unsympathetic with her natural desire to keep in touch with her son, and to secure the maintenance of affectionate relations between the two children of the now dissolved marriage. At the same time I do not ignore the fact that Dr Westergaard, as appears from the correspondence laid before us, while he denies Mrs Westergaard's legal right to obtain access to her son, does not fail to recognise his obligation, if not from the point of view of morals at least from that of humanity and good feeling, to afford such access. In such circumstances it is regrettable that the parties should not have left the adjustment of terms of access in the hands of some mutual friend. I have a strong impression that if Dr Westergaard could now see his way to accept the offer made by the petitioner at the bar, namely, to leave the adjustment of terms and conditions to the senior counsel of the parties, such adjustments to embrace what raises the same question, Dr Westergaard's access to his daughter, all occasion for further friction would be happily ended.

The respondent pointed out that no averment is made by the petitioner against him as a fit custodier of her son. In her petition she claims that "access ought to be granted to her in respect of her natural rights as his mother." It was not disputed that, if it were relevantly averred that the interests of the child demanded either a change of custody or an arrangement for access, the Court would have power to interfere in order thus to safeguard and secure the child's interests. I think the respondent is right in his contention that no relevant case is averred for interference in order to preserve the child's interests. But Mr Constable maintained that by the law of Scotland the only case in which an innocent parent, whether native or foreign, if resident in Scotland, will be refused access to his or her legitimate pupil child is where it is proved, to the satisfaction of the Court, by the other parent or other interested person, that such refusal is necessary in the interests of the child. As a general proposition this was not disputed. But the circumstances here are so special as to make the ordinary rule inapplicable. It appears to me, as the result of the whole papers in the proceedings in the Danish Courts, that the parties agreed to abide by the decision of the Danish Courts not only in the matter of divorce but in all questions incident thereto, including questions of custody and access. It is noticeable that in the protest lodged by the petitioner in the Danish Court the question of access was raised for decision by that Court, although even according to that protest the terms of access were left to be adjusted by the parties without any provision as to what was to happen if the parties failed to agree. Now it appears that the Danish Court will give effect to such an arrangement and will not decree access in such a case to the innocent spouse. It was argued that such an arrangement would not be held binding in Scotland. It does not appear to me that any of the cases quoted establish the petitioner's contention on this point. They were cases in which the marriage stood undissolved, and in which, moreover, there was nothing of the nature of a mutual arrangement relating to more than one child. I may add that, in my view, no question of a private agreement between spouses, or of a decree of Court following on such an agreement, involving an arrangement which is *contra bonos mores*, arises in this case. Our law may not countenance such arrangements or even allow them, but I see nothing in its nature immoral in spouses agreeing that in the event of separation, temporary or final, the husband shall obtain exclusive charge of the boys and the wife exclusive charge of the girls of the marriage.

LORD DUNDAS was sitting in the Extra Division.

The Court dismissed the petition.

Counsel for the Petitioner—Constable, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Respondent—C. D. Murray, K.C.—A. M. Mackay. Agents—J. & R. A. Robertson, W.S.

Saturday, July 18.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

MANSFIELD *v.* PARKER AND ANOTHER.

Fishings—Salmon Fishings—White Fishing—Fixed Nets in Solway—Paidle Nets without Covers.

Circumstances in which *held* (*rev.* judgment of Lord Skerrington, Ordinary), in an action of interdict by the proprietors of salmon fishings against certain members of the public engaged in white fishing in the Solway, that paidle nets though uncovered were so placed and of such a description as to be fitted to catch salmon, not as a mere incident of white fishing, but as a substantial and valuable portion of the total catch, and that it was not necessary for the complainers to prove direct injury to their salmon fishings, and interdict *granted* against the use of such nets.

The Earl of Mansfield and William Dalziel Mackenzie of Newbie in the county of Dumfries, *complainers*, brought a note of suspension and interdict against John Fisher, Craigwood, Glencaple, James Parker, Bankend, and Joseph Douglas, Wardlawmains, Dumfriesshire, *respondents*, in which they craved the Court to "interdict, prohibit, and discharge the said respondents from erecting and using stake nets, paidle nets, or other fixed engines for the purpose of capturing salmon or fish of the salmon kind, or fitted to capture salmon or fish of the salmon kind, or of such size and construction, or in such situations, or used in such manner and at such times as to pre-

judice, interfere with, or injure the complainers' rights of salmon fishings on the river Annan or estuary thereof, and upon the sands and shores between high and low water-marks within the limits of the district of the river Annan, fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862."

The complainers pleaded — "In respect that the use of said stake nets as constructed and situated constitutes a material injury to the salmon fishing rights of the complainers, interdict should be granted as craved."

The respondents pleaded, *inter alia*—"(1) The nets in question being situated within the water of the Solway, where the sea ebbs and flows, are privileged by the Act of Queen Mary, 1563, cap. 68, said privilege being reserved by the first section of the Statute Law Revision Act, 6 Edw. VII, cap. 38. (2) The respondent James Parker, in erecting and using the nets in question, having acted in pursuance of his just and legal rights, is entitled to be assoilzied from the conclusions of the action. (3) The respondent James Parker is entitled to be assoilzied from the conclusions of the action in respect that (first) he has not erected or used the nets in question for the purpose of catching salmon or fish of the salmon kind; (second) and the said nets are not of such size, construction, or so situated or used as to injure the complainers' rights of salmon fishing to any substantial or material extent."

The respondent Fisher did not appear.

Interim interdict was granted and thereafter, the note having been passed, the Lord Ordinary (SKERRINGTON) allowed a proof.

The *facts* of the case and the import of the proof sufficiently appear from the opinion of the Lord Ordinary, who on 17th December 1912 refused the prayer of the note of suspension and interdict.

Opinion. — "The complainers are the Earl of Mansfield and Mr Mackenzie of Newbie, who are the proprietors of salmon fishings within the salmon fishery district of the river Annan. At the date when the present note of suspension and interdict was presented, the respondents, John Fisher, James Parker, and Joseph Douglas, were fishing each with a range of three paidle nets on the Blackshaw Bank, a large sandbank which is dry at low tide, and which is situated in the parish of Caerlaverock and county of Dumfries. An imaginary line running north and south across this bank divides the salmon fishery district of the river Annan on the east from the district of the river Nith on the west. The complainers ask for an interdict to restrain the respondents from 'erecting and using stake nets, paidle nets, or other fixed engines for the purpose of capturing salmon or fish of the salmon kind, or fitted to capture salmon or fish of the salmon kind, or of such size and construction, or in such situations, or used in such manner and at such times as to prejudice, interfere with, or injure the complainers' rights of salmon fishings on the river Annan or estuary thereof, and upon the sands and shores between high and low water-marks within the limits of the district of the river Annan, fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862.' The complainers' pleadings are as confused as their prayer, and they mix up in a very perplexing manner three separate and distinct grounds of action, viz.—(1) The old Scots Statutes, and particularly the Act 1563, c. 68, which have been construed as prohibiting fixed engines for the capture of fish within the estuaries of rivers where the tide ebbs and flows, but excepting always fixed engines in 'the water of Solway'; (2) the Salmon Fishery Acts of 1861 and 1862, which prohibit the placing or using of fixed engines 'for catching salmon' in the Solway Firth or its tributary rivers; and (3) the rule of the common law which is expressed in the maxim *sic utere tuo ut alienum non laedas*. Though the *locus* in the present case is within the fishery district of the river Annan, the Ordnance plan shows that it is also in the Solway Firth. The salmon stake nets belonging to the complainer Mr Mackenzie are four miles further east and nearer the mouth of the river Annan, but they have been held to be legal as being in the Solway Firth—*Johnstone* v. *Mackenzie*, (1869) 6 S.L.R. 727. On the other hand, in a case which he decided in 1886, Lord Trayner found that the paidle nets complained of in that action were not in the Solway but were in the river Nith. This distinction is of great practical importance, because it followed from the foregoing finding in fact that these nets were illegal without any proof that they were placed or used for catching salmon and without proof of material injury either actual or imminent. The respondent Douglas, who acted as his own counsel, argued that it was not proved that the place on which his three nets had been erected was within the district of the river Annan. I do not agree with him. The respondent Fisher did not lodge answers. The respondent Parker lodged answers and was represented by counsel.

