vation to be made here is, that the interlocutor before us is not one dispensing with the adjustment of issues. Nay, I think there is nothing in it that necessarily implies that there are to be issues; for though a proof is to be led, a proof before consent, it might be convenient to have an issue adjusted with a view to that proof. In the second place, this is not merely determining the manner of proof; it allows a proof before answer, which is not contemplated in the 27th section. Sometimes it is of very considerable importance whether the proof is to be before answer or not. If the proof is allowed without these words it usually amounts to sustaining the relevancy of the averments; but if the words are added, the relevancy is still open. I cannot hold this to be within the meaning of the fourth sub-division of the section, and therefore I am for repealing the objection.

The other Judges concurrred.

Agent for Pursuers—R. Denholm, S.S.C.

Agent for Defender—D. Curror, S.S.C.

Thursday, July 8.

SECOND DIVISION.

KENNEDY *v.* MURRAY.

Salmon Fisheries Act, 25 *and* 26 *Vict. c.* 97—*Bye-laws—Power of Commissioners—Costs.* (1) *Held* that the Commissioners under the statute 25 and 26 Vict. c. 97, have power to make bye-laws as to lades, dams, &c., not in the process of being constructed or repaired. (2) Terms of bye-laws which held to be regulations in the sense of the statute. (3) *Held* (by a majority) that the Commissioners under the statute have power to impose an obligation on owners or occupiers of mills to execute the works embraced in the bye-laws at their own costs.

This was a summary application, brought in the Sheriff-Court of Ayrshire by William Murray, solicitor in Girvan, clerk to the District Board of the River Girvan, against the Right Hon. T. F. Kennedy of Dunure, for the purpose of compelling the latter to put "hecks" at a certain mill-lade belonging to him on the river Girvan, in terms of bye-laws passed by the Commissioners under the Salmon Fisheries Act, 25 and 26 Vict. c. 97, sec. 6.

There were a variety of preliminary pleas stated, going to exclude the petitioner's title to sue, but these were repelled; and, on the merits, the Sheriffs both decided in favour of the petitioner. Mr Kennedy advocated, and after hearing counsel some time since, the Second Division sent the case for argument before seven Judges upon the following special questions:—

1. Whether the Commissioners, under the statute 25 and 26 Vict. cap. 97, sec. 6, had power to make bye-laws as to lades, dams, &c., not in the process of being constructed or repaired?

2. Whether the following bye-laws, Nos. 3, 4, and 5 (being the bye-laws founded on by the petitioner), are 'regulations' in the sense of the said Act?—

"(3) At the intake of every lade there shall be placed, and constantly kept, a heck or grating for each opening, or one embracing the whole openings—the bars to be not more than 3 inches apart if horizontal, and not more than 3 inches if vertical.

"(4) A similar heck or grating shall be placed, and constantly kept, across the lade or troughs immediately above the entrance to each mill-wheel.

"(5) A similar heck or grating shall be placed, and constantly kept, across the lower end of each tail-lade at its entrance into the main river."

3. Whether the Commissioners have power to impose an obligation on owners or occupiers of mills to execute the works embraced in the bye-laws at their own cost?

4. Whether the bye-laws, supposing them to be competently issued, are framed with such precision and clearness as to be valid and operative in reference to the parties by whom the regulations are to be observed, and the manner in which they are to be executed?

5. Assuming that the construction of hecks has been competently directed by the bye-laws of the Commissioners, and that the cost of construction is chargeable against the advocator as owner of the mill, and assuming that additional trouble and some cost will be imposed by the additional hecks, whether the case of the advocator, who has had immemorial possession of the mills, is within the provision that such regulations shall not interfere "with any rights held at the time of the passing of the Act under royal grant or charter, or possessed for time immemorial?"

GIFFORD and H. J. MONCREIFF for advocator.

CLARK and ASHER for respondent.

At advising—

LORD-JUSTICE CLERK—The application in the case we are now to consider was made to the Sheriff of Ayr, and proceeded upon a statement made by William Murray, solicitor in Girvan, who is described as clerk to the Fishery Board for the district of the river Girvan. He makes as against Mr Kennedy the allegation that, certain bye-laws having been made by the Commissioners appointed under the statute of 1862 applicable to the salmon fishings of Scotland, Mr Kennedy had refused or neglected to obey that bye-law, and in consequence he craved that the Sheriff should take such proceedings as should cause its enforcement at his expense. The statement was, that he was bound to erect and construct at his own expense three several hecks upon the mill and mill-lade belonging to Mr Kennedy, and that, the Commissioners having in virtue of the bye-law given Mr Kennedy notice to do the work, he had refused or delayed to do so. The notices embraced a number of questions with which we have nothing to do at present, but they embrace the matters embodied in the questions now submitted for our consideration. The first question put to us is, whether the Commissioners, acting under the statute of 1862, had power to make bye-laws as to lades, dams, &c., not in the process of being constructed or repaired. The power which is given to the Commissioners is conferred by the 6th section of the Act, and the power is to make general regulations as to the construction of mill dams or lades, or water-wheels, so as to afford a reasonable means for the passage of salmon. The argument of Mr Kennedy proceeded upon this, in the first place, that it was not to be assumed that he was to be disturbed in a possession which had existed for time immemorial on valid title, except he was about to construct or make alterations on the dam connected with his mill. No doubt the words used admit of the construction which Mr Kennedy puts upon them, for regulations as to the construction and alteration of mill-dams may very

