

therefore mean the manner of division. I think then it is left to the trustees to apportion and divide the estate *in forma specifica*. How this is to be done is left to their discretion.

The question that arises is this, Is it a natural consequence of these provisions that the estate should be converted into money? or is it not rather merely that the trustees shall have power in a case of difficulty occurring in the administration of the estate to sell? It is quite consistent with the authorities that the existence of a power of sale will not affect the nature of the estate if no sale has taken place and the administration has been in conformity with the expressed wish of the testator. I am of opinion, then, that each child acquired as they came of age a *jus crediti* in a heritable estate.

**LORD DEAS**—In this case the whole estate consisted of heritable subjects. I am of opinion that when that is so the succession must be ruled by the law applicable to heritable property, unless the party objecting can make out either—first, that it is obvious that the testator meant it to be converted; or secondly, that the purposes of the trust are inextricable without such a conversion. Now there is nothing here to show any intention of conversion except the power of sale given to the trustees. That is a mere discretionary power, and it is quite settled that unless that power is exercised there is no conversion. But it is maintained that unless that is effected the purposes of the trust cannot be carried into effect. I am not satisfied of that. The power of borrowing is a very peculiar provision. I am disposed to think that the trustees might have borrowed money and used it to equalise the shares of the children, but if that had not been possible I am disposed to think that the trustees may convey to the parties *pro indiviso* as your Lordship suggested. The result is very much the same as if they had borrowed money to equalise the shares, for any one of the parties may then insist on a division, in which their rights will be equalised in the same way.

As regards the clause as to the shares being alimentary, I think that that has no effect in determining this question. She meant that the whole capital and interest should be alimentary. It does not create an alimentary liferent. In no view has that any effect.

**LORD PRESIDENT**—I forgot to notice the conversion that has actually taken place. As the compulsory powers under which that was done were exercised long subsequent to the date of vesting that fact can have no effect.

**LORD DEAS**—I agree with your Lordship in that opinion.

**LORD MURE**—The only question is—Is the estate heritable or moveable? There was merely a power of sale given to the trustees; Was it indispensable for the proper management of the estate that it should be sold? It is the result of the opinions in *Buchanan v. Angus*, and in other cases, both here and in the House of Lords, that unless such conversion is indispensable we cannot hold that the character of the succession is moveable. Now, I concur with your Lordships in thinking it was not by any means necessary for the administration of the trust.

The Court adhered.

Counsel for Mrs Anderson and William Mabon—M'Laren—Lorimer. Agent—D. R. Grubb, Solicitor.

Counsel for Charles Mabon—Lord-Advocate (Watson)—Scott. Agent—George Begg, S.S.C.

Counsel for Dr Cowie and Judicial Factor—Kinnear—MacKintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, December 8.

## FIRST DIVISION.

[Lord Curriehill, Ordinary.]

### WEST AND OTHERS v. THE ABERDEEN HARBOUR COMMISSIONERS.

*River—Salmon Fishings—Obstruction—Upper and Lower Heritors.*

By virtue of an Act of Parliament, Harbour Commissioners executed certain operations on the bed of a river, in consequence of which fishing on one bank was rendered impossible. This state of matters continued for four years. The Commissioners having afterwards acquired right to the fishings, proceeded to make alterations on the bank so as to be able to resume fishing. In the course of their operations the depth of the river was considerably altered. In an action for interdict by the upper heritors, *held* that the operations complained of were not obstructions in the legal sense of the term.

*Observations (per Lord President) on the right of an inferior heritor to improve his fishings.*

This was a note of suspension and interdict for Lieut.-Colonel West and others, proprietors of salmon-fishings in the river Dee, against the Aberdeen Harbour Commissioners. The following narrative of the facts of the case is taken from the note of the Lord Ordinary:—

The complainers are proprietors of salmon-fishings in the river Dee, the one called "The Pot" and the other "The Fords," which extend for a considerable distance on both sides of the river above the Wellington Suspension Bridge, the "Pot" being immediately above the bridge, and the "Fords" immediately above the "Pot." The respondents, the Aberdeen Harbour Commissioners, incorporated by sundry Acts of Parliament, are proprietors of the Midchingle fishings on the Dee, which begin at a point immediately below the "Pot" and extend downwards for a considerable distance on both sides of the river. The Dee is a tidal river, and the tide flows to a point considerably above the "Fords" fishings. The complainers object to certain operations by the respondents on the north or left bank of the river, in the Midchingle water, as being prejudicial to the "Pot" and the "Fords" fisheries. The respondents deny the right of the complainers to interfere with these operations unless a case of injury to the upper fishings by illegal operations can be established, and they maintain that the operations are neither illegal or injurious. Hence the present application for interdict.

