sion of this case to determine any general question as to the power of one joint-adventurer to bind his co-adventurers, because I am of opinion, with Lord Rutherfurd Clark, that the case may be decided on its special circumstances. In my opinion Welding knew and approved of the premises in question being taken for the purposes of the joint-adventure, and entered into possession of the premises. He must therefore pay the rent which is now demanded.

The Court adhered.

Counsel for the Appellant—H. Johnston—G. Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for the Respondent—Shaw—Abel. Agent—R. C. Gray, S.S.C.

Friday, January 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GRANT *v.* HENRY.

River—Navigable but Non-tidal River—Trout Fishing.

Held in the case of a navigable but non-tidal river that a right of access to and along the bank did not confer on the public a right of angling for trout therein; that a riparian proprietor had the exclusive right to trout fishing *ex adverso* of his lands; and that the right could not be acquired by the public by use for the prescriptive period.

Mrs Kinloch Grant was proprietrix of the lands of Arndilly and Aikenway, in the counties of Elgin and Banff. These lands were bounded on the west by the river Spey. *Ex adverso* of the lands the Spey was not a tidal river. Mrs Grant's title to Arndilly included the salmon-fishings thereof in the Spey, but in her title to Aikenway the salmon-fishings were reserved to the heirs and assignees of James, Earl of Findlater and Seafield.

In October 1892 she brought an action against John Henry, who had claimed a right to fish for trout in the Spey *ex adverso* of her lands, in which she sought to have it declared (1) that she was entitled to prevent the defender from entering on or passing along that part of the *alveus* of the Spey lying between the bank in the pursuer's lands and the *medium filum* of the river, and from entering and passing along the banks of the river so far as within her lands; (2) that the pursuer had the exclusive right to fish for trout and other fish from the *alveus* of the river between the bank in her land and the *medium filum*, and from the bank *ex adverso* of her lands (excepting the right of salmon-fishing reserved under her title to Aikenway); (3) that the defender had no right to fish for trout or other fish from her side of the river, or the foresaid part of the *alveus*, or in the water flowing over the same. The summons also contained conclusions for interdict corresponding to the first and third declaratory conclusions.

The defender in answer averred, *inter alia*, "that the Spey is a public navigable river, and that any part of its *alveus* is inalienable by or from the Crown as trustee for the public. The members of the public have enjoyed its use as a public navigable river since beyond the memory of man.... The public have exercised and enjoyed the right of fishing for trout and other fish not of the salmon kind in and use otherwise of the *alveus* of the said river *ex adverso* of the pursuer's said lands from time immemorial. They have also exercised and enjoyed the right of walking on its bed and along its banks. They have in particular enjoyed and exercised from time immemorial a right of way on the south bank of the river *ex adverso* of the pursuer's lands."

The defender pleaded, *inter alia*—"(4) The public have from time immemorial enjoyed the right of fishing for trout and other fish not of the salmon kind in the *alveus* of the said river *ex adverso* of the said lands; the defender as a member of the public is entitled to exercise said right. (5) The Spey being a public navigable river, the pursuer has no exclusive rights therein, except the right of fishing for fish of the salmon kind. (6) Alternatively, prescriptive use."

On 16th February 1893 the Lord Ordinary (KYLLACHY) repelled the defences, and found, decerned, and declared, and interdicted, prohibited, and discharged in terms of the conclusions of the summons, and found the pursuer entitled to expenses.

"*Opinion.*—The defender in this case claims right, as one of the public, to fish for trout in the river Spey *ex adverso* of the pursuer's lands of Arndilly; and the present action has been brought to have it declared that he has no such right, and to have the defender interdicted from continuing to fish on the pursuer's water.

"The defender's claim is rested upon two grounds:—(1) That the river Spey is at the place in question navigable—that is to say, navigable for boats and rafts; and that being navigable, although not tidal, it is a public river, in which the public have the same rights as they have at sea; (2) that assuming the river to be private in point of property, the right of trout fishing may yet be acquired by the public by prescriptive use, in the same manner as a right of way.