well mean regulations as to the way in which mill-dams in the course of being constructed or altered shall be altered or constructed. But the words admit of another and a more extended signification. They admit of being interpreted as relating to the construction of a structure, and to alterations to be effected, not in the course of the ordinary operations of the proprietor, but to alterations which may be directed to be carried out by the Commissioners. According to the best consideration which I can give to that part of the question, it appears to me that the construction most reconcilable with the object of the Act is that which would make it a power of the Commissioners to pass regulations generally, whether the particular dams and lade, &c., that are referred to are in the process of being constructed and altered or not. For the Act could not very well be carried out according to its spirit if practically there should be so large an exemption as the exemption which in that case must take place, and if the provisions which the Act certainly does consider to be of very great importance should be delayed till the accident of reconstruction or of alteration should take place. The next question put to us is as to the regulations being binding. It seems to me that that is solved by the interpretation clause —(*reads it.*) I think that is a sufficient reason why we should decide that question against Mr Kennedy's contention. But then we come to two questions, which really are the important matters in this case, involving a construction applicable very generally, and involving matter certainly of novelty and of difficulty. The question which is put to us third is, whether the Commissioners have power to impose an obligation on owners or occupiers of mills to execute such works as are embraced within the regulations at their own expense? and whether, assuming that they have the power, it has been so validly and effectually exercised as to impose the burden upon Mr Kennedy? Of course the condition on which alone the application can be supported is, that Mr Kennedy has refused or neglected to carry into effect a bye-law imperatively binding him; and if that be not so, the summary application to the Sheriff, and the proceedings that have taken place, are not to be supported. According to the best consideration that I can give to these two questions, I am disposed, in the first place, to say that the Commissioners had no power to appoint such constructions to be erected at the cost of Mr Kennedy. I am also of opinion that, if they had that power, it has not been exercised, because there has been no definite obligation laid upon him, either in his character as proprietor or in any such form or shape as definitely and precisely fixes the obligation upon him. The first question may be considered as the most important. The proceedings which are competent to be taken by the Commissioners, or the particular proceedings we are dealing with, refer to that part of the 6th section which relates to the construction or alteration of mill-dams or lades or water-wheels—that is to say, operations for altering the condition of mill-dams and lades so as to alter levels, operations for adding to the structure of the dam itself, or for adding to the machinery which may be found in these dams; or, generally speaking, any such alterations as may be thought, in the opinion of the Commissioners, advantageous for the purpose of affording a reasonable means for the passage of salmon—or rather, according to the construction which we must give it, of giving to the salmon, by withholding from them access to the mill-lades, a better passage than they would have if the alterations were not made. It is to be observed that in this enumeration of matters falling within the sixth sub-division of the 6th section we range over a great variety of matters; and I shall ask your Lordships' consideration to this, whether we find in any of the other portions of the particular sub-division in question any other case in which it can be held to be a duty imposed upon a proprietor. It may be argued—If a series of provisions are introduced which plainly and palpably bind the proprietor, that this being known from its companions may hold the like character. Let us consider for a moment whether it is so or not. The first is the due observance of a weekly close time,—a matter with which a proprietor *qua* such has nothing to do except in so far as in the connection between him and a tenant, whose right to the subject being totally independent of his, and excluding him from the occupation of the thing with reference to which that weekly close time applies, excludes him by necessary implication from an obligation put upon the tenant. And if Mr Kennedy had been convened in an application setting forth that according to certain bye-laws of these Commissioners there was imposed a weekly close time, which he, Mr Kennedy, as proprietor, had not observed, I should take leave to say that your Lordships would have very little hesitation in dealing with an application so framed, and rested upon such grounds. The next question is as to the construction and use of cruives. The use of cruives depending upon the opening of the cruive at certain times, and its being put out of gearing altogether at other times, is necessarily a matter with which the tenant has to do also. The construction may admit of a question how far there may not be a responsibility impliedly attached, but as I rather apprehend that the construction and use of these instruments is matter with which the tenant is immediately concerned, the tenant is the party against whom that is operative, and the tenant therefore must answer, and not the proprietor for the tenant; for the tenant in that respect does not represent any act which the proprietor can well control, or anything under a lease which he can enforce to any such effect. The regulations are passed after the lease has been entered into in this case, and the tenant's tenure is therefore wholly independent of the proprietor's. He is not compellable to put into a lease that which the tenant may not accept from him. The position of the tenant, I think, is an independent one, and a position which makes it impossible that the non-observance of that regulation, any more than the former, could bring Mr Kennedy under the operation of penalties for not observing the statute, or under a summary proceeding such as this for the purpose of compelling him to do that which another party was bound to do. The meshes of nets is another matter entirely for the tenant. Then comes the question of obstructions in rivers or estuaries to the passage of salmon; and here we have something which is analogous in its character. We have in the one case a proposal which makes these parties competent to direct the alteration of the structure of mill-dams, and to impose machinery or other things which they may think necessary, and to alter levels and so forth. Here is another regulation which the Commissioners are competent to pass, and which is to effect the re-