"For the reason already explained, I decide that the respondents' nets were in the water of Solway. I now proceed to consider whether they were illegal under the Acts of 1861 and 1862 or at common law. The nets used by the three respondents were paidle nets—in other words, miniature stake nets, 4½ to 5 feet in height, as contrasted with proper salmon stake nets, which are from 10 to 12 feet in height. Paidle nets are primarily adapted to catch flounders—fish which swim near the ground and will therefore enter the nets at all states of the tide except when the nets are dry. On the other hand, as salmon swim near the surface, these nets are specially adapted in order to avoid, so far as possible, either catching salmon or obstructing their passage up and down the Solway. Owing to the lowness of the white fishers' nets, it would be difficult for them to creep into the chambers at low tide and collect the fish, and they would further with their heavy boots destroy the netting, which is generally spread over the floor of

the chambers. Hence the advantage of a 'paidle' or barrel trap in which the fish are collected, and from which they are removed by the fishermen shortly before low tide. Salmon nets have no paidle. The fisherman walks into the chamber and collects the fish. It has been recently suggested that paidle nets ought to have a heck or gate made of horizontal spars three inches apart in order to prevent salmon from entering the chamber, but this suggestion has not yet been proved to be feasible. In the opinion of the white fishermen it would prove unworkable owing to the quantities of jelly-fish which are found in the Solway. The present case is in its facts entirely different from one which was recently decided by the Second Division on appeal from the Sheriff of Dumfries and Galloway and which at first sight appears to be very similar—*Buccleuch* v. *Smith*, 1911 S.C. 409. The *locus* was the same sandbank, but that part of it which lies within the fishery district of the river Nith. It also appears from the opinions of the Judges that they assumed that the nets complained of were in the Solway Firth. Lastly, except for one specialty which affects the respondent Parker alone, the nets used in the two cases were substantially the same, viz., the ordinary paidle net. So far the two cases were very similar. On the other hand, it appears from the opinions of the Lord Justice-Clerk (p. 417), Lord Ardwall (p. 424), and Lord Salvesen (p. 425) that they held it to be proved that the netting which formed a cover over the top of the chamber of the defenders' nets was useless for preventing the escape of flounders, but was useful for preventing the escape of salmon. It was inevitable that white fishers who used nets specially adapted for catching salmon and not flounders should be subjected to an interdict. I have not seen the evidence by which it was proved that flounders will not rise from the sand and escape by swimming when there is plenty of water available. No such evidence was adduced by the complainers in the present action. Neither in his cross-examination nor in his speech did their counsel suggest any doubt as to the truth and accuracy of the evidence given by the respondent Parker and his witnesses to the effect that the removal of the covers subsequent to the judgment of the Second Division had been proved by actual experience to diminish the value of the catch of white fish by about one-half owing to the larger flounders making their escape through the top of the net. On the other hand, the complainers' counsel tried to prove that the cover did not materially facilitate the capture of salmon. His witnesses propounded the theory that a salmon would not try to jump or swim through the top of the net, but would make its way straight into the paidle. In deference to the views expressed in the 1911 case, most of the Caerlaverock white fishers, including the respondent Parker, removed the covers from their nets and submitted during the seasons 1911 and 1912 to the loss of a large part of their catch. The complainers are not content with this sacrifice, but insist that the paidle also must be removed. No person has ever used a net which had neither cover nor paidle, and I do not believe that such a method of white fishing is practicable, though it was recommended so long ago as 1881 in the report referred to by Lord Ardwall at page 423 of his opinion. I distrust the complainers' theories as to the mode in which the respondents ought to carry on their business, and as to the probable behaviour of fish when inclosed in the chamber of a net. It is very remarkable that the theories upon which the Court was induced to interdict the white fishers in 1911 are now abandoned as not worth defending.

"The complainers tried to prove that the respondents had selected a fishing ground which was better suited for catching salmon than flounders, and that under the pretext of catching flounders they fished with the object of catching salmon, but this attempt was a failure. I saw Parker and I heard his evidence. I believed him when he said that he had no desire to catch salmon and did not try to do so. He proved his sincerity by taking the covers off his nets after the Judges had suggested that the covers were hurtful to the salmon-fishery owners. Douglas did not go into the witness-box, but as he had not the benefit of legal advice I do not draw any unfavourable inference from this fact. It is enough to say that it is not proved that salmon and not flounders were the real object of his fishing. His refusal to remove the covers from his nets shows merely that he objected to the loss of his best flounders. There is no evidence that any of the respondents killed a single salmon. But it is proved that their nets whether with or without covers were capable of catching not only flounders but salmon, and did in fact capture some salmon or fish of the salmon kind. Their nets were repeatedly inspected by the police from late in April until early in July 1912. In the case of Fisher (who used a cover but no paidle) thirteen visits disclosed eight salmon or fish of the salmon kind in his three nets; in the case of Parker (who used a paidle but no cover) twenty-one visits disclosed four such fish in his three nets; and in the case of Douglas (who used both cover and paidle) eighteen, or as he maintains twenty-two, visits disclosed sixteen such fish in his three nets. In view of these figures I do not think it possible to hold that the respondents captured salmon only occasionally or accidentally. There must be many places within the Solway Firth (which for the present purpose extends to the Mull of Galloway) where no one would expect to catch salmon, though occasionally a salmon might come into a net as might a porpoise or a small shark. But the Blackshaw Bank seems to me to be a place where the capture of salmon or sea-trout is at least probable, notwithstanding the fact that a paidle net is used and not a proper salmon net. Accordingly if the respondents' acquittal depends on my holding that it was an unlikely event that salmon would be caught in their nets, and that they in fact entertained any such belief, I should find them guilty. I use the language of criminal law, because the first question is whether the complainers have

proved that the respondents have committed an offence against the Salmon Fisheries Acts 1861 and 1862.

