with some other tenant who would have taken over the plant as at Whitsunday 1874, at its then value—that is, precisely at the value which the pursuer himself was to pay for it. All these details, however, must be dealt with, and necessarily only approximately dealt with, by the jury. I have tried to take everything into due account, and my verdict is for the pursuer. Damages assessed at £2000.

LORD JUSTICE-CLERK concurred.

The following interlocutor was pronounced:—

"Find the defenders liable to the pursuer in the payment of Two thousand pounds in name of damages for the injury sustained by him, and by the defenders having wrongfully retained possession of the colliery in question after the period at which they were bound to remove therefrom: Find the pursuer entitled to expenses up to the date of said minute of admissions, including the expense of said minute, and remit to the Auditor to tax the same and to report; and find no expenses due to either party after that date, and decern."

Counsel for Pursuers—Mackintosh. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders—Asher—Moncrieff. Agent—Alexander Morison, S.S.C.

Friday, January 26.

FIRST DIVISION.

[Lord Young, Ordinary.

SCOTT *v.* KALNING.

Ship—Charter Party—Breach—Unseaworthiness.

A vessel became unseaworthy during a voyage for which she was chartered, and put into port for repairs. These were executed, but surveyors who were employed by the owner to examine her reported unfavourably, and advised that she should be further strengthened. This was not done, and she proceeded to sea. In a question between the shippers of cargo, which was damaged, and the owners—*Opinions* (*per curiam*) that the report by the surveyors, though not conclusive, operated to shift the *onus* of proving unseaworthiness from the shippers, and laid upon the owners the burden of proving the contrary.

Counsel for Pursuer—Lord Advocate (Watson)—Guthrie Smith. Agent—Thomas Dowie, S.S.C.

Counsel for Defender—Trayner—Thorburn. Agent—P. S. Beveridge, S.S.C.

Friday, January 26.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

COLQUHOUN'S TRUSTEES *v.* ARCHIBALD ORR EWING & COMPANY.

Property—River—Alveus.

Held that the proprietor of land on the banks of a navigable non-tidal river has no right to raise in the bed of the river any structure which may tend to obstruct navigation.

Observations (*per* Lords President, Deas, and Shand) on the distinction between navigable tidal rivers and navigable non-tidal rivers.

Observed (*per* Lord President) that the right of the public over a navigable non-tidal river is akin to that of a right-of-way.

Observations per Lord President upon his remarks in the case of *Buccleuch* v. *Cowan*, December 21, 1866, 5 Macph. 214, and upon the case of *Bickett* v. *Morris*, 2 Macph. 1052, 4 Macph. (H. of L.) 44.

Opinion (*per* Lord Deas) that the right of free navigation in a river where the tide does not ebb and flow arises from use only, and depends upon the nature and extent of that use.

Opinion (*per* Lord Shand) that if a non-tidal river be navigable, and a natural highway between public places, it is not necessary that it shall have been previous use to entitle the public to vindicate a right to use it.

Acquiescence.

An action was brought for the purpose of having it declared that a river was a navigable river, free and open to the public, and that the piers of a bridge which the defenders were erecting in the *alveus* of the river at a point where they were proprietors on both sides, "do at present and will when completed obstruct the free navigation of the said river;" and for decree ordaining the defenders to remove the said bridge and piers. The defenders founded upon a letter written to them by the pursuers' predecessor agreeing to make no objection to the erection of the bridge, "provided his fishings and other rights are not interfered with."—*Held* that the pursuers were not barred by acquiescence from insisting in the action, as it had for its object the vindication of their right, as representatives of the public, to use the river for the purposes of navigation.

Opinion (*per* Lord Mure, *diss.* from the other Judges) that the object of the action as laid was simply to have the bridge removed on the ground that it obstructed the navigation of the river, and that therefore the pursuers could only succeed (in view of their predecessor's letter) if they instructed a case of injury to their own patrimonial rights.

The trustees of the late Sir James Colquhoun of Luss raised this action against Archibald Orr Ewing & Co., calico printers and turkey-red dyers, Levenbank, concluding, firstly, for declar-

ator (1) that "the river Leven throughout its course from Loch Lomond until it falls into the river or Firth of Clyde at Dumbarton is a navigable river, free and open to the public"; (2) "that the defenders have no right to execute any works which will in any way interfere with or obstruct the navigation thereof, or the free use of its banks, and of the towing-path along the bank of the said river, for the purposes of navigation;" and (3) that they had no right to erect bridges, piers, or other works on the river, which would injuriously affect the pursuers' interests as proprietors of salmon-fishings. Secondly, for declarator that a bridge which the defenders were then erecting at Dillichip, and its piers and supports, "do at present, and will when completed, obstruct the free navigation of the said river, and the use of its banks and towing-path, to the injury of the pursuers, and will also injuriously affect their rights and interests in the salmon-fishings in the said river and loch." Thirdly, that the defenders should be ordained to remove "the said bridge and the piers and supports thereof, in so far as the same obstruct or interfere with the navigation of the said river Leven, and the use of the said river and its banks and towing-path as the same has hitherto been possessed and enjoyed by the pursuers, their predecessors and authors, or that in any way injuriously affect the rights and interests of the pursuers in the salmon-fishings of the said river and loch." The defenders were proprietors of certain print and dye works near Dillichip, Bonhill, on the east or left bank of the Leven. The North British Railway from Balloch to Dumbarton ran along the west bank, and having purchased certain ground upon that side for the purpose, the defenders proceeded to connect their works at Dillichip with the railway by the construction of a branch line and a bridge across the river. Before doing so, they communicated in 1872 with Sir James Colquhoun, Mr Smollett, and other proprietors interested, and no objection was made. Sir James Colquhoun's factor, Mr Andrew Wylie, wrote at that time the following letter to the engineers employed by the defenders:—

"*Camstradden, Luss*, 14*th May* 1872.

"DEAR SIR,—Referring to our conversation lately about the proposed railway branch from Alexandria to Dillichip, across the Leven, I am directed to state that Sir James Colquhoun will make no objection, provided his fishing and other rights are not interfered with."

The bridge was thereafter constructed. It consisted of iron girders resting on two sets of stone piers, each set consisting of two stone pillars or piers of five feet diameter, placed near each other in a line transversely to the bridge. The west piers were on the towing-path on the bank of the river, and the line of the path was altered to allow of their being placed there. They were placed in a line three feet apart. The east piers were in the bed of the river towards the left bank, and were also three feet apart. The span of the bridge between the west and east piers was ninety feet wide.

The pursuers' averments were to the following effect:—The Leven was a navigable river used by steamboats and also by gabbarts or scows, the latter affording a convenient and inexpensive means of conveying supplies to, and produce (particularly wood) from, the pursuers' lands and farms on Loch Lomond to the Clyde or places on the Leven. The scows were occasionally towed, and the towing-path was used for that purpose. The pursuers were also proprietors of salmon-fishings in the Leven, and of those in the Clyde belonging to Dumbarton, and of other fishings in Loch Lomond. The erection of the pillars for the bridge on the towing-path would interfere with the towing of vessels, inasmuch as the horses would not be worked with the same freedom as formerly; and the erection of the pillars for the bridge in the bed of the river would obstruct the passage of vessels, or at least of the scows or gabbarts, up and down the river. These pillars in the river would also obstruct the passage of salmon up and down. The *alveus* of the river was not the property of the defenders. The most material interest which the pursuers had in the matter was the effect the bridge as it was being constructed would have on the value or return from the estate under their charge. The erection of the bridge would materially interfere with the transmission of the produce from the farms and of goods to them. These articles would not be transmitted as conveniently and cheaply as hitherto, but would have to be carried by road or rail, and the value of the lands would be diminished, and the rents to be obtained lessened. The pursuers further averred, that the impediment which the bridge will cause in the conveyance of wood from the pursuers' lands down the Leven would prevent merchants from giving the same price for it as formerly. As a considerable quantity of wood from the estates was likely to be in the market in a few years, amounting in value to several thousand pounds, any reduction of price would be a serious loss to the trust-estate.