"I have had a very full and careful argument on the important questions thus raised, and have been very willing to consider how far the law of Scotland leaves these questions open. In result, however, I cannot say that I have found room for any serious doubt on that subject.

"As to the first ground, it is probably true—at all events (what is enough at present) it is averred—that the river Spey, from about Kingussie downwards, is navigable, and has been long navigated by boats, currachs, rafts, and other native

craft. On the other hand, it is admitted, and is notorious, that at the place in question the river is not tidal. In point of fact, as mentioned at the debate, the tide only flows for a very short distance above the mouth of the Spey at Garmouth.

"In these circumstances it is necessary for the defender to contend, as he does contend, that mere navigability makes a river public—at least that it does so when there has been in fact a usage of navigation for the prescriptive period. In other words, the defender contends, as he requires to contend, that it is immaterial whether the river is tidal or non-tidal at the part in question.

"It appears to me to be hopeless to maintain this contention in face of the authorities. It is settled in England, and has been so since the days of Sir Matthew Hale, that fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent (Hale *De jure maris*, ch. i). Both in England and in Ireland there have been repeated decisions to that effect—decisions distinguishing between tidal and non-tidal waters, and negativing the right of the public to fish in the latter (*Pearce* v. *Scotcher*, L.R. 9 Q.B.D. 162; *Murphy*, 2 Ir. Rep., C.L. 143). There have been similar decisions in America, where, looking to the character of American rivers, a different doctrine might perhaps have been looked for (Angell on Watercourses, p. 552 *et seq.*) And although in Scotland there may have been until lately an absence of direct authority, it cannot, I think, be said that the point has ever been regarded as doubtful. In any case, the opinions of the judges in the recent case of *Colquhoun's Trustees* v. *Orr Ewing*, and particularly the opinions of the judges in the House of Lords (which cannot in any view be regarded as *obiter*), settled, I think conclusively, that by the law of Scotland a right on the part of the public to navigate a fresh-water river does not imply that the river is public. They settle, on the contrary, that the only public rivers are those which, being both navigable and tidal, are truly parts of the sea, and in which accordingly, as in the sea, the property of the *solum* is in the Crown and the right to fish in the public.

"As to the second ground of defence, viz., the alleged prescriptive use, it is also, I think, clear that the defence is foreclosed. It is not disputed that in an ordinary private stream it is impossible by any amount of possession to acquire the right of trout fishing. Certain rights over private property may no doubt be so acquired. Known servitudes, including rights-of-way, may certainly be so, but, as Lord Cockburn puts it in the case of *Fergusson* v. *Sheriff*, 6 D. 1363—'It is certainly not true that by the law of Scotland anybody may do anything not criminal which he has been accustomed to do for forty years.' The question always is, whether the right claimed falls within the category of known servitude. Accordingly, in the case of *Fergusson* v. *Sheriff*, which I have just quoted, it was expressly held that a right of trout fishing in a private stream could not be acquired by forty years' possession, and the same thing was again decided in the case of *Montgomerie* v. *Watson*, 23 D. 635, where the question was as to an alleged right of fishing in a fresh-water loch.

"But the defender argued that when once a stream is found to be subject to a right of navigation, it is no longer a private stream in the sense of those authorities. Such a stream is already, it is said, *quodammodo* public, and being so, there is no legal objection to the extension by usage of a public right, so as to add the right of fishing to the right of navigation. As to this, I can only say that I can find no authority and can see no principle for such a distinction. A right-of-way through an estate does not carry with it, or make it possible to acquire by usage, a *jus spatiandi* over the estate, and the principle is the same whether the subject is dry land or land covered by water. The question really is, whether this river is public or private property. It must be one or the other. If it is public there is of course an end to the question, but if it is private, as I hold it to be, the existence of one burden in the shape of a right of passage for rafts and boats cannot, in my opinion, be a ground for admitting another burden—a burden unknown to the law as affecting private property.

