LORD M'LAREN — I am of the same opinion. The rule having been authoritatively laid down that the net must be constantly in motion to bring a mode of fishing within the category of legal fishing by net and coble, it is impossible to say that this is true of a system in which the net remains stationary for hours at a time. I think that the case is perfectly clear, and that the Lord Ordinary is right.

LORD KINNEAR — I am of the same opinion. The ground on which we were asked to arrive at a different conclusion was that the exposition of the law given in Lord Westbury's opinion in *Hay* v. *The Magistrates of Perth* was a mere *dictum* by the way which we were at liberty to examine, and that if we did so and compared it with previous cases, we should find that it is not sound.

I agree with your Lordship as to the principle of that judgment, and I do not see that it was possible for this Court or the House of Lords to decide such a case as that of *Hay* without drawing a defining line between the methods of fishing for salmon which are legal and the methods which are illegal; and I think that the House of Lords has done that in such a way as to be binding on this Court. I see no reason to doubt that the mode of fishing now in question falls within Lord Westbury's description of the modes of fishing that are not legal, and it is clear that it was held to be an illegal method by Lord President M'Neill, of whose opinion Lord Westbury approved. I therefore concur.

LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuers — Sol.-Gen. Dickson, Q.C.—C. N. Johnston—MacRobert. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Defenders—Balfour, Q.C. — Dundas, Q.C. — Blackburn. Agents — Dundas & Wilson, C.S.

Friday, March 3.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

DUKE OF ATHOLL AND OTHERS *v.* GLOVER INCORPORATION OF PERTH AND OTHERS.

Res judicata—Identity of Persons—Riparian Owners of Fishings.

Certain proprietors of salmon-fishings on the river Tay, seven in number, raised an action of declarator against another proprietor to have it found that the use of certain nets known as hang or drift-nets on the river Tay was illegal. The Court held that the use of the nets was not illegal, and assoilzied the defenders.

Thereafter an action was raised for the purpose of obtaining declarator that the use on the Tay of nets indistinguishable in use or construction from those dealt with in the first action was illegal. The pursuers were eight proprietors of salmon-fishings on the Tay, five of whom had been pursuers in the first action. The defenders were certain other proprietors of salmon-fishings on the Tay, and did not include the defender in the former action. The defenders pleaded that the previous decision was *res judicata*, on the ground that all the pursuers in the present action were represented by those in the former action, that the subject-matter of the two actions was the same, and that as the various proprietors of salmon-fishings in the Tay had identity of interest in a common subject, the defenders in the present case were represented by the former defender, or alternatively that they were represented by the former pursuers, who represented the interest of all the proprietors on the Tay.

The Court, after a proof, *held* (*rev.* judgment of the Lord Ordinary) that the previous decision was not *res judicata*.

Salmon Fishing—Fixed Engine—Net.

Held (on the authority of the case of *Wemyss* v. *Zetland*, November 18, 1890, 18 R. 126) that the use of "hang-nets" or "drift-nets" for catching salmon on the river Tay was not illegal.

An action was raised at the instance of the Duke of Atholl and seven other proprietors of salmon-fishings on the river Tay, its tributaries, and Loch Tay against the Glover Incorporation of Perth and other proprietors of salmon-fishings on the Tay and their tacksmen, concluding for declarator that the defenders were not entitled "to fish in any part of the river Tay for salmon or fish of the salmon kind with nets of the description known as hang-nets or drift-nets;" and for interdict against the defenders fishing with these nets.