The defenders answered—Admitted that occasionally, in times of flood, small boats of a light draught of water, and known as gabbarts, pass up and down the river Leven, and carry goods of various kinds down the river, being towed up it empty. Admitted that sometimes in high flood the steamers used for the navigation of Loch Lomond have been towed unloaded up and down the said river. Explained that the tide does not reach nearly so high up the river Leven as the bridge in question, and that the *alveus* of the river there is the private property of the riparian proprietors, each up to the *medium filum* where the lands on the opposite banks belong to different proprietors. Explained that the west piers are placed about ten feet back from the west bank of the river, so as to leave (as they leave in fact) a sufficient towing-path between them and the river, and that thus no inconvenience is caused by the said bridge to the towing of boats. Further, explained that the east piers are placed a short distance above the entrance or intake of a lade from said river, and at a point in a direct line or nearly so up the stream from the catch-water wall of said lade, where they do not and cannot form an obstruction to the passage of boats up or down the river; and the span spans over the whole of that part of the river which at that point is available for or is used for the passage of boats. Further, explained that said piers are built in or nearly in a line with what was formerly and naturally the east bank or margin of the river at that point, a portion of the bank having been there cut away to form the entrance to the lade,

said entrance and lade coming in place of the original bank of the river, and the *solum* thereof, and of the site of the pillars, being the property of the defenders; at all events, in the original condition of the bank of the river at that point the said east piers would not have interfered with the use of the river by boats. The allegation that the piers form an impediment to the passage of salmon is altogether unfounded. *Quoad ultra* denied, and explained that the operations connected with the said bridge were commenced on 3d March 1875, and that they were almost completed when this action was raised. The construction of said branch railway and bridge was entered on and carried out with the full knowledge and consent of the pursuers and their predecessors, and the pursuers and their predecessors acquiesced in the said operations. There are and have for many years been three bridges farther up the river Leven than Dillichip, and the maximum height of two of these is less than the height of the bridge now complained of—Balloch Bridge being two feet and Bonhill Bridge eight inches less in height. There are also two bridges below Dillichip, both of which are erected upon piers placed in the bed of the stream. The bridge built by the defenders will not detrimentally affect the use of the river Leven by the pursuers, nor injure their interests in any way.

The pursuers pleaded—"(1) The river Leven being a public navigable river, the defenders have no right to make any erection in the channel of the river, on its banks, or on the towing-path, which will in any way interfere with the free navigation thereof. (2) The pursuers, their predecessors and authors, having by themselves and by their tenants and others had hitherto the free use of the river and its banks and towing-path, for purposes of navigation and floating timber, the defenders are not entitled to do anything which will impede or obstruct the said uses hitherto had by them. (3) The pursuers, as proprietors of the rights of salmon fishing before mentioned, are entitled to challenge the works of the defenders in so far as the same will impede the passage of the fish up and down the river. (4) The operations complained of being to the obstruction of navigation, and to the injury of the pursuers, they are entitled to have a decree as concluded for, with expenses."

The defenders pleaded, *inter alia*—"(2) The erection of the bridge in question and the execution of the relative works having been lawful, and in exercise of the defenders' rights, the defenders are entitled to absolvitor. (3) The river Leven having been for upwards of forty years dedicated to manufacturing uses, as condescended on, and the bridge in question being necessary for the proper conduct and enjoyment of the works in question, and constituting no interference or material interference with any uses claimed by the pursuers, the defenders are entitled to absolvitor. (4) The pursuers and their authors having acquiesced in the erection of the bridge and works libelled, they are barred from insisting in the conclusions of the summons. (5) None of the pursuers' interests being injuriously affected by the operations complained of, they are not entitled to sue the present action."

Both parties were allowed a proof of their respective averments, the purport of which, as affecting the question at issue, sufficiently appears from the Lord Ordinary's interlocutor and note and from the opinions of the Court. The following interlocutor was pronounced:—

"*Edinburgh*, 12*th June* 1876.—The Lord Ordinary having considered the cause, Finds and declares that the river Leven throughout its course from Loch Lomond until it falls into the River or Firth of Clyde at Dumbarton is a navigable river, free and open to the public; and that the defenders have no right to execute any works which will in any way interfere with or obstruct the navigation thereof, or the free use of its banks and of the towing-path along the bank of the said river, for the purposes of navigation, and decerns: Finds and declares that the piers recently erected by the defenders in the bed of the said river near to the east bank are an obstruction to the free navigation thereof; Therefore decerns and ordains the defenders forthwith to remove the said piers: Finds the pursuers entitled to expenses, but subject to modification; allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and report.

"*Note.*—The pursuers ask to have it declared that they have a public right of navigation in the river Leven. The defenders, on the other hand, contend that the river is private, and that no public right of navigation exists.

"It is certain that for a long period of time the river has been navigated by a particular class of vessels called scows and gabbarts. They descend the river by the force of the current; but they are towed up by horse haulage. There is a towing-path on the right bank. It ends about 800 yards from Loch Lomond, after which the boats are poled up to the loch.

"The river has been thus used for the purpose of carrying to the Clyde the produce of the lands on Loch Lomond side, and of bringing to that district what was required by the proprietors and their tenants. An attempt was made, but in the opinion of the Lord Ordinary unsuccessfully, to shew that the navigation had been carried on for a more general purpose.

"The traffic was carried on to some extent by boats belonging to the owners or tenants on Loch Lomond side; but chiefly by boats belonging to persons who kept them in readiness for hire. It was formerly more considerable than it now is. But though it has been diminished by the railways, it is not unimportant. It is probable, however, that loaded boats will not be taken up the river, and that the navigation in that direction will be confined to empty boats intended to bring down a cargo.

"The Lord Ordinary is of opinion that a public right of navigation exists in the River Leven. That it is navigable is proved by the fact that it has been navigated. It is the natural channel of communication between an extensive district and the Clyde. It is within the definition of a public or navigable river as given by Erskine, ii. 6, 17, and by Bell in his Principles, sect. 648.

"The defenders contended that no right of public navigation could exist when the navigation could not be carried on in both directions without the use of banks for haulage. For this proposition no authority was cited, and it is not supported by the *dicta* of the institutional writers. Whether the public have the right to use the bank of a navigable river for traction, the Lord

Ordinary does not stop to inquire. Such a right has existed for time immemorial in connection with the navigation of the river Leven, and it does not appear to be important whether it depends upon common law or on usage.

"If the Lord Ordinary is right so far, the next question is, whether the bridge is an obstruction to the navigation. The pursuers make two complaints—first, with respect to the alteration of the towing-path, and, second, in regard to the piers which are placed in the bed of the river. The Lord Ordinary does not think that they have any well-founded cause of complaint as regards the former, but the latter, in his mind, presents a very serious question for consideration.

"The piers are situated in what must be considered the bed of the river. The defenders no doubt contended that the site on which they stand had originally formed part of the bank, which was removed to form the lade of the defenders' mills. But this is at the best no more than a conjecture. At anyrate the water has been in use to flow over the site beyond the memory of man, and though it had at one time formed part of the bank, it must, as the Lord Ordinary thinks, be taken to be a part of the *alveus* of the river.

"But the defenders maintain that the piers do not obstruct the navigation. On this question the evidence is very contradictory. On the whole the Lord Ordinary prefers that of the pursuers. The witnesses for the defenders give a very unintelligible account of the manner in which they have been accustomed to conduct their boats between the piers and the right bank of the river. One thing, besides, is very evident, that in descending the river a boat will have less space and time to clear the bridge than to clear the obstruction presented by the defenders' catchwater dyke.

"The defenders further maintained that they were not encroaching on the right of the public, even though the piers were to be considered to be an obstruction. They argued that the river had been employed for other uses than that of navigation, and that if a reasonable space was left for the exercise of that right the public had no right to complain though the navigation might be made less convenient than before. They rely on the case of *Grant v. Gordon*, M. 12,820, where regulations were made for the floating of timber down the Spey, and salmon-fishing by means of cruives.