The respondents are by their Acts of Parliament vested with the whole works of the harbour, which includes within its limits the waterways and banks and works from the Suspension Bridge to the sea. In the year 1872, in pursuance of the Act of Parliament obtained by them in 1868, they diverted the channel of the river for a considerable distance below the Suspension Bridge, the effect of which was to a great extent to obliterate the old channel and destroy the fishing stations or shots of the Midchingle fishings, and of a part of the fishings immediately below, known as the "Raik" and "Stell" fishings. By the statute referred to—31 and 32 Victoria, c. 138, sec. 82—it was enacted that the Harbour Commissioners should, before completing the diversion of the river, "make out and provide on lands belonging to them, or to be acquired by them for the purposes of this Act, such number of new shots or stations for fishings, and in such situations on either side of the new channel of the river, and with such extent of servitude or privileges on the banks thereof, and such access thereto as shall be requisite for the proper fishings of the river when so diverted, and as shall in case of difference be fixed by arbitration in manner provided by the Lands Clauses Consolidation (Scotland) Act 1845, for the settlement of cases of disputed compensation by arbitration." The persons who in 1868 were proprietors of the Midchingle, Raik, and Stell fishings did not insist upon the construction of the new shots or fishing stations, but entered into an agreement with the respondents by which they sold to the latter, for a price to be fixed by arbitration, the whole of the said salmon-fishings. That agreement was confirmed by the "Aberdeen Harbour Act 1871," and the sale was afterwards duly carried out by the fishings being conveyed to the respondents for the price of £5100. The Act of 1871 repeals, *inter alia*, the 82d section of the Act of 1868, the same having been no longer necessary or applicable to the changed circumstances.

The respondents are, further, proprietors of the banks of the river, including the foreshores and alveus of the old channel, and of the foreshores of the existing channel, in virtue of conveyances from the proprietors of the lands of Midchingle, and from the Crown, and also of a decree of declarator at the instance of the respondents against the Lord Advocate, as representing the Commissioners of Her Majesty's Woods and Forests and the Board of Trade, dated 14th July and 15th October 1874. They are thus proprietors not only of the fishings of Midchingle, Raik, and Stell in the diverted channel (the extent of which has been considerably shortened by the diversion of the river), but also of the banks and foreshores on both sides of the river below the Suspension Bridge, and of all the works connected therewith.

By the Act of 1868 the respondents are authorised to execute the works marked on the deposited plans on the lands, water, and property described in the deposited Book of Reference; and by section 72, "to alter, enlarge, improve, remove, and maintain the piers, breakwaters, lighthouses, lines of rails, and whole other buildings and works, machinery, and conveniences hereby vested in them." By section 74 they are empowered to deviate laterally from the lines of such works within the limits of lateral deviation marked in the deposited plans, and from the levels of the said works, as shown on the de-

posited sections to any extent not exceeding five feet; and by section 75 they are, within these limits, authorised "to make any deviation from or alteration on the deposited plans and sections which to them may appear expedient, provided always that they shall, before adopting and carrying the same into execution, submit the plans and sections of such deviation or alteration to the Board of Trade, and no deviation or alteration shall be adopted or executed by the Commissioners unless approved by the said Board of Trade, signified in writing under the hand of the secretary or otherwise as they may think proper." None of these sections are repealed by the Act of 1871, and both Acts are to be read together as one Act.

After obtaining their two Acts of 1868 and 1871, the respondents proceeded, in 1872, to straighten and narrow the channel of the river from the Suspension Bridge downwards, and in the course of their operations, which were completed in March 1873, they constructed a high embankment on the north or left bank of the river, the face thereof being pitched—that is, roughly paved with large stones firmly packed together—to prevent injury to the embankment from wash of the water. The pitching was carried down to about the level of low water, a line of piles being inserted in the face of the embankment about thirty feet above low-water mark in order to increase its strength. The slope of the embankment from the piles to low water was about 1 in 3, which was found to be so steep that it was impossible for the respondents, in exercising their rights of salmon-fishing, to draw their nets upon the north side of the Midchingle channel.