The pursuers averred—"(Cond. 3) The defenders, the said lessees, by themselves and their sub-tenants, have during the past season been in the practice of using in their said fishings a species of net known as the drift or hang-net. The use of the said nets has been expressly sanctioned by the defenders, the foresaid proprietors, as lessors of the fishings occupied by said lessees. These nets are from 200 to 280 yards in length, and from 12 to 15 feet in depth. They are fitted with a small rope along the bottom, sunk with lead, or a heavier rope which keeps the net sunk without lead. There is a cord along the top with cork floats placed at distances from 10 to 12 feet apart. The mesh is generally about 12 inches all round. The said nets are used at the turn of the tide both at high and low water when the current is least, when they are run out of a boat over the stern in a straight line across the river, and they maintain that position as practically fixed or stationary for a considerable time. They are attached by one

end to the boat to prevent their being lost, especially at night. During slack-water they are fixed or stationary, and the water is practically slack for the whole or nearly the whole of the time during which the nets are in. The salmon caught in them are either hung or caught by their gills, according to the size of the fish, and become entangled in the net. As often as the floats indicate that a fish is caught, the boat leaves its position and is rowed along the line of the net, and the fish is then and there taken out, the net being left as before. The fishermen are generally provided with a long cleek or gaff, and this is often used to secure fish that strike the net and are only momentarily entangled or confused. The length of time the nets are in the water is generally about three quarters of an hour, and during that time they remain stretched across the current of the stream, and they effectually obstruct the passage of fish either up or down. At each tide the whole breadth of the river is blocked against the passage of fish by a series of these nets for a period of about three quarters of an hour, and at a time specially favourable for the run of the fish. These nets are used not only for the purpose of taking fish as aforesaid, but for the purpose of acting as leaders to toot-and-haul-nets fixed at the shore, and for keeping back the fish not so taken that they may be taken by the draught-nets that are used as soon as the turn of the tide makes such fishing available. The statements in answer are denied."

They further averred that the portions of the river where these nets had been used were perfectly suited for net-and-coble fishing in the ordinary way. They maintained that the use of these nets by the defenders was illegal at common law, and contrary to the provisions of various Acts of Parliament, and averred that the use of them during past seasons had been very injurious to the fisheries on the river, both by the illegal capture of a large number of fish and by scaring the fish away.

The defenders, while admitting the substantial accuracy of the description of the method of fishing given by the pursuers, denied that the nets were fixed or stationary, that they blocked the whole breadth of the river, and that they were used as leaders for the toot-and-haul-nets. They averred—"(Ans. 5) The pursuers are called upon to specify the Acts of Parliament upon which they found. In an action raised by the Earl of Wemyss and others against the Earl of Zetland and others, it was decided by the Court of Session, on 18th November 1890, that fishing in the river Tay, in waters adjoining those belonging to certain of the defenders, by means of nets of precisely the same description as those complained of in this action, was a legal and proper mode of fishing. The said action was raised for the purpose of obtaining a judgment as to the legality of the said mode of fishing; it was a test case, and the decision has since regulated all dealings with salmon-fishing rights in the river Tay."

The defenders pleaded—"(1) *Res judicata*, in respect of the judgment referred to in Answer 5, or at all events the pursuers are barred by that judgment from questioning the legality of the mode of fishing employed by the defenders."

The Lord Ordinary (Low) on 5th November 1897 repelled the first plea-in-law for the defenders and allowed a proof before answer.

The defenders reclaimed, and the Court varied the interlocutor by adding after "defenders" the words "in so far as it is stated as a bar to proof being allowed, reserving it *quoad ultra*."

A proof was held, and as the result the pursuers admitted that the hang-nets which they were seeking to have declared illegal could not be distinguished in construction or use from the nets which were held to be not illegal in the case of *Wemyss* v. *Zetland*, November 15, 1890, 18 R. 126. The proof was further directed to the defenders' plea that the decision in that case constituted *res judicata* in the present.

In *Wemyss* v. *Zetland* there were seven pursuers, of whom three reappeared as pursuers in the present action, while two were represented by their heirs; accordingly three of the eight pursuers in the present action were new. That action was directed solely against Lord Zetland and his tenants, and he was not called as defender in the present action.

The defenders led evidence and produced minutes of the Tay Fishery Board, and letters of its clerks, with a view to showing that the selection of the pursuers in both actions was matter of arrangement among the individual members of the Board, and that they were really representatives of all the proprietors.

