being purged. The whole loss sustained by the pursuer was sustained after Mr Ingram became his agent, and it rather appears that it was through Mr Ingram's neglect of duty alone that the pursuer has suffered any damage."

Counsel for the Pursuer — Chisholm. Agent—D. Milne, S.S.C.

Counsel for the Defender Adair—Macllellan. Agent—Robert Broatch, Solicitor.

Friday, May 30, 1890.

SECOND DIVISION.

[Sheriff of Dumfries.

DUKE OF BUCCLEUCH AND OTHERS *v.* KEAN.

(*Ante, Gilbertson* v. *Mackenzie and Beattie*, February 2, 1878, vol. xv., p. 334, and 5 R. 610; *Coulthard* v. *Mackenzie*, July 18, 1879, vol. xvi. p. 768, and 6 R. 1322; *Mackenzie and Beattie* v. *Murray*, December 1, 1881, vol. xix., p. 157, and 9 R. 186.)

Fishings—Salmon Fishings—Public Right of White Fishing—Stake Nets on Foreshore Alleged to be White-Fish Nets Found to be Injurious to Salmon Fishings.

In an interdict by the proprietors of salmon fishings in the Solway against the use of certain stake nets or paidle nets on the foreshore, the Court *held* that although the public had universal right, both at common law and under statute, to fish for white fish by means of fixed nets on the Solway, the nets in question were of the same description and were erected in the same situation as those interdicted in the cases of *Coulthard* v. *Mackenzie*, July 18, 1879, 6 R. 1322, and *Mackenzie and Beattie* v. *Murray*, December 1, 1881, 9 R. 186; and were therefore of opinion, though it was only proved that two salmon had been caught in them, that the complainer was entitled to interdict, and that the respondent was not entitled to erect such nets *ex adverso* of the petitioners' property either in the open salmon season or in close time.

The Duke of Buccleuch and Queensberry, Sir Frederick Johnstone of Westerhall, Baronet, and William D. Mackenzie of Newbie, proprietors of lands and salmon fishings within the limits of the district of the river Annan, brought this action in the Sheriff Court at Dumfries to interdict David Kean, fisherman, Powfoot, Dumfries, "from maintaining or using stake nets, bag nets, or other fixed engines for the capture of salmon on the shores of the Solway Firth, between high and low water-mark, *ex adverso* of lands situated at the foot of Pow, opposite Powfoot village, in the parish of Cummertrees, and to decern and ordain him forthwith to take down and remove the stake nets, bag nets, or other fixed engines for the capture of salmon already erected by him on the shores of the said Solway Firth *ex adverso* of the said lands, and that at the sight and to the satisfaction of an engineer, or other person of competent skill, who may be appointed for the purpose by the Court."

By the Solway Salmon Fisheries Commissioners (Scotland) Act 1877 provision is made for the appointment of commissioners, to be styled "the Special Commissioners for Solway Fisheries." One of the duties of the said special commissioners was to inquire into the legality of all fixed engines erected or used for the taking of salmon in the waters and on the shores of the Solway Firth in Scotland, as fixed under the authority of the Salmon Fisheries (Scotland) Act 1862, and in the rivers flowing into the same, and to abate and remove all such fixed engines as should not be found to their satisfaction to be privileged, as thereinafter provided. By section 4 of the said Act it is enacted that the expression "fixed engine" "shall include any net or other implement for taking fish fixed to the soil or made stationary in any other way, not being a cruive or mill-dam; and 'privileged fixed engine' shall only include such fixed engines as were in use for taking salmon during the open season of one or more of the years 1861, 1862, 1863, and 1864, in pursuance of any grant or charter or immemorial usage." By the 5th section of the Act it is provided that where a claim is made by any person on behalf of a fixed engine that it is privileged, the Commissioners shall, on being satisfied by proof that such engine is in whole or to any extent privileged, certify to that effect, and shall state in their certificate the situation, and also the size and description of the engine, so far as the same is privileged. In the two following sections provision is made for the holding of courts, after due advertisement in the several districts, for determining the legality of the fixed engines in use therein, for which privilege might be claimed.

