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Friday, November 14.

FIRST DIVISION.

[Lord Young, Ordinary.]

PEDDIE AND OTHERS (MASTERS, PATRONS, AND MANAGERS OF ALLAN'S MORTIFICATION) v. THOMSON.

Salmon-Fishing—Fixed Engine—Net and Coble.

Mode of salmon-fishing where the boat was allowed to drift down with the tide, and where the net, which was left in motion all the time, was used as a means not of enclosure but of entanglement, which was held to be within the principle of fishing by net and coble, and therefore in the circumstances legal.

Opinion (per Lord Deas) that the fact that a certain mode of fishing is the only practical method of utilising certain portions of water for that purpose is an important element to be taken into account in the question of its legality.

The complainers in this case were the masters and the patrons and managers of Allan's mortification, Stirling, who were proprietors of the Longerack salmon-fishings on the river Forth. The respondent was the tenant of the Tulliallan fishings, which were situated on the Forth below the Longerack fishings, and extended from about a mile above Kincardine pier to about three miles below it.

The question related to the legality of a certain mode of fishing practised by the respondent. The following joint minute of admissions sufficiently sets forth the nature of the fishing:—“(2) The said portion of the estuary of the river Forth is not suitable for being fished by means of net-and-coble fishing, pursued by sweep-nets in the usual method; and fishing by that method is practically not possible in the said portion of the river. (3) The method of fishing practised by the respondent is as follows:—The net used by the respondent is 6 or 7 feet deep, and about 200 yards long. The meshes, which are made of very fine twine almost approaching to thread, are from 2½ to 3 inches wide from knot to knot—that is, from 10 to 12 inches round. A light head-rope runs along the whole length of the top of the net, to which are attached cork floats at intervals of about 3 feet, and to a similar rope running along the bottom are fixed light weights or sinkers at intervals of about 10 to 12 feet. The purpose of these floats and sinkers is to keep the net in an upright position in the water, and to keep the upper side of the net always on the surface. A portion of the kind of net used by the respondent, with head and foot ropes, floats, and sinkers attached, is produced. (4) In fishing with this net the practice is to fish about three or four hours every

tide, commencing when the ebbing tide begins to slacken, and continuing a short time after the commencement of the flow. This period of the tide is selected because owing to the lightness of the material of which it is composed, if the net were used at a time when the tide flowed at its full strength, the strength of the tide acting with greater force on the floats than on the sinkers would carry the upper part of the net more rapidly than the lower part, and thus make the net take a horizontal position and float upon the surface. But for that circumstance the net might be used in any state of the tide. (5) The operation of fishing with the net is conducted in the following manner:—The boat with the net in it is rowed out into the stream. One end of the net, which may be called the far end or the loose end, is then begun to be payed out into the stream, and during the operation of paying-out the boat is rowed towards the shore, either directly across the stream or in such a direction as will allow sufficiently for the difference of the action of the wind and tide upon the net and the boat respectively. When the net is all payed out the end next the boat is attached by a short rope, one or two yards long, to the stern of the boat. The net is then in the fishing position. There is no direct connection between the far end of the net and the boat or its occupants; and the rope attaching the net to the boat does not for fishing purposes require to be held, and is not in practice held, by any of the occupants of the boat except when the net is being hauled in. The net is generally fished with in water much deeper than the depth of the net, and at a distance from the side sufficient to secure such a depth of water as will keep the net from coming in contact with the bed of the river. The fineness of the material of the net renders it necessary to keep it in a free and slack position, both from the circumstance that if it were kept strained or tight a strong fish would easily burst through it, and also that it would not serve so well the purpose of entangling the fish. The boat is rowed gently for the purpose of putting such a strain upon the net as will keep it extended, and also for the purpose of drawing and keeping the end of the net attached to the boat a little in advance of the middle portion of the net, in which position it fishes more successfully, but not so as otherwise to accelerate the motion of the net, which is allowed to be carried with the current. For the purposes above referred to, the man in charge of the oars requires to ply them constantly except on an occasion when a favourable wind, acting on the boat with greater force than on the floats of the net, renders a continuous use of the oars unnecessary. Occasionally, also, a strong wind blowing in the same direction as the current renders it necessary to restrain the boat so as to prevent it from putting too great a strain upon the net. The action of the tide being in general stronger at the centre of the river than at the shore, the outer end of the net gets gradually in advance of the boat until at length the net lies in a line parallel or nearly parallel to the shore. Being then in a position unsuitable for fishing, it is taken out of the water and again shot or payed out in the manner above described. Throughout the whole process the net and the boat are kept continually in motion in the manner above specified. (6) While the net is being fished as aforesaid, as soon