Mr Mackenzie, one of the clerks to the Tay District Fishery Board, deponed—"The expenses of the action at the instance of *Lord Wemyss and Others* v. *Lord Zetland and others*, in 1889 and 1890, charged in our business accounts against the proprietors in the Tay fishery district, were included in the assessment laid on those persons, including, I believe, the expenses found due to Lord Zetland by the pursuers of the action. (Q) Were they first paid by the general assessment upon all the salmon-fishery proprietors as an expense incurred on their behalf?—(A) They were paid in the ordinary course; they were recovered as part of the assessment. All the fishery proprietors were asked payment of them, and none of them declined; they paid. The expenses were all paid. (Q) And you levied this assessment on Lord Zetland himself?—(A) My recollection is that these expenses were included in the ordinary assessment, and no one objected. (Q) Was not the only reason why that action was not taken at the instance of the Board as such, that you had been advised, or you advised the Board, that they could not sue common-law actions, and that the proper way for the Board to sue a common-law action was to sue in individual names?—(A) The Board having been precluded by a previous decision of the Court from suing such an action, the only course was for the

Board to appear by individuals. But for that decision I presume the action would have been taken at the instance of the Board."

The Lord Ordinary (STORMONTH-DARLING) on 18th May 1898 repelled the defenders' plea of *res judicata*, and assoilzied them from the conclusions of the summons.

"*Opinion.*—It is now admitted by the pursuers that the hang-nets or drift-nets which they seek to have declared illegal in the river Tay cannot be distinguished in construction or use from the nets which were held by the Second Division of this Court to be not illegal in *Wemyss* v. *Zetland*, 18 R. 126. That being so, the action must fail in the Outer House, whatever may be its fate elsewhere.

"But the fact that I am bound by authority to assoilzie the defenders does not absolve me from dealing with the plea of *res judicata*, because that plea has only been repelled as a bar to proof, and *quoad ultra* it has been reserved. It must therefore be disposed of one way or other in the light of the proof which has been taken, and there are possible views of the case in which it may come to have greater practical importance than it has at the present stage.

"I am of opinion that it ought to be repelled. The subject-matter of the two actions being the same, and the *media concludendi* the same, the whole question comes to be whether the parties are in law identical.

"In the action of *Wemyss* v. *Zetland*, on which the plea is founded, there were seven pursuers, of whom three reappear as pursuers of the present action, and two are represented by their heirs. Thus among the present pursuers, who are eight in number, only three are new. But I am satisfied on the evidence that even these three were truly represented in the former action, because the minutes of the Tay Fishery Board and the letters of its clerks clearly establish that the selection of pursuers in both actions was matter of arrangement among the individual members of that Board in order to get over the difficulty that by the decision in the case of *Robertson*, 15 R. 40, the Board itself had no title to sue an action for restraining an illegal mode of fishing. If, therefore, the sole question had been whether the present pursuers were open to the plea of *res judicata*, I should have held that they were.

"But then it is necessary also to inquire whether the defenders who state the plea are *in titulo* to state it. Now, the defenders in this action are the proprietors of four of the lower salmon-fishings on the Tay, and their respective tenants. Not one of these persons was a defender in the former action, which was directed solely against Lord Zetland and his tenants. Their interest, no doubt, is the same; and it was strongly maintained that identity of interest in a question of this kind is the same thing as identity of person. The present defenders cannot, of course, be *in titulo* to plead the former decision as in their favour, unless it would have been pleadable against them if it had gone the other way. I ask, therefore, whether a judgment in 1890 adverse to Lord Zetland would have been *res judicata* against the Glovers' Incorporation and the other defenders in this action?

"I fail to see why it should. There is no evidence of any concert or co-operation among the lower proprietors such as there undoubtedly was among the upper. Lord Zetland was not put forward by the lower proprietors as their representative; he was selected for attack by the pursuers. The present defenders, so far as appears, had no control over his conduct of the case. If he had failed in the Courts of Scotland, and had chosen not to appeal, why should the present defenders have been foreclosed from ever taking the judgment of the House of Lords on a question deeply affecting their individual rights, merely because their interest in that question was the same as his?