"The Lord Ordinary has not been able to adopt that view. He thinks that the defenders cannot place in the bed of the river any obstruction which materially affects the navigation, and that they cannot appeal to what has hitherto been done as any sanction for such an act. It is to be presumed that the uses to which the river or its bed has been put do not injure the navigation, or if they do, that the public have lost their right to object. But prior encroachments will not, in the opinion of the Lord Ordinary, justify further encroachments.

"The case of *Grant* is a peculiar one. It related to the regulation of two co-existent rights in the river, the one of floating down timber, and the other of salmon-fishing by means of cruives. It had been previously decided that fishing by cruives was a lawful mode of fishing, and it was certain that it had been exercised for time immemorial. It is true that the pursuers alleged that in recent times alterations had been made on the dykes, which impeded the navigation. But with both these co-existent rights the Court could do no more than regulate the possession of both. This does not, in the opinion of the Lord Ordinary, justify the introduction into the bed of the river Leven of a new obstruction to the navigation.

"No case was made as to the alleged obstruction of the passage of salmon."

The defenders reclaimed, and argued — The Leven was not a public river in the sense that a place overflowed by the sea was. The rule against structures in the *alveus* was limited to places where the sea ebbed and flowed. Here the law of ways applied, and the rights of parties depended upon use. All that the riparian proprietors could assert was a right of servitude of passage. That right must be exercised in the way least burdensome to the servient tenement. It was said that, apart from proof of the fact, the obstructions were illegal. But by reason and principle the bed of the river was the property of the riparian proprietors. There was nothing to subject that right of property to any limitations or restraints. The water covering it did not have that effect. But if it did, mere fitness for navigation was not enough. There would require to be proof of use of the water as a navigable river as a foundation of the right. There was here no proof of such use. Nothing was taken down the loch and river except what was incidental to the places on the banks. The Acts 1690, cap. 33, and 1695, cap. 113, appointing fairs at Tarbet and Luss, established nothing about Loch Lomond, and did not show that it was a public place. The proprietors on the banks were the only people with whom trade was carried on. There had been no public use continuously for forty years. There was, further, no obstruction caused to the navigation, and that being so, by the letter of 14th May 1872 Sir James Colquhoun had consented to what had been done.

The pursuers argued—They were not bound to show that damage was caused by the obstructions. They were entitled to put a stop to any operations in the *alveus* of the stream. Even if the *alveus* belonged to the riparian proprietors, they had no right in the matter. The public were proprietors of the surface. It was so settled in *Bicket* v. *Morris*, May 20, 1864, 2 Macph. 1082, 4 Macph. (H. of L.) 44. It was there established that *ex adverso* proprietors can prevent one another from erecting anything on their own half of the stream without qualifying injury. That was because the water was affected, and it was common property. The right of the public in a navigable river like the Leven was similar to their right in a highway. No limit or obstruction could be offered to the width of a road; much less to a river where the navigable stream was always more or less shifty. No engineer could speak with certainty as to what might not be obstructions in such a case. It was impossible to say whether operations might or might not be injurious. But if that were necessary, present injury was proved here.

Authorities.—*Colquhoun* v. *Duke of Montrose*, Dec. 21. 1793, M. 12,827; *Grant* v. *Gordon*, March

9, 1781, M. 12,820, 2 Pat. (H. of L.) Apps. 582; *Duke of Buccleuch* v. *Cowan*, Dec. 21, 1866, 5 Macph. 214; Craig, i. 16, 11; Act 29 and 30 Vict. cap. 62, sec. 7; Erskine's Insts. ii. 6, 17; Bell's Prin. secs. 650 and 651; *Macdonell* v. *Caledonian Canal Commissioners*, June 5, 1830, 8 S. 881; *Menzies* v. *Macdonald*, March 10, 1854, 16 D. 827; *Carron Company* v. *Ogilvy*, March 7, 1806, 5 Pat. (H. of L.) Apps. 61; Acts 1690, cap. 33 and 1695, cap. 113; Thomson's Acts, vol. ix. 184 and 501; Lord Hale, *de jure maris*, quoted in Hall on the Sea-shore (ed. by Loveland); Angel on Water-courses, 552, 556, 560, 561; *Fairlie* v. *Eglinton*, Jan. 26, 1744, M. 12,780; *Edmonstone* v. *Lanark Twist Company*, June 27, 1810, Hume's Decns. 520; *Bicket* v. *Morris*, May 20, 1864, 2 Macph. 1082, 4 Macph. (H. of L.) 44; Stair's Insts. ii. 1, 5; Woolrych on Rivers, 40; Act 11 Geo. IV. cap. 69, sec. 22. Right-of-Way Cases—*Wood* v. *Robertson*, March 9, 1809, F.C.; *Galbreath* v. *Armour*, July 11, 1845, 4 Bell's Apps. 374; *Thomson* v. *Murdoch*, May 21, 1862, 24 D. 975; *Sutherland* v. *Thomson*, Feb. 29, 1876, 3 Rettie 485.

At advising—

Lord President—The pursuers of this action complain that the defenders in erecting a bridge across the river Leven, at a part of that river where they are proprietors on both sides, have built the piers of the bridge in such a way in the *alveus* of the river as to interfere with the navigation, and also to obstruct and interfere with the pursuers' right of salmon fishing. As regards the latter supposed injury, no evidence has been given at all to support the averments of the pursuers, and that part of the case therefore is no longer before us. The only question is whether the piers of the bridge complained of interfere with the navigation of the river, and upon that ground ought to be removed.

The first defence which is made—at least the defence which requires to be first considered—is a plea of acquiescence. It is said that the pursuers of this action, as representing the late Sir James Colquhoun, are barred from insisting, because he consented to the erection of this bridge, or acquiesced in its being erected, and therefore if he had been alive now he could not have been here to complain. If I thought that defence well-founded, of course I should come to the conclusion that the pursuers were not entitled to insist, and that the action ought to be dismissed. The conclusions which alone the pursuers now insist in are conclusions which they maintain as representatives of the public, because it is the public use of the river as a navigable river that they seek here to vindicate and set up. And even if the pursuers were excluded from suing this action, and the action were dismissed, it would not prevent any other member of the public from taking up the complaint and insisting in it. But if they are not barred from suing this action by acquiescence, then we must take it that the pursuers are here as the proper representatives of the public and not in any private capacity. I am of opinion that there is not sufficient evidence of acquiescence. The letter which has been founded on by the defenders in support of this plea, dated 14th May 1872, by Sir James Colquhoun's factor to some person representing the defenders, merely says that, referring to a recent conversation, the writer is directed by Sir James Colquhoun to say that he will make no objection provided his fishing and other rights are not interfered with. Now, I cannot suppose that by "other rights," as mentioned in that letter, it was not intended to embrace the right of using this river for the purposes of navigation in common with all the subjects of the realm; and if it turns out that those rights are interfered with, then no plea of acquiescence can be founded upon this letter. The other evidence which was attempted to be brought in support of this plea I do not think requires any particular notice. I am very clearly of opinion that the pursuers are not barred from insisting on this action, and that they are entitled to insist on it as members of the public, and as representing the public interest.

Now, that being so, the question is whether there is here an obstruction or apprehended obstruction to the navigable river; for that is the case presented by the pursuers. It has been contended that this is not in any proper sense a public navigable river, and our attention has been very properly called to the distinction which exists between navigable rivers of different kinds—between a navigable river where the tide ebbs and flows and a proper fresh-water river, which the Leven undoubtedly is at the part of the river with which we have to deal. The distinction between the two is very important as regards legal principle, because where the tide ebbs and flows the *alveus* of the river is the property of the Crown for public purposes as well as the banks of the river, and in such a river as that the rights of the Crown are much more extensive than they can be supposed to be in a proper fresh-water river. The Crown, acting through the appropriate department of State, would be entitled to deepen a river where the tide ebbs and flows, and to perform any operation upon the *alveus* of the river that was conducive to the improvement of the navigation. Not so with a fresh-water river. The *alveus* of a fresh-water river is the property of the proprietors upon the banks, just as the *alveus* of a stream which is not navigable is the property of the proprietors upon the banks. But notwithstanding of that distinction, which is a very clear one, there may be a public use of a fresh-water river for the purposes of navigation, and although the rights of the Crown or the benefit of the public are not the same there, nor by any means so extensive as in the case of the estuary of a river where the tide ebbs and flows, yet undoubtedly there may be public rights of navigation, and public rights of navigation which are capable of being defended very much in the same way as they would be in any other case. The right of the public over a river of this class is more like a right-of-way than the right of the public which is protected by the Crown in the case of a navigable river where the tide ebbs and flows, and I am very much disposed to deal with this case as if it were just a right of way along this river, by means of this river, where it is fitted for purposes of navigation.