"Section 33 of the Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97) enacts that from and after 1st January 1865 the provisions of the English Act of 1861 shall 'extend and apply to salmon fisheries in the waters and on the shores of the Solway Firth, situate in Scotland, as the same may be fixed by authority of this Act, and to the rivers flowing into the same, in so far as such provisions relate to the use of fixed engines for the taking of salmon: Provided that all offences against such provisions shall be prosecuted and punished as directed by this Act.' The Commissioners under the Act of 1862 fixed the limit dividing the Solway Firth from the Sea to be a straight line from the Mull of Galloway to Hodbarrow Point in Cumberland. Section 11 of the English Salmon Fisheries Act of 1861 (24 and 25 Vict. cap. 109) enacted that 'No fixed engine of any description shall be placed or used for catching salmon on any inland or tidal waters, and any engine placed or used in contravention of this section may be taken possession of and destroyed, and any engine so placed or used and any salmon taken by such engine shall be forfeited, and in addition thereto the owner of any engine placed or used in contravention of this section shall for each day of so placing or using the same incur a penalty not exceeding £10.' The section excepted 'any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage.' In order to give practical effect to this legislation a private Act was passed on 14th August 1877 (40 and 41 Vict. cap. 240) authorising the appointment of commissioners 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,' and empowering the Commissioners to 'abate and remove all such fixed engines as are not proved to their satisfaction to be privileged as hereinafter provided.' In Stewart on Fishings (2nd ed.) p. 556 *et seq.*, there is a list of the fixed engines on the Solway which received a certificate of privilege, and also a memorandum by the Commissioners as to their proceedings. The Act of 1877 does not throw any light upon the interpretation of the Act of 1861. It uses the words 'erected or used' as equivalent to the words 'placed or used' in the earlier Act. The Court of Session decided that these Commissioners had jurisdiction to order the removal of paidle nets when they were satisfied that such nets had been erected or used for taking salmon—*Coulthard* v. *Mackenzie*, (1879) 6 R. 1322. The Acts of 1861 and 1862 are highly penal, and must be strictly construed. The purpose for which the net is set is of the essence of the offence—*Haydon* v. *Cormack*, (1835) 22 S.L.R. 563; *Marshall* v. *Phyn*, (1900) 3 F. (J.) 21; *Watts* v. *Lucas*, L.R., 6 Q.B. 226. According to the ordinary use of language a person does not fish for salmon who adopts every known and practicable means in order to avoid catching them, and who puts back every salmon which is caught in his net. Fishermen cannot help catching fish which are either worthless to them or which they are legally bound to return to the water. Anglers for trout catch eels, salmon anglers catch kelts, and sea fishers catch dog-fish. It is inevitable that they should do so, and in a sense they intend to catch these fish, because every man must be deemed to contemplate and intend the natural consequences of his acts. But in ordinary parlance it would be absurd to say that such fishermen use their tackle for catching eels or kelts or dog-fish. If the Act of 1862 had intended to make it a part of the law of Scotland that no fixed engine capable of catching salmon as well as white fish should be placed or used in waters frequented by salmon it would have said so. Any such enactment would have made white fishing impossible in places where it had been practised from time immemorial. I do not believe that Parliament would have passed such a law without giving the white fishers an opportunity of defending themselves by their counsel and witnesses. They have since had such an opportunity before departmental and royal commissioners, but no legislation has followed upon these inquiries. If upon a sound construction of the Act of 1861 the paidle net is illegal merely because it is fitted to catch salmon as well as flounders, I do not understand why the Nith and Annan Fishery Boards have not long ago swept them away. Instead of doing so they have left it to individual proprietors of salmon fisheries to attack individual white fishers upon the ground that the latter, though ostensibly fishing for flounders, did so as a pretext for catching salmon. Anyone can see that a paidle net will catch a salmon, and everybody knows that large numbers of salmon ascend and descend the Solway Firth between the mouth of the Nith and the mouth of the Sark. If the capacity to catch salmon is the test of legality no evidence except of a formal kind would be necessary in an application for an order for removal of such a net from a place like the Blackshaw Bank. Proof of material injury, or indeed of any injury, to a salmon fishery is by statute unnecessary in an action for interdict or removal directed against a a white fisher who uses an illegal engine within the same fishery district.—See the Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. cap. 123), sec. 37. The complainers have, in my judgment, failed to prove that the respondents while ostensibly fishing for flounders placed or used their nets for the purpose of catching salmon. Their case under the Acts of 1861 and 1862 having failed, it now remains to consider whether they have made out a case which entitles them to a remedy at common law.

"The common law applicable to cases of this kind is familiar and simple and is summed up in the maxim *sic utere tuo ut alienum non laedas*. There is, so far as I am aware, no specialty affecting the application of this general principle of law to conflicts between a heritable right of salmon

fishing and a public right of white fishing, though the contrary is, I think, sometimes assumed to have been decided in the case of *Gilbertson* v. *Mackenzie*, (1878) 5 R. 610, and although that decision is sometimes referred to as if it professed to lay down in advance precise conditions with which persons fishing for white fish by means of stake nets must comply under pain of being regarded as outlaws. In *Gilbertson's* case the pursuer had come into Court with the extravagant claim that he was entitled to fish for white fish by means of stake nets without any regard whatsoever to the rights and interests of the owners of salmon fisheries. He was met with the equally extravagant defence that members of the public who used the foreshore in the exercise of their undoubted common law and statutory right of fishing were not entitled to use stake nets for the purpose of catching white fish. The Court negatived both these contentions. Accordingly, in declaring that the pursuer as one of the public had right to fish for white fish in the Solway by means of stake nets fixed on the shore, the Courts added the words 'in such places and of such a description as not to interfere with the defenders' salmon fishing.' The interlocutor further contained a reservation '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 encroachments on or interference with his or their respective right of fishing.' From this judgment I extract four propositions, viz.—(1) The public right of white fishing resembles all other rights in that it is absolute and unqualified only in those cases where its exercise does not to any extent interfere with the rights of third parties, *e.g.*, a right of salmon fishing; (2) if there is any interference at all with the rights of third parties the Court must decide whether it is material or negligible; (3) if the interference is material the Court must try to reconcile the exercise of both rights so that each may subsist and continue to be enjoyed; and (4) if in any particular case white fishing by means of stake nets is impossible without material injury to a salmon fishing, it may be that the latter right should prevail as being 'the higher and more potential,' but no decision was pronounced on this point. The recent case of *Pirie & Son, Limited* v. *Kintore*, 5 F. 818, 8 F. 1058, *aff.* 8 F. (H.L.) 16, is a practical example of the application of the principles which we affirmed in general terms in *Gilbertson's* case. The action arose out of a conflict between a right of salmon fishing and a proprietary right to divert the water of a river for driving a mill. Both the Court of Session and the House of Lords rejected the argument that it was illegal for riparian owners to build a weir across a river, because it would necessarily interfere with the rights of the owners of salmon fishings by detaining salmon in the pool below the weir where they were liable to be caught by poachers. On the other hand, interdict was granted on proof of material obstruction to the passage of the fish up and down the river. Lord Davie said (p. 18)—'The respondents say that their right is to have the river maintained in its natural condition, and that any interference, however slight, with the natural flow of the stream is therefore a wrong which may be restrained by interdict. I think that this puts the right of the fishery owners against the lower riparian proprietors too high, and that their right is only to require that no interference shall be made which materially obstructs the passage of the fish.'