"Erskine's statement of the law (bk. iv. tit. 3, sec. 3) is—'No defender is entitled to the plea of *res judicata*, or that the cause has been already finally determined, unless the decree founded on in proof of that allegation has been given forth in a process litigated between the same parties or their ancestors or authors respecting the same subject, and proceeding upon the same *media concludendi* that are contained in the subsequent actions brought against him by the pursuer.' There is, of course, no hardship in a man being held bound by the conduct of his ancestor or author in a litigation about a subject which has descended to him. I am aware that that phrase has been extended beyond the limits of strict representation. Succeeding heirs of entail in questions about the entailed estate, as in *Leven* v. *Cartwright*, 23 D. 1038; different members of the same voluntary association in questions about the affairs of the association, as in *Gray* v. *M'Hardy*, 24 D. 1043; the body of heritors in a parish and the common agent in a prior locality in questions with individual heritors, as in *Duke of Buccleuch* v. *Common Agent of Inveresk*, 7 Macph. 95; individual shipowners on the Clyde and the Clyde Trustees in questions about the regulation of the river, as in *Glasgow Shipowners' Association*, 12 R. 695—are all instances of that extended representation. The widest extension of all is in the case of rights-of-way, where it has been held that a decree against individual members of the public would be *res judicata* against all the world (*Macfie*, 11 R. 1094). That, I say, is the widest extension, because there is no bond of union among members of the public except community of interest. On the other hand, an *actio popularis* like a right-of-way case is exceptional, and the principle underlying all these cases is that a particular individual or estate is not to be harassed by a second action about the same thing, where the question has once been fairly tried out at the instance of some-one who was either the author, or the associate, or the mandatory, or in some proper sense

the representative, of those who are trying to raise the question over again. That seems to me to afford no warrant to a defender, against whom and against whose estate no previous action has ever been directed, for pleading *res judicata* on the strength of a decision in favour of somebody else with whom he has no sort of bond or connection, except that their interests happen to be the same—just as, in my judgment, he would not be precluded from disputing the former decision if it happened to be adverse. In either case, of course, the former decision would have its full weight as an authority, but it would not have the more stringent effect of foreclosing even the consideration of the merits.

"This very question was mooted in one of the Tay fishing cases at the beginning of this century (*Earl of Kinnoull* v. *Dalgleish*, March 21, 1805, 4 Pat. 671), for Lord Kinnoull and other proprietors, who had obtained interdict against the use of stake-nets on the fishings of Mr Hunter of Seaside, pleaded that case as *res judicata* against another lower proprietor, Mr Dalgleish of Scotscraig. I read Lord Eldon's judgment at p. 677 of 4 Paton's App., in rejecting that plea, as going quite as much on the fact that the respondents were different, as on a possible slight variation in the question at issue founded on a difference of locality. I shall therefore repel the defenders' plea of *res judicata*, but I shall assoilzie them, with expenses."