Some reference was made to casual remarks which I made in charging the jury in the case of the *Duke of Buccleuch* v. *Cowan*, Dec. 21, 1866, 5 Macph. 214, and I am sorry to observe that those remarks were rather loosely made, and that they suggested a view of the law in that respect which I am not by any means prepared to

maintain,—thinking, on the contrary, that the exposition which I have now given is a great deal more accurate than what I appear to have stated in the course of that trial.

But it seems to be contended, further, on the part of the defenders, that it is a very inferior sort of navigation of which the river Leven at this part of it is susceptible,—as if the legal rules applicable to a subject of this kind varied according to the extent to which a river is navigable. But I rather think if a river is navigable at all, and has been enjoyed and used as a navigable river by the public, the rights of the public must be judged very much according to the same rule, whether the river be capable of being navigated by vessels of one kind or another, by vessels of large or small dimensions. The legal principles, I apprehend, would be entirely the same, and the question therefore comes to be whether this is a fresh-water river at the part of it with which we have to deal, which has been used by the public as a navigable river beyond the memory of man. Upon that question of fact I entertain no doubt whatever. I think the evidence upon that subject is perfectly conclusive; and it appears to me that the attempt to represent Loch Lomond as being not a public place is perfectly hopeless. The river Leven affords access to and from Loch Lomond, which we all know is one of the largest sheets of fresh water in this kingdom, and is the boundary between two counties for a long distance,—for somewhere, I think, about 30 miles. There are four very large parishes which abut upon its shore, and it is surrounded by the estates of I think eleven different proprietors, some of them very extensive proprietors, and others of them small proprietors. There are many inhabitants upon the banks of Loch Lomond, and there are villages. These villages are said to stand upon the private estates of some of those large proprietors; but surely that does not prevent this loch from being surrounded by a considerable population, who represent, and are in fact, the public of that district of the country; and therefore to say that Loch Lomond is a private loch, as much as if it were a small loch in the middle of a landlord's policy, appears to me to be perfectly monstrous. Therefore I do not entertain the smallest doubt that the navigation of the river Leven, having been carried on past the memory of man in the manner which has been described in the evidence, makes the Leven a public navigable river to all intents and purposes so far as a fresh-water river can be so made.

In these circumstances, it follows that the public, having such rights of navigation, are undoubtedly entitled, and any one of the public is entitled, to vindicate and protect those rights against any encroachment upon the bed of the river. The Lord Ordinary's findings, I think, are quite satisfactory in so far as he finds that this river is a navigable river, free and open to the public, and that the defenders have no right to execute any works which will in any way interfere with or obstruct the navigation or free use of its banks, and of the towing-path along the bank of the said river, for the purposes of navigation; and I need only say, with reference to that last finding, that I should have been inclined to make it a little more extensive than his Lordship has done, because it seems to imply that in order to entitle the public to complain they must be in a position to show that the operations of which they complain do in point of fact, and at the present time, interfere with or obstruct the navigation. I do not think the burden upon the pursuers in an action of this kind is so heavy as his Lordship supposes. On the contrary, it rather appears to me, that if any man building a bridge over such a river as this fixes its piers in the channel *in alveo* of the river, he is in point of fact committing what is an illegality in itself. He has no right to build in the *alveus* of the river. No man is entitled to build even in the *alveus* of a small stream, at least without the consent of all the other proprietors who are interested in that stream, and I think, *multo magis*, no man is entitled to build anything in the *alveus* of a stream in which the public have rights of navigation. In short I am inclined to be of opinion that the doctrine which was firmly established in the case of *Bicket* v. *Morris*, 2 Macph. 1082, 4 Macph. (H. of L.) 44, is quite as applicable to a river of the description we are now dealing with as it was to a private stream. The principle of that case appears to be, that where there are other parties besides the party complained of who have an interest in a running water, it is illegal to build *in alveo*. It is not enough to say in defence of the operation complained of that it does nobody any harm. It may be that at the present moment the injury may not be foreseen, and yet it may occur, because nothing is so wilful and capricious (if one may use the expression) as a stream of running water, and it is almost impossible to foresee what the effect may be of any interference with the navigable flow of such a stream as regards the proprietors further down the stream, or as regards the proprietors opposite to the place where the operation is carried out. Now, in like manner, in the case of a navigable river like this, where there is no great abundance of water, and where the deep part of the channel is but narrow, and there is nothing to spare in the way of room for navigation, it is very difficult to foresee what the effect of any operation of this kind may be in times of flood or drought, or in various states of the river. The deep water channel of a stream like this may shift and vary by the operation of causes with which we are very imperfectly acquainted, and which even experts of the highest skill are unable to foresee. And therefore to put down the pier of a bridge, or any other building, in the *alveus* of a river of this kind appears to me to be what I should call a dangerous operation as regards the navigation, even though it cannot be shown that at the present moment it constitutes an absolute obstruction to that navigation.

I have made these observations because I have some little difficulty in saying that upon the evidence before us the preponderance or weight of the evidence is in favour of the pursuers upon the question of fact whether the piers of this bridge do at the present moment constitute an obstruction to the navigation. It is a narrow case in that respect, and if the pursuers were under the burden of proving as matter of fact that at the present moment there is an obstruction to the navigation caused by the existence of those piers, I should hesitate to affirm that proposition. But then the view which I take of the law is most materially strengthened when I find that men of skill, and men of practical knowledge as

well, upon the part of the pursuers, have expressed their strong opinions that even as the matter stands at present they consider this to be an obstruction to the navigation. Supposing them to be wrong in that respect, they cannot surely be so far wrong but that a very slight change in the condition of this river would make that an obstruction to the navigation which at present perhaps is not.

The law upon which I think this case falls to be decided was, as I said before, very firmly established in the case of *Bicket* v. *Morris*, but it was not I think for the first time made the law of Scotland by that judgment. On the contrary, it appears to me that in the two earlier cases which were reported by Lord Kilkerran—the cases of the *Mags. of Aberdeen* v. *Menzies*, 1748, M. 12,787, and *Farquharson* v. *Farquharson*, 1741, M. 12,779—the very same doctrine was laid down with regard to streams not navigable, and in one of those cases it was certainly a stream of very considerable size, the river Tay, although at a portion of the Tay not very far below Loch Tay. But that the doctrine itself is well-established, and is applicable to a case of this kind, I think may be made very clear by citation of one or two passages from the opinions of the Judges in this Court and in the House of Lords in the case of *Bicket* v. *Morris*, and the principle being to my mind so very important, I take the liberty of closing my remarks with these. Lord Benholme says—"Without my consent," meaning the consent of the proprietor on the other side of the river, "you are not to put up your building in the channel of the river, for that in some degree must affect the natural flow of the water. What may be the result no human being with certainty knows; but it is my right to prevent you doing it, and when you do it you do me an injury, whether I can qualify damages or not." Lord Neaves says—"Neither can any of the proprietors occupy the *alveus* with solid erections without the consent of the others, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question." The Lord Chancellor (Lord Chelmsford) says, after quoting these opinions—"These views appear to me to be perfectly sound in principle, and to be supported by authority. The proprietors upon the opposite banks of the river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water." Lord Westbury, who seemed to think that the case was entirely new, and did not recognise the cases which I have mentioned as reported by Lord Kilkerran as really establishing this doctrine, says—"This is a case of very considerable importance, because, so far as I know, it will be the first decision establishing the important principle that a material encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor without the necessity of proving either that damage has been sustained, or that it is likely to be sustained from that cause." And he goes on—"I have felt much difficulty upon it, because undoubtedly a proposition of that nature is somewhat at variance with the principles and rules established on the subject by the civil law. I am, however, convinced that the proposition, as it has been laid down in the Court below, and as it has received the sanction of your Lordships in your judgments, is one that is founded in good sense, and ought to be established as matter of law."

