant, the witness David Cunningham, and when challenged, threw into the river a bag containing five fish, one of which was afterwards got hold of by Cunningham: Finds that the whole of these fish were whitling, and that this was well known to the pursuer: (13) That the pursuer at first gave a false name and address, but afterwards, when being taken to the police station, disclosed his real name and address, and claimed a legal right to fish for yellow trout with single rod and line in the river Doon at the place where he was found: In respect of these findings in fact, finds in point of law that the pursuer is not entitled to the declarator and interdict sought for, but reserves to him any right he may have as one of the public to fish in the Doon from the sea-shore, but subject always to the provisions of the Salmon Fishery laws: Therefore assoilzies the defender from the conclusions of the action, with expenses.

"*Note.*—There can be no doubt that the public have an inalienable right of fishing for white fish in the sea, but does this right extend as far up a river as the tide ebbs and flows, or may the Crown convey the exclusive right of fishing in a river at the part subject to the tidal influence? It does not appear to the Sheriff that the opinion expressed by Lord Cairns in *M'Dowall's* case, 2 R. (H. of L.) 55, was intended to go the length the Sheriff-Substitute would carry it. The Lord Chancellor in delivering his opinion was dealing exclusively with the case of a proprietor of lands on the sea coast, and had not before him such a case as the present. Accordingly he speaks only of 'the sea,' and of 'a title on the part of the subjects to use the shore.' The ebb and flow of the tide may extend a mile or more up a narrow stream, the land on each side of which belongs to private owners, and it would be a startling thing to say that the public had an inalienable right to catch by single rod and line the fish therein other than salmon and fish of the salmon kind. There is a dearth of authority on the point, but the Sheriff is of opinion that a grantee may acquire an exclusive title from the Crown to the whole fishings in such a river. In *Nicol* v. *Blackie*, December 23, 1859, 22 D. 335, the Lord Justice-Clerk says (p. 343)—'It is important in the present case to observe that the public right of fishing, in aid of which the shore may be used by the public, is the right of white-fishing, which is essentially *juris publici*, and may be exercised by anyone without title, license, or authority of any kind.' Inasmuch as there is special reference to the sea and the rights of the public in both these cases, they cannot be taken as in any way deciding the present question, but seem to leave it entirely open. In deciding the case of *Gilbertson*, 5 R. 610, Lord Ormidale said (p. 615)—'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 immemorable use, is a question which does not seem ever to have been precisely and authoritatively determined.' The present is a case of royal grant accompanied by immemorable use, and as it seems to the Sheriff, the exclusive right of fishing is claimed by the defender in such circumstances as to entitle him to have effect given to his claim.

"The pursuer says he was fishing for yellow trout; Lord Cairns makes no reference to yellow trout in the opinion above mentioned. He deals exclusively with such white fish as inhabit the sea. If the Sheriff is correct in his views as to the defender's rights of fishing in the Doon, then the pursuer had no right to carry on such fishing without written permission, trout-fishing being a part and pertinent of the lands adjoining the Doon, through which it flows.—See *M'Kenzie* v. *Rose*, May 26, 1830, 8 S. 816, and opinion of Lord Cringletie, p. 818; *Carmichael* v. *Colquhoun*, November 20, 1787, M. 9645; and *Fergusson* v. *Sheriff*, July 18, 1844, 6 D. 1363.

"It is deserving of notice that the terms of the grant to the defender partly coincide with the terms of a similar grant to the Duke of Argyll.—See *Duke of Argyll* v. *Robertson*, December 17, 1859, 22 D. 261.

"The grant there was of "salmon-fishings and other fishings, as well in salt as in fresh waters.' This, it was held, did not comprehend mussel-scalps, unless followed by exclusive possession for the prescriptive period. But in the later case of *The Duchess of Sutherland* v. *Watson*, January 10, 1868, 6 Macph. 199, it was held that the Crown may grant to a subject the exclusive right to mussel-scalps situated between high and low water-marks, and that a Crown title to a barony with fishings in the Sound of Nigg (Cromarty) was a sufficient title on which to establish by exclusive possession for the prescriptive period, an exclusive right to mussel-scalps between high and low water-marks in the said lands. Lord Cowan there reserves his opinion, as the Sheriff-Substitute points out, 'relative to white-fishing or the fishing of floating fish in the sea or along the coast or shore of the sea.' If the Crown may grant such a right as to mussel-scalps, why not to the white-fishings within the tidal portion of the river Doon, there being reserved to the public the right of fishing at the mouth of the Doon from the shore for fish other than those of the salmon kind, and the whole shore rights of fishing.

"The Sheriff entirely agrees with the views of the Sheriff-Substitute as to the alleged footpath. It is quite clear that the public have not acquired any right of footpath along either bank of the river between Doonfoot bridge and the sea. That the banks of the river at this point have often been frequented by pedestrians and others may be taken as certain, but they were only there on sufferance.

"The Sheriff further agrees with the Sheriff-Substitute that there is no right of access for fishing the river Doon from the public road, and that between the road and the river there is a strip of private ground of varying breadth, from which the defender has right absolutely to exclude the public. But the Sheriff-Substitute thinks there can be no practical difficulty in getting access from the sea by boats at certain stages of the tide or from the seashore by wading. Possibly, when the river is high and the tide in, small boats may get up to the dam-dyke, and when the river is low and the tide out wading may be practicable, but as means of access they are attended with obvious trouble and difficulty, and, in short, unless the public can get access to the water from the banks (which they cannot legally without permission) they have really no other such mode of access as would enable them to exercise their assumed right to any useful extent. Further, there is very little for the public to catch. The Sheriff is satisfied on the evidence that neither yellow trout, eels, flounders, seath, lythe, nor mullet are to be found in any considerable numbers. And, on the other hand, the presence of boats or persons wading would be highly injurious to the defender's net-fishing. Boats seldom or never seem to have been used by the public for fishing purposes, and it may be taken as certain that those who fished with or without leave invariably approached the river from the banks.