In September 1875 they proceeded to lay down gravel and other materials about or below low-water mark, for the purpose of making the slope of the north bank less abrupt; but before proceeding with further alterations involving an alteration or deviation from the levels in the deposited plans and sections, they applied to the Board of Trade for their sanction, which was obtained in the month of January 1876 after opposition on the part of the present complainers. The respondents then proceeded to carry out the alterations of their original plans thus sanctioned by the Board of Trade, none of which are in excess of the deviations allowed by the statute. They removed the pitching from the lower part of the embankment for a space of about 130 yards along the river. They then made a perpendicular cut of from 18 to 20 inches into the earth of the embankment, and carried the embankment out towards the river on a slope of 1 in 7 instead of 1 in 3, after which they replaced the pitching and proceeded to strengthen the upper part of the embankment by depositing stones and shingle where the perpendicular cut had been made, and to deposit a quantity of stones and gravel in the river to a distance of 13 fathoms from the line of piles—that is, 48 feet from the bottom of the original pitching, so as to make a gradual gravelly slope available for the drawing of salmon nets. The result of these operations would have been to reduce by two or three feet the depth of water along the foot of the embankment, where after the diversion of the river the current was somewhat deeper than on the south or right bank, or in the centre of the stream. It does not

appear from the evidence whether prior to the diversion there was any such difference in the depth of the various parts of the channel.

Such being the position of matters in February 1876, the complainers presented the present note of suspension and interdict for the purpose of having the respondents restrained (1) from depositing sand, mud, stones, or other similar materials, and from carrying on, or causing to be carried on, any operation or constructions on the existing bed or alveus of the Dee within the limits of the Midchingle salmon-fishery, at least in such a way "as either materially to obstruct the free passage of salmon and fish of the salmon kind in the water of the said river, or to enable the respondents either to fish for salmon where they could not previously fish, or more advantageously than they would be able to do unless the said operations were executed;" and (2) "from altering the bed or the bank of the existing channel of the said river within the said limits, and the lines and levels thereof, as the same are shown on the plans and sections deposited with reference to the Aberdeen Harbour Act 1868." Interim interdict, in terms of the first branch of the prayer of the note, was on 21st March 1876 granted by the Lord Ordinary on the Bills in pursuance of a remit from the Lords of the First Division. The note was passed, the record closed, and a proof before answer allowed.

The complainers pleaded, *inter alia*—" (1) The operations complained of being illegal and unwarrantable, the complainers are entitled to suspension and interdict as craved. (7) The respondents as salmon-fishing proprietors are not entitled to execute any operations in the bed and on the banks of the river except such as are necessary to repair any injuries caused thereto by floods or otherwise, and to restore the said alveus and banks to the condition in which they were at the completion of the diversion on 1st March 1873."

The respondents pleaded—" (3) The respondents are entitled in the exercise of their statutory powers to construct the banks of the said channel of the river Dee in such a manner as will enable them to exercise their right of salmon-fishing from the left as well as from the right bank of the river. (4) The respondents, as vested in the property of the river bank, are entitled to make any alteration on the same which may be requisite for the proper fishing of the river, provided such operations are not inconsistent with the provisions of the Act of Parliament, and obtain the approval of the Board of Trade. (5) The complainers not being in any way injured or threatened to be injured by the operations complained of, they have no title or interest to obtain the interdict sought."

The Lord Ordinary recalled the interim interdict, and refused the suspension, adding the following note to his judgment. After a narrative of the facts (given above) the note was as follows:—

"Note.— . . . Various questions are raised in the record as to whether the operations complained of are or are not works undertaken by the respondents in connection with their duties as Harbour Commissioners. But at the hearing after the proof both parties were agreed that the question truly at issue between them

is, whether the respondents, as proprietors of the said Midchingle salmon fishings, are entitled to make shots upon the north bank of the river for the purpose of enabling them to exercise their undoubted right to these fishings. The respondents do not now maintain that any of the operations complained of are necessary for the purposes of navigation, or have been undertaken by them in pursuance of their duties as managers of the harbour or conservators of the river. On the contrary, they admit that they have been undertaken for the purpose and in the expectation of enabling themselves to fish more conveniently on the left bank of the river than they can at present do.

"The complainers, on the other hand, maintain— (1) That they, as upper heritors, have a title to complain of these operations of the respondents, whether injurious to the upper fishings or not, on the simple ground that no lower heritor, especially in a tidal river, is entitled to put stones, or sand, or mud, or any such article, in the bed of the river; (2) That in point of fact the operations complained of are prejudicial and injurious to the upper fishings, in respect that they obstruct the passage of salmon, or give the respondents an undue advantage in the capture of salmon as they pass up the Midchingle waters.