moval of obstructions in rivers or estuaries to the passage of fish. These obstacles may be natural, or they may be originally artificial. A rock may be ordered to be removed; an old dyke, constructed at some former period, may be ordered to be removed; a sand bank may be ordered to be cleared away. What is the result? Are the proprietors of the portions of the rivers upon which these obstructions are, liable to answer for the removal of these obstructions at their own cost? There are three positions of the matter, first the private river, second the public river, and third the public estuary. Take first the private river: there are three riparian proprietors, neither of whom I shall assume to have any salmon fishing right whatever—neither of them interested in the removal of that obstruction,—very much opposed to it. Yet the condition of the case as it is put against Mr Kennedy, supposing him to come within the same category, is, that there shall be a removal of that rock, or dyke, or sand bank, and all at the cost and expense of parties having no earthly interest in the matter, and who would rather perhaps have all these remaining as they were. So far as the public river and the public estuary are concerned, the thing is more absurd still; because then we are constrained to hold that, according to the conception of this Act of Parliament, a power was given to these Commissioners, by the simple declaration that there should be the removal of a rock in an estuary or public river, to put on the public exchequer of the country—the Crown being the proprietor of the solum of the river or estuary—to carry out these works at their expense, —a condition of matters which I think is a *reductio ad absurdum*. If the obstructions stand in the same category as the case of alterations upon mill-dams and upon levels, then I think there can be no question. But it must be said that the position is different. A proprietor of a mill, with mill-dams and levels by which the water comes to his mill, may in particular circumstances, or generally, have a different connection from the connection which riparian proprietors may have with the solum of a river wherein a rock may exist. But the question comes to this,—Is it because of the interest of these proprietors,—is it because of the mere fact of property, or is it because that property is necessarily to be held constructively to give such an interest to these parties as to entitle them to impose a liability? Take the case of property: the proprietor of a mill has the property of the mill itself, and has a right of servitude by which water is introduced to that mill, and another right of servitude by which a dam is thrown across a river belonging to another party, he being the possesser of the right of servitude, but not having one inch of ground beyond the ground on which the mill stands, and having no other interest but that of a proprietor of a dominant tenement with a servitude; surely it could never be said that the proprietor over whose property the servitude extends is to be under the liability. Well then, shall the proprietor who has that right, be liable? Why should he? If it necessarily followed that he had a direct beneficial interest to be attained by the operation, one could understand it. If he was to be benefited by it, no wonder that it should be done at his expense, but if it was not to inure to his benefit, but to his considerable inconvenience, why should he be put to the expense of carrying through such an operation? Wherein does the matter of property, therefore, introduce the relation without the accompanying and attendant benefits? I am unable to perceive any ground on which that can be said. With respect to agricultural mills, it may be stated, generally speaking, that they are let like ordinary agricultural subjects, on leases of 19 years, and the occupation is carried on very much as an agricultural subject. But with reference to the mills with which we in this country have mostly to deal,—those large and important manufacturing establishments which have been erected in all directions, and which are at least as numerous as the agricultural mills in the country, how does that stand? To a great extent notoriously these have been erected on the property of the landlords, and there are long leases, extending to 99 years, or 57 years, or whatever other period may be agreed upon, and the man who gets the lease erects the works, and establishes his manufactory. It is inuring to his benefit. What is paid to the landlord in the name of rent is very much of the nature of feu-duty; and yet the condition of the case must be that the proprietor in the second year of a 99 years' lease is to be held liable by the mere fact of his being the nominal proprietor of a subject, the benefit and the use of which is to be in the hands of a tenant of his during a period of 2 or 3 lives, and in which he never can have any beneficial interest whatever. The condition of the case against him is, that he shall pay as for a matter in which he can have no interest at all. Various other cases might be put, of liferents extending beyond the period to which it may be assumed that the life of the fiar may extend, and yet the fiar is to be liable. Cases of heirs of entail may be figured, in which, if it were to be held that, in order to conduct such operations, these parties should be called on to come down with the money which is to be expended upon their construction, it would involve the most palpable inconvenience and injustice. And I think it will never do to say that, because in this instance there are only three hecks, or rather two, because one has apparently been constructed, we are to deal with this on a different footing than we should do on the general point. Now it appears to me, in the first place, that it is a mistake to represent the matter as being so very trivial, for there is a very extensive proceeding in the erection of the heck itself, if you take the description of it as given by the Commissioners, viz., that it is to be in a curved form or in a slanting direction, so that it may not occasion a diminution of the water power which is to move the machinery of the mill; you have it extending from 28 to 29 feet, you have an iron structure and a gangway necessary to clear it out, and you have this further operation imposed in a party who may only have a servitude right, and no right to touch the ground at all; but you have three several widenings of the lade in order that these particular things may be introduced; and so in this case I do not think it is a matter which can be regarded as a very trivial one. I am sure if we contrast it with the subject matter of the litigations which occur in this Court every day, we shall say that the matter supposed to be regulated is not to be by any means regarded as one in which the parties do not feel and generally act as one of great interest. But that is not all, because precisely *pari passu* with those orders as to new hecks, is the construction according to these regulations of a fish-pass upon the dam. It is impossible to distinguish between the principle applicable to the one and the other. In a question of judging of power, and the meaning of the Legis-