"The pursuer's contention that the Doon is a navigable river is extravagant. In coming to a conclusion on this point the Sheriff has had in view the opinions expressed in the Court of Session in the case of *Colquhoun's Trustees* v. *Orr Ewing & Company*, January 26, 1877, 4 R. 350, where the Lord President says—'But I rather think that if a river is navigable at all, and has been enjoyed and used as a navigable river by the public, the right of the public must be judged very much according to the same rule whether the river be capable of being navigated by vessels of one kind or another, by vessels of large or small dimensions.' It has not been proved that the Doon has been enjoyed and used as a navigable river by the public, and in particular it is not and never was 'fit for the transportation of the country products'—Bell's Prin. 648; see also Erskine, ii. 6, 17. In this respect the Doon contrasts strongly with the Leven, which, it was found in *Colquhoun's* case, had been for a long period of time navigated by scows or gabbarts, which descended the river by the force of the current, and were towed up by horse-haulage, there being a towing-path on the right bank. No doubt the defender's titles provide for the use of boats (*cymbæ*) *in flumine de Doon*, and there is not only evidence that the defender or his tenants have been in the habit of using a boat or boats when netting the river below the dam-dyke, but there is some evidence in the pursuer's proof (particularly the evidence of the witnesses Purdie, Bell, and M'Guire) that other boats have occasionally been seen on the river. But when it is remembered not only that there is a bar at the mouth of the Doon, which must seriously impede the ascent of boats unless in certain conditions of the tide, but the bed of the river is liable to constant silting up and other changes from floods, that boats cannot get further up than the dam-dyke, which is but a short distance from the mouth, and that it is not proved that boats have ever sailed on the Doon for any practical purpose except netting the river, the Sheriff is of opinion that there are no sufficient materials for enabling him to hold that the Doon is a navigable river.

"It may be added that there seems no reason for attributing blame to the action of the bailiff and his assistant—See 9 Geo. IV. cap. 39, sec. 11, and 31 and 32 Vict. cap. 123, sec. 129."

The pursuer appealed to the Court of Session. In the course of the hearing doubts were expressed on the Bench as to the competency of raising questions of such an important character by way of an action in the Sheriff Court, and the case was allowed to stand over to allow the defender an opportunity of bringing a declarator in the Court of Session.

Accordingly Bowie on 20th May 1886 brought an action against the Marquis, concluding for declarator "that the pursuer, as a member of the public, has right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish which are not salmon, sea-trout, or whitling, or the young of salmon, sea-trout, or whitling, or fish of the salmon kind, in that part of the river Doon where the tide ebbs and flows, and as far as the highest point reached by ordinary spring-tides, and that the defender, or anyone claiming under him, has no right to interfere with the right of the pursuer to fish as aforesaid;" and for interdict.

The following were the material averments of parties:—"(Cond. 1) The pursuer is resident in Ayr, and has resided there during the greater part of his life. He is an angler, and has long been

in the habit of fishing for trout, flounders, and other floating white fish in the tidal part of the river Doon when opportunity offered. The defender is, or claims to be, the proprietor of the salmon-fishings at the mouth and in the lower part of the said river Doon. With reference to the statements in answer it is averred that so far as the defender's titles purport to confer upon him an exclusive right to fish for floating white fish in the tidal part of the Doon they were *ultra vires* of the granter, and have no validity against the pursuer as a member of the public. *Quoad ultra* the said statements, so far as inconsistent with those of the pursuer, are denied. (Ans. 1) Admitted that the pursuer is at present resident in Ayr. Admitted that in 1878 and 1879 the pursuer occasionally fished with rod and line in the lower portion of the river Doon in virtue of a permission which he had asked and obtained from the defender. . . . Admitted that the defender is proprietor of the salmon and other fishings in the lower part of the river Doon. Explained that the defender has right to said fishings in virtue of an express grant in his titles flowing from the Crown. Further, explained and averred that the River Doon is a private river, and that the defender is proprietor of the banks on both sides of said river, and of the *solum* thereof, in the lower part of its course; that he and his predecessors have from time immemorial exercised by themselves, their tenants, and others having permission from them, the exclusive right of fishing for salmon and all other kinds of fish in the lower part of said river till it reaches the sea-shore, and have debarred all others not having permission from them from fishing in said parts of said river. . . . . *Quoad ultra* denied. (Cond. 2) The river Doon is a tidal river in which the ordinary spring tides reach at least as far as the lower dam dyke, which is distant several hundred yards from the mouth of the river. Up to that point the said river is public and navigable, and in point of fact it has from time immemorial been navigated by boats and other small craft. In the tidal portion of the river, trout, flounders, eels, seath, lythe, cod, mullet, and a variety of other floating white fish, are found in considerable numbers, and afford, or are capable of affording, sport and profit to the public. With reference to the statement in answer, it is denied that angling for floating white fish is injurious to the salmon fry. On the contrary, it is believed that the capture of these fish is one of the best means of preserving the stock of salmon, as they are very destructive of the salmon fry. (Ans. 2) Admitted that the river Doon is to a limited extent affected by the tide, but explained that the ebb and flow of the sea water in ordinary tides does not extend beyond the bar on the sea-shore at the mouth of the river, and that at all times, whether the tide is out or in, the water in the river above said bar covers the whole *solum* of the river from bank to bank. Admitted that there is, and has been from time immemorial, a dam-dyke across the said river, at a point about 400 yards above the line of the sea coast. *Quoad ultra* denied. The river is not a public or navigable river. Explained that the only fish which frequent the lower part of the said river are salmon and fish of the salmon kind. The river is, and has always been purely a salmon river, and is the main breeding river for salmon in the estuary of the Clyde, and for several years the defender has been at considerable expense in putting salmon fry into it, with the view of maintaining the salmon fishings in the estuary of the Clyde. For some months during the fishing season fry in large numbers frequent the portion of the river lying between the dam-dyke and the sea, and if the pursuer and the public were allowed to exercise the pretended right the salmon fishings in the river and the sea at the mouth thereof, which are at present very valuable, would soon be of no value, and the defender and other proprietors on the river would thus suffer serious loss and injury. (Cond. 4) By the Act of Parliament passed in the first Parliament of the reign of Queen Anne, dated September 21st 1705, entituled 'An Act for advancing and establishing the Fishing Trade in and about this kingdom,' it is provided as follows:—'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;' and by the Act 29 Geo. II., cap. 23, entituled 'An Act for encouraging the Fisheries in that part of Great Britain called Scotland,' it is provided as follows (section 1):—'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.' Neither of the above enactments has been repealed. (Ans. 4) The Acts of Parliament are referred to. Denied that the river Doon is within the localties specified in the said Acts. Denied that salmon, and fish of the salmon kind, river or yellow trout, and other fish which frequent the lower portion of the river Doon above the line of the foreshore, are included in the fish mentioned in the said Acts."