"With reference to the first contention of the complainers, that they as upper heritors are entitled to complain of operations by a lower heritor on the alveus of the river without instructing damage to their own fishings, or shewing that the operations are of the nature of fixed permanent obstructions, declared illegal by the various Fishery Statutes, as explained by decision of the Court, the complainers' counsel were unable to refer me to any authority. The cases of *Bicket v. Morris* (H. of L.) 4 Macph. 44; *Mather v. Macbriar*, 11 Macph. 522; and *Jackson v. Marshall*, 10 Macph. 913, to which reference was made, are all cases of proprietors of opposite banks of the river complaining of operations by the opposite heritors in the alveus, of which each was proprietor *ad medium filum*, and in the whole of which each had a common interest to prevent encroachment. In the case of *Forbes v. Smith*, 2 Sh. 602, and 1 W. and S. App. 583, which was also cited, the question was one between the proprietor of one bank of a river without right of salmon-fishing and a party who, having no right to the land on either bank of the river, but a right of salmon-fishing, had made fixed erections *in alveo* of the stream to the injury of the banks of the river, and these erections were on that ground ordered to be removed. The only other authority cited by the complainers was the case of *Copeland's Trustees v. Maxwell*, 13th June 1810, F.C., where stones placed by the lower heritor on the Nith at the edge of a pool below the Burgh Mills dam-dyke at the Bridge of Dumfries, were, in an action at the instance of the upper heritors, ordered to be removed. The report is extremely meagre, and not very accurate. I have examined the session papers, which contain the whole proof, and a plan prepared by order of the Court, and sworn to by the surveyor who prepared it, showing the whole localities and operations. The main object of the action was to have the defenders found liable in the penalties of the Act 1696, c. 33, for fishing below dam-dykes, and so far the defenders were assoltized. But they were ordered to remove the stones, which are shown by the plan to have been

an artificial pile projecting from the right bank of the river nearly half way across, immediately below the pool in question. They were of such a height that the fish could only get over them at full tide, and they thus plainly formed an obstruction to the passage of the fish to a gullet or slap in the dam-dyke, by which they found their way to the upper waters. None of the authorities, therefore, cited by the complainers support their first contention that they are entitled to have all materials removed from the lower part of the alveus, whether or not these are injurious to the upper fishings or illegal under the Fishery Statutes.

"The next question is, Whether, in point of fact, the operations of the respondents complained of are illegal, as forming or calculated to form a fixed permanent obstruction to the free passage of the fish up and down the river? One thing is very clear, and that is, that if the operations complained of do not form a fixed permanent obstruction to the passage of the fish up and down the river, the mere fact that they may enable the lower heritor to use his net more advantageously than before, and so as to catch a greater number of fish, cannot give the upper heritor any title to complain. This I take to be the principle of the decision in the *Bermoney Boat case (Hay v. The Magistrates of Perth)*, 12th May 1861, 1 Macph. (H. of L.) p. 41. Now, I am of opinion that the complainers have failed to prove that any such obstruction will result from the respondents' operations, and indeed that the respondents have proved that there will be none. The river is at the place in question about 30 feet wide at low water, its least depth being about 3 feet at the south side and centre, and its greatest present depth at the north bank, where it is about 5 or 6 feet deep. The effect of altering the slope of the embankment, and of depositing gravel along the foot of that slope, will certainly reduce the depth of the current there, and may tend to divert the fish nearer to the centre of the river, or even to the south side altogether; but the notion entertained and expressed by some of the complainers' witnesses, that this gravel bed, which will still be covered at low water with about 3 feet of stream, would so frighten the fish as to turn them back to the sea and prevent them from ascending the river at all, appears to me to be entirely visionary. All the witnesses for the respondents, and some of the most trustworthy witnesses of the complainers, and particularly Mr George Davidson (who is a member of the Don District Fishery Board, a tenant of fishings in the Don with a rental of £1500 a-year, and whose father was *pro indiviso* proprietor of one-third of the Midchingle fishings before they were purchased by the respondents), distinctly say that the operations complained of will in no way obstruct the passage of the salmon, although the respondents may be able to catch more fish than heretofore.

"On these grounds, therefore, I am of opinion that the complainers have entirely failed to make out any case for succeeding in the first branch of the prayer of their note of suspension. But the respondents do not rest their case solely upon the failure of the complainers to make out the operations complained of to be illegal and injurious obstructions. They maintain that everything which they have done and intend to do is lawful and within the express powers conferred upon them

by their Acts of 1868 and 1871. I am of opinion that they have successfully maintained that proposition.