Now, it must be observed that the interest which was there held to be violated by the erection *in alveo* was the interest of a proprietor on the banks of the stream, and in that respect, but in that respect alone, I think the case there decided differs from the present. Because here the party complaining has not the interest of a proprietor, but only the interest of one of the public. I do not understand that the case of Sir James Colquhoun's Trustees is really based upon the notion that they have a private right here as distinguished from that of any other member of the public. But it appears to me that the distinction is one of no consequence in the application of the legal principle. The proprietor on the banks of a stream has an interest to prevent an erection in the *alveus*, because it may interfere with his rights—it may interfere with the flow of the stream, and so injure him. But it is not because he is a proprietor on the banks of the stream, but because, being a proprietor on the banks of the stream, he has an interest in the water, that he has a title to complain, and it is because the public have a right in this water that they, I think, have a title to complain. The title is not so much that of proprietorship as of interest in a running water; and in that respect the title of the complainers here, and the title of the complainer in *Bicket* v. *Morris*, are identical in principle.

I am therefore of opinion that the pursuers are entitled to prevail in those conclusions of the summons which are directed to the removal of the piers of this bridge as an interference with the *alveus* of a navigable river.

Lord Deas—There are two classes of public navigable rivers, the incidents of which are different—rivers in which the tide ebbs and flows, and rivers in which there is no ebb and flow of the tide, but where there is a navigable course beyond where that ebb and flow ceases to extend. The Lord Ordinary finds that the river Leven, now in dispute, throughout its course from Loch Lomond to the Firth of Clyde is "a navigable river, free and open to the public," but he does not distinguish—at least not in express terms—to which of the two classes of public navigable rivers he holds the river to belong—either that portion of the course of the river at or near Dumbarton where the tide ebbs and flows, or the upper portion where there is no ebb and flow of the tide, on which last portion the works now complained of are constructed. Over the whole course of the river from the sea to Loch Lomond the pursuers have maintained in argument that the character of the right of navigation is one and the same, and that it belongs to the public—though they claim it alternatively as a right of use or servitude.

Now, if the character of the right in question were the same above as below the ebb and flow of the tide, there could be no doubt at all that the works in dispute would be illegal, without the necessity of proving that injury to the navi-

gation did actually result from them. The *alveus* of the tidal part of a river belongs to the Crown for behoof of the public, and it is too clear for argument that no *novum opus* could have been lawfully constructed in the tidal part of the Leven. Neither the summons nor record really raises any such question. The declaratory conclusions, the averments, and the pleas are throughout directed against works which will interfere with or obstruct the navigation or the free use of the banks and towing-path in connection with that navigation. With respect to the question, whether or not it may have been competent for the pursuers to maintain that the right of free navigation in that part of the river, between the place where the tide ceases to ebb and flow and Loch Lomond, is a right belonging to the whole public—it is not the limited or unlimited class of persons who have been in use to navigate a river in which there is no tide, or to navigate that portion of a river which is above the tidal ebb and flow, that makes the difference in the incidence of the right, but it is the difference of the ground and origin of the right itself. The right where the tide does not ebb and flow arises from use only, and depends upon the nature and extent of that use, but the right where the tide ebbs and flows requires no use or allegation of use there. The Crown holds the *solum* of the tidal part of the river as trustee for the whole public, but in the remaining portion of the river the proprietors on the banks are the proprietors of the *solum* of the river, and the right to navigation on the part of others requires use to be found and supported. In the present case I think it must be made apparent that there is obstruction, actual or expected, and, on the whole, I think that the proof sufficiently preponderates in that direction. Obstruction is not proved. There is a degree of inconvenience even now; and I agree with your Lordship that if there is here obstruction now, or probable obstruction in the future, that is quite sufficient to entitle any member of the public to object to such an erection as we have here. I do not intend to go into the details of the proof. In some respects it is contradictory, but upon the whole matter I think the proof is in favour of there being a certain degree of obstruction. I cannot say more than this—that there may be obstruction in the future; and either of these grounds is quite sufficient to justify the conclusion at which the Lord Ordinary has arrived.

Lord Mure—I have felt this case to be one of very great difficulty, more especially with reference to the question of the obstruction of the navigation. Putting aside the question of salmon-fishing, it appears to me that this action is raised exclusively upon the question of fact—Whether that which has here been done will have the effect of obstructing the navigation of the river? The object of the action is to have this bridge, which was completed before the action was raised, removed, and upon the ground that it obstructs the navigation of a navigable river. In looking at the summons and record and pleas in law I find that that is the special objection which is taken to the proceedings of the defenders. The bridge therefore is not, I think, challenged on the abstract ground (as I read the record) that the erection of a bridge over a navigable river, the piers of which bridge rest on the *alveus* of part of the river, is in itself an illegal act to which the pursuers are entitled to object, and which they are entitled to have removed; but the action appears to me to be laid exclusively on the ground of actual injury to the pursuer's rights of navigation, and his right of salmon-fishing. In this view it is unnecessary to enter upon the question relative to the distinction between the tidal and non-tidal part of a navigable river, as regards the rights of proprietors along the banks of the river to deal with the *alveus*. I may state further, that on that point I see no reason to differ from the view of your Lordship, that there is a distinction between the tidal and non-tidal part of a river in that respect, and I am disposed to think that the proprietors of the ground on either side of a non-tidal part would be entitled to do things that the proprietors on the banks alongside the tidal part would not be entitled to do.

But the question which is here raised is a simple question of fact—Will the erection of this bridge be injurious to the navigation and to the pursuers' rights? Now, in the condescendence, where it sets forth the interest the pursuers have to raise this question, the most material interest stated is "the effect the bridge, as it is being constructed, will have on the value or return from the estate under their charge. The erection of the bridge will materially interfere with the transmission of the produce from the farms, and of goods to them." Now, I think this action has been laid on very special grounds, and I think the letter to which your Lordship has referred, from the factor of the late Sir James Colquhoun, in May 1872, puts the case on a somewhat different footing from what it would have been had the question been raised by one of the public insisting on the removal of a pier in the *alveus* of a navigable river. It appears that so early as May 1872 the defenders had in view the building of a bridge at this place, where they were proprietors on the one side, and had also acquired a right of property on the other. They communicate with the factor of Sir James Colquhoun on the subject, and in the factor's letter to them there is, I think, the assent of Sir James Colquhoun to the erection of a bridge at this place, provided his fishing and other rights were not interfered with. Now, we have it in evidence that in the course of this river between Dumbarton and Loch Lomond there are five bridges, some of them in the tidal part of the river; so that the mere fact of these piers being put there cannot be of itself an obstruction to the navigation. There is some evidence as to a stone bridge at Dumbarton, and as regards the others it is in evidence that the piers are brought down to the very bank of the stream, and are even in the *alveus* of the river—one of the bridges, I understand, belonging to Sir James Colquhoun himself. Well, after that letter, I do not very well see how a person so assenting, or his representatives, could seek to have the bridge in question removed, even if it had been erected over a tidal navigable river, whatever any other member of the public might be entitled to do, unless the person so assenting could instruct a case of injury to his own patrimonial rights, as alleged in the condescendence.

In dealing with this case it has been argued on

the part of the pursuers that there was here an interference with the rights of the public. It is not unimportant, therefore, to keep in view that every endeavour appears to have been made by the defenders to satisfy the public on the matter, and that long before they began to build the bridge. It appears from the proof that the other two largest proprietors on Loch Lomond, Mr Smollett and the Duke of Montrose, were communicated with; that the Loch Lomond Steamboat Company, who were also materially interested, were likewise communicated with; and after due consideration, no objection was made by any of them to the proposal. The Steamboat Company, it appears, had at first some difficulty as to the height of the bridge, which was at once removed by the defenders agreeing to raise the bridge to the height required by the Steamboat Company; and it also appears that when some of the boatmen objected to the way in which the towing-path of the bridge was to be formed, that objection was also at once removed; and it was not until the bridge had in these circumstances been almost completed, and a great part of the heavy expense had been incurred, that the pursuers interfered to stop the erection of it, and endeavoured to have it removed.