"On the whole matter I see no ground for allowing a proof. I propose to find that the defender's statements are irrelevant, and to repel the defences with expenses."

The defender reclaimed, and argued—The Spey was a public navigable river, and the members of the public, having the right to use the *alveus* of the stream for the purposes of navigation, might lawfully fish there, as the proprietor had no exclusive property in the trout. The case of *Carmichael* v. *Colquhoun*, November 20, 1787, Hailes, ii. p. 1033, and M. 9642, showed that a person standing on the high road might fish for trout, and accordingly he might do so when as here he had a right to be in the *alveus*. This case was different from that of an ordinary right-of-way; the chief use here being navigation, the subsidiary ones, such as that of trout fishing followed. The English law of property was more stringent on these points than that of Scotland, and the English cases cited by the Lord Ordinary did not apply, nor did the case of *Fergusson* v. *Sheriff* apply, for that was one of a private river, while its navigability made the Spey public. Alternatively, a right of trout fishing was not a servitude, but was capable of reservation, or of transference to a third party. It was not merely coterminous with the possession of the *alveus*, as was shown by the fact that it extended beyond the *medum filum*. It might be capable of transference, and therefore could be acquired by prescription (*Carmichael* v. *Colquhoun*). The right of navigation, implying the subsidiary one of trout

fishing, the latter may well have been reserved by the Crown from its grant. The Crown accordingly would allow the public to use this right as it did in tidal waters. The distinction between tidal and non-tidal navigable waters was an illogical one.

It was also argued for the defender, but the contention was subsequently withdrawn, that the actual property of the *alveus* of a navigable river lay not in the riparian proprietor but in the Crown.

Argued for respondent—The owner of lands *ex adverso* of a river partly navigable but not tidal had a right in the *alveus* as far as the middle of the stream. This was settled in the cases of *Patrick* v. *Napier*, March 28, 1867, 5 Macph. 683; *Colquhoun's Trustees* v. *Orr Ewing*, July 30, 1877, 4 R. (H. of L) 116. The right of navigation was equivalent to a right-of-way, and did not interfere with the proprietor's right of trout-fishing. This was a right which necessarily accrued to the owners of the bank as part and pertinent of their rights of property, and could not be separated from the land—*Mackenzie* v. *Ross*, May 26, 1830, 8 S. 816—Navigability was simply a burden superimposed on the rights of ownership in a private river, and the proprietor had the right to the use of the water and all it contained to the exclusion of others, except so far as they had a known servitude over it—*Harrison* v. *Duke of Rutland*, December 3, 1892, 1 Q.B. 142. The public could not obtain by long use a right which they could not otherwise acquire. The right of fishing was neither a personal nor a praedial servitude; it was not a known public right, and could not be acquired by prescription—*Fergusson* v. *Sheriff*, July 18, 1844, 6 D. 1363, at 1365-66. The English cases and *Colquhoun's Trustees* showed that mere "navigability" did not make a river "public" as declared by the reclaimer. There was no such reservation by the Crown of the right of trout-fishing as was contended by him—*Carmichael* v. *Colquhoun*.

At advising—

Lord Kinnear—The pursuer brings this action to establish an exclusive right to fish for trout in the Spey *ex adverso* of her lands of Arndilly, and to have the defender interdicted from encroaching upon that right. The defence is that the public, or at all events the inhabitants of the neighbourhood, have right to fish for trout in the water in question, because they have free and unrestricted access to the water without trespassing on the pursuer's lands. The averments of fact on which this contention is based are that the Spey is a navigable river; that there is a public right-of-way along the bank of the river opposite to the pursuer's lands, and that the right to fish for trout has been exercised by the public for time immemorial. The argument upon these averments may be stated on the following propositions:—First, That inasmuch as trout in a river are not property, they may be lawfully captured by anyone having access to the water; secondly, that even if access will not of itself infer the right to fish, such a right may be acquired by continuous use and enjoyment for the period of prescription; and thirdly, that whatever may be the law with reference to private streams, there can be no exclusive right to fish for trout in navigable rivers.