"In the first place, it is clearly proved that without the operations complained of, the Midchingle salmon-fishings cannot be advantageously enjoyed on the north bank of the river in its new channel. But the Act of 1871 expressly enacts (section 4) that the respondents after acquiring the salmon-fishings in question may hold and enjoy them 'and exercise all the rights of fishing for salmon belonging thereto, with all the necessary facilities therefor, in like manner and to the same extent as the proprietors could have done before such purchase.' And it is further provided that upon the completion of the diversion of the river the complainers may by reason of the acquisition of the said river fishings, 'acquire, and take, and may hold and enjoy the rights of fishing for salmon within and along the new channel of that part of the river Dee which is by the recited Act authorised to be diverted, with all the necessary facilities therefor, in like manner and to the same extent as the right of fishing for salmon in the present channel between the points of commencement and termination of the diversion is or may be held and enjoyed by the proprietors of the salmon-fishings therein.'

"Now, what were the rights of the proprietors of the Midchingle fishings prior to the purchase thereof by the respondents? and what were the necessary facilities therefor to which they were entitled? It appears from the proof that prior to 1834 the Midchingle fisheries were used and exercised by means of four shots—two on the south bank and two on the north,—those on the north being the 'Old Man's Head,' a little below the Suspension Bridge, and on a part of the old channel corresponding very nearly to the part of the new channel in which the operations complained of are being carried on,—and 'Muck's Hole,' which is farther down the river, and to which the present proceedings apparently do not refer. But it is also proved that in 1834 an agreement was entered into between the proprietors of the 'Midchingle' fishings, now represented by the respondents, and the proprietors of the 'Pot' and 'Fords' fishings, now belonging to the complainers, by which the whole of these three fisheries were to be wrought as one fishery, a proportion of the total fish caught being accounted for to the proprietors of 'Midchingle' fishings. All the three fishings were fished under that agreement from 1835 until the Midchingle fishings were acquired by the respondents in 1872, when, of course, that joint agreement came to an end. It is further proved, that in working the fishings the shots on the north side of the old channel were entirely disused after 1834, and, as might have been expected, fell into disrepair; and even those on the south side of the river were comparatively little used. The fishing was, in point of fact, mainly carried on in the 'Pot' and 'Fords' reaches of the water. Now, had the agreement in question for the joint working of the fisheries been terminated by mutual consent at any time before the Midchingle fishings were acquired by the respondents and the channel of the river was diverted, I think it cannot be doubted that the proprietors of Midchingle would have been at once entitled to perform all operations on the north bank of the old channel necessary to enable them

to use the old shots on that bank. But if so, it appears to admit of equally little doubt that the respondents, as proprietors of the fishings in the diverted channel, are entitled to have at least the same facilities as the former proprietors would have had in the old channel—that is to say, they are entitled to adopt the present north bank of the river to the purposes of their fishery, provided they do so without causing any fixed or permanent obstruction to the passage of the fish. As I have already said, it is not only not proved that their operations will create such obstruction, but it is proved that no such obstruction will be caused. Indeed, the respondents are only doing that for themselves, as now proprietors of the fishings, which before the purchase, and but for the purchase of the fishings, they would, under the Act of 1868, have been compelled to do for the former proprietors.

"It is perhaps not very material to the case to observe—but still it may be noticed—that whereas during the four years preceding the diversion of the channel the proportion of the joint produce of the three fisheries accounted for to the proprietors of Midchingle as their share of the catch was 9700 lbs. weight per annum—the quantity of fish actually taken on Midchingle by the respondents themselves during the four years following the diversion was only 4100 lbs. per annum—clearly showing that the diversion of the river without the restoration of the shots on the north bank has caused, and will continue to cause, great deterioration of the Midchingle fishings. Unless, therefore, the present proprietors are found entitled to exercise the full right of fishing on both sides of the river, the complainers will be unduly and unfairly benefited to the prejudice of the respondents.

"As regards the second branch of the prayer of the note of suspension, it is really unnecessary to say anything. The alterations complained of are not beyond the lines of deviation authorised by the statute, and the sanction of the Board of Trade has been duly obtained. The complainers therefore appear to me to have no title to insist in this part of their application.

"On the whole matter, I am of opinion that the interdict must be recalled, and the note of suspension refused, with expenses."

The complainers reclaimed.

