ing at a furious pace. It constantly comes under our observation—and indeed we may almost take judicial notice of the fact—that when two lads are in charge of a light van like this they drive at a furious pace. In fact, the thing is so notorious that against such a van as this, driven by boys who are laughing and chatting together, and which has run over a person in daylight, the presumption is irresistibly strong, and I think it wholesome in the interests of the public safety that masters who send out boys with such vans should be held responsible for the injuries inflicted by the recklessness of these drivers.

LORD CRAIGHILL—I have come to the same conclusion, although I regret that I have to differ from the two Sheriffs. The Sheriff-Principal, however, has held negligence proved on the part of the defender, and therefore I think we cannot escape from the conclusion that the defender is liable. It also appears to me, as has already been observed by your Lordship in the chair, that contributory negligence cannot come into this case. It is not necessary to weigh in fine scales the evidence of the two different sets of witnesses, for even if, as the witness Young says, the cart was going at an ordinary pace, in the circumstances this was not enough, as he was not in his proper place, and had not the usual power of controlling his horse so as to protect the foot-passengers. He was only entitled to drive at his ordinary rate if he was using all the ordinary means for protecting foot-passengers. Young says that he did not see the little boy, but he did not see him because he was not in his proper place, and he did not see what he ought to have seen. This was enough to make his fault the distinct cause of the accident.

LORD JUSTICE-CLERK—With regard to the assessment of damages—This was a very serious injury, and we are not yet in a position to say what the result will be. There appears to be some hope, however, of complete recovery. I think, however, we should give substantial damages, and £50 seems a proper sum. I will only add that I hope some strong-minded ædile will arise who will put down the furious pace at which these vans and spring-carts are driven.

The Lords sustained the appeal, recalled the interlocutors of the Sheriffs, found that the injury had been inflicted through the fault of the defenders, and assessed the damages at £50.

Counsel for Pursuer and Appellant—Sym. Agent—D. Cuthbert, S.S.C.

Counsel for Defenders and Respondents—Guthrie Smith—Brand. Agent—Adam Shiell, S.S.C.

Thursday, December 1.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

MACKENZIE AND BEATTIE *v.* MURRAY AND OTHERS.

(Sequel to *Gilbertson* v. *Mackenzie*, Feb. 2, 1878, *ante*, vol. xv. p. 334, and 5 R. p. 610; and to Special Case *Coulthard, &c.* v. *Mackenzie*, July 18, 1879, *ante*, vol. xvi. p. 768, 6 R. p. 1322.)

Fishings — Salmon - Fishing — Public Right of White-Fishing— White Fishing with Fixed Nets in Solway—Acts 1563, *cap.* 3—*Act of Queen Anne*, 21*st Sept.* 1705—29 *Geo. II. cap.* 23 (*Act for Encouraging the Fisheries in that Part of Great Britain called Scotland*, 1756).

A public right of white-fishing in the Solway by fixed engines having been declared to exist concurrently with a private right of salmon-fishing, "so as not to interfere with the salmon-fishing," and "reserving to the parties respectively to take such legal proceedings, the one against the other, as may be competent for preventing all undue or improper encroachment or interference with the respective rights of fishing" of the pursuer of the declarator, as representing the public, and of the proprietor of salmon-fishings, the latter in a subsequent process established that the white-fishing as conducted injured materially the salmon-fishing during the open season. *Held* that he was entitled to interdict against the white-fishing during the open season with fixed engines of the kind then in use.