In these circumstances, does the evidence show that the pursuers' rights have been interfered with? Now, in the first place, it has not been shown that any damage at all is done by the bridge. There is, in my opinion, no evidence to show that the patrimonial interests of any of the proprietors on the banks of Loch Lomond will be seriously affected. Mr Wylie, who was for many years factor on the estate of Luss, and who only ceased to hold that office in May 1875, when this bridge was in course of formation, is quite distinct as to that point. He says it will do no harm to the sale of wood on the banks of Loch Lomond. Mr Murray, factor to the Duke of Montrose, is still more distinct. The Duke is the largest proprietor on the banks of the loch, and the question was deliberately considered by Mr Murray, who consulted the Duke on the subject, and his evidence is that the bridge will not do any harm to the property or to the sale of wood. Mr Wm. Edmond, a large wood-merchant, who has made considerable purchases of wood on the banks of the loch, says there is not the slightest apprehension that the bridge will impede the navigation of the river or make any difference in the price he offered for wood on Loch Lomond. Mr Smollett and Mr Mackenzie, both proprietors on the banks of the loch, say the same thing, and I think that any evidence brought by the pursuers on this point is of very little weight as compared with the evidence of the witnesses for the defenders.

It is however alleged that the obstruction to the navigation which has been maintained will indirectly affect the pursuers' rights and the value of his estate. So that the main question to be determined just comes back to this—Is there any reason to think that the navigation will be obstructed? Now, in dealing with that question it is important to attend to the condition in which the river was, and to the state of the navigation before 1875 at the place where the bridge was built. The channel is proved to be from 25 to 30 feet to the west of the eastmost piers of this bridge. This is quite distinctly proved by Mr Neilson and various witnesses of experience examined for the defenders. Mr Copland, the engineer examined for the pursuers, says it is from 20 to 25 feet west; some of the witnesses say from 26 to 27; and some go as high as 30 feet. That deep channel, which is from 25 to 30 feet west from the east piers, is about 16 feet broad, as is proved by one of the witnesses examined for the pursuers. Now, the scows or boats which navigate the river are—the largest of them—about 60 feet long and 15 feet wide. In that state of matters, and with this channel, there was, before this bridge was put up, a catch-water or intake a short distance below this place, which was carefully to be avoided in the course of the navigation. That is distinctly proved by the principal witness examined on the part of the pursuers—Dugald Macfarlane. Now, that was the condition of matters spoken to by the pursuers before the bridge was built, that if, in coming down, a scow got into the place where this pier was placed, it would infallibly go down into the intake. The witnesses for the defender—Mr Neilson, of the Steamboat Company, Geo. Macfarlane, and others who have taken boats up and down before and since this bridge was built—all concur upon this point. Such being the condition of matters before these piers were put up, what has been the change? The piers, we have it in evidence, come a few feet further into the river than does the post that indicates the top of the catch-water wall, but this catch-water wall slopes down a few feet into the river, and substantially, I think, the piers are about in the line of the catch-water wall, taken as a whole. In that state of matters the pier is put down, and it occupies a place that all skilful boatmen avoided before the bridge was built. That is distinctly proved to my mind by Mr Neilson, who has been for a very long period of time connected with the river, and who was consulted by the Steamboat Company as to whether they should object to the erection of the bridge, by George Macfarlane, John Stewart, Russell, and others—six or seven witnesses of experience examined on the part of the defenders, the only parties who had gone down the river in boats since the bridge was put up. There is a witness for the pursuer, Walter M'Gregor, who gives evidence to the same effect. He was referred to as having objected strongly to the bridge, but he says—"I cleared the pier on the three or four occasions I have gone up or down since it was built"; and he says he had no difficulty in doing so. There are one or two witnesses for the pursuers who say that if they came against this pier with a barge they might get into trouble; but skilful boatmen will take care to keep away from this place. They have avoided it before. They have nothing to do but to follow the same course which they have followed for the last twenty years, and avoid a spot which they have all their lives avoided in coming down the stream.

I think, therefore, that the pursuers have failed to prove that this bridge at this particular place in the least degree obstructs the navigation or is injurious in any respect to boats; and there does not appear to be any apprehension on the part of those who are interested in the matter that there will be any effect on the patrimonial interests of proprietors on the banks of Loch Lomond in respect of any difficulty in passing down the river. There is a water-way between the piers of about

80 feet, and the width of the scows is only 15 feet. On these grounds I am unable to come to the conclusion that we have any evidence here that the navigation of this stream will be injuriously affected at all by this bridge. On the contrary, my opinion is, on the evidence, that the navigation will be rather improved, because you have a pier at a place where there was formerly great danger of their getting into the intake, which now affords protection from it.

I have not referred to the evidence of the engineers who were examined. I do not think that they differ materially. Mr Stevenson and Mr Leslie are of opinion that you might perhaps have to pole, so as to get into midchannel, 50 or 60 feet sooner now than you would have had to do before the bridge was built; but they were not aware that before the bridge was built the boatmen began to pole at the very place where they begin now, and for this very reason that they were afraid to get into the intake if they allowed their boats to go down to the place where the bridge now stands. Then there is a question as to the towing-path. My impression is that the towing-path appears to have been improved by the bridge. M'Intyre, Sharp, and others say that the horses have greater command over the boat by the river being narrowed at this point, and those who have gone up and down since the bridge was put up say that there is no difficulty in getting past on this towing-path.

In that view, does the possibility of some future danger entitle the pursuers, on the authority of *Bicket* v. *Morris*, to say that the bridge must come down? Now, whatever an individual member of the public might be entitled to maintain upon that point, I do not think that a party who assented to this bridge in 1872, and never objected till the bridge was put up, can raise any such point as that. The letter which has been referred to conveys this to my mind, that "unless it is proved that there is a direct injurious interference with my rights of salmon fishing, or with the navigation in which I am interested as a proprietor on Loch Lomond side, I do not object to your bridge being put up." I think the pursuers have failed to prove any such injury. I think that they are not entitled to have applied here the principle which was laid down in *Bicket* v. *Morris* with respect to a navigable river, though in that case, I may remark, it was laid down with reference to proprietors immediately opposite to the obstruction complained of. I hold that the pursuers here take upon themselves the *onus* of showing there would be a direct obstruction to the navigation by that bridge, and that there would also be a direct interference with their patrimonial interests. In my opinion they have failed to do so, and therefore I am compelled to differ from the view which has been expressed by your Lordships.

Lord Shand—I concur generally in the opinions expressed by the majority of your Lordships. I think the finding of the Lord Ordinary, that this is in point of fact a public navigable river, fully warranted by the evidence in the case. Though the navigation has been always attended with considerable difficulty, it is proved that the Leven has been used from time immemorial for the conveyance of goods and merchandise in scows or gabbarts—a peculiar kind of flat-bottomed boat used and suitable for the navigation—between the river Clyde and the banks of Loch Lomond. It rather appears from the old case of *Colquhoun* v. *The Magistrates of Dumbarton*, which was referred to in the course of the discussion, that at the end of last century the river was of that character. That case no doubt had reference entirely to a question of salmon-fishing, but the pleadings in the case seem to show that the river was then treated by both parties as a river which was in use for public navigation. But apart from that, I think the proof here shows that this river possesses all the qualities which are necessary to make it a public water-highway. You have two public termini,—at one end the river Clyde, with all the public navigation upon it, and the town of Dumbarton, and at the other end Loch Lomond, which from the evidence appears to have been from time immemorial navigated by the public without objection on the part of any one. There is a large track of many miles of country along the borders of Loch Lomond, and the boats to which I have referred have constantly resorted to all the different villages and houses on the banks. The river has not only been used by the tenants of particular owners on the banks of the loch and of the river, but there have constantly been persons who obtained their living by keeping boats on the river for hire for the transport of goods, using the river not as a favour obtained from any owner, but as a public right, and employing horses which were kept by other persons who made their living by tracking the boats up the river and between various places on its banks.