lature, we must judge as to what these parties might have directed as well as what they did direct. And assuming that they have directed that a fish-pass should be constructed conformable to the very formidable description which they give of the ladder which they propose, I cannot suppose that that is not a matter of some expense, a difficulty to carry out, and it would appear to me to amount to the very strongest case of injustice if operations from which a proprietor shall not benefit to the extent of one farthing, but which, being conducted upon his property and placed in his possession, shall occasion to him inconvenience, should be carried out at his expense. You may suppose that these Commissioners, because they are vested with absolute power according to the views presented to us, acting upon certain views with respect to mill dams, and the angle at which they stand in the river, or the levels, have directed that there should be a reconstruction of the mill dam altogether, with different levels and heights,—all these things being within their competency,—your Lordships are asked to hold that it is placed within the powers of these parties to fix the expense of that proceeding upon proprietors *qua* proprietors of a mill, and not *qua* proprietors of salmon fishings, —proprietors who may not have one penny worth of interest in any salmon fishings whatever, and who as proprietors of mills may have no such interest, for they may be constituted a *separatum tenementum*, and so conveyed; but unless the statute said so, I think it would be unjust to hold that the proprietor who does not benefit, but suffers from these operations, is to have them carried out at his own expense. But the injustice does not stop there, because there is a body of parties who are eminently benefited by the operation which is contemplated. The parties who are pursuing this application are the district board. They are the District Board of Salmon Fishery Proprietors, into which there is not admissible any one to represent the public as interested in public fisheries, or any other persons as proprietors of land, but simply proprietors of salmon fishings; and that board is so constituted, according to the provisions of this Act of Parliament, that the assessments are levied according to the extent of the interest which these salmon-fishing proprietors hold, and they, having undoubtedly the immediate and direct advantage from every thing that shall increase the extent of salmon fishing in the rivers which belong to them, have the direct interest, and a plain interest, to expend these assessments. Now surely if it is possible, and not only possible but necessary, to read the statute so as to hold that the money may be contributed by these parties, you have the alternative presented of an expenditure demanded from parties who have no interest, but the reverse, and to be expended for the patrimonial benefit of the individuals who are by these works to have additional money put into their pockets by the improvement of their property. By the very act and proceedings of these parties they are to mulct their neighbours, the proprietors, to the effect of making improvements which shall inure to their benefit, and also to the public benefit. But the proceedings of proprietors in such cases always inure to their benefit when it is an enlightened self interest. They are the parties who have the immediate interest, and who, by improving the turns of the salmon-fishings, are improving in the first place the public supply, and in the next place they are filling their own pockets. Now let us look to this statute. The board have a power of assessment by the 23d clause—(*reads it*). The assessment is to be made upon fisheries—and most justly, because fisheries are to be benefited by these operations, and the improvement for the purpose of benefiting the fisheries very fairly comes to be put upon these parties. They are entitled to make a provision with respect to the levying of a rate for the purposes of this Act. If the improvement of the fishings is an object of the Act, and a purpose of it to be carried out by means of regulations to be made by commissioners, then the purpose of the Act as to carrying out the improvements, and the proper and legitimate application of the fund as to improvements directed by the Commissioners with a view to the increase of the fisheries within the particular district, it appears to me is really met by this,—and I would revert to the former point which I put, and which, falling within the same subdivision of the clause, seems to me to raise the question purely and simply—would or would not the purposes of that Act be effected by the removal of an obstruction in the river, in a public river or in an estuary? Supposing these Commissioners to come to be of opinion that it was necessary, for the purpose of improving the ascent and descent of salmon, and saving the smolt in the time when they are generally destroyed, to order the removal of a subject, that is within their power of regulation under this Act, and I do not think it necessary, in judging as to what the import of this Act is for that purpose, to consider what has been done since; but the question which occurs to my mind is this, these regulations having been passed to the effect of removing these obstructions, and there being a declaration that they shall be removed, surely it must be competent for the purpose of carrying that into effect not to attempt to fix a liability on the Crown or the riparian proprietors who have nothing to do with the matter, but on the fisheries,—that is to say, the proprietors of fisheries having the interest and taking the benefit of the act of removal. But if under this Act of Parliament it is competent to levy such an assessment for the purpose of removing obstructions, where the removing of obstructions will benefit the salmon fisheries, why should it not be for the purpose of making such alterations in the constructions or levels of existing dams which have been long enjoyed by existing proprietors undisturbed,—why should it not be within the operation of the same clause to levy an assessment for these purposes, which are cognate and immediately connected with the improvement of the salmon fisheries? I confess it appears to me that the putting of that case seems to dispose of the meaning of the Legislature upon that subject. I apprehend that, whether a fish-pass is ordered to be put up on an old dam, or whether new constructions by way of machinery are directed to be put up, these are purposes of the Act, and not intended to be at the cost of proprietors who do not benefit from them, but the other way. It appears to me that that is illustrated by the contemporary legislation of the period, that is to say an Act of Parliament which passed the very year before, and which, singularly enough, is imported into the present Act to the effect of determining the rights of parties in connection with fishings on the Solway. And what is the provision as to the fish-pass in that Act, 24 and 25 Vict?—(*reads it*). Now that is contemporary legislation; and unless we read the mind of the same Legislature that passed the other

Act of Parliament as having so very greatly changed during the interval, and do not apply the 23d section as reconciling the matter and putting the expense on the parties truly benefited, we come to the extraordinary conclusion that, whereas permission is given in the one Act with consent of the proprietor or the Home Secretary, and subject to the condition of making compensation,—in 1861, that there shall be a fish-pass placed on the dam of a proprietor and if placed there and causing injury he shall be indemnified,—next year the unfortunate proprietor, who is according to the conception of the statute of 1861 to suffer, but to suffer with remedy, is not only to be the party making the alteration, but according to the argument presented to us on the part of the District Board, he is the party to suffer to the whole extent of the operation necessarily caused by such regulations. I can only say that I see no ground or warrant for our interpreting the statute, where it is possible to come to another conclusion, in a way which would involve such palpable injustice or such palpable contradiction to an act of the Legislature touching the same matter in the sister country one year before. I am therefore of opinion that there was no power. I am also of opinion that these Commissioners have not exercised that power, if they had it; and I desiderate one single word which touches the proprietor from the beginning to the end of these regulations. If it attaches to anybody, it attaches to the miller or manufacturer whose acts are spoken of in various parts of these regulations, and not to the proprietor. When the regulation is as to lifting sluices, it is necessarily imposed upon the manufacturer. And are we to be told, you the tenant, or the proprietor, or one or other of you, must do it, and it is of no consequence which? It is of consequence, and *in essentialibus* of this case, because the foundation of this case being a refusal to carry out an obligation imposed on the party, he is rendered liable to a summary application. He must be brought within that category, and it will not do to say that you do not know whether it is the proprietor or the tenant,—the miller who may have the property for 90 years or a party having a mere nominal interest as proprietor. I cannot go about in a summary application of this kind to discover which parties may be within the intendment of the gentlemen who passed the regulations; and, so far as they have indicated anything at all, they have indicated that another party is liable, namely, the miller or manufacturer,—the tenant who may be in the use of the mills and the machinery, and upon whom the duty of observing these regulations is apparently fixed. Therefore, upon that ground, it does not appear to me that we are in a position to hold that Mr Kennedy can be decerned to do this at his own expense, or that the Sheriff can take the equivalent proceeding of directing it to be done at his cost; because, in the first place, there was no power to impose upon a proprietor any such obligation; in the next place, there being another fund to which parties must go for the execution of such works; and, in the next place, because there has been no definite expression of any view or intention on the part of those parties who are said by their regulations to have imposed this obligation from which I can gather that that obligation has been imposed at all. Upon these grounds, I think we should answer these two questions as I have proposed. With reference to the last question, assuming the power to have been in these parties and to have been well exercised, it does appear to me that the mere additional inconvenience to which the party might be subjected would not be a ground upon which the operation of the Act should not hold; because there is no case in which there would not be more or less inconvenience in the case of mills which existed for a considerable time; if it were so the operation of the statute would be so hindered and trammelled as to be confined to limited cases, and I don't think that would be giving fair effect to the Act. On that ground I answer that question favourably to the pursuer, and unfavourably for Mr Kennedy.