In the case of *Gilbertson* v. *Mackenzie*, *supra*, which was a declarator brought by Gilbertson of his right as one of the public, at common law and under certain statutes which are fully quoted and referred to in the report of the case, to fish for white fish in the Solway by means of stake-nets, the Second Division pronounced this interlocutor:—"Having heard counsel for the parties on the reclaiming note for the pursuer, adhere to the interlocutor of the Lord Ordinary reclaimed against." It contained the following findings of fact:—(1) That the salmon-fishings in the Solway opposite the parish of Cummertrees belong to the defender Mr Mackenzie, and are possessed as tenant by the other defender Mr Beattie. (2) That these fishings for time immemorial have been fished by stake-nets fixed on the shore between high and low water-marks. (3) That the pursuer and other inhabitants of Cummertrees, as well as other persons living in that neighbourhood, have from time immemorial fished in the Solway for flounders and other white fish opposite that parish, also by means of stake-nets fastened on the shore between high and low water-marks. The interlocutor of the Second Division then went on to recal that of the Lord Ordinary *quoad ultra*, and in place thereof to "find that the pursuer (Gilbertson) as one of the public has right to fish for white fish including flounders, and all other kinds of fish, excepting salmon and fish of the salmon kind, in the sea and along the shores of the

Solway Firth, and, in particular, in that part thereof opposite the parish of Cummertrees, and that by means of stake or other nets or engines fixed on the shore, in such places and of such a description as not to interfere with the defender's salmon-fishing; and repel the defender's pleas, so far as opposed to this declaratory finding, under reservation, however, of the right of the parties respectively to take such legal proceedings, the one against the other, as may be competent for preventing all undue or improper encroachment on, or interference with, his or their respective rights of fishing; and in regard to the action otherwise, dismiss the same, and decern."

In 1879 the Commissioners under the Solway Salmon Fisheries Commissioners (Scotland) Act 1877 having found certain fixed nets, called paidle-nets, belonging to the white-fishers of the Solway, to be "erected and used for taking salmon," and having ordered their removal by virtue of the powers in that Act conferred, a Special Case was presented under section 8 of that Act to the Second Division of the Court of Session, which formed the second of the litigations above referred to. In that Special Case the Court found that the Commissioners were entitled to remove the engines referred to therein.

On 18th June 1879 Edward Mackenzie, proprietor, and James Beattie, tenant, of certain fishings in the Solway opposite the parish of Cummertrees, raised this process of suspension and interdict against John Murray, John Gilbertson, John Coulthart (parties to the former litigations), John Birnie, Andrew Dalrymple, and Charles Dalrymple, all fishermen in that parish, to have them interdicted from "erecting, maintaining, or using during the open salmon-fishing season, stake-nets or paidle-nets on the shores of the Solway between high and low water-marks within the complainer's salmon-fishery," and to have all stake-nets and stakes erected or used by them removed, and the "scaurs" left "void and redd" of such nets.

A number of other processes were raised at various dates, having the same prayer, but directed against other fishermen. That first referred to was treated as the leading process.

The complainers alleged that the respondents' nets were really erected and used for taking salmon, and materially injured the salmon-fishings. They pleaded that the respondents had no right to erect or use nets which materially injured the salmon-fishings.

The respondents maintained their right, on the grounds founded on in the case of *Gilbertson* v. *Mackenzie*, and under the judgment of the Court in that case, to use stake-nets in the Solway for white fish, notwithstanding that salmon might occasionally be caught therein. They averred that their nets were erected and used for taking white fish, and pleaded that the complainers were not entitled to interfere with them in the exercise of that right. They denied that their nets either materially injured or were intended to injure the salmon-fishings.

After a proof the Lord Ordinary (CURRIEHILL) found that the respondents' nets were "placed, constructed, or used so as to take salmon, and otherwise interfere with the complainers' salmon-fishings," and that "none of the respondents are entitled to erect or use such nets or fixed engines at or near any of the said sites, or at or near any" of certain scaurs mentioned in the prayer of the note. He therefore sustained, to the extent of the findings relating to these scaurs, the reasons of suspension, declared perpetual an interdict formerly granted, and decerned for removal of the nets erected on these scaurs. *Quoad ultra* he refused the prayer of the note. The respondents were found liable in expenses.