The first and second of these propositions were rejected by the Court in *Fergusson* v. *Sheriff*, 6 D. 1363. It was decided in that case, first, that the right of angling for trout in private streams is an accessory to the right of property in the adjoining lands; secondly, that there is no common right of fishing for trout residing in the public at large, or in such members of the community as may have access to the water by virtue of a right of passage along the banks; and thirdly, that the continuous use and practice of fishing in such a stream for forty years or more will not establish a right in the public or in the inhabitants of the neighbourhood, but must be ascribed to toleration by the proprietors. All the earlier authorities on which the defender relied were brought before the Court in that case, and are fully discussed in the opinions of the four very eminent Judges who agreed in the decision. It does not detract from the authority of the judgment that in some of these opinions the question whether a public right of trout-fishing might not be acquired by use was treated as a question of difficulty. The Lord Justice-Clerk says—"I believe there has been a common belief of right where there has been possession. I have wished much to find that this right of amusement or enjoyment is a legal title on which prescription can be founded so as to protect the use. I must confess I have struggled so to find it." And Lord Medwyn said that he had framed his opinion with a good deal of hesitation, and perhaps with some reluctance. But notwithstanding these difficulties both of these learned Judges after deliberate consideration became satisfied that there was no ground in law on which a right of fishing could be established by usage, either in the public at large or in a particular community. The opinions of Lord Moncreiff and Lord Cockburn were even more decided to the same effect. The authority of these decisions has never since been called in question, and it is certainly binding upon this Court. The same law has been laid down in the later cases of *Montgomery* v. *Watson*, 23 D. 635, and *Copland* v. *Maxwell*, 9 Macph. (H.L.) 1. The former of these cases is not so directly in point, because it concerned the right of fishing in a loch, and it appeared from the titles produced that the complainer was proprietor of the whole loch and its *solum*. The Court, however, held that access to the loch conferred no right to fish; that the decision in *Fergusson* v. *Sheriff* was applicable, and that the doctrine there laid down could not be impugned. In *Copland* v. *Maxwell* the question was whether an agricultural tenant had a right to fish for trout in a pond on his farm to which he had access as a necessary result of his tenancy. It was held on the authority of *Fergusson* that the mere right of access inferred no

right of fishing, and therefore that an agricultural tenant could have no such right, since it was wholly independent of the agricultural enjoyment of the land, unless it had been communicated to him by the proprietor. The Lord Justice-Clerk said the right of trout-fishing in private streams or lochs must be conceded to be one accessory to the right of property in the lands which surround them. "If the right be incident to the property of the lands, as it is universally said to be, the tenant can only claim to exercise it on the assumption that it has been communicated to him by the landlord." Lord Neaves, concurring generally with the Lord Justice-Clerk, says—"A right of trout-fishing is an incident to the right of property. It is not a right open to the public, and exerciseable by all who have access to the water. There is no property in trout in the burn any more than in the running water." Lord Westbury, quoting this *dictum* in the House of Lords, observes —"This is for the purpose of distinguishing this case from the case of an ordinary fishpond enclosed all round, where the fish may be said to be no longer feeding in a state of nature, and where the owner has unquestionably a property in them." Lord Neaves goes on to say—"But the right to fish is a privilege of the proprietor of the soil, and no stranger is entitled to take the trout any more than he is entitled to ladle out the water." The judgment was affirmed, and the opinions I have quoted were approved in the House of Lords.