Lord Cowan—This application at the instance of the Clerk of the Girvan Fishery Board of Fisheries concludes against the advocator as proprietor of the Bridge mill on the river Girvan to make certain erections on the mill lade;—and in expressing my opinion, I confine myself to the two material questions which must be decided towards the right disposal of the prayer of this petition.

The first, and I think the material question on the merits—certain preliminary objections having been overruled—is, whether the regulations apply to mill lades attached to mills existing at their date, and in thorough working order and repair, as well as to mill-lades attached to new mills being constructed or requiring to be renewed or repaired? The defence stated, on the ground that they do not apply to existing mills and mill-lades, appears to me not well founded. Having in view the object of the Act, expressly declared to be for the regulation of salmon fisheries and the removal of obstructions to the free passage of the fish in the rivers, it would have been very imperfect legislation to have confined the operation of the statute to new erections. And accordingly the general regulations which the Commissioners are empowered to make have all of them relation to existing obstructions in rivers or estuaries to the passage of salmon. Under the power conferred on them to make regulations with respect to "construction and alterations of mill dams or lades or water-wheels so as to afford a reasonable means for the passage of salmon," they were entitled to embrace existing erections as much as new ones, and the terms of the regulations actually made by them do not admit of any limited application. On this part of the case I entertain no difficulty. The regulation, to the effect that there shall be a sluice or sluices at the intake of every mill-lade, that there shall be a heck or grating of the dimensions specified at the intake of every lade, and that a similar heck or grating shall be placed across the lower end of each tail lade at its entrance into the main river, are so expressed as to apply to every lade by which existing mills in salmon rivers are supplied with water. I hold therefore that the advocator's mill-lade is within the operations of these regulations, and that they may be enforced as regards the Bridge mill belonging to him. For I agree in thinking that the fifth question before the Court must be answered in the negative.

Taking this to be the true view of the statute, the next question is at whose cost the required erection on existing mill lades shall be made.

The statute does not provide that the expense shall be borne by the proprietors of the mills the lades of which are thus to be operated upon to bring them into conformity with the statutory regulations; and it is for consideration whether it could have been intended to impose the pecuniary burden on mill owners or occupiers—for in this

matter I see no ground for distinguishing between proprietors and tenants? The purpose of the statute and the contemplated affect of the regulations which it authorised to be made, plainly were to improve the salmon fisheries, and the benefit therefrom arising was necessarily to enure exclusively to the owners of such fisheries. The mill owners along the banks of the rivers had as good a legal right to use the water to drive their mill wheels as the owners of salmon fisheries had to exercise their right of salmon free of obstruction in the rivers. And when a new and improved mode for the benefit of the salmon fisheries for supplying existing mills with water has been enacted by the Legislature, it would seem only just that the expense of altering existing machinery which is not in itself in any way objectionable, but has on the contrary been recognised as unexceptionable, and as such been enjoyed for time immemorial, should be borne by the parties for the benefit of whose property the alteration is to be made. This would seem to be no more than a just inference from the silence of the statutory enactment on the subject. But there is this additional consideration pointing in the same direction. The statute, by the 23d section, confers upon the district boards power to impose an assessment on the proprietors of fisheries " for the purposes of the Act," to be called the fishery assessment. There are no doubt other provisions in the statute requiring expenditure, to meet which the assessment allowed was indispensable. But it is no more than a warrantable construction of the words " purposes of the Act" that the expense of the improved structure to be enforced as regards existing mill lades to hold the expense of them to be one, and a very important one, of the purposes to meet which the power to assess was granted. It would have been different had there been an express provision on the subject. But when there is nothing of the kind, it would be unjust to maintain that while all the benefit is to accrue to the one class of proprietors, all the expenses should be borne by the other class, more especially when a fund is provided for out of which that expense may be defrayed.

It has been asked how this view can be entertained consistently with the first of the regulations or bye-laws under which it is alleged that the cost of such erections as are here in dispute must be paid by the mill owner. The reason is very obvious. The regulations had reference to new dams and dams which require to be renewed or repaired as well as to existing erections. The first regulation applies solely to such cases. It does not deal at all with existing dams which are in thorough repair and not requiring renewal. In the formation, renewal, or repair of the dams to which the regulations apply, the owner must necessarily comply with the statutory appointment as to their structure. He could not be permitted to deviate from the authorised structure without exposing himself to a prosecution if not for penalty at least for an order or warrant to have the erection made conformable to the regulations. The making of the erection, or of renewing the dam, or of repairing it in the manner prescribed, must necessarily in such cases be defrayed by himself.

A farther objection to the expense of bringing existing lades into conformity with the regulations being thrown upon the fishery assessment, is supposed to be that the same principle of construction ought to throw on the assessment fund the additional annual expense which must, it is said, be caused by the erection of these hecks on the mill-lade. In this case the advocator states that expense at not less than from £30 to £50 yearly. This contingent expense, however, if it truly is the result, must be borne by the mill owners or their tenants. It may be a consequence no doubt of the new erections required to be made on the mill-lade. But as the erections when made by the District Board are executed in virtue of statutory power, the proceeding, being lawful in itself, cannot infer liability for eventual loss that may enure to the mill-owner in the maintenance of his mill machinery so altered. The statute does not provide for any such indemnification. It is not one of the purposes of the Act, to meet which alone the fishery assessment is allowed to be imposed.