Commissioners appointed in terms of the Act held courts at Annan in April and May 1878 for determining the legality of fixed engines used within the district of the river Annan which should be claimed as privileged, and issuing certificates accordingly. Various claims of privilege were made and certificates granted, but no certificate of privilege for any fixed engine or engines was granted for the lands specified in the prayer of the petition. At these courts a number of fishermen who fished in the Solway with fixed engines called "paidle nets," appeared before the Commissioners in answer to citation in order that there might be inquiry by the Commissioners touching the legality of the fixed engines, and the fishermen having pleaded that the "paidle nets" or fixed engines were neither erected nor used for taking salmon, the said Commissioners, after receiving evidence and hearing parties, found that it had been proved to their satisfaction that the fixed engines were erected and used for taking salmon, and that it had

not been proved to their satisfaction that the said fixed engines were privileged, and they found the same illegal, and in terms of the Solway Salmon Fisheries Commissioners (Scotland) Act 1877 ordered the said fixed engines to be abated and removed forthwith. The finding of the Commissioners included the case of *James Coulthard*, father-in-law of the defender, who had three paidle nets of a description similar to the defender's nets (the same being fixed engines), and situated on or near the site now occupied by the defender with the three nets after mentioned. Coulthard, along with others, appealed under a special case to the Second Division of the Court of Session against the decision of the Commissioners ordering the removal of the appellant's nets, and urged that as their nets were white fish nets their right to fish for white fish with stake nets was *res judicata*, in respect of the decision in *Gilbertson* v. *Mackenzie*, February 2, 1878, 5 R. 612, but the Court, after hearing counsel, upheld the decision of the Commissioners, and dismissed the appeal.

The pursuers averred—"Some time after the opening of the fishing season this year (1883) the defender erected stake nets, or bag nets, or other fixed engines, between high and low water-mark on the shores of the Solway Firth *ex adverso* of the said lands last referred to. These nets or fixed engines erected by the defender are similar in size and construction to the fixed engines called 'paidle nets' of James Coulthard which were ordered by said Commissioners to be removed. The said nets belonging to defender, which are three in number, are fixed to the soil, and are fixed engines within the meaning of the Salmon Fisheries (Scotland) Act 1862 and the Solway Salmon Fisheries Commissioners (Scotland) Act 1877. The said nets are wholly illegal, and have been erected by the defender without authority or permission of any kind. These nets are still in working order, and since they were erected the defender has regularly captured salmon and sea trout by means of the said nets. The said nets are of a size and description well adapted for the capture of salmon, and their erection and use by the defender is very hurtful to the fisheries owned or occupied by the pursuers. Although the defender has been required to remove the said nets he refuses to do so."

The defender relied on these statutes—The Act of Queen Mary, 1563, cap. 3, which, while expressly prohibiting the use of cruives and yairs where the sea ebbs and flows, expressly exempted such engines when situated upon "the waters of the Solway." The Act of Queen Anne, September 21, 1705, whereby "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 may be taken." The Act 29 Geo. II., cap. 23, which enacted "That from and after the 25th day of June 1756, all persons whatsoever, inhabitants of Great Britain, shall, and they are hereby declared to have power and authority, at all times and seasons, when they shall think proper, freely to take, buy from fishermen, and cure any herrings, cod, ling, or any other sort of white fish, in all and every part of the seas, channels, bays, firths, lochs, rivers, or other waters where such fish are to be found on the coasts of that part of Great Britain called Scotland, and of Orkney, Shetland, and all other islands belonging to that part of Great Britain called Scotland, any law, statute, or custom to the contrary notwithstanding; and if any person or persons whomsoever shall presume to obstruct or hinder any person or persons from fishing as aforesaid, every such person shall, for every such offence respectively, forfeit the sum of £100 sterling, to be recovered in manner hereinafter directed, any law, usage, or custom to the contrary notwithstanding."