The pursuers reclaimed, and argued—It was admitted that there was no material difference in the nets and *modus* of working them from those affected by the judgment in *Wemyss* v. *Zetland*, Nov. 18, 1890, 18 R. 120, but this was not fishing by net-and-coble, but by fixed engines, and accordingly that judgment ought to be reconsidered. In any event, it did not constitute *res judicata* in the present action. Taking the standard laid down by Erskine in book iv. tit. 3, sec. 3, quoted by the Lord Ordinary, the case was still higher than the Lord Ordinary had put it, for in the first place the evidence did not show that the pursuers were the same. The actions were not at the instance of the Board, for that would be *ultra vires—Tay District Fishery Board* v. *Robertson*, Nov. 16, 1887, 15 R. 40. Nor were the actions authorised by the same individuals, for three of the pursuers here were not pursuers in the former action, and none of them were represented there, there being no evidence that they had entered into any agreement to that effect. Nor was the subject-matter of the actions the same. It was not enough that the question should be one of general public law in which the parties were interested. There must be a particular subject and common interests in it—a patrimonial interest in some heritable subject, and not different interests in several subjects—*MacArthur* v. *County Council of Argyll*, March 1898, 25 R. 829, Lord Kyllachy, at p. 831. Each proprietor ha sasine only in his own salmon fishings, and there was no common interest in the same subject. If the respondents' contention were sound, they would be bound to argue that the decision against Lord Zetland was *res judicata*, not only against proprietors in the Tay, but all over Scotland. This argument was closely connected with the question whether there was any identity between the defenders in the two cases. It had been shown that there was not such identity of interest as was equivalent to identity of persons, and not one of these defenders had been a defender in the previous action, which was directed solely against Lord Zetland. There was no evidence of any concert or co-operation between the lower proprietors, and it therefore could not possibly be maintained that there was any identity between the defenders in the two actions. As to the alternative view that the present defenders were represented by the pursuers in the first action, which was argued now for the first time, it was not supported by any averments, there was no evidence to support it, and it was open to the same objections as the first view. The first action had been compared to a special case to which all the proprietors assented, but the Court would be very slow to hold them bound, unless they specially gave their assent to being so bound.

Argued for respondents—The Lord Ordinary's statement of the conditions of *res judicata* was substantially correct, and these were all fulfilled in the present case. As was stated by him, the minutes of the Tay Fishery Board, and the letters of its clerks, clearly showed that the three new pursuers were represented in the case of *Wemyss* v. *Zetland*, because the selection of pursuers in both actions was matter of arrangement among the members of the Board in order to get over the difficulty raised by the case of *Robertson*. Nor could there be any doubt that the subject of the two actions and the *media concludendi* were the same, the subject-matter being the right of salmon-fishing in which the proprietors had a common interest, and the legality of a certain mode of fishing. But while the present defenders were not defenders in the last action, identity of interest in a question of this kind was equivalent to identity of persons. A question of the legality of fishing having heen sharply decided by persons having a right and interest was sufficient to bind persons having that same right and interest, viz., the right in travelling fish. The defenders' interest was the same as Lord Zetland's—to have the legality or illegality settled; they were therefore represented by him, and the decision in his case would be binding on them. The Court would look, not at the individuals, but at the community of interest—*Jenkins* v. *Robertson*, April 5, 1867, 5 Macph. (H. of L.) 27, at p. 35; *Gray* v. *M'Hardy*, June 4, 1862, 24 D. 1043. The case of the *Earl of Kinnoull* v. *Dalgleish*, to which the Lord Ordinary referred, was clearly distinguishable, because there the whole question of legality depended upon the *locus*, and accordingly the difference of locality made all the difference between the cases. Alternatively the pursuers in *Wemyss* were representing not only the interest of the upper proprietors, but of the whole

proprietors of salmon-fishings in the Tay, and accordingly all the parties in the two cases were the same. This was proved by the correspondence. The whole proprietors were represented in the first case because they afterwards paid the expenses, thus homologating the action of their representatives, which was equivalent to a mandate. The first action was therefore like a special case, to which all the proprietors assented. It made no difference that the present defenders were thus represented by pursuers, for the action was a test one, fought by their representatives. It was not necessary to have antagonism between the parties if they were the same in the two actions, and the same interest was at stake.

At advising—

LORD PRESIDENT—The plea which stands first in the order of precedence is that of *res judicata*. The averments made in support of it did not disclose any very clear appreciation of the facts necessary to found the plea. They were judged of, however, when the case was formerly before us, with the leniency appropriate to a stage of proceedings when regard must be had to the general convenience of having the case brought together for final decision. On the plea of *res judicata*, therefore, as well as on the merits, proof has been led, with the singular result that the plea was maintained in the Outer House on the ground that the interests of the present defenders were represented by the defender in the previous action, while in the Inner House it was also alternatively stated that the documents which, since the Lord Ordinary's judgment, have been printed had brought home to the defenders the belief that they had been represented by the pursuers in the previous case. It would be singular if a plea possessing such elasticity had any solid foundation.