The pursuer pleaded—"(1) The pursuer, as one of the public, having at common law right to fish for all floating fish not of the salmon kind in the tidal portion of the river Doon, is entitled to decree of declarator as craved, with expenses. (2) The pursuer, by virtue of the Acts of Queen Anne and 29 Geo. II., cap. 23, quoted in condescendence 2, is entitled to decree in terms of the declaratory conclusions of the action. (3) The right of white fishing in the sea (including the tidal portions of rivers) being incapable of alienation by the Crown, the second plea-in-law for the defender should be repelled. (4) The defender having prevented, or asserted a right to prevent, the pursuer from exercising his legal right of fishing in the tidal portion of the river Doon, the pursuer is entitled to decree of interdict as concluded for, with expenses."

The defender pleaded—"(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. (2) The defender having in virtue of his titles, and the immemorial possession following thereon, the exclusive right to the fishings in the lower portion of the river Doon, he ought to be assoilzied. (3) The pursuer not having, as a member of the public or otherwise, any right or title to fish in the foresaid portion of the river Doon, the property of the defender, the defender should be assoilzied. (4) The Acts of Parliament quoted by the pursuer do not apply to the defender's fishings in the river Doon, in respect that (1st) the said portion of said river is not within the localities mentioned in said Acts, and (2d) the fish frequenting said portion of said river are not of the kinds specified in the said Acts. (5) The pursuer's averments, so far as material, being unfounded in fact, and his pleas untenable in law, the defender ought to be assoilzied, with expenses."

A proof was allowed. The evidence sufficiently appears from the opinions of the Lord Ordinary and the Court.

On 10th December 1886 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Finds and declares, interdicts and prohibits, in terms of the conclusions of the summons, and decerns: Finds the defender liable in expenses, &c.

"*Opinion.*—The pursuer in this case seeks to have it declared that he, as a member of the public, has right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish, not being salmon or fish of the salmon kind, in that part of the river Doon where the tide ebbs and flows, and as far as the highest point reached by ordinary spring tides. The defender, on the other hand, claims the exclusive right to the fishings in the lower part of the Doon (that is, the part of the Doon in which the pursuer asserts his right to fish), and denies the right of the pursuer, as a member of the public, to fish there at all. He maintains alternatively that in any view the pursuer is not entitled to fish in the Doon so far up as the point to which the pursuer claims right to go.

"The river Doon flows into the sea about two miles to the south of Ayr, and is therefore one of the rivers on the coast of Scotland. Access can be had to the mouth of the Doon either by walking along the sea-shore or by boats, without trespassing upon the grounds of the defender. When the mouth of the river has been reached it can easily be waded up as far as the dam-dyke. That the tide flows into the river is admitted, but how far up the river the flood-tide goes is a matter of controversy.

"The exclusive right of fishing claimed by the defender has not, in my opinion, been made out. His title, which is a barony title, no doubt contains the words, 'cum piscationibus yairis et cruives et salmonum et alborum piscium tam in aquis salsis quam dulcibus,' but upon that title there has not been any exclusive possession of white fishing. Indeed, there is no distinct proof of any white fishing at all by the defender in respect of that title. In these circumstances it does not appear to me to be necessary to decide whether the Crown could grant a title to white fishing on the shore—that is, where the tide ebbs and flows—which, without possession following thereon, would exclude the public.