At advising—

**LORD DEAS**—In this case the complainers are proprietors of certain salmon-fishings in the river Dee above a suspension bridge mentioned in the proceedings. The respondents, the Harbour Commissioners, are proprietors of certain fishings below the bridge, extending to the sea. A portion of these fishings is what is called the Midchingle fishings, lying immediately below the complainers' fishings. The Harbour Commissioners have recently been performing certain operations on the north bank of these fishings, being proprietors of the fishings on both banks and of the land also. The complainers are proprietors of the fishings on both banks likewise, and they seek to interdict the respondents from proceeding with these operations, which consist mainly of changing the shape of the north bank in a way to which I shall allude more particularly.

The question which arises between the two parties is not what I may call the general question

between upper and lower heritors of fishings; it arises in very special circumstances. The Commissioners have two characters—Commissioners of the Harbour, and proprietors of the fishings. It is only in that latter character that they are here. As regulating the navigation they have to deal with the Board of Trade, whose sanction to these operations they have already got. But these fishings stand in a peculiar position. By the Aberdeen Harbour Act of 1868, the Commissioners were authorised to divert and thereby shorten the course of the river Dee, and were also authorised to purchase by compulsion the land belonging to three sets of proprietors—the proprietors of Raik and Stell fishings and of Midchingle fishings. All these by the Act of 1868 the Commissioners were authorised to purchase.

Another Act was passed in 1871, narrating the Act of 1868, and narrating the rights of the parties to the mouth of the river. It bears that questions had arisen which it was desirable to put an end to, and agreements had been entered into which it was expedient to confirm; that is done by section 3; it bears that the Midchingle fishings are to be transferred to the Commissioners, and authorises them to carry that agreement into effect. Section 4 provides, after setting forth the agreement and the former Act, "that the Commissioners may hold and enjoy the whole sea and river salmon-fishings mentioned in the said agreement, and exercise all the rights for fishing for salmon belonging thereto, with all the necessary facilities therefor, in like manner and to the same extent as the proprietors thereof could have done before such purchase." Then it goes on to say that the Commissioners by the acquisition of these fishings shall "acquire and take, and may hold and enjoy, the right of fishing for salmon within and along the new channel of that part of the river Dee which is by the recited Act authorised to be diverted, with all the necessary facilities therefor, in like manner and to the same extent as the right of fishing for salmon in the present channel between the points of commencement and termination of the diversion is or may be held and enjoyed by the proprietors of salmon-fishing therein." And then, further, it says that the rights of salmon-fishing in the new channel shall "for all purposes of title be held to be the same as such rights of fishing for salmon in the present channel."

Now these sales were carried out; the price of the fishings was fixed by Mr Leslie and was paid. Then the diversion was made with the approval of the Board of Trade in 1872 and 1873—one effect of it was that the channel of the river was 200 yards shorter than it had been before. Then the Commissioners in making this diversion found it expedient to build an embankment on the north side of the river, the pitch of the embankment being 1 in 3. The pits of this embankment are there still as I understand. The effect of this was found to be to make it impossible to have a shot for fishing on the north side at all, and thereby largely to destroy the produce of the fishings. The operations that are now in course of execution are to reduce the steepness from 1 in 3 to 1 in 7, and thus give an opportunity for having a shot there. Then they proceeded to deposit stores and gravel outside the pits to the distance of 48 feet from the bottom of the

original slope, making a gradual slope to the centre of the river, and reducing the depth on the north side to about 3 feet at low water. The depth of water in the centre was increased. It was admitted at the bar that there will be at low water a depth of 7 feet in the centre.

It is necessary for obvious reasons to go back to the history of these fishings to ascertain what was their state prior to the execution of any of these operations. Before 1834 there were four shots; in that year an agreement was made between the proprietors of the Midchingle fishings and the proprietors of the "Pot" and "Ford" fishings, by which these three fishings were to be worked as one, and a proportion of the fish to be accounted for to the proprietor of the Midchingle fishings. This agreement was acted on till 1872, that is to say, from 1834 to 1872 these fishings were fished in common, and the produce was divided between the parties according to what was understood to be their right.

Certain states of the production were made up, from which it appears, as stated in the Lord Ordinary's note, that for four years preceding the diversion of the channel the quantity accounted for to the proprietors of the Midchingle fishings was more than double the quantity they caught themselves on these fishings for the four years following the diversion.