Confining myself entirely to those erections with which this petition alone deals, my opinion is that these operations under the Act are to be made, and can be enforced only on the footing of the cost of them being provided for by the District Fishery Board. It was urged that the formation of a salmon ladder at the dam, if required to be made, would fall within the same principle, and throw the cost on the Fishery assessment. And I think this is no more than a just inference, although the point does not require to be decided under the present petition.

The views on which I proceed may apply to other obstructions which the District Board may think it necessary to have removed towards the free passage of the fish up and down the stream. But we have not to consider any other matters than those embraced within the prayer of this petition.

I therefore answer the questions submitted to the Court, thus:—the 1st, 2d and 4th in the affirmative, and the 3d and 5th in the negative.

Lord Deas—I agree with the Lord Justice-Clerk and Lord Cowan in answering the first two questions in the affirmative, and the fifth one, taken by itself, in the negative. The important part of the first question I understand to relate to the distinctions between operations in the course of constructing a mill-dam, or of altering a mill dam or lade, and operations such as are in question here, where the mill-dam and lade are neither being constructed or altered by the proprietor. But I am of opinion that there is no room for any such distinction. I read the enactment in the sixth section of the Act just to mean that the Commissioners are to have power to make general regulations with respect to the mode of construction of mill-dams or lades, and with respect to the alterations necessary to be made upon mill-dams or lades, in order to carry out the purposes of the Act. That, therefore, sufficiently answers the first question. I agree also in the answer to the second, that the regulations which are now before us are regulations or bye-laws in the sense of the Act. I am not quite sure whether the answer given by the Lord Justice-Clerk and Lord Cowan to that question implies that they are regulations within the power of the Commissioners to make. If it does, I agree in that. If it does not mean that, I go further, and hold that they are regulations which they had the power to make. The third question is,—(*reads it*). Now there are two things embraced there, which are quite distinct. The one is, whether the Commissioners have power to impose this obligation upon the owners, to cause the thing to be done; and the other is, if they have power to cause it to be done,

at whose expense is it to be done? Now I understand from the opinions which have been expressed that the Commissioners have neither of these powers; that they neither have power to cause that to be done by the owners or proprietor, nor at the expense of the owner or proprietor. That appears to be made a very important part of this case. It does not appear to me how it is possible to give any reasonable construction to this enactment without holding that if anybody is to be ordered or compelled to do it it must be the owner, or at least that he must have one party against whom that order or *compulsitor* is to be directed, because without him there is no tenant or manufacturer using the mill, or the lade, or the dam, who has any right to interfere with the construction of these works, or to alter the mill-dam, or the lade, or the water-wheel, or anything of the sort. If there is anybody to be compelled to do it, the proprietor must be made a party to it at all events; and it does not suggest any difficulty to my mind that there may be tenants who are interested in that matter, or that there may be in some instances, tenants who have a much greater interest in it than the proprietor himself, viz., tenants under long leases of 99 years, or it might be 999 years. That does not suggest any difficulty to my mind applicable to a case like this, where there is a fee-simple proprietor and a tenant for 19 years, and where there is no difficulty raised in respect of the tenant for 19 years not being made a party to this. If there are any parties who can be compelled to do it at all, it must be the landlord, and it may be also the tenant for his interest, if any interest he has. I could understand an objection such as was taken here, that all parties interested are not called, that you ought to have called the tenant because he has an interest. But no difficulty arises here from that, because, although a plea of that kind was stated, it has been disposed of finally with the consent of the parties themselves, first by the Sheriff-substitute and then by the Sheriff, both stating expressly that the plea was not insisted in, but was abandoned. The plea itself is at page 39. The Sheriff-substitute's interlocutor is at page 8. "The Sheriff-substitute has repelled." &c.—(*reads*). Then the Sheriff in his note says "The three preliminary defences first in order were abandoned at the bar," —in other words, the judgment of the Sheriff-substitute was acquiesced in as to these. So that the case we are dealing with here comes to us precisely in the same position as if there was no tenant at all, and the proprietor of the mill was working it himself. Therefore I do not see the relevancy of the puzzle raised, that there might be a difficulty as to who was the right party against whom to enforce this in different circumstances. There is not a word in the regulations about close-time, or cruives, or about meshes of nets, or about obstructions in the river, or anything of that sort; and I presume that some parties may be responsible for one of these things, and some for another; in regard to the last, innumerable questions may arise which we have not to solve here. If it was a question of obstruction in the lade or channel of the river, it might be very important whether it applies to natural rocks, and if so, whether there was the same rule as to removing them as to who was to remove a thing he himself had put in. But we have nothing to do with these matters here. In the same way, if this was a case of spinning-mills built by a tenant on a 99 years' lease, or the case of a liferenter who happened, unfortunately for the fiar, to live longer than the fiar, or the case of an heir of entail, we would have to consider whether we had the right party—the party who had the power over the property. But we have nothing to do with that, because this is directed against the only man who is pretended to have anything to do with it, or any power over it; and if there is a man under the sun who can be compelled to do this, he is the party. The only other way in which it could be done would be by the Commissioners asserting a right to do it themselves. That is not the difficulty suggested, as I understand, by the Lord Justice-Clerk. The difficulty was between tenants and manufacturers, and persons of that kind. But if the Commissioners were to assert a right to do it themselves, I should not be ready to support them in that. I think it would be a far greater interference with the rights of property than is asserted here. It is a very different thing to compel a man to do a thing of this kind, that the Legislature has said is to be done on his own property and for the Commissioners to assert a right to come in themselves and do it, and to assert a right to keep it in repair and redd and cleared, and having their men going about his works night and day at all times. That would be a far greater interference with his property; and I do not understand it to be suggested that that is what is to be done. Therefore I have no difficulty with respect to the party, if this be a thing that is to be done by anybody except the Commissioners themselves. Now, the Legislature has simply said that the Commissioners are to have power to make regulations to cause these things to be done; and I entertain no doubt upon that part of it, that if they are to cause it to be done in this case, it must be done by Mr Kennedy, the owner of the mill-dam. It is said the bye-laws are not directed against the proprietor, and do not distinctly point out whether it is the proprietor or the tenant, or who it is that is to do their work. I do not see that any difficulty arises here. As I have already pointed out, there are no different parties with whom that question can arise. The regulation is very clearly directed to things to be done, but plainly on the footing that it is not to be done by the Commissioners themselves; and in this case there is nobody by whom the regulation is to be carried out except the proprietor. If anything were necessary to make that clear, it is that the things we are now concerned with are the construction of the three hecks. The note to the regulations says—"To prevent any obstruction to the flow," &c.—(*reads*). This shows that it was recommended to some parties, not the Commissioners, to do this, and it could only be recommended to the man who had the power to do it. But the material question remains, and that is the only question upon which I have any difficulty,—Whether this is to be at the expense of the proprietor or is to be done out of the assessment? That the Act of Parliament must be carried into effect I can have no doubt at all, and I see no way in which the expense can be provided for except either by the proprietor or out of the assessment. If a reasonable distinction could be taken (which I think Lord Cowan pointed at) between the expense of putting these hecks on a lade or dam which presently exists, and which the proprietors had no occasion to alter, and the expense of putting on the hecks on a used dam or lade, or on a dam or lade which was being altered, there would be some show of expediency in that distinc-