"The pursuer bases his right to fish for floating white fish in the part of the Doon in question upon the provisions of the Acts of Queen Anne and King George II., mentioned in Cond. 4. The latter of these Acts provides that "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, friths, lochs, rivers, or other waters, where such fish are to be found on the coasts of' Scotland. I think there is no room to doubt that the primary, if not the sole, purpose of that Act was to encourage the trade or industry of fishing, and had no reference to fishing for sport. But although this is so, the words of the Act do not confine the privileges thereby conferred to fishermen, or persons engaged in the trade of fishing, alone; it confers them on 'all persons whatsoever, inhabitants of Great Britain,' and that without regard to the motive or purpose which leads to the use or exercise of the privilege. It follows, therefore, that the pursuer is entitled to the privilege, whatever it may be, conferred on the inhabitants of Great Britain by the statute. I think it is equally clear that he is entitled under this statute to take white fish in the Doon, as the Doon, at least the portion of it in question, appears to me to fall within the words of the statute as a river on the coast of Scotland where such fish are to be found. Of the fact that white fish are to be found there there can be no doubt. I agree, however, with the defender's counsel that the privilege conferred by the statute will not cover fishing for river or yellow trout. The fish referred to in the statute are 'herrings, cod, ling, or any other sort of white fish,' and in my view that means 'any sort of white fish' *ejusdem generis*. In a word, I think the statute only confers the privilege of catching fish which are inhabitants of the sea. I shall deal with the right to fish for trout claimed by the pursuer afterwards.

"The next question is—How far up the river is the pursuer entitled to go in exercise of his right of white fishing? If the right to fish at all is conceded or established, I think the parties are agreed that the right may be exercised on the shore. But how far the shore extends is a question on which they are at variance. The pursuer says that the shore extends as far inland as the high water-mark of ordinary spring tides; the defender confines it to the line which marks the average between ordinary spring and ordinary neap tides. In this controversy I think the pursuer is right; Erskine (b. 2, t. 6, sec. 17) remarking that under the Roman law the sea-shore reached as far as the highest spring tide—(the words of Justinian are, 'quaternus hybernus fluctus maximus excurrit')—says 'it goes no further, by the custom of Scotland, than the sand over which the sea flows in common tides.' I take that to mean exactly what the pursuer contends for. The ordinary spring tide is a common tide, as distinguished from an extraordinary or uncommon tide, and therefore as distinguished from the highest spring tide or highest winter

flood. So also Bell (Prin. sec. 641) describes the shore as comprehending 'all that is covered by the sea in ordinary tides—the land which lies between high and low water-mark.' Here, again, I think the word 'ordinary' is used as opposed to 'extraordinary,' and means the ordinary spring tide, not the highest spring, or the highest point reached by some unusual tidal wave. In *Nicol* v. *Blaikie* (22 D. 342) the Lord Justice-Clerk Inglis speaks of the shore vested in the Crown for public uses as 'between high and low water-mark of ordinary spring tides.' The same view was in effect adopted in the case of *Smith* v. *Officers of State*, 8 D. 711. I refer especially to the opinions of the Lord Justice-Clerk (p. 719) and of Lord Moncreiff (p. 721).

"The defender in support of his view refers to the case of *Attorney-General* v. *Chambers*, 23 L.J., Chan. 662, in which it was decided 'that the right of the Crown to the sea-shore is limited to the line reached by the average of the medium high tides between the spring and the neap.' No doubt that is now the law of England, but I cannot accept it as the law of Scotland in the face of the authorities which I have cited. The shore has always been regarded by the law of Scotland as limited to high water-mark, and that might mean either the mark of high water at ordinary spring or ordinary neap tides. But there is no authority in Scotland which defines the shore as limited to a line which marks the average between these two. Nor can 'ordinary' or 'common' tides necessarily mean neap tides, for spring tides are as ordinary and common as neaps. I therefore hold that to be shore where the tide ebbs and flows up to the high water-mark of ordinary spring tides. As to the exact point reached in the Doon by ordinary spring tides I will pronounce no decision, because it is or may be a fluctuating point. A change in the conformation of the coast, or in the bed of the river, or the course of the river, might make a very material alteration on the line of high water-mark. But it may be for the convenience of parties, so long as the coast and river remain in their present condition, to have my opinion on this point, as regulating at present the rights of parties. The evidence, I think, establishes that ordinary spring tides reach the dam-dyke. Several of the pursuer's witnesses have tasted the water there, and found it brackish—that is, saltish to some extent. Others have been driven away from the rocks just below the dam-dyke by the rising of the tide upon them.

"The witness Shearer is a good example of this kind of evidence, and he was a very clear and intelligent witness. I think this kind of evidence better than that given by Mr Stevenson and David Powrie. It is the result of a longer and more varied experience. Powrie's observations are not corroborated by anyone, and their value depends largely on the care with which he made his experiments, which were at the best of a very rough-and-ready character. The value of Mr Stevenson's experiments is detracted from by their having been confined to a single occasion, and at a time when (according to his own statement) the river was not in a normal or usual condition. I may notice, in addition to what I have already said, that on the Ordnance Survey map, prepared in 1859–60, the dam-dyke is marked as 'the highest point to which ordinary spring tides flow,' affording corroboration of a valuable kind to the evidence of the pursuer's witnesses.

"I come now to the question whether the pursuer is entitled to fish for trout in the part of the Doon in question. This he claims on the ground that the Doon, so far as he claims the right, is a public navigable river, and that therefore the public have a right to fish there.

"One of defender's witnesses says—'The Doon is not a navigable river; it would be extravagant to call it so, I think.' I think so too, if by the Doon is meant the whole river, from its leaving Loch Doon until it reaches the sea. But the same thing might with equal propriety be said of the Clyde. The Doon, however, at the point in question is navigable, and has been navigated by boats for pleasure, and formerly was navigated by smacks taking grain to the mill, although they did not ascend higher than the fishers' house, which is a very considerable way below the dam-dyke. But in the view I take of the case it is not necessary to determine how far the Doon is navigable, or whether it is navigable at all. According to my opinion the ordinary spring tide, which is the limit of the shore, flows up to the dam-dyke. To that point, therefore, the river is public, and in the water which covers that part of the bed of the river I think the public have the right to fish for trout (Bell's Prin. sec. 747). That right, however, must not be exercised so as to injure the higher right of salmon-fishing, which is in the defender. I see no reason why trout-fishing should not be carried on without injury to the salmon-fishing, although there may be reason for saying that it has not always been so. If the pursuer does injury to the defender's rights the defender has his remedy."