In these circumstances, the Commissioners proceeded to execute the operations now complained of. It is contended by the other side that after having made this embankment they had no right to touch it. It did occur to me that in the circumstance of the lapse of time it might have been right to have applied to the Judge Ordinary for leave to enable them to execute these operations; but that cannot affect the matter of right. The object is to have the matter of right settled, and the question is, whether they could have got that authority if they had asked for it?

Now, in the state of matters I have mentioned, I cannot doubt that if they had made the embankment at first as it has now been made, they would have been doing a right and legal thing, and a thing authorised by the Act of Parliament.

And to ascertain to what extent they were entitled to go, we must go back beyond 1834, for since that date the fishings have been carried on in common. At that time there were four shots on the Midchingle fisheries, which produced a great deal more than double what is now produced. Now, as regards the matter of right, it was contended that no inferior heritor is entitled to make an alteration in the river, whether it affects the upper heritor or not; but here the commissioners were specially authorised to make these alterations and therefore the question does not arise whether the proprietor of the lower fishings is entitled to perform any such operations; that is not the question here; it is—Were the Commissioners doing anything not authorised to be done by them by Act of Parliament?

At the same time, if you are to compare the results expected to be attained by this additional shot with the state of matters before, it is very difficult to say that there is injury at common-law. It is said fish will be turned back; the only reason given is that fish prefer deep water; it is admitted that fish can come up in 3 feet of water, the depth on the bank at low water; it is said that they are more easily frightened in shallow

water. All the witnesses agree that the fish will turn into the deeper water; if so, they will find it in the middle of the river. The objection comes to no more than this, that they will get more fish by having a shot on the north side of the river, which they had not before.

I am of opinion that there is nothing to prevent the respondents doing what they are doing here.

**LORD MURE**—I have come to the same conclusion as the Lord Ordinary, and I adopt the grounds of his opinion and of that of Lord Deas. Any difficulty I had arose from the serious injury alleged to arise to the upper heritor from these operations, but I find nothing in the evidence to support these allegations. Some confusion arose between the two characters of the respondents, who, besides being proprietors of the fishings, are entitled as Harbour Commissioners to improve the navigation of the river. What they had in view in these operations, however, was to improve the fishings. It is contemplated by the framers of the Statute of 1868 that alterations might have to be made afterwards in the operations permitted by that Act, for there is a power that they shall go to the Board of Trade if they intend to execute such alterations, and this they have done. Now all the operations have been done on their own ground. There is no *ex adverso* proprietor objecting, and in what they have done they have got no greater facilities than the Midchingle fishings had before the execution of any of these operations. The upper heritors say it will damage their fishings. But the operations complained of are a fair exercise of the right of property, and all grounds of challenge are negatived by the proof. On the whole, I think there is a total failure to prove any injury to the upper fishings.

**LORD PRESIDENT**—The peculiarity of this case is that the respondents combine the characters of proprietors of salmon-fishings and Harbour Commissioners; if this were not so, the case would have been even clearer than it is. Prior to 1868 they did not combine these characters, and were laid under an obligation by the Aberdeen Harbour Act of that year to the proprietors of certain salmon-fishings in the river Dee. When the river was diverted it was provided by the 82d section that they should "make out and provide on lands belonging to them, or to be acquired by them for the purposes of this Act, such number of new shots or stations for fishings, and in such situations on either side of the new channel of the river, and with such extent of servitude or privileges on the banks thereof, and such access thereto as shall be requisite for the proper fishings of the river when so diverted." This was found likely to cause difficulty in reconciling the interests of navigation and salmon-fishing, and therefore they decided to obtain an Act of Parliament confirming an agreement that they had made with the proprietors of these fishings for their purchase.

Now, I cannot doubt that the Commissioners, having become proprietors of these fishings, were entitled to have such facilities as they were bound to provide for the former proprietors under the Act of 1868. The question is, whether they have been carrying out their operations as licensed by the statute and the agreement? They are said to have made these fishings more valuable. I do not say that they would not be entitled to do so

if they did not thereby interfere with the rights of others. The circumstance that in attending to the supreme interest of navigation the Commissioners lost sight of the salmon-fishing interests is of no moment. The leading object of the Commissioners is to provide for navigation, and that they had to consider first of all; but as proprietors of salmon-fishings they also represented the interests of the public; their revenues are to be applied to the furtherance of navigation, and the rents of the salmon-fishings are as much public property as the harbour rents.