"Applying these principles to the facts of the present case, I find that the complainers have failed, or rather have not attempted to prove, that the respondents' nets have in the past caused any material injury to their salmon fisheries, or that any such injury directly resulting from the use of these nets is imminent and certain in the future. There is no proof that salmon are diverted from the complainers' nets, the nearest of which are four miles distant from the nets of the respondents. There is no proof that the respondents have caught and killed a single salmon or sea trout. The only interference which the complainers have proved is the detention of a few salmon for a short time in the respondents' nets upon their journey up and down the Solway Firth. If the respondents are carrying on a business which is otherwise lawful it is absurd to suggest that they can be interdicted upon any such ground. The complainers, no doubt, believe, rightly or wrongly, that the respondents will poach and kill salmon whenever they get the chance of doing so with impunity, but at the same time they shrink from incurring the trouble and expense of proving their case. They wish to have the benefit of the Acts of 1861 and 1862 without having to prove what the Acts require as a condition of the remedy. Accordingly they ask the Court to assume without evidence that the respondents' nets were placed and used for the purpose of catching salmon. The difficulty of proving actual or intended poaching is not a good reason for assuming that men who may be innocent are guilty.

"There are four decisions by the Second Division of the Court of Session in which decree has been pronounced at the instance of the owners of salmon stake nets for interdict against the use of or for removal of paidle nets. In the earliest of these cases—*Mackenzie* v. *Murray* (1881), 9 R. 186—the *locus* was Powfoot, a village some miles to the east of the Blackshaw Bank. The Court held that the paidle nets complained of had been used for the purpose of catching salmon and had been 'chiefly profitable as real salmon nets.' It followed that these nets had been placed and used in contravention of the Acts of 1861 and 1862. It was further proved that they had been placed unduly near to the complainer's nets, and that they diverted salmon from these nets. It followed that they were also illegal at common law. The second case is the decision by Lord Trayner in 1886 to which I have already referred. It is reported under the name of

Buccleuch v. *Herries* in a footnote to the report of *Buccleuch* v. *Smith*, 1911 S.C. 409, to which I have also already made reference. The *locus* in both these cases was the Blackshaw Bank. Lord Trayner's first ground of judgment was that the nets complained of were 'placed on the river Nith and estuary thereof and not in the waters of the Solway.' The contrary was assumed to be the fact in the 1911 case. The plan was used in the litigations of 1886 and 1911. The nets referred to in the 1886 case are marked in red and numbered in black ink. The nets referred to in the 1911 case are marked in black and numbered in red ink. They are very numerous in each of the two cases and occupy much the same positions. The line of nets begins at a point which is undoubtedly on the left bank of the river Nith and not in the Solway, and it extends for a long distance southward along the side of the channel in which the Nith runs at low water before joining the Solway Firth. It then turns eastwards across the Blackshaw Bank until it crosses the line dividing the district of the river Nith from that of the river Annan, and so reaches the *locus* of the present dispute. There has been much litigation as to the boundary between the river Nith and the Solway.—See *M'Whirr*, 11 S. 552, *rev.* 1 S. and M'L. 393, 15 S. 299, 873. The line fixed in *M'Whirr's* case is shown on the plan No. 6 as running parallel to and three-quarters of a mile to the west of the line which divides the fishery districts. The Salmon Fisheries Acts of 1862 and 1868 do not touch this question of fact.—See Stewart on Fishings (2nd ed.), p. 354 note. In the litigations of 1886 and 1911 the Court in each case applied the broad axe, and in the earlier case treated the nets as being all in the Nith, and in the later case as being all in the Solway. Lord Trayner's second ground of judgment was that the respondents' nets were erected and used for the capture of salmon, and were not *bona fide* erected or used for the capture of white fish. This amounted to a conviction of an offence against section 11 of the 1861 Act. His third ground of judgment was that the capture of salmon in these nets was prejudicial to the pursuers as salmon fishery owners. It was proved that prior to 1886 the owners of paidle nets thought themselves entitled to capture and kill and did capture and kill salmon. The case which Lord Trayner had to decide was therefore a very clear one—(1) under the old Scots Acts, (2) under the Acts of 1861 and 1862, and (3) at common law. The same is true of the recent case in the Second Division, except that the old Scots Acts did not apply, as the *locus* was assumed to be in the Solway. The fourth case—*Buccleuch* v. *Kean*, 17 R. 829—was decided in the year 1890, and the *locus* was Powfoot. This decision seems to carry the rights of the salmon fishers very far, as it does not appear that there was any evidence of guilty intention or of actual injury to a salmon fishing on the part of the white fisher by killing salmon or otherwise. This last decision, and also the dicta of some of the Judges in all the four cases, have caused me considerable difficulty. After giving them the best consideration in my power I do not think that they compel me to issue an interdict against persons who are not proved to have fished with the object of catching salmon or to have caused any injury whatsoever to the complainers. For the sake of clearness I have thrown into statutory form the legal proposition which I should have to affirm if I granted interdict in the present case, and the result is a very formidable amendment of the Act of 1861, viz.—'No stake net capable of catching salmon, though primarily adapted for catching flounders, shall be erected or used for the *bona fide* purpose of catching flounders in any place in the Solway Firth where the capture of salmon (except accidentally or occasionally) is likely to result or has in fact resulted from the use of such a stake net, and the erection or use of such a stake net in any such place shall without further evidence be deemed to be injurious to every salmon fishery in the same fishery district.'

"For the foregoing reasons, I refuse the note and recall the interim interdict in the case of the respondents Parker and Douglas."

The complainers appealed, and argued—The Lord Ordinary had treated the present case as if it were a criminal prosecution where the mental intent of the respondents was the chief thing, whereas the *de quo queritur* in the case was the nature of the engine. The presumption was that the respondents had set the nets to catch salmon because that was the only thing that would pay them. It was further proved on the evidence that salmon as a matter of fact were caught in the nets. The complainers in the present case were suing at common law and not under statute. The present case was ruled by that of *Buccleuch* v. *Smith*, 1911 S.C. 409, 48 S.L.R. 300, and was indistinguishable from it, except as to the cover on the net. Complainers did not dispute the right of white fishers to fish with fixed engines on the Solway. This right was not, however, derived from the statute of Queen Anne, 1705, c. 48, or the Fisheries (Scotland) Act 1756 (29 Geo. II, c. 23) cited by respondents, but from the old statute of Queen Mary, 1563, c. 68. The Statute Law Revision Act (6 Edw. VII, c. 38), repealed this in part, but the right to fish in the Solway with fixed engines had been recognised by a long series of decisions, and the complainers did not dispute it—*Gilbertson* v. *Mackenzie*, February 2, 1878, 5 R. 610, 15 S.L.R. 334, referring to two earlier cases in 1777 and 1811 (not reported), and following them. This right, however, could not be exercised to the material injury of salmon fishing. In 1879 the Solway Salmon Fisheries Commissioners, acting under the Solway Salmon Fisheries Commissioners (Scotland) Act 1877 (40 and 41 Vict. cap. ccxli), secs. 3 and 8, made an investigation to determine what nets were authorised to catch salmon, and paidle nets were condemned—*Coulthard* v. *Mackenzie*, July 18, 1879, 6 R. 1322, 16 S.L.R. 767 (reported *s. v.*