The only question therefore which appears to me to be open for consideration is, whether the doctrine which has been established with reference to private rivers and lochs is or is not applicable to the river Spey above the point where the tide ebbs and flows. It is said to be inapplicable because the Spey is a public navigable river. It is not pretended that the Spey is in fact navigable by vessels of burthen, but it must be assumed for the purposes of this discussion that it is navigable, and has in fact been navigated by "rafts, boats, currachs, and other native craft" from Kingussie to the sea. I do not see that if the river has been used by the public as a navigable river, it can make any difference to the question now under discussion whether it is navigable by one class of vessels or another. But assuming the right of navigation to be as extensive as the physical character of the river will permit, no tenable ground has been suggested for holding as matter of law that the right to use a fresh water river for purposes of navigation must necessarily carry with it the right to use it for any other purpose, and particularly for the purpose of fishing. The right to use a river of this kind for the purpose of navigation is assimilated by the Lord President in *Orr Ewing* v. *Colquhoun's Trustees*, 4 R. 344, to a public right-of-way, and it is obvious that a right-of-way by means of a river where it is fitted for navigation is just as definite and specific a right as a right-of-way by land, and does not by its definition imply any other or more extensive uses than are necessary for purposes of passage. It necessarily implies a right of access to the river, but it is settled by the authorities already mentioned that a right of access does not infer a right to fish for trout. It is a right of access for one specific purpose only which has nothing whatever to do with the use and enjoyment of the river for fishing. But it is said that the ultimate ground of judgment in *Fergusson* v. *Sheriff* was that the banks, the *alveus*, and even the water of a private stream are the private property of the riparian heritors, subject only in the case of each to the rights and interests of the others, and that there is no such right in the *alveus* or stream of a navigable river. To make good this argument the counsel for the reclaimer maintained that the law of Scotland recognises no distinction between inland and fresh water river, and the estuary of a river where the tide ebbs and flows. No authority was cited for this proposition, and there is very high authority to the contrary. I agree with the Lord Ordinary that it is unnecessary to go further back than the case of *Colquhoun's Trustees* v. *Orr Ewing*. In that case the doctrine of the law of Scotland is laid down with the greatest clearness and precision by the Lord President and Lord Deas. The Lord President says—"The distinction" between a navigable river where the tide ebbs and flows and a proper fresh water river "is very important as regards legal principle, because where the tide ebbs and flows the *alveus* of the river is the property of the Crown for public purposes as well as the banks of the river... Not so with a fresh water river. The *alveus* of a fresh water river is the property of the proprietors upon the banks, just as the *alveus* of a stream which is not navigable is the property of the proprietors upon the banks. But notwithstanding of that distinction, which is a very clear one, there may be a public use of a fresh water river for the purposes of navigation." His Lordship goes on to define the legal character of this public use by the analogy I have already mentioned. His view therefore is that in such streams there is a right of property in the *alveus*, subject to the public right to navigate, just as there is a right of property in land over which the public has a right-of-way subject to the public right of passage. Lord Deas states the same distinction between the two classes of public navigable rivers, and explains that operations which would be illegal in the tidal part of the river may be lawful in the non-tidal part, the difference being that "the Crown holds the *solum* of the tidal part of the river as trustee for the whole public, but in the remaining portion of the river the proprietors of the banks are the proprietors of the *solum* and the right of navigation on the part of others requires use to found and support it. The law so laid down is approved and confirmed by the opinions delivered in the House of Lords, 4 R. (H. of L.) 116, and especially by the opinion of Lord Blackburn, and indeed, it proved the basis of the judgment by which the decision of this Court was re-