[After narrating the nature of the operations carried out by the Commissioners on the north bank, his Lordship continued]—Now, when they found the bank too steep I cannot doubt that they were entitled to alter it so as to obtain more convenient shots. How they did this is utterly immaterial; the result is that the deepest part of the river is thrown into the centre of the channel instead of being immediately below the north bank. The complainers say that what the respondents have done or are doing injures their upper fishings by obstructing the passage of salmon, and, if that statement were well founded, they are entitled to what they ask. But what is an obstruction in the legal sense? An improvement in the means of fishing, by which the lower heritor increases the produce of his fishings, is no obstruction, unless there is something illegal or objectionable in the mode by which he effects it. There is in one sense no more fatal obstruction to the passage of a fish than catching it, because it certainly can go no further; but it is no legal obstruction if the lower heritor catches double what he did before, provided there is nothing objectionable in the mode by which he does so. There must be an obstruction that will prevent the passage of the fish that escape the lower heritor. Now, here there is nothing in the nature of a weir or fixed obstruction. The objection is that the depth has been diminished and that fish will be easily frightened. Assuming that to be well proved, which I think it is not, that is quite a visionary grievance. For these reasons I agree with the Lord Ordinary.

The Court adhered.

Counsel for Complainers—Trayner—Keir.  
Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Respondents—Lord Advocate  
(Watson)—Kinneir. Agents—Morton, Neilson,  
& Smart, W.S.

Saturday, December 9.

FIRST DIVISION.

[Bill-Chamber.

M'DERMOTT v. RAMSAY.

Master and Servant—Apprentice—Meditatio fugæ  
—Desertion.

Held that it is a competent proceeding to apprehend as *in meditatione fugæ* an apprentice who has deserted his service with the intention of proceeding to America, and to imprison him till he find caution *de*

*judicio sisti* in an action to have him ordained to return to his service and continue in it.

Process—Sheriff Court—39 and 40 Vict. cap. 70,  
sec. 6.

The form authorised by sec. 6 of the Act 39 and 40 Vict. cap. 70, is the proper form for all civil proceedings in the Sheriff Court.

The complainer M'Dermott, a lad of sixteen, was bound apprentice to the respondent Ramsay, a smith and cartwright, in July 1875, under a contract of indenture for five years. There was a penalty of £20 stipulated for non-performance. On 4th November 1876 he deserted his service, and took away his tools with him. Ramsay raised an action in the Sheriff Court by petition and condescence, as provided by the 6th section of the Sheriff Courts Act of 1876, setting forth that he believed M'Dermott to be *in meditatione fugæ*, and that he was about to raise an action against the said M'Dermott, "founded upon the said contract of apprenticeship, to have the defender ordained to return to and continue in the service of the pursuer during the term of his apprenticeship, and to find caution to that effect, or otherwise to pay to the pursuer the penalty of £20 sterling," and praying the Court to grant warrant to apprehend the defender, to examine and commit him to prison till he should find caution *de judicio sisti*.

Warrant was granted, and the defender having been apprehended and examined, and thereafter committed to prison till he should find caution *de judicio sisti*, a note of suspension and liberation was brought before Lord Rutherford Clark, Lord Ordinary on the Bills. The Lord Ordinary passed the note, but refused to grant liberation *hoc statu*.

The complainer appealed, and argued—There is no authority for such a procedure. The proper course was under 38 and 39 Vict. cap. 90, sec. 6. It is not competent to apprehend on such a warrant where the action to be raised does not conclude for a sum of money. Besides, the procedure adopted here is not applicable. Summary procedure before any magistrate was, previous to the Sheriff Courts Act 1876, competent, and therefore that Act does not now regulate the form of procedure. If caution is to be found, the complainer's own bond should be sufficient—*Cameron v. Murray & Hepburn*, 8th March 1866, 4 Macph. 547 (Lord Deas' opinion).

The respondent argued—This case was peculiar, as the complainer here was anxious to leave the country. That intention would have made proceedings under 38 and 39 Vict. cap. 90, futile; it also made the complainer's bond of no avail. Any one who is under a civil obligation, be it *ad factum præstandum* or for a sum of money, may be arrested on such a warrant as this.

At advising—

LORD PRESIDENT—This is a kind of question in which one is extremely anxious to hear everything that can be said in favour of the apprentice, but I am sorry to say I can see no ground whatever for his liberation.

With regard to the objection to the form of proceedings, it is difficult to see on what that is founded. In the Sheriff Courts Act of last year one form is prescribed for the forms ordinarily in use previously, and it is intimated that this is to apply to every case whether it would have originated by summons or by petition under the old