The defender reclaimed, and argued—(1) He had an exclusive right to the fishings in the portion of the river in dispute in virtue of his Crown title. The Lord Ordinary had found it unnecessary to decide the abstract question as to the power of the Crown to grant a title to white-fishing, as he was of opinion that the defender had failed to prove any exclusive possession on such title. But though there was a dearth of authority on the question it fell, on the whole, to be answered affirmatively — Lord Ormidale's opinion in *Gilbertson* v. *Mackenzie*, Feb. 2, 1878, 5 R. 615; Lord Corehouse's opinion in *Duke of Portland* v. *Gray*, Nov. 15, 1832, 11 S. 14; Craig, i. 15, 17; Lord Barcaple's opinion in *Nicol, &c.* v. *Lord Advocate*, July 1, 1868, 6 Macph. 972; Stair, ii. 369; Erskine, ii. 6, 6. Further, it was clearly proved that the defender had exercised under the title all the possession of which the subject was capable. That was sufficient for the decision of the case. But (2) the grounds on which the Lord Ordinary had based his judgment were erroneous. The Acts of Queen Anne and King George II. did not apply to the fishings here. These were Acts framed with the intention of promoting the white fishing industry along the coasts, and not of facilitating private sport. They had no application to the 500 yards in question between the coast-mark and the dam-dyke, where white fish were only occasionally found, and in small numbers. "Rivers" in the later Act was used so as to include all the waters on the coast of Scotland, by whatever name they might be called. The present fishings could not be said to be waters on the coast.

In any view, the right ought not to be extended higher up a river than the highest point at which salt water is to be found during the average tides of each lunar period, *i.e.*, the medium high tides between the springs and the neaps. In a river tidal influence was felt much higher than the point to which salt water ascended owing to the damming back of the fresh water. But it would be straining language to call that the tide. The rule that it was the average of both neap and spring tides, and not merely of spring tides, was that adopted in England, and was the reasonable one—*Attorney-General* v. *Chambers*, July 1854, 23 L.J. 662, and 4 De Jex & Macnaghten, 217. It was not inconsistent with Scottish authority, although it had never actually been laid down—Bell's Prin. sec. 641; Stair, ii. 1, 5; Erskine, ii. 6, 17; opinion of Lord Medwyn in *Berry* v. *Holden*, Dec. 10, 1840, 3 D. 205; *Smith* v. *Officers of State*, July 13, 1849, 6 Bell's App. 487; opinion of Lord Brougham in *Agnew* v. *Lord Advocate*, Jan. 21, 1873, 11 Macph. 309; *Dunbar, &c.* v. *Brodie*, Feb. 1765, 6 Pat. App. 769; Rankine on Land Ownership, 217 *et seq.* The river had been proved not navigable above the bar, and the mere fact of tide would not by itself give the public a right to fish trout. In a river tidal and navigable the *solum* was in the Crown, and the public had full rights of navigation and fishing. But in rivers navigable but not tidal the *solum* was in the riparian proprietors, and the public had only a right-of-way unconnected with any right of fishing. It was therefore incumbent on the pursuer to show that the river was at once tidal and navigable within the 500 yards. "Navigable" did not mean navigable for pleasure-boats. There was no evidence of freight-boats going higher than the fish-house. The mere inroad of the tide had no effect in making it fuller in the sense of being navigable—*vide* Lord Mansfield's opinion in *Mayor of Lynn* v. *Turner*, 1774, 1 Cowper's Rep. 86, referred to with approbation in *The King* v. *Mountagne*, 1825, 4 Barnewall & Cresswell's Rep. 598. The Act 29 and 30 Vict. c. 62, sec. 7 (Crown Lands Act 1866), showed that it was the belief of the Government Department, when it transferred the Crown's right of foreshore to the Board of Trade, that the only right possessed by the Crown was one in public navigable rivers—*vide* also *Pearce* v. *Scotcher*, March 31, 1882, L.R., 9 Q.B. Div. 162. The river was in point of fact neither tidal nor navigable.

Argued for the pursuer—The right to take sea white fish was to be tried by different considerations from the right to take yellow trout. The former depended on the Acts of Anne and George II., and on these Acts there was really no answer to the pursuer's claim to take fish up to the dam-dyke, if in point of fact such fish were to be found so high, and the evidence showed that they were. The right of trout-fishing, on the other hand, depended, mainly at least, on whether the river was public or not, though there was also this point in the pursuer's favour, that he being legitimately fishing as high as the mill-dam (in the exercise of his rights under the statutes) might keep trout if he caught any, they being *res nullius*. By "public river" was meant a river of which the *alveus* was in the Crown in trust for the public whether it was navigable or not. It was not disputed that the tide flowed up to the dam-dyke in this sense, that through the influence of the tide the level of the water there was periodically raised and lowered, whether the salt water itself actually went so high or not. Even Stevenson admitted that but for the resistance of the fresh water the salt water would have gone up that length. But the other witnesses were clear that the salt water reached that point, and Stevenson, who alone spoke to the contrary, based his evidence on the experience of a single day, when admittedly there was a heavy volume of fresh water, which would keep the tide back. These being the facts, the river up to the dam-dyke was a public river, for a river was public in so far as it was under the influence of the tide. By the civil law every river was public provided it was perennial, and was a *flumen*, not a *rivus*, which excluded burns—Dig. xliii. 12, 1. In English law thed istinction was drawn between a navigable river, which as such was public only as regarded its use of navigation, and a tidal river, of which the *solum* was in the Crown in trust for the public. The test of the one was navigability, of the other tidal influence, so that if a river was navigable but not under tidal influence its bed was not public property, but if it was under tidal influence, though not navigable, the bed was public property. The American law was the same—Angell on Watercourses, p. 558. And by English law all grants by the Crown to private persons of public rivers were bad unless made prior to Magna Charta—Hall on the Sea-Shore, p. 47. The law of Scotland, it was now settled, recognised the same distinction between navigable and tidal rivers—*Orr Ewing* v. *Colquhoun*, July 30, 1877, 4 R. (H.L.) 116. The law of Scotland, however, did not limit, as English law did, the Crown right to the average of both spring and neap tides. The Lord Ordinary was right in holding that the test was the average of the ordinary spring tides. Whether the Crown could grant a right of white-fishing it was unnecessary to inquire. The defender's grant here was not in terms an exclusive one, and had not been interpreted to be so by possession.