Solway Salmon Fisheries Commissioners, Mackenzie and *Coulthard's* cases). This case was followed in *Mackenzie* v. *Murray*, December 1, 1881, 9 R. 186, 19 S.L.R. 157. The test was not whether the nets were intended to capture white fish, but whether they were fitted to capture and did capture salmon—*Duke of Buccleuch* v. *Kean*, May 30, 1890, 17 R. 829, 27 S.L.R. 695. The cover had nothing to do with the actual decision in these cases, which was based on the fact that the nets were capable of catching salmon and did so in considerable numbers. It was not necessary for the proprietors of salmon fishings to prove material injury by the illegal acts of other persons—The Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. c. 123), sec. 37, and Stewart on Fishings, p. 159. The form of interdict in the present case was almost exactly the same as the form under which interdict was craved and granted in *Buccleuch* v. *Smith*, *cit. sup.* The cases of *Haydon* v. *Cormack*, March 19, 1885, 22 S.L.R. 563; *Marshall* v. *Phyn*, December 11, 1900, 3 F. (J.) 21, 38 S.L.R. 171; and *Watts* v. *Lucas*, 1871, L.R., 6 Q.B. 226, referred to by the Lord Ordinary, were not in point.

Argued for the respondent Parker—This defender had adopted all practicable means of avoiding the capture of salmon while continuing to catch white fish. His nets were low and had no cover. It could not be questioned that he had a statutory right to fish for white fish by stake nets—Act of 1705, c. 48, and the Fisheries (Scotland) Act 1756 (*cit. sup.*). The Court could not deprive the respondent of that right on the ground that the nets did in fact catch a few salmon. The salmon fishing was not paramount—*Gilbertson* v. *Mackenzie* (*cit. sup.*). Stake nets were not illegal at common law, and the Act of Queen Mary, 1563, c. 68 (*cit. sup.*) exempted the Solway from the prohibition against fixed engines—Stewart on Fishings, p. 344; *M'Whirr* v. *Oswald*, March 8, 1833, 11 S. 552, 1 S. & M. 393; *Murray* v. *Earl of Selkirk*, July 6, 1821, 1 S. 107, 2 Sh. Ap. 299. This respondent was fishing in a position which was comparatively innocuous for catching salmon. If it could be shown that the place in question was prolific in salmon the complainers' right to interdict might be good, but that was not so. There were no covers in this case, and in that respect it was different from the case of *Buccleuch* v. *Smith* (*cit. sup.*), founded on by the pursuers. It was further distinguishable from that case in that it was proved that the respondent was genuinely fishing for white fish, and that the complainers had not proved any material injury. Further, the complainers must show the nature and extent of their interest in salmon, and they had failed to do so. In any event the interdict craved was too vague—*Cathcart* v. *Sloss*, November 22, 1864, 3 Macph. 76; *Cairns* v. *Lee*, October 29, 1892, 20 R. 16, 30 S.L.R. 47; *Perth General Station Committee* v. *Ross*, June 26, 1896, 23 R. 885, 33 S.L.R. 786, 24 R. (H.L.) 44, 34 S.L.R. 871.

The respondent Douglas presented on his own behalf an argument of substantially the same import as the foregoing, subject to the admission that his nets were covered.

At advising—

LORD SALVESEN—This case marks a further stage in the controversy which has now raged for at least 150 years between the white fishers of the Solway and the proprietors of salmon-fishings on the north side of the estuary. I am not so sanguine as to believe that our judgment will finally settle this dispute, but at all events it is desirable that it should be consistent with previous decisions, and it may help towards the regulation of the conflicting rights which have given rise to all the trouble in the past.

In the case of the *Duke of Buccleuch* v. *Smith and Others*, 1911 S.C. 409, this Division decided that stake nets erected by the respondents in the estuary of the river Nith ostensibly for the purpose of white fishing were constructed in such a way and placed in such a position that they were calculated to capture and did capture large quantities of salmon to the prejudice of the complainer's rights, and we granted interdict accordingly against the use of these nets. The interdict applied only within the limits of the river Nith. The respondents have erected similar nets on that part of the Blackshaw Bank which is within the limits of the district of the river Annan. Accordingly the previous interdict, which applied to at least one of the respondents in this action, was of no value as soon as the nets were removed into the Annan district, which is bounded on the west by a line intersecting the Blackshaw Bank from north to south. The nets used by the respondent Douglas are precisely the same as those which were the subject of the interdict at the instance of the Duke of Buccleuch. Those of the respondent Parker differ only in respect that there are no covers on the chamber into which the fish are led by the arm of the net which is placed at right angles to the current. Those of the respondent Fisher are identical with those of Douglas except that Fisher dispenses with the paidle. There was some evidence to the effect that the nets which are the subject of the present case were lower than those which we had under our consideration in 1911, but I am not satisfied that any substantial difference in height has been established, nor do I think that in view of certain of the facts found proved by the Lord Ordinary the difference, if any, is material to the legal question we have to decide.

The Lord Ordinary has held it proved that the part of the Blackshaw Bank on which the respondents' nets were placed was "a place where the capture of salmon or seatrout is at least probable, notwithstanding the fact that a paidle net is used and not a salmon net." Accordingly he says—"If the respondents' acquittal depends on my holding that it was an unlikely event that salmon would be caught in their nets, and that they in fact entertained any such belief, I should find them guilty;" and in another part of his opinion he says—"I do not think it possible to hold that the respondents captured salmon only occasionally or accidentally."

He has, however, also held it proved that Parker had no desire to catch salmon and did not try to do so; and that as against Douglas, who did not go into the witness-box (perhaps because he was defending his own case), "it is enough to say that it is not proved that salmon and not flounders were the real object of his fishing."

I entirely agree with the Lord Ordinary with regard to the former finding in fact, which is to the effect that the respondents' nets were fitted to capture and did capture salmon in considerable numbers. I do not, however, agree with him that the evidence of the respondent Parker is sufficient to displace the real evidence in the case—that he set them for the purpose of catching salmon as well as white fish. I reach a conclusion adverse to the respondents from the following facts which I hold to be established.