The original view of the defenders was at least intelligible, but I think that the argument breaks down at every stage. Three of the present pursuers, the Duke of Atholl, Lord Breadalbane, and Lord Ancaster, were not, on the face of the proceedings, pursuers of the former action.

I am unable to agree with the Lord Ordinary that any one of these noblemen was represented in the former action by the pursuers of that action, for I find no good evidence that any one of them entered into any agreement to that effect. The minutes of the Fishery Board and the letters of its clerks are not in my opinion of themselves proper evidence of that fact, and there is no other evidence.

On the other hand, there is no evidence at all that the present defenders, or any of them, agreed to be represented by Lord Zetland in the former action. He was singled out for attack by the former pursuers, and the defenders had no contractual relations with him in the matter.

It is said, however, that without any such agreement, the present defenders were bound by the result of Lord Zetland's defence if it had failed, and are equally entitled to found on its success. The theory is that the question decided in the former case was the legality of drift-nets, and that thus the subject-matter was the same, and then that, as the owners of salmon-fishings in a river form a community, a decision given in an action (*in foro contentioso* of course) as to a mode of fishing binds the other proprietors. I am unable to accept either part of this theory, and first of all I am not prepared to allow, as does the Lord Ordinary, that the subject-matter was the same. To support the plea of *res judicata* it is not enough that the point raised in the action is the same (*per* Lord Chelmsford in *Leith Dock Commissioners* v. *Miles*, 3 Macph. (H. L.) 14). Even although the same rule of law applies to all persons fishing for salmon, Lord Zetland's right is one subject-matter, and the several rights of the present defenders are other subject-matters. Again, I find it difficult to see why if the present defenders are affected by Lord Zetland's case as *res judicata*, the same should not be said of the owners of salmon-fishings in other rivers. The point decided had no special reference to the Tay; it is a point of general law. The defenders seem to have no good reason for limiting their theory to the river Tay, except a natural shrinking from a very startling result. They say that the proprietors of salmon-fishings in a river form a community, and in a sense that is true; they have a common interest in the frequentation of the river by salmon, and in the breeding of the fish within the river. But the present action, and innumerable other actions, illustrate the obvious fact that each man's right of salmon-fishing is a right separate from, and sometimes antagonistic to, that of his neighbour, and that his interest in having a particular mode of fishing declared legal or illegal may vary according to a variety of circumstances. The owners of fishings are not partners in a common fund—each has his separate estate.

Accordingly, I do not think that this action relates to the same subject-matter as did *Wemyss* v. *Zetland*, or that the present defenders were represented by Lord Zetland so as to be bound by, or entitled to found on, the result of his defence.

The basis of the alternative theory of the defenders, viz., that they were parties to *Wemyss* v. *Zetland*, is that they were truly pursuers, suing in the name of the ostensible pursuers, and this seems to me to be unsupported by evidence. A great deal seems to have been assumed and taken for granted by the clerks of the Tay Fishery Board, and I make no doubt that a well-deserved confidence was reposed in the management by those experienced gentlemen of the interests of the proprietors generally. But I find nothing to prove about any one of the present defenders that he agreed to combine in suing Lord Zetland, and if appeal be made to the fact that everyone submitted to pay his share of the costs, this would equally prove that Lord Zetland himself was a pursuer. The other difficulties in the way of the defenders' original and more plausible theory

of his plea equally attended the view which I have last noticed. I am therefore against the plea of *res judicata*.