tion. After fully considering the matter, I have not been able to see the possibility of any such distinction. The proprietor who is constructing his dam must be at this additional expense; it may be somewhat more easily done, but there is additional expense. The proprietor altering his dam must be at additional expense, and they must be at the subsequent expense of keeping it clear. So that it appears to me next to impossible to suppose that the Legislature contemplated that this thing under the circumstances that occur here, was to be paid out of the assessment, and that in these other cases it was not to be so paid. They must all, I think, go one way. A great deal of proof has been led here as to whether this is or is not a serious burden. I don't think I ever saw so anxious a proof as this on both sides,—such a multiplicity of witnesses, men of skill of all kinds, in order to make out the proposition on one side and the other, and the result is, that some of them think it is considerable expense and disadvantage, and some think it is no expense worth mentioning nor any disadvantage, and I cannot say the proof impressed me with the idea that it was a very heavy burden on the proprietor either to make these hecks or to keep them up. But that is scarcely a matter for our consideration. The proprietor says that the heck at the mill-wheel serves his purpose. Very credible witnesses tell us that that is the most dangerous place for it, because no man can go there to clear the heck without the greatest risk of his life. Others are of a contrary opinion. As to the importance of the hecks for the protection of the salmon-fishery, that is a very clear matter. One witness says he has in that lade killed 210 salmon in one night. The importance of that on the one hand, and then somewhat serious nature of the burden on the proprietor, must be taken for granted. The question is, what did the Legislature intend? I cannot say I am so much moved as my brethren who have given their opinion, by the observation that the proprietor of the lade and of the mill or mill-dam get no benefit by this, and that the proprietor of the salmon-fisheries do. The benefit of the proprietor of the salmon-fisheries is not the sole object of these statutes. I don't think it is their principal object; because from the earliest time, when Scotland was a separate kingdom, as well as now, all these statutes had in view and pointed at the public benefit much more than the benefit of the proprietors of the fisheries. The statute 1696, c. 33, begins with the preamble, "considering the great advantage that redounds to this kingdom by the salmon-fishings therein," and it goes on to make an enactment that there shall be a constant slap in mid-stream in every mill-dam, so as to allow the free passage of the salmon. Not very long ago we had to consider that statute, and although it was not made the subject matter of decision, we did not entertain any doubt that that statute, which made it imperative to have this slap in the middle of the mill-dam, was applicable and would be applicable to mills and mill-dams which existed before the time it was passed as well as to those that might be erected afterwards; and it never was doubted that the expense of making and keeping up the mill-dam was upon the proprietor although the statute does not say a word about it. I think all the other statutes indicate the same policy. It is therefore not a very startling thing that for the benefit of the salmon-fishery, which the old statute says redounds so much to the benefit of this kingdom, the proprietors shall be laid under an obligation to do reasonable things of this kind, which did create an intolerable expense, for the great benefit that redounds to the public in consequence of these things being done, and the great detriment that would redound to the public if 210 salmon per night were to be killed in this mill-lade, and the same number, it might be, in every mill-lade in this kingdom, so that there should be no salmon left at all. It does not startle me to find that the proprietors are laid under the obligation to make these alterations at their own expense. If the regulations of the Commissioners were totally extravagant and unreasonable, I am not prepared to say that this Court would not have a controlling power over them in that respect. I do not understand any such objection to be taken to these regulations, and I do not see any room to take such an objection. If this thing is to be done at all, I do not suppose it could be done in a more reasonable way than it is here. Mr Kennedy himself was of that opinion at one time; that may not be obligatory on him now, but I think we know enough of these matters to see that if Commissioners are to have power to make regulations binding on proprietors, and at their expense, there is no ground for holding that these regulations can be challenged on the ground of their extravaance or unreasonableness. With reference to the English Act, I would draw rather the opposite inference from it than what the Lord-Justice Clerk did,—viz., that if the Legislature intended to apply it to this country they would have done so. Upon the whole matter my opinion is, that the first four questions should be answered in the affirmative, and the last in the negative.