At advising—

Lord Justice-Clerk—There has been a good deal of procedure in this case. It commenced with a petition in the Sheriff Court of Ayrshire praying to have it found and declared "that the pursuer, as a member of the public, has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and all other fish which are not salmon, sea-trout, and whitling, or the young of salmon, sea-trout, and whitling, in the river Doon, at least in that part of it within the tidal influence of the sea." After a proof of considerable length the Sheriff-Substitute decided in favour of the petitioner. That judgment was recalled by the Sheriff, whose judgment came before your Lordships by appeal. After hearing parties on the appeal, and having some difficulty as to the competency of dealing with such questions as are here raised, in an application to the Sheriff your Lordships thought that it would be desirable that a declarator should be brought in this Court, and accordingly it has been brought, and the conclusion of the summons in this case is substantially to the same effect as in the Sheriff Court

action—"That the pursuer, as a member of the public, has right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish which are not salmon, sea-trout, or whitling, or the young of salmon, sea-trout, or whitling, or fish of the salmon kind, in that part of the river Doon where the tide ebbs and flows, and as far as the highest point reached by ordinary spring tides."

It was contended on the part of the pursuer that as long as he fishes for white fish he is entitled to fish anywhere in the river Doon where white fish can be found within the salt water of the sea, and he founds his contention upon two Acts of Parliament, of Queen Anne and of Geo. III., for the encouragement of white-fishing in Scotland, which certainly give a right to fish for white fish wherever they can be found on the coasts of Scotland. The pursuer says further that the Doon at that part of it to which this action relates is a public river, and not private property, that the tide ebbs and flows within those limits, and that the *solum* belongs not to the Marquis of Ailsa but to the Crown, and therefore that the Marquis of Ailsa has no right to prohibit the pursuer in the exercise of his right to fish for white fish.

The Marquis of Ailsa, on the other hand, says that his titles give him not only right to the *solum* of both banks of the stream down to a point considerably below the place in question, but also the sole and exclusive right to the fishings of all kinds, both white fishing and salmon fishing; and if that contention is well founded the Marquis of Ailsa's right must necessarily exclude the right of the pursuer. The Marquis of Ailsa says besides that the river is neither tidal nor navigable at that part, and that the real object of these proceedings on the part of the pursuer is to obtain the authority of the Court to fish within these limits in order that he may fish for sea-trout, whitling, and fish of that kind under pretence of fishing for white fish; that there are no white fish in that part of the river, and nothing that would tempt a man to go there except the opportunity of obtaining that other and illegal kind of fishing. The Marquis of Ailsa says further—and I think that this is a very material part of the case—that there are no means of access to the fishings in question without trespassing upon his private property. It is said on the part of the pursuer that the water may be reached by a public footpath which runs on the north side, or by a public road running upon the south side. Lord Ailsa contends that he is proprietor of the ground between the high road and the river, and that the other access is a private footpath.

These are the questions which your Lordships have to consider. Undoubtedly they touch upon some very important principles of law in regard to property in the sea and in a river. I shall state the opinion I have formed as shortly as I can, and without detail.

In the first place, I am quite clear that the Acts of Parliament referred to do not affect this case at all, and are not meant to affect any question of property in a tidal stream such as this. They are meant to apply to sea-fishings, and to provide protection for the public in carrying on a large article of commerce without interruption of business. The case of *M'Dowall*, 2 R. (H. of L.) 55, referred to in the Sheriff's note, was a case of that sort, and Lord Cairns' observation was necessarily directed to sea-fishing only. It certainly never was intended to do more than to give a right to the public to fish on the coasts as the Act of Parliament expresses it; and I do not apprehend that the banks of this river, although it is subject to tidal influence, can possibly come within the provision of the statute.