The defender averred that from time immemorial, or at least for upwards of forty years, the fishermen on the Scottish shores of the Solway Firth had fished for and captured white fish in the Solway by means of stake nets which, as their name implied, were fixed engines planted between high and low water-mark, and was the only mode in which the catching of white fish there could be carried on so as to be remunerative. In particular, he himself had carried on for several years his employment as a fisherman, using three stake nets for the purpose of catching white fish, principally flounders, upon the shore near an artificial bank called "Powfoot Scaur" made and kept up by the fishermen of white fish. The defender denied that his nets were adapted for the capture of salmon, and that he caught salmon by their means. He also referred to and relied on the case of *Gilbertson* v. *Mackenzie, supra.*

The pursuers pleaded—"(1) The fixed engines erected and used by the defender for the capture of salmon not having been certified as privileged by the Commissioners under the statute of 1877 are illegal, and the pursuers are entitled to decree in terms of the prayer of the petition. (2) The defender's nets being similar to those of James Coulthard, which were ordered to be removed by the Commissioners appointed under the 'Solway Salmon Fisheries Commissioners' (Scotland) Act, 1877,' whose order was upheld and conclusively settled by the Court of Session, the question involved in the defence is *res judicata*, and the defence ought to be repelled, and decree of removal granted as craved."

The defender pleaded—"(1) The question involved in this action of the defender's right to fish for white fish in the Solway by stake nets having been conclusively settled in the Supreme Court, as condescended on, has become *res judicata*, and the present action ought to be dismissed, with expenses. (2) The defender and his predecessors and others, residenters along the shores of the Solway Firth, having, by means of stake nets or fixed engines,

fished for and taken white fish in the said Solway Firth, and in particular, from that part of it opposite the parish of Cummertrees, for time immemorial, and the pursuers having no right or title to interfere with their doing so, the petition should be dismissed, with expenses. (3) The defender, by virtue of the Acts of Queen Anne, 21st September 1705, and 29th George II., cap. 23, as well as common law, has a right to fish for white fish in the waters and along the shore of the Solway by means of stake nets or fixed engines, and the pursuers have no right to interfere with him in the exercise of that right, and the petition ought to be dismissed, with expenses. (4) The defender's nets not being fixed engines erected or used for taking salmon, the statutes, bye-laws, and others founded on by the pursuers, are inapplicable, and the petition ought to be dismissed, with expenses."

At a proof before the Sheriff-Substitute, there was evidence that the nets in question were of the same description as those belonging to Gilbertson, Coulthard, Murray, and others, the legality of which had already been considered. James Barton, police constable, deponed that on 19th February 1883 he visited the defender's nets and found two salmon in one pocket. He was corroborated by Thomas Irvine, water bailiff.

The Sheriff-Substitute (HOPE) pronounced this interlocutor upon 17th December 1883:—"Finds in fact (1) that the petitioners are proprietors of lands and salmon fisheries situated within the limits of the district of the river Annan in the Solway Firth; (2) that the respondent has erected four stake nets or paidle nets on the shore of the Solway between high and low water-mark and within the limits of the salmon fishings belonging to the petitioner William Dalziel Mackenzie, and on that part thereof known as Powfoot; (3) That said nets are, by their situation and construction, calculated to be injurious to the salmon fishings belonging to the petitioner, and especially to those belonging to the said William Dalziel Mackenzie; and (4) that though called upon to discontinue the use of said nets the respondent has refused to do so: Finds in law (1) that the nets complained of are illegal; and (2) that the respondent is not entitled to erect any nets of a similar description between high and low water-mark *ex adverso* of the lands belonging to the petitioners within the district above named; therefore repels the defences: Ordains the respondent within ten days to remove the stake nets in dispute, and *quoad ultra* grants interdict as craved, and decerns: Finds the respondent liable in expenses.