They reclaimed, and argued — The damage averred to the salmon-fishings was not established in fact. In the former declarator the Court had held that white fishers did no real damage to the salmon-fishings. But further, the present process was just an attempt to get over the result of the case of *Gilbertson*. The defence there formed the reasons of the suspension here, and yet in that process the Court had declared the right of the public to use fixed engines for white-fishing in the Solway as a right existing along with that of salmon-fishing, and it would be as reasonable that the white fishers should have a right to stop salmon-fishing as that the complainers should succeed in a process which would put a stop to the white-fishing for a great part of the year, and which was only a step to putting it down altogether. As matter of law, the private right of salmon-fishing was not stronger than the right of white-fishing, especially in a place where that right was, as in the present instance, anxiously declared and guarded by a series of statutes. Indeed, Lord Ormidale and Lord Gifford in *Gilbertson's* case held that the public right was more a favourite of the law than the private. The prayer of the note was thus one which the Court could not legally grant.

After argument, the Court remitted, of consent of both parties, to Mr Anderson, Edinburgh, who was suggested in a list of suitable persons proposed by the respondents and approved of by the complainers, to report whether the respondents' nets were calculated materially to injure the complainers' salmon-fishings, and whether white-fishing could be carried on by fixed engines without such injury? He reported that in his opinion the present nets were injurious, and suggested that they should be greatly reduced in size and used at different localities.

The respondents maintained that it was impossible, in consequence of the rapid run of the tide in the Solway, and other causes, without ruin to the white-fishing industry, to prosecute the fishing without such nets as had been previously in use, and that the construction of net suggested by the reporter would be useless for the purpose of white-fishing.

At advising—

LORD JUSTICE-CLERK—[After hearing the reclaimer's counsel]—I do not think it necessary to hear anything more about this matter, although in certain respects the case may be one of some difficulty. To some extent it may be regulated by the case of *Gilbertson*, of which we have heard a good deal since the present case came before us. That judgment, however, was a very guarded and limited one in its direct application, and since it was pronounced the Solway Salmon Fisheries Commissioners Act has been passed, under which a commission was appointed to sit; and the proceedings of these Commissioners have come to be exceedingly material in such matters as that before us.

But I do not mean to go into these questions in detail, especially since we consider them jury questions. We have already had the present question very fully discussed before it came up in its present stage; and we came to be of opinion that unless some man of skill could report or suggest a way in which white-fishing could be carried on without injury to the salmon-fishing during the open salmon season, there was no sufficient answer to the Lord Ordinary's views, or to the interlocutor and interdict which he pronounced.

In his report Mr Anderson has made the suggestion which has been so often referred to in the course of the debate. His report is quite satisfactory considering the terms of our remit. It answers all the questions we put to him. It perhaps says a little more, but that is of no consequence. I refer to it at present more particularly for the recommendation as to the construction of nets for white-fishing, and which construction, if it were adopted, would not be objectionable on the score of being injurious to salmon-fishing, and which might therefore be fairly permitted.

But it seems the parties do not wish to take advantage of that mode. If they are content to fish in the way that Mr Anderson has reported to be innocent, of course they will be protected. If not, of course they must take the consequences. But there the recommendation is. Probably, however, it is not necessary, after the repudiation of it which we have had from the bar, to take any further notice of Mr Anderson's report, except to act upon it in so far as it applies to this judgment.

I am therefore for adhering to the Lord Ordinary's interlocutor, and for continuing the interdict.

Lord Young—The pursuer of this action is proprietor of the salmon-fishings on the shore of the Solway Firth, and he seeks to have the respondents, who are white-fishers there, interdicted from placing certain nets at certain points within the limits of the salmon fishery belonging to him. He complains that certain nets, placed within the limits of the fishery, and which are professed to be used for the purpose of taking white fish, are, notwithstanding that profession, really used for the purpose of taking salmon, and are, at all events, materially injurious by their existence there to his proprietary right of salmon-fishing.