I have therefore no difficulty in holding, with your Lordships, that this is in point of fact a public navigable river. It appears, no doubt, that in later years there has been considerably less use of the river than there was formerly, very much because of the existence of the railway which is now upon its banks; but I think this must be taken as an accidental circumstance, and be disregarded in a question like the present. The railway has been there only for a time. It has produced, it may be, a temporary effect. Other causes may operate again to increase the navigation, and therefore I do not think that is an element that can be taken into view in this question at all.

While, however, the river is public and navigable, it appears, on the other hand, that the bridge which has been put up by the defenders, and is now complained of, is erected at a place at a considerable distance—about 1½ miles, I think,—above the point where the influence of the tide is known. It is also true that the defenders are the proprietors on each side of the river, and have thus a right of property in the banks, and this part of the river being above the influence of the tide, they have also a right of property in the river bed or *alveus* throughout its whole extent. The question that arises between the parties is in this position, therefore, that, on the one hand, the defenders are the proprietors of the river bed, but, on the other hand, the public have a right of navigation throughout the course of the river, including the portion of it on which this bridge is built. It so happens that this right is beyond question, because it has been established by use; but I should like to say that, so far as I am concerned, I am not satisfied

that the public right of navigation of a river of this kind is necessarily dependent upon its past use. On the contrary, my opinion is, that if a river be navigable, and a natural highway between public places,—even though it may be that it has not hitherto been used, the public would be entitled to vindicate a right to use it. But that question does not arise here, and is not involved in the decision of this case.

The next question that arises is, Whether there has been here an injury done to the public right of navigation by the erection of this bridge? The injury complained of is two-fold. One complaint is that a towing-path has been advanced to a certain extent into the river-bed, to the injury of the navigation; the other is, that certain piers have been put down in the *alveus*, also in the way of the navigation.

In regard to the first of these matters, I concur in the opinion expressed by Lord Mure and the Lord Ordinary. A proprietor is fairly entitled, in dealing with a servitude-right of this kind, to change to some extent the course of a towing-path, provided there is no substantial injury done to the right. He may do so in order to make his own property available. He may not, however, materially or seriously interfere with the public right. But in the present case I think the evidence shows, in the first place, that the change which has been made on the towing-path is one which gives the horses a more direct pull on the boats they are tracking than they formerly had; and that, even if that were not so, the portion of the river bed into which it is said the horses were in use to go in order to get the benefit of a full pull upon the boat is still open; and so I do not think that any injury exists from that cause.

With reference to the river channel, certainly a more difficult question arises. The fact is that the east piers of the bridge have been put down in a part of this river-channel which is deep enough for navigation at many states of the river, and there can be no doubt that the piers would be an obstruction, and clearly a material and present injury to the navigation of the river, but for the catch-water to which reference has already been made, the existence of which it is said makes the piers no additional obstruction. The piers are about 5 feet in diameter, and are solid blocks of masonry, from 36 to 41 feet from the east bank; and there is no doubt they are in a depth of water that would be useful for navigation. But then it is said that though they would be an obstruction to a great part of the water-way if there were no catch-water there, they are not so in point of fact, because you must take the river as it has existed from time immemorial; and that is, I think, a reasonable contention on the part of the defenders. The catch-water is about 30 feet below the bridge, and extends out in the river to within a few feet of the line in which these piers are; and there is a considerable amount of evidence to show that many of the boatmen who were in the habit of navigating the river downwards (because these piers are only in the way of the navigation downwards, the upward navigation being entirely on the other side of the river) took care, in taking the sweep of the river at that part, to avoid the portion of the water upon which the piers now stand. At the same time, it is worthy of observation that the witnesses speaking to a matter of that kind were dealing with a broad sheet of water, and it is not easy, after a stone pier has been put down in the position in which these piers are, for boatmen to say with any degree of accuracy that this particular point was a place they did or did not pass over, and I think their evidence must be received with that qualification. They say they did not pass over it, because if they had done so their boats would heve drifted into the lade; but I am not satisfied that one can rely upon that evidence to the extent of a few feet either way. The result of the evidence on this subject, as it appears to me, is, that taking the piers as they are, and taking the catch-water as it exists, it has now become necessary that the boatmen shall use greater care, that they must navigate their boats with greater anxiety than was the case before. I think Mr Leslie is right when he says (and he is one of the defenders' witnesses) that the boatmen will require, as matter of precaution, to begin to pole their boats higher up, imposing, it may be, a slight burden upon them, but still a difficulty that did not exist before; and, secondly, I think it a matter of some importance that if boats do not clear that piece of ground now, they are apt to go against a very dangerous obstacle. There is now a solid block of masonry of the size I have mentioned. It appears that this river at times when it is navigated sometimes runs at the rate of six miles an hour; and if the river carries down a boat against one of the piers in consequence of the current, or of the boatman ceasing to pole or not taking proper care, the boat will encounter a very dangerous obstacle at this place which was not there before. Taking these elements into account, I am not prepared to agree in the view that there is no present injury to the navigation. It has been suggested by some of the witnesses that the pier is a beacon to warn the boatmen to keep off the intake below. In one sense that is true; but it is a beacon which, if struck by a loaded barge going down at the rate of six miles an hour, will produce much more serious consequences than if the barge had struck upon a wooden pole further down the river. Therefore, upon the evidence as a whole, I am of opinion, with the Lord Ordinary, that it has been shown that there is here a material obstruction to the navigation of the river.

But while that is my opinion on the question of fact, I do not think it in the least degree necessary, so far as I am concerned, to rest the decision of the case upon that view; because I agree with those of your Lordships who have expressed the opinion that it is not necessary that the pursuers shall make out that the piers are *de facto* a present danger to the navigation—a present obstruction of the kind I referred to. There are certain distinctions between that portion of a navigable river which is under tidal influence and that which is not so. Your Lordship in the chair has pointed out the most material of these. In the first place, a tidal river is under the guardianship of the Crown; the property of the soil is in the Crown, and the public are entitled not merely to use the river in navigation, but, it may be, to execute operations upon the river bed to improve the navigation. It is different with a river that is not tidal; but, on a question of obstruction of the navigation I do not think there is any real difference between