"*Note.*—Except in one particular there is nothing in this case which has not been decided before in the Supreme Court. The respondent seems under the impression that the case of *Gilbertson* v. *Mackenzie*, February 2, 1878, is in his favour, and the petitioners equally found upon it as supporting their contention. The important part of the interlocutor in that case is the following:—'Find and declare that the pursuer as one of the public has right to fish for white fish, including flounders and all other kinds of fish excepting salmon and fish of the salmon kind, in the sea and along the shore of the Solway Firth, and in particular in that part thereof opposite the parish of Cummertrees, and that by means of stake or other nets or engines fixed on the shore in such places and of such a description as not to interfere with the defender's salmon fishing; and repel the defender's pleas so far as opposed to this declaratory finding, under reservation however of the right of the parties respectively to take such legal proceedings, the one against the other, as may be competent for preventing all undue or improper encroachment on or interference with his or their respective right of fishing.'

"This carefully guarded judgment affirms a certain right to fish for white fish in the Solway by means of stake nets to exist in the public, and therefore the respondent maintains that it is an authority in his favour, ignoring altogether the existence of the clause 'in such places and of such a description as not to interfere with the defender's salmon fishing.'

"The learned Judges well saw the difficulty of reconciling the rights of the white fishers and salmon fishers. Lord Ormidale observed—'A judgment in the terms now suggested may possibly, in its practical effect, prevent the pursuer fishing for white fish by any form or description of stake net on the shores of the Solway within the bounds of the defender's salmon fishery, or the bounds of the Annan Fishery Act, but I am not at present satisfied that this must necessarily be the result.'

"Lord Gifford said—'The result of the decision is that there is a right of white fishing in the public, and also an exclusive right of salmon fishing in the defenders, and that both these rights subsist together, and must be exercised consistently with each other. How to reconcile these respective rights is the difficulty. But I feel that without further investigation, and possibly a remit to a man of skill, it would be impossible in this process, as it stands, to determine these questions, which indeed, must necessarily vary in each particular case, and which really involve a consideration of the nature and topography of the whole line of coast in question, and its bearing on the two kinds of fishing, both of which are lawful.' And the Lord Justice-Clerk said, 'I think in the main that the contention is true, and that as a general rule the right of white fishing must be so used as not to interfere with or injure the right of salmon fishing. The difficulty is where and in what way to draw the line.'

"By an Act passed in 1877 Special Commissioners were appointed to deal with the question of fixed engines in the Solway, and they dealt with the paidle nets, and condemned them, having in view the abovementioned decision in *Gilbertson's* case. On appeal the Court of Session refused to interfere. It appears from the proof in this case that there were some of the paidle nets

which were not ordered off by the Commissioners, but this arose because they were not visited from want of time. The Commissioners in their report, of which No. 9/25 of process is a certified copy, say, 'We ordered to be removed such of them as we had seen at the period of our visit to Annan.'

"The defender laid so much stress on the fact that some of the nets were not ordered off, that he seemed to think that therefore they were legal, which of course is an error on his part.

"Notwithstanding the decisions of the Commissioners, the use of paidle nets was continued by some persons, and the father of the present petitioner, W. D. Mackenzie, raised an action of interdict in the Court of Session against a batch of fishermen, including Gilbertson, and was completely successful. The same arguments founded on the original case of *Gilbertson* appears to have been used, as have been used in the present case, and nothing more need be said, except to consider the evidence, to see whether or not the respondent's nets are calculated to injure the salmon fishings. The Sheriff-Substitute considers it quite unnecessary to examine the evidence in detail. It appears to him quite clear that the nets are of the same description as those which the Commissioners condemned, and as those which were interdicted in the Court of Session, and one of the nets is actually situated on the same spot as one of the condemned nets. The respondent no doubt says, and has brought witnesses who also say, that the nets are different, but the differences are in shape and dimensions, not in principle. A slight difference in the shape of a pocket or in the length of an arm does not prevent the nets being similar to former paidle nets. Further, the principle of construction is quite similar to that of salmon nets.

"The defender was obliged to admit that his nets would take salmon if they came to them, but he said that this never happened except on one occasion, when he could not deny the fact, because the police found two in one of his nets.

"In regard to the evidence for the defence, that paidle nets hardly ever take salmon, it is sufficient to say that not only has the contrary been abundantly proved in previous cases, but the list of convictions of paidle fishers in the neighbourhood who have been punished for catching salmon (which has been put in evidence) shows that they almost invariably use their nets for that purpose.