The defence was that the nets complained of were proper white-fishing nets, and were there lawfully, all the world being entitled to fish in a proper manner for white fish; and that the pursuers had no ground to complain, inasmuch as although a salmon might be caught there occasionally by a rare accident, yet salmon were not caught in any numbers, and the nets were not fitted for that purpose, and were not injurious to the salmon-fishings.

There was thus an issue in point of fact raised between the parties. The Lord Ordinary accordingly allowed a proof, and a long proof was taken. The Lord Ordinary arrived at the conclusion, upon the proof, that these nets complained of were so constructed and so situated as to take salmon, and by taking salmon and by their position interfering with the run of the fish to be injurious to the complainer's right of property in the salmon-fishing; and he interdicted the respondents accordingly during the salmon-fishing season. And here I may remark that season is not the proper white-fishing season at all. I do not mean that white-fishing cannot go on then, or that during any part of it white-fishing cannot be availably carried on. But the best period of the year for white-fishing is just the close time for salmon-fishing; and the interdict concluded for here is limited to the open time for salmon-fishing. The Lord Ordinary, as I have said, has granted interdict against these particular nets accordingly on the ground that they are injurious to the complainer's right.

I may say that my own impression upon the evidence is that these nets were erected for the purpose of taking salmon, and have been chiefly profitable as real salmon nets. However, we were very much indisposed to do anything which might unnecessarily interfere with the rights of the white-fishers, or which might avoidably interfere with their rights. It was conceded at the bar — and very properly conceded — that the white-fishers were not entitled so to exercise their right as members of the public as to materially interfere with the proprietary right of salmon-fishing. But in so far as that public right might be exercised—and it was represented to us that it might really be exercised without interfering with the right of salmon-fishing—we were very anxious that our judgment should be so framed as to leave the white-fishers at liberty. And with a view to arrange the matter between the parties in a more satisfactory manner than could be done by a judgment under the mere prayer of this note of suspension, the parties agreed to refer it to Mr Anderson to adjust their rights, and to point out what construction of nets the white fishers might use, and at what points in regard to situation, so as not to do injury to the complainers' rights, for the law under which these white fishers conduct their fishing will not allow them to inflict any such injury. After intervals we have had two reports from Mr Anderson. In the first report he condemns—as I think the Lord Ordinary does as the result of the evidence led before him — the existing nets, as not only injurious to the salmon-fishing during the close time—although this is a mere observation and not within the conclusions of the prayer—but by being there in the close time they interfere with the run of the fish in the spawning time. That may be a hint to the proprietors of fishings in the rivers there, or to the pursuer who is one of them, to apply for interdict against the use of nets of that construction even in close time as interfering with the run of the fish during a very important season for the propagation of the fish and the prosperity of a fishing. But I give no opinion upon that matter. We have nothing to do with close time here.

But Mr Anderson now points out, in answer to the remit made to him by us, that although the nets in question in the localities indicated to us are injurious to the salmon-fishing, yet the white-fishing may be prosecuted. I necessarily read that as meaning prosecuted with advantage. He says the white-fishing can still be carried on, and that must necessarily mean in his opinion with advantage. If you do not care about taking fish, you can carry it on anywhere and in any way, but when a man like Mr Anderson reports to us that white-fishing can be carried on at a

certain place by nets of a certain description, I must understand him to mean availably carried on. He states the localities, or at least the distance from the salmon-fishing ground, at which the nets may be used with advantage. He also describes the construction of net that may be so used. But the counsel for the respondents—who seem to have changed their mind, or to have instructed their counsel differently from what they did formerly—says, "Oh! this is quite idle. Really the construction of nets which we are using are the only nets, and the places where we have set them are the only places where white-fishing can be carried on availably, and it would be quite useless to go elsewhere."

Therefore it seems to me we cannot afford any further protection to the white-fishers in this matter, but, confirming the judgment of the Lord Ordinary, must prohibit the use of those nets in those localities which are proved and reported by a judge of the respondents' own selection to be injurious to the rights which they are not by law entitled to injure.