In the second place, the important question which arises is, whether the river is tidal at the point here in dispute? But before I say a few words upon that subject, I think it not immaterial to see how this question arose, because by considering that a good deal of light may be thrown upon the real objects of the action, as well as upon the real rights of the parties, and the state of the possession which it is proposed to subvert. The Marquis of Ailsa's titles give him the bank of the river on each side, and also the fishings, and his possession has been, as far as I can see, exclusive, because although it is quite true that some of the public have been in the habit of fishing in part of the stream at the mouth, as far as I can see that was done uniformly by the permission either of Lord Ailsa or his tacksman. This very pursuer himself had such a written permission dated 1879, under which he could fish, which was a clear acknowledgment of Lord Ailsa's right. Therefore I hold that the state of possession when this question arose was that Lord Ailsa had exclusive right to the whole fishing in the Doon, and that the public exercised that right only by permission or by tolerance or by poaching. The way in which the question arose was by the pursuer being found by the keepers of Lord Ailsa fishing with a rod and line above the the place which is alleged to be the ordinary high water-mark—that is to say, above the Doonfoot Dam. He endeavoured to escape in the first place. He had some fish in his bag, and he threw these out, but one was caught, and it turned out to be a whitling, not a white fish. He was taken to the Police Office, gave a false name, but at last gave his real name; and when he was examined I see that even then he fenced with the question whether it was not a whitling that had been taken by the police. So that the whole conduct of the pursuer shows that he was quite aware that he had been so far trespassing. That, I think, indicates pretty clearly that the real object of his obtaining a right to fish for white fish was not merely to fish for white fish, but to fish for fish of the salmon kind. I think that was the object which the pursuer had in view when he brought this action.

The main question in this case is, as I have already said, as to whether this is a tidal river at the point in dispute. The Lord Ordinary holds that it is, and it is quite true that the influence of the tide extends beyond the point contended for by Lord Ailsa in this case. But I do not think that shows it to be a tidal river, because that must take place in every case where fresh water meets salt water, and the salt water is under the influence of the tide. Without going into the evidence I think it is sufficient to say that the salt water, in my opinion, ceases at a point considerably below the Doonfoot Dam, which I take to be the terminus contended for by the pursuer. Of course the hydrostatic effect of raising the level of the salt

water through the action of the tide is to raise also the level of the fresh water, which is obstructed by the higher level to which the salt water has ascended; but I think that the result of the evidence is that no salt water, or at least no material saline quality in the water, is to be found at Doonfoot Damdyke, or considerably below it. Now, upon this matter a great deal of legal lore has been expended in other cases, but I do not think that the question has ever arisen as to whether the fact that fresh water has had its level raised through the influence of the tide constitutes it to the extent to which that rising has taken place a part of the sea. I think it does not. I think that it has been held in other cases relating to rivers and estuaries that it is a fair jury question where the sea ends and the river begins, or where the river begins and the sea ends. The *dicta* which have been cited from cases relating to the sea margin only have no real bearing upon the question which we have here I therefore think that in this case the high-water mark of ordinary spring tides is to be found as marked upon the Ordnance Survey, and as is reproduced in the plans by Mr Stevenson put into process, and that the tide does not extend beyond; that in the portion of the river between that point and the Doonfoot Damdyke there is no salt water or substantially none; and that the raising of the fresh water by the operation of the obstructing tide is not of itself a sufficient test to show where the public right in the river ends. If I am right in that, there is no doubt, both upon principle and on the evidence which was led in the Court below, and also before the Lord Ordinary, that there is substantially an end of this case, because it follows that the river above the point to which I have alluded to is the private property of Lord Ailsa, and not public in any sense.

In regard to the question of navigability, I do not think there is any pretext whatever for saying that this is a navigable river. According to the evidence of perhaps the strongest witness for the pursuer on that matter, while he says that there used to be flat boats going up to Doonfoot, he admits that there have been none such for the past forty years. Clearly, it is impossible that your Lordships should hold that this is a public navigable river used as such by the public. I think further, that the banks of the river are the property of Lord Ailsa. The public have no right to the private footpath on the north side, and that there are no means of getting at the water from the public road except by trespassing upon the bank. It is said, and said quite truly, that boats could reach the point in question, but I apprehend that what I have said, if sound, leads to the result that the channel of the river is private property. The impression made upon my mind is that the view taken by the Sheriff in the Court below in the appeal case is the right one; and although the Lord Ordinary has stated his views with ability and force, I do not think that they are sound. I think that the substantial fallacy which pervades the Lord Ordinary's views is simply this, that although perfectly sound as applied to any question of sea margin, they cannot be applied to the junction of river and sea. Upon the whole matter I am for recalling the interlocutor of the Lord Ordinary and assoilzieing the defender.

Lord Young—I am of the same opinion. I concur exactly in all that your Lordship has said, and I agree generally with the Sheriff in the opinion which he has expressed. It is quite clear that the public have right to fish for white fish in the sea. I think they have it irrespective of the Statutes of Queen Anne and Geo. II., which were passed to promote the fishing trade or industry in Scotland. But I agree that the Doon is no part of the sea. It runs into the sea, but it is not the sea. Nor do I think that it is a river of the kind to which the statutes refer. We know there are rivers in Scotland which have estuaries opening out gradually until they become sea, finishing their course through sand, which on either side is uncovered at low water. This, however, is not a river of that kind at all. It is a river with a narrow *alveus* like a creek, only that it contains fresh water, which fills it from bank to bank, and leaves no dry shore at any state of the tide. Three or four hundred yards up from where it enters the Firth of Clyde there is a dam, and to talk of it as a navigable river is out of the question. It has private cultivated property belonging to the defender on either bank up to the dam, and beyond the dam no navigation could possibly proceed, nor does it affect the question that there is tidal influence here. If there is a level channel, the tide will fill it up, and if a channel conducts the fresh water into the sea—a burn for instance or even a mere pipe—where the tide passes the mouth it will stop the water—possibly there may be a salt flavour in the water, but in many cases it only serves to dam back the fresh water. This then is not a public navigable river but is a private river, and the fishing industry of Scotland is not to be prosecuted here. Now, this man detected poaching here on the Doon appeals to the statutes and to what I assume is the common law giving the public right to fish in the sea, and brings this action, in which he concludes for declarator that he has right to fish for herring, cod, and ling with single rod and line. And the Lord Ordinary has granted decree in terms of this conclusion. Why limit it to single rod and line? If the statute applies, the pursuer may exercise the right by fishing with a net or in any other way in which herring, cod, or ling are fished for. Single rod and line are all very well for such poaching as the pursuer was detected in, and intends to continue if he succeeds in this action, but it is an odd idea in herring-fishing. The judgment therefore is rather singular when contrasted with the Act of Parliament on which the Lord Ordinary founds. But I need say no more. We know instances where the tide has greater influence than here on streams flowing through enclosed parks. These are not however public navigable rivers just because you can float a boat on them with the tide. I think there has been a misapprehension of the law applicable to white fishing in the sea. I entirely agree that the defences in the declarator ought to be sustained, and decree of absolvitor pronounced, and if the Sheriff Court case is before us, that the appeal should be dismissed and the judgment of the Sheriff affirmed.