On the merits of the case it was distinctly stated by the Solicitor-General for the pursuers that he adhered to the admission noted by the Lord Ordinary in the first sentence of his opinion, viz., that the nets in question cannot be distinguished in construction or use from the nets which were the subject of decision in *Wemyss* v. *Zetland*. This being so, I think we must follow the decisions in that case and in the previous case of *Allan*, proceeding entirely on their authority.

I am for adhering.

LORD M'LAREN—I agree that the case of *Wemyss* v. *Zetland* and the other case of *Allan's Mortification* constitute precedents which are binding on this Court. But neither of these cases has in the present question the degree of authority that constitutes *res judicata*. The distinction is an important one for the parties in the present case, because if they are bound by *res judicata* they would be unable to obtain a decision of the House of Lords on the merits of the present question, or to bring under review the doctrine laid down in the cases to which I have referred.

Now, without entering on a discussion of what constitutes *res judicata*, I think it may be taken that it means a contract made by the parties to the present proceedings, or by someone who had authority to bind them, to submit the questions in dispute to adjudication. It is perfectly clear that neither of the present parties, nor anyone with their authority, has bound them by the decision of *Wemyss* v. *Zetland*, nor have the parties ever agreed that they would be bound by that decision. The case of *Wemyss* v. *Zetland* has all the authority which belongs to a well-considered decision of this Court, and we are all agreed that we must follow the decisions which have been pronounced. But I may add that I am not desirous of giving any opinion on the merits of the question, because I cannot help seeing that it would be difficult to reconcile the principle of these decisions with the decision which we have given in the case last considered.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers — Sol.-Gen. Dickson, Q.C.—C. N. Johnston. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Defenders—J. B. Balfour, Q.C.—Dundas, Q.C.—Blackburn. Agents—Dundas & Wilson, C.S.

HIGH COURT OF JUSTICIARY.

Friday, March 3.

(Before the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff).

GRAY & COMPANY *v.* MACKENNA.

Justiciary Cases—Complaint—Relevancy—Truck Amendment Act 1887 (50 *and* 51 *Vict. cap.* 46), *sec.* 6

Held that a complaint against a firm under section 6 of the Truck Amendment Act 1887, which did not give the names of the partners or of the manager or of the foremen through whom alternatively the offences libelled were said to have been committed, was irrelevant from want of specification.

This was a case stated for appeal at the instance of John Gray & Company, shoe manufacturers, Maybole, who had been convicted before the Sheriff-Substitute of Ayrshire at Ayr (PATERSON) of a contravention of sec. 6 of the Truck Amendment Act 1887. The complaint charged such contravention in respect that they being the employers of Patrick Kelly, Robert Austin, John M'Gee, Peter Clark, John Dunlop, and William Killin, all shoemakers, and all workmen within the meaning of the Truck Acts 1831 and 1887—(First) did, between 25th April and 9th May both 1898, in their said shoe factory at Maybole, by themselves or their manager or foremen, impose as a condition in or for the employment of the said Patrick Kelly, Robert Austin, and John M'Gee, that they should not expend at the store of the Carrick Provident Co-operative Society in Maybole, or at the store of any other co-operative society, any wages or portion of the wages paid to them; and (Second) did by themselves or their manager or foremen, in said factory, between 5th and 9th May 1898, dismiss the said Peter Clark, John Dunlop, and William Killin from their employment on account of their expending at said Co-operative Store in Maybole the wages paid to them by the said John Gray & Company, or a portion thereof.

Objections to the complaints were stated for the appellants, and amongst these was the following:—"(3) That the complaint was irrelevant in respect that it was wanting in specification by the use of the alternatives 'by themselves or their manager or foremen,' and in so far as the names of the manager and foremen referred to in the complaint were not stated." The Sheriff-Substitute repelled these objections and also an objection taken in the course of the trial to the admission of the evidence of the workmen named in the complaint as to statements made to them by foremen of the appellants who were not named in the complaint, and whose authority to make such statements had not been proved at that stage.

The Sheriff-Substitute after hearing evidence convicted the appellants and sentenced them to pay a penalty of £4.

The second question of law for the opinion