"In the last case referred to, *Mackenzie, &c.* v. *Murray, &c.*, December 1, 1881, 9 R. 186, Lord Young said—'I may say that my own impression upon the evidence is that these nets were erected for the purpose of taking salmon, and have been chiefly profitable as real salmon nets.'

"The Sheriff-Substitute has exactly the same opinion, and he believes that it would not pay to work the nets for white fish alone, as one of the witnesses said was his experience. The respondent, who conducted his own case with remarkable ability, having lost the services of an agent after the record was prepared, objected to all reference to the case of *Mackenzie, &c.* v. *Murray, &c.*, because it was not founded on in the record, but it is in the public reports and of course it is quite competent to use it as an authority in so far as the circumstances are analagous.

"There is, as has been said, one particular in which this case differs from previous ones—viz., that interdict is sought against the use of the nets not only during the open salmon season but also in close time. That was not asked in the case against *Murray and Others*, but the Sheriff-Substitute does not see how he can refuse it. There seems even more reason for preventing the use of the nets in close time when the fish are running to spawn."

The defender appealed to the Sheriff (MACPHERSON), who on 13th February 1884 allowed a further proof by the pursuer "on the question whether the defender's nets would be injurious to the fishings of the pursuers if used during the salmon close time, and also to lay down upon a map or otherwise define the limits within which they desire that any interdict granted may apply."

"*Note.*—The evidence is of the same character which satisfied the Court of Session (*Mackenzie* v. *Murray*, December 1, 1881, 9 R. 186) that nets similarly constructed and situated to those of the defender, were so placed, constructed, and used as to take salmon, and otherwise interfere with the complainers' salmon fishings, and had the interdict only applied to the salmon open season like that granted in *Mackenzie* v. *Murray and Others*, the Sheriff would have had no difficulty in adhering to the interlocutor appealed against. But, for the first time in any of these cases, the prayer for interdict is unrestricted in point of time, and it is thought that there should be in process some evidence as to the habits of the salmon throughout the whole close season, and perhaps some more evidence as to injury from persons of skill to justify going the full length of the interlocutor.

"No doubt if these nets are erected and used for the taking of salmon, they must be illegal at all times, including close time, just as much as an ordinary stake net is illegal in close time, and the report of Mr Anderson to the Court in *Mackenzie* v. *Murray* bears that they would be injurious at all seasons, but the Court remarked that that matter was not remitted to him, and, at any rate, that report cannot be taken as evidence here.

"The prayer of the petition is too indefinite for an interdict, and it seems to have been contemplated that the limit to which it was to apply should be marked off by an engineer. It is in order to give effect to this intention that the pursuers are allowed to explain the precise limits within which they desire interdict to be granted."

The additional proof was led, and upon 10th October 1884 the Sheriff pronounced this judgment:—"Dismisses the appeal, adheres to the interlocutor appealed

against; and further, in case of any difference of opinion, appoints the removal of the nets and engines complained of, to be made to the satisfaction of Mr James Barbour, Dumfries: Finds the defender liable in additional expenses, &c.

"*Note.*—The additional proof led removes the only difficulty I felt as to adhering to the interlocutor under appeal on the merits, and the joint-minute disposes of the difficulty as to vagueness as to the limits within which the interdict applies, and seems to show that there will be no attempt to evade a judgment on the merits. The proof is of the same character as that in the previous cases, of which there have been so many. The facts established by the pursuer's proof are not disproved by the experience of the defender and his witnesses, and they are consistent with the known habits of salmon. The defender made no attempt to construct or place nets in the manner suggested by the reporter to the Court of Session, as that was likely to be injurious to salmon."

The defender appealed to the Court of Session.

Upon 7th July 1885 the Court pronounced this interlocutor:—"Remit to Mr Peter Wilson, Fishery Officer, Girvan, to make trial of nets complained of, or such of them as he shall see proper, with respect to their capacity and fitness to take salmon and fish of the salmon kind; and to that end to order the period or periods and continuance of the trials, the same being during close time; and to appoint suitable persons to have charge and superintendence of said trials under his directions, to secure that they shall be fairly and satisfactorily made, and to report the result to the Court."