Lord Craighill—I concur in all that your

Lordship and Lord Young have said. I think that the Doon from its source till it meets the sea is a private river, and it appears to me that it meets the sea only at the point up to which the high water of ordinary spring tide rises along the coast. No doubt there are many cases in which it may be said that the river still exists after it has met the sea. The present is not of that class at all. There is here but one channel, and that is covered as well at low water as at high. If it had been the case that at low water there was left on either side of the channel what would be called shore, then the river would have had its channel, and the rest would have been part of the sea. As it is, the channel is the channel of the river only, and is not a part and pertinent of the sea.

Lord Rutherfurd Clark—I am of the same opinion. I am clear that the river Doon between Doonfoot Bridge and the high water-mark of ordinary spring tides is a private river in all essential respects, and is in no sense a public navigable river. I therefore think that the Acts of Parliament do not apply to it in so far as between their two points, because it is not there a river in the sense of these Acts upon the coasts of Scotland. That being so, I have no difficulty in concurring in the judgments which your Lordships propose to pronounce.

In the Court of Session action the Court recalled the Lord Ordinary's interlocutor, sustained the defences, and assoilzied the defender from the conclusions of the action with expenses.

In the Sheriff-Court action the Court pronounced the following interlocutor:—

> "Find in fact (1) that the Doon is not a public river, and is not tidal nor navigable; (2) that the defender the Marquis of Ailsa is proprietor of the *alveus* and banks at the point where it reaches the sea, and thence upwards to the Doonfoot Bridge; (3) that under his titles the said defender has right to the white-fishings in that portion of the river, and for time immemorial has had exclusive possession and use thereof: Find in law that neither the pursuer nor any other member of the public is entitled to fish in the said part of the river without leave obtained from the said defender: Therefore sustain the defences: Of new assoilzie the defender from the conclusions of the action, with expenses."

Counsel for Pursuer—D.-F. Mackintosh, Q.C. —Salvesen — Gardner. Agents — Sturrock & Graham, W.S.

Counsel for Defenders—Muirhead—Blair—Darling. Agents—Hunter, Blair, & Cowan, W.S

HIGH COURT OF JUSTICIARY.

Friday, March 18.

(Before Lords Young, Craighill, and M'Laren.)

CLELLAND *v.* PROCURATOR-FISCAL OF RIVER-BAILIE COURT, GLASGOW.

Justiciary Cases — Ship — Collision — Culpable, Reckless, and Negligent Steering — Indictment — Relevancy.

A collision took place in the navigable channel of the river Clyde between two vessels proceeding in opposite directions. *Held* that a complaint charging those in command of the two vessels with culpable, negligent, and reckless steering was *irrelevant*, on the ground that if both were to blame there were separate acts of negligence which should not have been charged under one libel.

Peter Clelland, licensed pilot, Glasgow, the appellant, and Duncan M'Tavish, master of No. 4 hopper barge, residing in Govan, were charged on a complaint by the procurator-fiscal of the River Bailie Court, Glasgow, with having "been guilty of culpable, negligent, and reckless conduct in navigating, directing, managing, or steering steam vessels, whereby a collision took place, and the lives of the lieges were endangered, actors or actor, or art and part, in so far as on Thursday, the twenty-first day of October Eighteen hundred and eighty-six, or on one or other of the days of said month, while the said Peter Clelland was in charge or command of the screw-steamer 'Horatio,' then sailing down the Frith of Clyde, and the said Duncan M'Tavish was in charge or command of the said hopper barge, then sailing up the said Frith of Clyde; and both vessels having met in or near Cartsdyke Bay, at Greenock, in said Frith of Clyde, the said Peter Clelland and Duncan M'Tavish did, both and each, or one or other of them, while said vessels were approaching each other, so culpably, negligently, and recklessly navigate, direct, manage, or steer said vessel 'Horatio' and No. 4 hopper barge as to bring or cause or permit them to come into violent collision with each other, whereby both vessels were damaged, and the lives of the lieges at the time on board both vessels, or one or more of them, were endangered."

The River Bailie found the charge against Clelland proved, and fined him £3, 3s., but found the charge against M'Tavish not proven.

Clelland took a Case. The Case stated that the Bailie held it proved "that No. 4 hopper barge was proceeding up the river, keeping closely to her own side of the channel, that the 'Horatio' was sailing down the Frith of Clyde in charge of the appellant, and that the appellant culpably, negligently, and recklessly took the wrong side of the channel with said vessel 'Horatio' when at a considerable distance from said hopper barge, and while the vessels were approaching each other, and continued to keep said vessel 'Horatio' on her wrong side of the channel, and so close to the shore as to render it doubtful whether said hopper barge could pa ss