In the first place, in the early months of the open season for salmon-fishing flounders are out of condition, although even then they are marketable at about 1s. 2d. per stone. They gradually improve as the summer advances, and they are marketable from June onwards at 1s. 6d. per stone. They are best in the autumn months and until the flounder-fishing has to be stopped—usually in November—by the rough weather which prevails at that time. In the second place, the value of flounders is so small that the takes made by any fisherman by means of nets placed where the respondents had set theirs are insufficient when marketed to afford them reasonable remuneration for their personal labour and the expense to which they are put in maintaining their nets. In the third place, I think it is conclusively proved that the value of the "red fish" (a convenient term to denote fish of the salmon kind) taken in the respondents' nets is at least as great as the value of the flounders which they capture during the open season for salmon fishing. The number of flounders is no doubt vastly in excess of the number of "red fish," but that is of no importance, having in view that the respondents fish for a livelihood and not for sport. Fourthly, the combined value of the "red fish" and the flounders taken together is not more than reasonable remuneration to the fishermen for their labour in attending to the nets. Fifthly, the respondents were perfectly well aware that nets similar to those which they were using had been interdicted on the other side of the imaginary line which divides the Nith and Annan districts, and had been so interdicted because they were fitted to capture and did capture large numbers of "red fish." From these facts I think it is a reasonable inference that the respondents set the nets with the intention of catching "red fish" as well as flounders, and that they would not have set their nets in the position selected unless they could have caught both kinds.

At this point I think it necessary to notice a misapprehension which may to some extent have affected the mind of the Lord Ordinary, as I deduce it from his statement "that the theories upon which the Court was induced to interdict the white fishers in 1911 are now abandoned as not worth defending." I take it that he is here referring to the use of covers which I thought in the previous case went far to indicate that the intention of the net fishers was to catch "red fish," as in my opinion it was not likely that flounders which had once entered the chamber would endeavour to escape by rising over the sides. It is true that in the present case less importance is attached by the complainer's witnesses to the presence or absence of the cover, as they think salmon entering the chamber would be likely to find their way into the paidle. That they do so to a large extent is plain from the findings of the Lord Ordinary to which I have already referred; but I do not read the complainers' evidence as negativing the view that the use of the cover makes the net a more efficient instrument for capturing red fish. That was certainly not the view of the respondents' witnesses, who one and all maintained that the efficiency of the net for catching flounders is much improved by the use of the cover. Some of them go so far as to say that large flounders invariably escape over the sides of the chamber when it is not covered; and indeed one of them estimated that only half the quantity of white fish can be got in a net which has no covering over the chamber. If this be true of flounders, whose habit it is to swim near the bottom, it must be much more true of the salmon which is a surface fish. Taking the evidence as a whole I see no reason to modify the view I expressed in the case of the *Duke of Buccleuch*. I think it is possible that the absence of the cover may make the net a less efficient instrument for the capture of white fish, but that it certainly makes it less efficient for the capture of salmon.

Even if I could hold with the Lord Ordinary that the complainers have failed to establish that the respondents' nets were set with the object, *inter alia*, of catching salmon, I should not agree in his conclusion. They are undoubtedly fitted to catch salmon and do catch them in considerable numbers. The view of the respondent Douglas was that even on this assumption the complainers would not be entitled to an interdict unless they were able to establish that the respondents actually kept the salmon which they so captured, and that the complainers must trust the net fishers to release all the salmon which they catch in their nets. If this were so the complainers would be practically without any remedy. The mere possession by the respondents of "red fish" during the open season would not infer any invasion of the complainers' rights, for some of them have licences to fish with the so-called "haaf" nets, and they might have captured the salmon in their possession by this means. On the other hand, the nets are placed on a flat sandy shore where the water bailiffs can be seen at a great distance, and the white fishers would of course release the salmon whenever they anticipated a visit from them. It would be a most unsatisfactory way of regulating the conflicting rights of salmon and white fishers if the owners of the salmon-fishing could not prevent the capture of salmon, but had

in each case to prove that salmon had been killed as well as captured. I think also it would be highly undesirable that the white fishers should be exposed to the ever-recurring temptation of appropriating the property of the complainers when they considered they could do so without risk of detection. The true answer to the Lord Ordinary's view appears to me to be this, that the complainers are entitled to their remedy if they can show that the respondents' nets are so placed and are of such a description as to be fitted to catch salmon, not as a mere incident of the white fishing, but as a substantive and valuable portion of the total catch. He has, besides, entirely overlooked the loss that may be caused to the owners of the salmon fisheries by the detention of the salmon in the nets and the injury which some of the fish at all events are likely to suffer even although liberated while still alive. The character of the nets appears to have been the issue in all the previous cases, including the unreported case between the Earl of Mansfield and Mr Neilson, the decision in which was pronounced on 13th February 1811. It was there found that the Earl of Mansfield, who then occupied the position of the present respondents, "when fishing for white fish must adopt such mode as not to encroach upon or anywise injure Mr Neilson's sole and exclusive right to salmon-fishing within the bounds and limits now fixed and ascertained to him." In *Gilbertson's* case (5 R. 610) the declarator of the right to white fishing by means of stake or other nets or engines fixed on the shore was thus qualified—"In such place and of such a description as not to interfere with the defender's salmon-fishing." It follows that nets which would interfere with the salmon-fishing constituted an encroachment on the rights of the salmon proprietors, and might be made the subject of an interdict. The judgment in the case of *Coulthard*, 6 R. 1322, proceeds on the same lines. That was an appeal from a deliverance of the Commissioners acting under the Solway Salmon Fisheries Commissioners (Scotland) Act 1877, which ordered the removal of paidle-nets. An appeal was allowed by way of a special case, which set forth that the Commissioners had come to the conclusion that the nets in question were erected and used for the taking of salmon. On this finding in fact the Court refused to interfere with the order. A description of the nets is given by Lord Gifford, from which it appears that they were substantially the same as those that the respondents use. Lord Gifford said—"A net might be erected with the intention of catching white fish with the purest motives, and yet if in point of fact it was used for the catching of salmon the Commissioners would have power to remove it." There is nothing in the report of that case to show that the appellants had actually killed any of the salmon which were captured in their nets; and, indeed, as they disclaimed any right of capturing salmon I think it must be assumed that there was no evidence to this effect. If the respondents' argument were well founded it seems to me that the description of the net would be of no consequence, provided it was one which was well fitted to catch flounders—as an ordinary salmon net undoubtedly would be. The only difference between such a net and the net used by the respondents is that the latter catches fewer salmon, because it is of less height; but in the cases I have already cited it appears to me that the decisions proceeded throughout on the footing that a net which was fitted to catch salmon and was placed on a shore frequented by salmon was in itself illegal, although it might also be an excellent instrument for catching white fish.