Mr Wilson made a report, dated 22nd February 1886, in which he detailed the experiments he made in the end of September and beginning of October 1885. He stated that he fished the river for a fortnight with the result of capturing a number of white fish but no salmon. He explained—"From the silted-up state of the nets, and the successive freshes that set in during the time I was there, salmon were constantly making runs for the river, in mid-channel of the Solway, and were not likely therefore to be found in the nets set on the shore." He further stated—"During my residence at Powfoot I was able to form an impression of the fishery, and obtain some particulars of its general conditions and mode of working, which, as bearing on the question at issue, I beg respectfully to state:—The capacity of paidle nets to catch salmon is, I think, unquestionable. They are aptly described by Mr Anderson in his report to the Court as 'miniature salmon nets.' They have leaders, cross-arms, covered pockets, and, in many instances, coops or barrels in addition. They are simply stake nets of the same general construction as the ordinary salmon stake nets, and the ground selected for fixing them is precisely of the same kind as that chosen for the ordinary salmon nets, and are capable of catching any kind of fish that may come across them. . . . It is inconceivable that nets constructed on the same principle for fishing as salmon nets, set in the same manner, and on salmon fishing ground, should fail to capture salmon, especially as they are the more abundant fish on this part of the coast. . . . The nets are fixed to the soil by poles or stakes between high and low water-mark. They are in many instances so joined as to form a continuous line of netting and occupy a considerable space along the foreshores. They remain fixtures on the same ground from week to week, from month to month, and even in certain cases from year to year, and are owned and fished by the same parties, so that the farmers, cottars, and labourers on the adjoining shore at Powfoot virtually become the public, and exclude all others from the fishing ground by actual possession. The system therefore interferes with the proper conduct of the fishing, and deprives the public of a right of common fishery, which ought to be held open and free to all alike, and for the whole community. . . . It might be a hardship for a time to the cottars and fishers on the shore to be deprived entirely of the opportunity of fishing the ground contiguous to their houses, and to reconcile the two methods of fishing, and prevent the constantly recurring contentions between the salmon and white fishers, I would recommend that the leaders and arms of the paidle nets be limited to a height of 4 feet, one pocket only allowed, and the cover and barrel removed. This, while of no great disadvantage to the net for white fishing, would lessen the chances of catching salmon."

The appellants argued—The reporter appointed by the Court had gone beyond his duty. The remit instructed him only "to make trial of the nets complained of," with respect to their capacity and fitness to take salmon and fish of the salmon kind, but instead of confining his attention to that he made various general observations upon the capacity of the paidle nets to take salmon. These opinions ought not to be looked at. The net used in the present case, and which was complained of, was not the same as was complained of in the previous cases. It was much smaller, it had only one leader and no runaways. This case could not be decided in the same way as that of *Murray* v. *Mackenzie*, because that had been decided in Mr Anderson's report, and that report was not part of this case. The fishers who lived along the banks of the Solway Firth and used the paidle nets were the only public concerned, and no one else had complained. If this mode of fishing was declared illegal a serious loss would be incurred by this public. As regarded the interdict sought during the open time there was no proof that salmon were ever found in the paidle nets except upon one occasion, and then they were handed over to the water bailiff who was present. Even in Mr Wilson's report it was shown that he had caught large quantities of white fish but no salmon. As regarded the interdict sought during close time it was possible that the nets may have caught an occasional salmon, but very few indeed, as no doubt the nets would sometimes hold a salmon if it got

into them, but the number was very small, and the value was so inconsiderable that the Court ought not upon that ground to destroy a flourishing industry.