LORD CRAIGHILL—I am of the same opinion. I think the interlocutor of the Lord Ordinary ought to be adhered to. In the interests of the reclaimers I do not think it necessary or expedient that any change should be made on the terms of the interim interdict that has been granted. The Lord Ordinary is of opinion that the stake-nets which were at the time on the ground, and which are complained of, were nets by which salmon as well as other fish might be taken. The nets, other than those which are matter of interdict, are not said to be of a nature to do injury to the complainers, and the respondents are at liberty to put up any nets which are not calculated to catch salmon. Therefore it appears to me to be unnecessary to do anything for the purpose of protecting what is the white-fishers' right, namely, to plant nets which are not calculated to do injury to the complainers' nets. Even if there were no other protection, it seems to me that ample protection is afforded by the interlocutor of the Lord Ordinary reclaimed against.

I may say further that I am of opinion that the argument submitted to-day is entirely inconsistent with the true reading of the judgment of the Court in the case of *Gilbertson*, which was the first of the actions referable to this matter brought into this Court. What occurred to us at first on hearing the address of the respondents' counsel was this—that on that judgment there had been an absolute permission of the right of the white-fishers to fish for white fish with any manner of engines, whatever the effect of using such engines might be upon salmon-fishing; but on looking at the judgment it is as plain as possible that that is not the view that was declared by the Court. On the contrary, what was declared was this—the right of the white-fishers to fish by means of fixed engines for white fish, and by such engines as those in question, providing there was no material or substantial injury done to salmon-fishing. Accordingly there was included a reservation under which either of the parties was left at liberty to make any new application to the Court which might be necessary for the protection of the rights thus recognised. Accordingly the present suspension and interdict was presented, and in that action there was sought interdict against the use of the stake-nets which in the interval had been erected. A proof was allowed, and afterwards when the case came to the Inner House there was a remit made by all concerned to Mr Anderson, in order that after inspection of the stake-nets his opinion might be obtained. The result of his report is that the engines used by the respondents for the purpose of white-fishing interfere with the complainers' right of salmon-fishing. The Lord Ordinary granted interdict against the use of these nets or engines, and I agree with your Lordships that the Lord Ordinary's interlocutor should be adhered to.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Complainers—R. Johnstone—Keir—Forrest. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondents — Nevay — Sym. Agent—W. N. Masterton, Solicitor.

Friday, December 2.

SECOND DIVISION.

AIKMAN AND OTHERS, PETITIONERS.

Trust—Nobile Officium—*Where Trust unworkable in consequence of Disagreement between Trustees.*

Two surviving trustees under an antenuptial marriage-contract having been unable to agree upon an investment of the funds, or upon a person or persons to be assumed into the trust, and the estate having suffered loss thereby, the Court, on the application of the beneficiaries, *authorised* the appointment of new trustees nominated by the beneficiaries.

By antenuptial contract of marriage between the Rev. Henry Walker and Miss Eleonora F. J. Gordon, with consent of her father Thomas Gordon of Park, Mr Walker agreed to assign to the marriage-contract trustees a policy of assurance over his life for £500, in addition to the whole property he might acquire during the marriage, which provisions, in addition to the annuity to which she would be entitled from the Ministers' Widows' Fund of the Church of Scotland, Miss Gordon accepted as in full of her legal rights. On the other hand, her father agreed to pay to the trustees, at the first term after his decease, a sum of £2000 to be invested by them for behoof of the spouses and the survivor, and after the death of the survivor the principal sum was to be divided among the children of the marriage, if any. The trustees were Andrew Steuart of Auchluncart, Major Duff of Drummuir, and three others, who had died before the date of this petition. Mr Gordon died in 1857, and the £2000 was paid to the trustees. Mr Walker died in 1860, predeceasing his wife, and leaving three children. The proceeds of the policy were paid to the trustees, and were invested at the date of the petition along with other sums in a mortgage of the North British Railway Company, in the names of Messrs Mackenzie, Innes, & Logan,