versed. In that case riparian proprietors on the river Leven had erected the piers of a bridge in the bed of the river. The Court held that although they were proprietors of the *alveus* they were not entitled so to build within the bed of the river, because the public having rights of navigation had an interest in the running water, and although the new bridge might not cause any present injury it was impossible to foresee what effect the operations in such a river as the Leven, where there is no great abundance of water and the deep part of the channel is but narrow, might ultimately produce in times of flood or in various states of the river. The Court therefore held that the right of navigation gave the public using the river the same title and interest to interfere with the operations of a riparian proprietor, as lower or opposite heritors might have in respect of their right of property, according to the doctrine established in *Bickett* v. *Morris*. But the House of Lords held that the right of navigation inferred no proprietary right or interest, and that *Bickett* v. *Morris* was inapplicable; and Lord Blackburn, in explaining his reasons for that conclusion, lays down the law as to the property of the *alveus* just as clearly as it had been stated in this Court. His Lordship says, in the first place, that "the river Leven is an inland stream, and the tide does not flow up to the point where the piers are erected. And as is pointed out by the Lord President, the rights of the Crown as regards the soil of the *alveus*, and of the public to navigate, are not the same in such a river as they are in the sea or in a tidal estuary;" and in defining the public right to navigate, he says that "the public who have acquired by user a right-of-way on land or a right of navigation in an inland water have no right of property. They have a right to pass as fully and freely and as safely as they have been wont to do." The question to be considered, therefore, as his Lordship treated it, was whether the erections complained of, being erections on the defender's own land, although *in alveo* of a running stream, were a present interference with the public right of passage, or if not, whether it could be shown that they would necessarily produce effects which would in future interfere with that right. The judgment appears to me to import that a riparian proprietor has just the same property in the *alveus* of a navigable river as if it had been a private stream, subject only to the public right of passage. It was suggested in argument that whatever might be the law as to *alveus*, there could be no such right of property in the water as if the stream were private. I think there is no substantial distinction in this respect between the river and the *alveus*. The only question in *Colquhoun's* case was whether the riparian owner's right of property enabled him to interfere with the running water. The law laid down, as I understand the decision, is that no difference in the legal character of the landowner's right is created by the public right of navigation. He has therefore a right not only to the ordinary uses of the water as it flows past him, but to any extraordinary uses he may be able to enjoy without interfering with the rights of other heritors above or below him, and without obstructing the navigation. He has therefore a right of use which although not unlimited is indefinite, and is available against all the world; and whether that is in law a right of property or not, it is exactly the same right as a riparian owner has in the water of a running stream which is not navigable. It appears to me, then, that all the grounds on which *Fergusson* v. *Sheriff* was decided are directly applicable to the present case. The pursuers, as an accessory of their right of property, have a right to fish for trout *ex adverso* of their lands, and in respect of that right they are entitled to exclude others from fishing, notwithstanding that there may reside in such other persons a right to use the river for some other definite and specific purpose.

The same considerations appear to me to be conclusive against the defender's claim to establish a public right by proof of a prescriptive use and enjoyment. If this were an open question, I should have thought it one of difficulty. We know that there are rivers which are practically open, where not only the inhabitants of the neighbourhood, but persons coming from a distance have been accustomed to fish for trout without let or hindrance for time immemorial; and one would have expected to find that a use and enjoyment so extensive and so continuous rested rather on public right than on the goodwill and good sense of private landowners. But that is just the difficulty which the Lord Justice-Clerk considered and overcame in *Fergusson* v. *Sheriff*. If the right to fish for trout is not an incident of the right of navigation, the navigable character of the river can afford no special title independent of possession to which the use can be ascribed. The relevancy of the averments of possession must therefore be determined on the same grounds as in *Fergusson* v. *Sheriff*. All the arguments which were addressed to us in support of the relevancy, including even those which were founded on what is said to be a public understanding and belief—topics which Lord Cockburn described as scarcely judicial—were fully considered and rejected in that case. I think that decision is binding upon us, and that we cannot allow the questions then settled to be re-opened.

LORD M'LAREN—I concur in the judgment proposed, and in Lord Kinnear's opinion.

If the question had not been settled by decisions, I should have felt difficulty in affirming that a right of fishing for trout or freshwater fish is a right which the law would protect. Trout-fishing is not, like salmon-fishing, a species of property distinct from the property in the channel of the stream in which the fish are taken; it is a right inseparable from the property of the *alveus*, and is, as I think, more correctly described as an incident of the estate of a riparian proprietor than as a separate right.