The respondent argued—The evidence showed that these nets were similar to those condemned in the previous cases. The nets were erected for the purpose of catching salmon under colour of white fishing. The differences upon which the appellants had founded as showing that the nets were not the same as those in the other cases were too slight to need any attention. The prohibition of these nets would not destroy the white fish industry in the Solway as there were other means of catching white fish than by stake nets. Indeed this was the only place where such fishing was pursued. There was proof that during close time the number of fish that were caught by the paidle nets was considerable—*Gilbertson* v. *Mackenzie*, February 2, 1878, 5 R. 610; *Coulthard, &c.* v. *Mackenzie*, July 18, 1879, 6 R. 1322; *Mackenzie* v. *Murray*, December 1, 1881, 9 R. 186.

At advising—

LORD JUSTICE-CLERK—The question is whether certain nets on the Solway, ostensibly put down for the purpose of taking white fish, are or are not calculated to take salmon and fish of the salmon kind, and should be removed because they interfere with the rights of those possessing the salmon fishing on that part of the Solway.

It appears to have been established by a decision in a previous case, that there is a right to fishermen by some local custom upon the shore of the Solway Firth, under which persons who fish for white fish may put down nets for that purpose of a somewhat fixed character, which otherwise would be illegal. And accordingly in the year 1878, a judgment was pronounced in the case of *Gilbertson* v. *Mackenzie*, finding that the pursuer in that case, as one of the public, had right to fish for white fish, including flounders and all other kinds of fish excepting salmon and fish of the salmon kind, in the sea along the shore of the Solway Firth by means of stake or other nets or engines fixed on the shore, but there were added the words, "and of such description as not to interfere with the defender's salmon fishing." Now, my Lords, that judgment having been pronounced, the question necessarily arises in the first place, whether any fixed stake nets of that kind which are there, or any which might be put down of a similar kind, did or would interfere with the salmon fishing of the proprietor of the salmon fishing, and accordingly this case was raised in the Sheriff Court of the county at Dumfries, for the purpose of having interdict granted against certain nets which were there.

My Lords, I have come to the conclusion upon the proof, that there is sufficient evidence to show that these stake nets which are used in the Solway are nets which do interfere with the rights of the salmon fishing proprietor, and that notwithstanding anything that was said in the case of *Gilbertson* v. *Mackenzie* it is perfectly consistent with that case that these stake nets should not be allowed to remain where they are. It is unnecessary to go into the proof in detail to show the grounds upon which I have arrived at that conclusion, which I believe is the conclusion at which your Lordships have arrived. It seems conclusively to show that such nets as are now standing on the Solway shore, at the place in question, are nets calculated to take salmon, and that they do take salmon, and that the result of that is necessarily that the rights of the salmon fishing proprietor are interfered with. The respondent in the Court below is therefore not in a position to show that he is within the decision in the case of *Gilbertson* v. *Mackenzie*—that the nets which he has put up are of such a description as not to interfere with the salmon fishing. Therefore upon these grounds I am for adhering to the judgment given in the Sheriff Court.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.

The Court pronounced the following interlocutor:—

> "Find in fact (1) that the petitioners are proprietors of lands and salmon fisheries situated within the limits of the district of the river Annan, within the limits of the Solway Firth; (2) that the respondent has erected four stake nets or paidle nets on the shores of the Solway, between high and low water-mark, and within the limits of the salmon fishings belonging to the petitioner William Dalziel Mackenzie, and on that part thereof known as Powfoot; (3) that the nets complained of are erected in such places, and are of such a description, as to interfere with the petitioner's salmon fishing; (4) that the said nets are illegal; and (5) that the respondent is not entitled to erect any nets of a similar description between high and low water-mark *ex adverso* of the lands mentioned in the prayer of the petition: Therefore dismiss the appeal, and affirm the judgments of the Sheriff-Substitute and the Sheriff appealed against: Of new ordain the defender within five weeks from the 30th day of May to remove the said nets, and that at the sight of Mr Peter Wilson, fishery officer, Girvan, and failing his doing so, grant warrant to the petitioner to remove the said nets at the expense of the appellant: Grant interdict as craved: Find the petitioner entitled to expenses," &c.

Counsel for the Appellant—Comrie Thomson—Rutherfurd Clark. Agent—Robert Broatch, L.A.

Counsel for the Respondents—R. Johnstone—C. K. Mackenzie. Agents—Welsh & Forbes, S.S.C.