Lord Benholme—I think it unnecessary to detain your Lordships with any observations except upon the question of the cost of these alterations. Upon that subject I think we ought to attend to the exact query which is put before us—(*reads 3d Qu.*) This is a question which relates to the owners and occupiers of mills. It is not a question which requires the very wide inquiry into which one of my brethren got, as to what would be the proper mode of apportioning the expense of removing various obstructions that may be figured in rivers. In the case of a mill, to which our attention is solely directed, I think the question may be answered without going into such a wide inquiry. I quite agree with Lord Deas, and I think his opinion is confirmed by the words of the statute itself, that the sole benefit of these regulations is not to be taken by the proprietors of salmon-fishings. I think it is a very secondary consideration, and I do not think our judgment with reference to the cost is to be determined by any such idea—that the sole benefit to be derived from the statutes and regulations of the Commissioners is to put into the pockets of the proprietors a large rent for the fisheries. I think the material consideration is the public benefit. We know that salmon-fisheries have been the favourites of the Scotch laws since ever there was law in Scotland; and we know that this matter has been followed out very inflexibly. I am not aware that the interest of the proprietors of salmon-fishings has ever been considered in regard to this matter. No doubt they catch the salmon and bring them to the public; but the great public benefit is the increase of the salmon. I take it that that is one principal consideration to regulate us in deciding the present question. But

there is another that has struck my mind, and I do not think it has been mentioned by any of my brethren. Where a new erection is to be made, it is clear that these Commissioners have power to direct in some respects how it is to be made, so that it may not constitute an obstacle to the free passage of the salmon,—so as not in the eye of the law to be a nuisance, for such I think it would be. In that case it is very clear, I think, and cannot be doubted, that the extra expense of avoiding this nuisance—of causing a new erection to be innocuous—must be borne by the party who proposes to make the new erection, just that he may escape the imputation of causing a nuisance to the public. If that be so, I look on it that the law considers every existing construction which has the baneful effect of interrupting the salmon, as a faulty construction, and liable to be altered. I think that is the view that justifies the statute being passed. I have no idea that the statute could be read as merely for the benefit of salmon-fishery proprietors. The public interest is clearly involved, and that is injured by the existence of dykes or whatever may cause an obstruction to the free passage of the salmon. There to my mind is one good reason why any necessary alterations of these constructions should be at the expense of the party who owns them. The two considerations which guide my mind are, 1st, it is not for the benefit of the salmon-fishery proprietors, but for the benefit of the public: and 2d, the constructions to be altered are in the eye of the law an offence. If there be anything in this, it would solve the question of cost entirely, because the party who owns the subject which sins against the public benefit is bound to set it right; and to set it right for the public benefit—not for the benefit of the salmon-fishery proprietors. The fishery proprietors are constituted a board, and there is an assessment laid on them for the ordinary purposes of the Act. They have their burdens in the execution of the law, but it does not consist in bearing the burden of altering those faulty constructions that belong to other people. They carry out this Act, and an assessment is laid upon them. That is justified by the interest they have in the matter. But I consider the material thing is, that they are acting for the public benefit, and that they are acting against parties or to affect parties whose property is in fault. That is the view on which I find myself strong in saying, in the first place, that the owners or occupiers of the mills shall do the thing. I think the consideration which Lord Deas has suggested render it absolutely necessary that the burden should, in the first place, be imposed on them; but second, I think the cost of doing the thing ought to rest with them, for the reasons I have suggested.

Lord Neaves—I concur in the opinion, delivered by Lord Deas and Lord Benholme, and I have nothing to add.

Lord Kinloch—I concur in the opinion of Lord Deas and the other Judges who agree with him.

I cannot interpret the statutory provisions in any other way than as enacting, on views of public policy, that certain operations should be performed on dams, lades, and water-wheels, calculated to promote the passage of salmon; and when such operations are statutorily required to be performed, I think, nothing being said to the contrary, the inevitable implication is that the proprietor of the dam, lade, or water-wheels, is to make the operations at his own expense. I cannot discover grounds in the present case for putting on the statutory enactments any other than this usual interpretation.

Lord President—It appears to me that among the five questions which have been laid before us, that which most directly and conveniently raises the whole matter in dispute is the third, and to that alone I think it necessary to direct my observations. As regards that question my opinion coincides with those of the Lord Justice-Clerk and Lord Cowan. The Judges who hold an opposite opinion seem to construe this third question as if it embraced two questions, first, whether the Commissioners have power to impose an obligation on the owners or occupiers of mills to execute the works? and secondly, whether they are entitled to lay upon them the cost of executing these works? My own impression is, that the question is intended to be limited to a single point, viz., Whether the Commissioners have the power to impose upon the owners or occupiers of the mills the burden and expense of making these works? My brother Lord Deas said that the Commissioners could never be supposed to be the parties that were to execute the works, because they are the parties who are to make the bye-laws and regulations, and they have made bye-laws and regulations accordingly for this purpose, in which they have inserted recommendations as to the manner in which the work is to be done, plainly implying that it is not to be done by them, the Commissioners; and then he says, if the work is not to be executed by the Commissioners, by whom can it be executed except by the owners or occupiers of the mill? Now I think that proceeds upon a forgetfulness that the executive body under this statute is not the Commissioners, but the District Board, in which you find a body armed with all necessary powers for executing or requiring the execution of such works. And therefore the difficulty thus suggested I think entirely disappears. And the question simply remains, not as to who is to execute the works—which is a matter of much less importance,—the works will be executed by the District Board with the concurrence of the mill-owner, or by the mill-owner with the advice of the District Board. That is not the point of difficulty at all; but the question, and the only question under this third head is, Who is to bear the cost? In answer to the question as thus construed, my opinion is, that it is an established rule in the construction of statutes, that no tax can be laid on the lieges, and equally no charge can be imposed on private property, either for public purposes or for the benefit of either proprietors or of private persons, without express words to that effect. I am further of opinion, that not only is there no such express enactment in this statute under consideration, but I find in it the power of assessment given for the purposes of the statute; and the produce of that assessment is, in my opinion, applicable to defray the costs which are now sought to be charged on the owners of mills.

Agents for the Advocator—Campbell, Espie, & Bell, W.S.

Agent for the Respondent—L. M. Macara, W.S.