In the ordinary case it would be impossible for a stranger to fish for trout against the will of the riparian proprietor without committing a trespass, and so the estate of the riparian proprietor in the channel of the stream and the adjacent banks carries with it a virtual exclusive right to the fishing. I need hardly say that there is no right of property in the trout which are found in a running stream, and which are free to migrate from one estate to another; it may be otherwise in the case of ponds and enclosed waters artificially stocked with fish. Now, in the not infrequent case of a road or right-of-way following the course of a stream, I should not, apart from the decisions, be able to come to the conclusion that a member of the public using the public way, and casting his rod across the stream for trout, was committing a trespass or invading a right. But the cases cited by the Lord Ordinary certainly establish the proposition that trout-fishing is in itself a subject of legal protection, and that the right of the riparian proprietor to the exclusive privilege of fishing does not depend altogether on his right to prevent trespassers from coming upon his lands. Indeed, it is impossible to read the opinions of the learned Judges who took part in those decisions without seeing that in their view a right to be on the bank of a stream, *e.g.*, in the exercise of a public right-of-way, is a strictly limited right, and that the defence that the fisherman was fishing from a standpoint where he had a right to be would not be a relevant answer to an application for interdict against fishing in private waters.

Now, if the point to which I have spoken be admitted or established, it appears to me that the claim of the defender Henry as one of the public must fail. His case is that the Spey is a navigable stream; that the right of navigation includes the lesser rights of fording, wading, or walking along the banks of the stream; and he contends that being lawfully on the stream or on the bank adjacent thereto, he may fish for trout without invading proprietary rights. But it is not disputed that the pursuer Mrs Grant is proprietrix of the channel of the Spey to the *medium filum ex adverso* of her lands as well as of the bank. She sued as a riparian proprietor. The circumstance that the public have a right of navigation in the Spey does not take away the rights of the riparian proprietors in relation to the stream, but only obliges the proprietors not to use their rights in such a way as to interfere with the uses of navigation. This point is made perfectly clear by the judgment of the House of Lords in *Orr Ewing & Company* v. *Colquhoun's Trustees*, 4 R. (H. of L.) 116. The defender was not fishing from a boat, but supposing he were, I think that a fisherman fishing from a boat could not defend himself against an interdict by pleading that the Spey is a navigable stream, and that he was entitled to have his boat on it. In principle, the fisherman in the case supposed would be in no better position than the angler using the riverside and fishing from it. There is no authority for holding that the servitude and use of navigation carries any such accessory rights with it as are contended for. Such expressions of judicial opinion as we have on this subject are to the effect that a right of navigation in the case of a non-tidal river is a species of public way or a right *ejusdem generis*.

While, therefore, I am not prepared to say that trout-fishing is an heritable estate, or anything more than an incident of the use of property, I am satisfied that we could not sustain the defences in this case without going counter to the authorities which recognise the right of a riparian proprietor to preserve his fishings.

I shall not add anything on the distinction between tidal and non-tidal rivers, because in the case of tidal rivers it is evident that the Crown alone has the right to restrain the public from fishing if such right exists at all. It is not likely that the Crown would seek to interfere with the right claimed by the public to fish in tidal waters, but the question is not before us, and its solution obviously involves considerations which have no bearing on the right claimed in the name of the public to fish in the navigable part of the Spey.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—Dickson—F. Cooper. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender—Graham Murray, Q.C.—Crabb Watt. Agents—Douglas & Miller, W.S.

Tuesday, January 16.

SECOND DIVISION.

WEST END CAFE COMPANY, LIMITED (AND REDUCED), PETITIONERS.

Company—Reduction of Capital by Purchase of Postponed Shares—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 51—*Companies Act* 1867 (30 *and* 31 *Vict. c.* 131), *sec.* 9—*Companies Act* 1877 (40 *and* 41 *Vict. c.* 26), *sec.* 3.

A company whose shares were fully paid-up, and consisted of preference and postponed shares, took powers by special resolution "to reduce the capital in any manner authorised by the Companies Acts in force at the time." The company thereafter passed a special resolution to reduce its capital with the consent of the holder of the postponed shares—(1) by the cancelment, as being unrepresented by available assets, of two-fifths of the nominal value of the postponed shares; and (2) by paying off the remaining three-fifths as being in excess of the wants of the company. To do this they proposed to