the right of the public in the one case and in the other. It may be that the proper party to vindicate the right of the public in a tidal river is the Crown, and the Crown only; but so far as regards an obstruction placed in any river which is navigable, and which the public are entitled to keep navigable, my opinion is that the public right to have it removed is substantially the same, whether the obstruction be within or above the tidal part of the river. As to the nature of that right, I concur with your Lordships in thinking that the same principle which was applied in the case of *Bicket* v. *Morris*, in which effect was only given to what had been settled in three different cases that had previously occurred, really applies here. That case arose between conterminous proprietors, and it was settled that a heritor is not entitled, even on his own side of the stream and on his own property, to erect any obstruction *in alveo*, even if present injury does not appear to have been thereby caused. The reason is, as your Lordship has explained, that in dealing with an element like water it is impossible to predict what changes may occur from operations *in alveo*, or from the course of the river changing from time to time. In that class of cases it is true there is a different kind of interest from that with which we have here to deal. The proprietors have there what may be regarded as a proper common interest in the stream. Here the proprietor has the right of the river banks and river bed, and the interest of the public is the right merely to have the stream kept in a navigable condition for their use. But still that is an interest in the water, and an interest in a subject of such a nature that, being once meddled with, the consequences cannot be predicated. Accordingly, I think that though the public interest here is necessarily different from the interest of a conterminous proprietor, the same rule must be applied. The water must not be interfered with in either case, for you cannot tell what injury to the public in the one case, or to the conterminous proprietor in the other, may arise. Just take the present case. Suppose this river-bed should through the action of a winter torrent entirely change its course, and that what is now the deep part of the river should become shallow, it would have been of the utmost importance to have had these piers away in order to leave the space useful for the purposes of navigation. Or suppose, as may quite well be conceived, that the catch-water in time is removed, either wholly or partially, it might then be of great importance to the navigation of the river that there should be no piers, and yet these piers would be there to block the public from the use they would otherwise have had. These are illustrations which occur to one's mind to shew that the absence of present injury is not conclusive of a question of this kind. I may say that while I observe that *Bicket* v. *Morris* decides only the special case of conterminous proprietors, in England its authority has been used as directly applying to navigable rivers. There were two cases—*The Attorney-General* v. *Earl Lonsdale*, May 1868, Law Reports, 7 Equity Cases, 377, in which Vice-Chancellor Malins gave a very full judgment, proceeding entirely upon the Scotch case; and *The Attorney-General* v. *Terry*, Law Reports, Chancery Appeals, vol. ix, 423, in which the decision of the Master of the Rolls, again proceeding upon the case of *Bicket* v. *Morris*, was adhered to by the Court of Chancery, with the Lord Chancellor and the Lords Justices sitting. I may read a passage from the opinion of the Master of the Rolls in that case, shewing how completely the case of *Bicket* v. *Morris* was considered as applying to the case of the public right of navigation—"I am of opinion that this is a material obstruction to the navigation, and would be indictable at law as a nuisance. If it was necessary to rest my decision on that, I should have no difficulty in doing so; but I do not think it is necessary, for there is another ground also, and a ground of very great importance, upon which I say that the informant is entitled to a decree, and that is this—that no man has a right to put an obstruction in the bed of a navigable river. As I understand the law, it is not an answer to say that at this moment the obstruction is not a nuisance; it may become so." And accordingly some piles that had been put into the river with a view to erect a wooden pier, though they extended only 3 feet into a breadth of 60 feet of navigable water, were ordered to be removed. It is true that was a river within tidal influence, but for the reason I have explained I do not think there is any difference upon this question of obstruction as to the rights of the public whether the obstruction be in a part of the river under tidal influence or not.

I therefore think that the Lord Ordinary's interlocutor should be adhered to. I may say, in reference to one point, referred to in the opinion of Lord Mure, that it appears to me too critical a view of this action to regard it as an action calculated to try only the question whether there is an obstruction in the river which presently impedes or interferes with the navigation. The conclusions of the action are to the effect that the river is a public and navigable river, and the pursuers ask a decree of declarator that the defenders have no right to put down any erections —not "which do obstruct or interfere with the navigation"—but "which will in any way obstruct or interfere with the navigation,"—and I cannot read those words, giving them their fair interpretation, as being limited to a case of actual present obstruction. Even if they were to be so read, I am of opinion that the proof is sufficient to show there is actual obstruction; but I think it right to say that I do not read those conclusions in that narrow sense.

In regard to the letter of 14th May 1872 by Sir James Colquhoun's factor, and the alleged acquiescence, I agree with your Lordship in the chair in thinking that the defenders' plea must be repelled. What is it that Sir James Colquhoun agreed to? He says that he will make no objection "provided his fishing and other rights are not interfered with." The fishing right is out of the case. What are the other rights there referred to? The only other rights that could have been in the mind of the writer of that letter are the rights of navigation. There is no other right suggested to which the expression "other rights" could refer. That right of navigation was not any patrimonial right of Sir James Colquhoun, but a right which he in common with all other members of the public had. It may be, and it is the case, that Sir James having large quantities

of wood upon his estate, might require to use this river a great deal more than other members of the public. It was not because of any private right he had, but because this is a public navigable river, which he as a member of the public required or might require to resort to frequently, that he had rights which he was entitled to have preserved. He says he will be satisfied if those rights are not interfered with. But the bridge is now up, and his trustees allege that those rights are interfered with, and I think this is proved. The proof shews there is a present material obstruction; but whether that is so or not, if there is a bridge which may at any future time come to be a block in the way of navigation, its existence is inconsistent with the pursuers' present right, for that right is to prevent any obstruction which now impedes, or which may impede, the navigation of the river. I therefore think that the letter founded on does not in the least preclude the present action. I think the right of navigation was reserved to the fullest extent; and if it be shown to have been injured, either by an obstruction which now causes injury, or which causes apprehension of injury, the pursuers are not barred by anything in that letter from maintaining their right to have that obstruction removed.

The Court adhered.

Counsel for Pursuers—Lord Advocate (Watson)—Kinnear—Mackintosh. Agents—Tawse & Bonar, W.S.

Counsel for Defenders—Balfour—H. J. Moncrieff—Jameson. Agent—John Carment, S.S.C.

Saturday, January 27.

SECOND DIVISION.

[Lord Young, Ordinary.

GLOVER AND OTHERS (SCOTT'S TRUSTEES) *v.* SCOTT AND OTHERS.

Succession—Trust—Vesting.

A truster directed his trustees to pay an annuity to his wife, and to collect the residue of his estate and lodge the same in bank until the fund so collected should be sufficient to pay off the debts heritably secured upon his property. On the death of his wife, "and as soon thereafter as the whole heritable debts" should be paid off, the trustees were to sell the heritable property and divide the whole estate among the truster's children. It was further specially provided and declared that the estate should not be divided during the lifetime of the wife, nor until the whole heritable debts were paid off, "without prejudice to my said trustees selling my said heritable subjects, under burden of the heritable debts affecting the same, at any time after the death of my said spouse without waiting until they shall be in possession of funds to enable them to clear off said debts as aforesaid, provided they shall think such a course expedient."—*Held* that the shares of the children vested on the death of the widow.

This was an action of multiplepoinding and exoneration raised by the trustees acting under the trust-disposition and settlement of James Scott senior, builder, Maryhill, dated 24th June 1852 and recorded 26th February 1857. The settlement conveyed to trustees the whole heritable and moveable estate, for payment of debts, for payment to his widow of an annuity of £30. to to be reduced to £20 on the death or marriage of her daughter Janet. The 3rd and 4th purposes of the trust were as follows:—"*Thirdly*, My said trustees and their foresaids, after payment of my whole debts and all expenses incurred by them in the execution of this trust, and after providing for the payment of the said yearly provision to my said spouse, and whole other sums before and after specially mentioned, shall collect the residue of my said estate; and in the event of my having prior to my decease paid off and liquidated the heritable debts presently affecting or which may affect my heritable subjects or any other heritable property I may yet acquire, they shall, in the event of my said spouse being alive, invest the residue of my said means and estate in good heritable or personal security, taking the rights and titles in their names as trustees foresaid, and hold the same until the time when a division of my estate is appointed to be made; But in the event" (which event occurred) "of my dying before the heritable debts presently affecting my heritable subjects, or any additional sums I may still borrow on the security of the same, or any other heritable property I may yet acquire, shall be fully paid off and extinguished, then my said trustees and their foresaids are hereby directed to collect the said residue and remainder of my means and estate, and lodge the same in some responsible banking company in their names, as trustees foresaid, until the funds so collected shall amount to such a sum or sums of money as may enable them from time to time to liquidate and discharge such heritable debts, or whichever parts or portions thereof may be remaining over unpaid and unextinguished." "*Fourthly*, My said trustees and their foresaids, upon the decease of my said spouse in the event of her surviving me, and so soon thereafter as the whole heritable debts now affecting or which may yet affect the heritable subjects presently belonging to me, or which I may yet acquire, shall be paid off and discharged in the event of the same not having been discharged during my lifetime, are hereby directed to sell and convert my whole estate, heritable and moveable, real and personal, generally and particularly before described and conveyed, into money, and after paying or providing for all expenses, to divide the same into five parts or shares and pay over the said shares to the following parties, my children, namely—to James Scott junior, wright, Maryhill, one share; Robert Scott, mason, Maryhill, one share; Catherine Scott or Haddow, widow of George Haddow, flesher, Glasgow, one share; Elizabeth Scott or Cameron, spouse of John Cameron, mason, and residing at Maryhill, one share; and Janet Scott, presently residing in family with me at Maryhill, one share: And in the event of any of my said children above mentioned deceasing before or after me, and before the division shall take place of my said means and estate, leaving lawful issue of their bodies respectively alive at that time, then the child or children of any such deceaser or de-