In the later case of *Mackenzie*, 9 R. 186, it was the nets again which were made the subject of the interdict. The finding on which the interdict proceeded was that the stake nets or paidle nets complained of were "placed, constructed, or used so as to take salmon and otherwise interfere with the complainers' salmon fishings." Before the judgment of the Inner House was delivered two reports by an expert had been obtained. From these reports it appears that the nets were of the same height and construction as those with which we are now dealing. The reporter describes them as "salmon stake nets in miniature," and he stated his opinion that they obstructed and injured the free course of the fish to the complainers' salmon nets during the open salmon season, stopping or retarding the run of the fish to the spawning beds during the close salmon season. He recommended that the nets should not exceed 4 feet in height, that there should be no cover on any part of the nets or the runaways attached thereto, and that no paidle or barrel should be attached to them. On considering these reports the Court unanimously adhered to the Lord Ordinary's interlocutor, the respondents having declined to bind themselves to the adoption of the form of net recommended by the reporter. It is impossible to read Lord Young's opinion in that case without coming to the conclusion that practically the same questions that we have here were agitated in that case, and that the same conclusions in fact were reached as I have above expressed. I find no trace of there having been any evidence that salmon were killed as distinct from being captured. The same observations apply to the judgment in the case of the *Duke of Buccleuch* v. *Kean*, 17 R. 829. The Sheriff-Substitute's finding was that the nets "are by their situation and construction calculated to be injurious to the salmon fishings belonging to the petitioners," and that they were illegal. These findings were substantially repeated on appeal. The Lord Justice-Clerk said that the evidence seemed "conclusively to show that such nets as are now standing on the Solway shore at the place in question are 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 proof was much weaker than in the present case, for the only evidence of cap-

ture of salmon was that on one occasion two salmon had been confined in the defenders' nets.

I do not require to refer in detail to the opinion of Lord Trayner in *Buccleuch* v. *Herries* in 1886 except to point out that he reached the same conclusions in fact as those at which I have arrived, upon what appears to have been substantially the same evidence. I do not agree with the attempt which the Lord Ordinary makes to distinguish the facts in that case from those which exist here, but it is unnecessary to subject his opinion to any minute analysis. Holding as I do that the purpose of the respondents in setting the nets in question was to capture red fish as well as white fish the cases are practically indistinguishable.

In the last case, *Buccleuch* v. *Smith*, the Court also came to the conclusion on the evidence—which was not a bit more cogent than what we have here—that the respondents' object in setting the nets was to catch salmon as well as flounders; but it is obvious from the terms of the interdict pronounced that the Court thought it sufficient to justify interdict that the stake nets used were fitted to catch salmon. This conclusion is also borne out by the opinions. Lord Ardwall said—"In view of these decisions and of the findings in *Gilbertson's* case the question really raised for our decision in the present case is, as I have already said, a question of fact whether the defenders' nets are of such construction and so placed as to catch salmon in considerable numbers and so materially to interfere with the pursuers' rights of salmon fishing. I have read through the evidence with considerable care and have come without difficulty to the conclusion that the nets now in question are so constructed as to capture salmon and fish of the salmon kind, that they are placed in such situations as to capture salmon, that in point of fact they do capture them in the sense of enclosing them in considerable numbers and thus materially interfere with the rights of salmon fishing possessed by the pursuers and the other proprietors within the Nith fishery district." It is noteworthy that in so stating the question for decision no reference whatever is made as to the purpose for which the nets were set.

There is thus a long and consistent chain of decisions by which we are bound and which establish that even if the complainers had failed to prove, as the Lord Ordinary has I think erroneously held, that the respondents' nets were not set for the *bona fide* purpose of catching flounders alone, the complainers are entitled to interdict if it is proved that the nets which are used in the positions in which they are placed are fitted to catch salmon in considerable numbers. I might have agreed with the Lord Ordinary in his conclusion if I could have accepted the view that the respondents have adopted every known and practicable means in order to avoid catching salmon, and that they put back every salmon which is caught in their nets. The latter statement rests upon the evidence of Parker alone, and is entirely without corroboration even from such notes as he might easily have preserved of the actual returns he has obtained by the use of the nets. With regard to the former statement, it is sufficient to say that the respondents have declined to adopt the recommendation of the Fishery Board to use "hecks" at the entrances to the chamber, which hecks would I am satisfied not materially interfere with the catch of flounders, and would effectually prevent salmon being captured. It is said that hecks would be obstructed by jelly fish, and this may to some extent be true, although it is equally true of the nets themselves. As the nets are attended to twice in twenty-four hours the obstructions can be removed by cleaning the hecks, but from the position in which the hecks must be placed I think they are very unlikely to be materially obstructed as they are protected by netting on three sides. The true reason why the respondents object to the use of hecks is, I believe, that the nets so modified would not capture salmon, which is one of the main objects for which they are set and without which the fishing on the Blackshaw Bank could not be prosecuted with success. I would only add that I substantially agree with the four propositions which the Lord Ordinary has extracted from the judgment in the case of *Gilbertson* v. *Mackenzie*. Where I differ is in his view that it is necessary that direct injury to the complainers' salmon fishings should be proved. Injury is, I think, to be presumed where salmon are captured in considerable numbers when on their way to an estuary where the complainers are the proprietors of salmon fisheries. Their title and interest to sue are conferred by statute and do not require to be the subject of substantive proof. For these reasons, I am of opinion that we must recall the interlocutor reclaimed against, and grant interdict substantially in the terms expressed in our interlocutor in *Buccleuch* v. *Smith*, 1911 S.C. 409. I am disposed to think, however, that the interdict should be limited to the period of the open salmon fishings as it was in *Mackenzie's* case. After that no doubt injury may still be done by the capture of salmon, but the possession by the respondents of salmon in the close season would of itself infer a contravention of the Solway statutes which I think ought to afford sufficient protection against material encroachments on the complainers' rights.

LORD GUTHRIE—I am of the same opinion. The Lord Ordinary says, and the misapprehension, as I think it, goes deep into the grounds of his judgment—"The complainers' pleadings are as confused as their prayer, and they mix up in a very perplexing manner three separate and distinct grounds of action, viz.—(1) the old Scots Statutes, and particularly the Act 1563, cap. 68, which have been construed as prohibiting fixed engines for the capture of fish within the estuaries of rivers where the tide ebbs and flows, but excepting always fixed engines in 'the Water of Solway;' (2) the Salmon Fishery Acts of 1861 and 1862, which prohibit the placing or using of fixed engines 'for catching salmon

in the Solway Firth or its tributary rivers;' (3) the rule of the common law which is expressed in the maxim *sic utere tuo ut alienum non lædas.*" I confess I can find no confusion either of thought or of statement either in the complainers' pleadings or in the prayer of their note of suspension and interdict, which are substantially in the form used and given effect to, without adverse comment from the Bench, in the case of the *Duke of Buccleuch* v. *Smith*, 1911 S.C. 409. So far from the old Scots Statutes, and particularly the Act of 1563, cap. 68, being a separate and distinct ground of action, they are not even referred to either in the pleadings or the prayer, and while the Salmon Fishery Act of 1861 is not mentioned at all, the Salmon Fishery Act of 1862 is appealed to, not as a ground of action, but in reference to the limits of the river Annan as fixed by the Commissioners under that Act. The action is brought on a simple ground to try a simple issue, namely, whether the complainers' common law rights as heritable salmon-fishing proprietors have been injured by the proceedings of the respondents which are complained of, and it is the respondents and not the complainers who have confused the issue, if there has been truly any confusion, by raising questions under the 16th and 19th century statutes—questions which, it seems to me, have all been settled by a train of decisions adversely to the respondents' contentions.

The complainers' title to complain is not now disputed. But it is said that they are only entitled to interdict if they can prove material injury resulting to their individual fisheries from the respondents' operations. It is enough to say that in the cases dealt with by Lord Salvesen the opposite of this proposition has either been assumed or expressly laid down. On the other hand, the complainers admit that within the limits in question the respondents' stake nets cannot be attacked as in themselves illegal engines, an admission which is ignored in several parts of the Lord Ordinary's very able opinion. Their nets are attacked, not because they are fixed engines, but because on account of their situation and construction they do material and unnecessary injury to the complainers' salmon fishings. I shall consider immediately whether I am justified in my use of the word unnecessary. There appear to be parts of the river Annan where the salmon are so few that no material injury could be reasonably apprehended from the use of nets so constructed, and it may be that even in their present situation the use of such contrivances as a heck applied to the nets as at present constructed might bring about the same result.

On record the respondents plead that they are entitled to be assoilzied unless the complainers have proved, first, that the nets in question were set on purpose to catch salmon, and second, that they did in fact catch salmon so as materially to injure the complainers' fishings, which latter plea implies in their view that the complainers must prove that any fish caught in the nets were killed by the respondents. The respondent Douglas adhered to both these pleas, but I understood that counsel for Parker in the end admitted that in view of the decided cases he could not dispute that the complainers would be entitled to prevail if they have proved material and unnecessary injury through the respondents' operations, even although they failed also to prove, directly or by reasonable inference, a deliberate purpose to take salmon. The main question in the case, therefore, becomes one of fact. But the parties are not agreed as to how the question should be stated. The complainers would state it thus—Have we proved that the respondents' operations, in catching salmon at the place and with the nets now used are calculated materially to injure the complainers' rights of salmon-fishing? The respondents, on the other hand, say the true question is—Have the complainers proved that material injury has actually occurred through the catching and killing of salmon by the respondents? I am of opinion that the true question is the one stated by the complainers, and that they have proved that the respondents' operations are calculated to produce the result alleged. Even, however, if proof of actual injury was required, I think the proof sufficiently establishes such injury in view of the fact found by the Lord Ordinary on the clearest evidence that the taking of salmon was not occasional or accidental, and in view of the further fact that there was nothing exceptional about the recurrent occasions on which salmon were found in the respondents' nets. On the question of whether the fish caught at other times were released or killed I do not think it was for the complainers to prove that they were killed, but for the respondents to prove that they were released, and I cannot hold this *onus* discharged by the mere statement of the complainers themselves. I may add that, for the reasons stated by Lord Salvesen, I am prepared to hold that if it were necessary to prove deliberate purpose to catch salmon by the use of the nets of the construction and at the situations in question, the complainers have sufficiently established such purpose by reasonable inference from the facts tabulated by Lord Salvesen.

It is not necessary to decide the question to which I have referred above, namely, whether it would be a good answer if the respondents, being entitled by statute to use fixed engines for the capture of white fish in the river at the places in question, were able to show, first, that they had taken "every known and practicable means"—to use the Lord Ordinary's expression—to exclude salmon from their nets consistent with the reasonable efficiency of these nets for catching white fish, and second, that they regularly returned any salmon which their nets might catch. That view may be sound, or it may be that in such a conflict of rights the heritable right of salmon-fishing would be held the paramount right as against the public right of white-fishing. In any view the *onus* in both cases would be on the respondents, and I do not think they have established either proposition.

On the whole matter, I am unable to see how in any view of the facts and the law

interdict can be refused as against Douglas, whose case is covered in terms by the case of the *Duke of Buccleuch* v. *Smith*. The only ground on which the Lord Ordinary refuses interdict against Douglas is because it has not been proved by the complainers that the catching of salmon and not flounders was not the real object of his fishing. I cannot agree with the Lord Ordinary where he says that the *Duke of Buccleuch's* case is entirely different in its facts from the present case. It seems to me identical in all essential features, and even identical in all important features with one exception, that the respondent Parker has dispensed with the use of a cover—a contrivance which was held important, but which, as I read the opinions in that case, was not, as the Lord Ordinary seems to think, the ground on which the Court was induced to interdict the white fishers in 1911. As to the other respondents, I agree that the interlocutor proposed by Lord Salvesen is the right one.

LORD JUSTICE-CLERK—I am of the same opinion. Looking into this case I have come to the conclusion that I could not add anything to what I said in the former case, which I think in all practical directions leads to the same result.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"Recal the interlocutor reclaimed against: Interdict and prohibit the respondents James Parker and Joseph Douglas, and each of them, from erecting and using, excepting during the close time for salmon, fishing stake nets, paidle nets, or other fixed engines for the purpose of capturing salmon or fish of the salmon kind, or fitted to capture salmon or fish of the salmon kind, in the river Annan or estuary thereof, and upon the sands and shores between high and low water-marks within the limits of the district of the river Annan fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862. . . ."

Counsel for the Complainers—Blackburn, K.C.—Lord Kinross. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent, Parker—Watt, K.C.—Duffes. Agent—William C. Morris, Solicitor.

For the Respondent, Douglas—Party.

Wednesday, February 25.

OUTER HOUSE.

[Lord Anderson.

LAIRD *v.* SCOTT.

Bankruptcy — Sequestration — Petition — Expired Charge on Debt Due to Another Creditor — Satisfaction of Debt Charged for Subsequent to Expiry of Charge — Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *sec.* 29.

The Bankruptcy (Scotland) Act 1913 enacts—Section 29—"Where the petition is not by or with the concurrence of the debtor, or, if dead, of his successor, and if the debtor, or if dead his successor, do not appear at the diet of appearance, either in person or by his counsel or agent, and show cause why the sequestration cannot be competently awarded, or if the debtor so appearing do not instantly pay the debt or debts in respect of which he was made bankrupt, or produce written evidence of the same being paid or satisfied, and also pay or satisfy or produce written evidence of the payment or satisfaction of the debt or debts due to the petitioner, or to any other creditor appearing and concurring in the petition, the Lord Ordinary or Sheriff, on production of evidence of the citation and of the foresaid requisites for sequestration, shall award sequestration in the manner and to the effect before mentioned. . . ."

A, the endorsee of a bill accepted by B, presented a petition for the sequestration of B's estates, on the ground that B had been charged to make payment of certain debts due to another creditor C, and that the days of charge had expired without payment having been made. B produced written evidence that the debts due to C had been subsequently satisfied, and craved the Court to dismiss the petition.

Held (*per* Lord Anderson, Ordinary) that, in the circumstances of the case, B was entitled to have the petition dismissed on making consignation in Court of the amount of the debt claimed to be due to A on the bill, and on consignation or payment of the expenses incurred by A in connection with the petition.

James Laird, Elswick House, Forfar, *petitioner*, presented a petition for the sequestration of the estates of Miss Jessie Scott, Nellfield House, Braidwood, Lanarkshire, *respondent*.

The *circumstances* of the case and the arguments of parties sufficiently appear from the opinion of the Lord Ordinary (Anderson).

LORD ANDERSON—This is a petition for the sequestration of the estates of Miss Jessie Scott, Nellfield Lodge, Braidwood, Lanarkshire, and the petition is at the instance of a creditor named James Laird,