as a fish is caught (which is ascertained by the splashing and other motions in the water) the net, up to the part in which the fish is entangled, is drawn on board the boat and the fish taken out immediately. The net has also to be taken out of the river should it get, as it frequently does, into an unfavourable position, or should any obstruction, such as a vessel or buoy, be encountered. Fishing begins, and fish are frequently caught, so soon as the net begins to be paid out as above described. (7) It is the habit of fish of the salmon kind to swim with the head against the current, and when lying in estuaries or tidal water, such as the Firth of Forth, within the boundaries of the Tulliallan fishings and the vicinity, to keep about the same locality. It is only in the time of flood or spate that they push further up the stream. On these occasions the net cannot be used on account of the velocity of the current. Except on such occasions, fish of the salmon kind do not 'run,' and do not, it is believed, shift their position much. At all events, in ordinary circumstances it is the tendency of fish of the salmon kind, lying in waters of the kind referred to, to drop back, tail first, with the ebbing current, and as the water gets shallower, and when the tide turns, the fish turn with it, and face and come up stream with the upflowing current. (8) The manner in which salmon and grilse are caught in the respondent's net is as follows:—When the net comes into contact with the fish, or the fish comes into contact with the net, the fish makes an attempt to push through the net, but the fine threads of the mesh entangle it about the mouth, and in further endeavours to escape it envelops itself in the loose net, the fine threads twisting about the snout of the fish, its teeth and the bones of its mouth, its fins, tail, &c. The lightness of the material of which the net is composed, and the free and unstrained position in which it is purposely kept, except at the end attached to the boat, assist materially in the entanglement of the fish. The net, from the wideness of its meshes, catches fish only of the larger sizes, the smaller fish escaping through the meshes. (9) In the course of the hour and a-half or two hours during which the respondent fishes before the turn of the tide, he usually traverses a distance altogether of about three miles, without including the distances rowed back as after mentioned. His usual course is to fish between Kincardine Pier and the eastern or seaward boundary of his fishing ground, fishing portions of that distance once and perhaps two or three times over—the boat being rowed back for that purpose against the tide. While the boat is being rowed back the net is not in use, but lying in the boat. The respondent usually times his operations downward so as to arrive at the eastern boundary of his ground at the turn of the tide, when he repeats the operation up-stream."

The complainers pleaded—" (1) The said nets used by the respondent as aforesaid being fixed engines employed and adapted for the capture of salmon and fish of the salmon kind, the same are illegal both at common law and under the statutes libelled. (2) The said nets used by the respondent as aforesaid being illegal, and in violation of the rights of the complainers as upper proprietors on the said river, the complainers are entitled to interdict against the continued use of the same, in terms of the prayer."

The respondent pleaded, *inter alia*—" (2) The nets used by the respondent being neither fixed engines nor illegal obstructions to the passage of salmon or fish of the salmon kind in the river Forth, interdict should be refused, with expenses. (3) The method of fishing pursued by the respondent being merely an improvement on the ordinary method of fishing by net and coble, and rendered necessary from the nature of the river or estuary within the points mentioned, the complainers have no good ground of complaint, and the reasons of suspension should be repelled, with expenses."

The Lord Ordinary (Young) sustained the second plea-in-law for the respondent, and refused interdict.

The complainers reclaimed. The arguments of parties sufficiently appear from the opinions of the Court, *infra*.

Authorities—*Hay v. Magistrates of Perth*, December 20, 1861, 24 D. 230, *rev.* May 12, 1863, 4 Macq. 535, and the cases therein cited; *Thomas v. Jones*, November 29, 1864, 34 L.J., Mags. Cases 45; Act 24 and 25 Vict. c. 109, sec. 11.

At advising—

LORD MURE—In this suspension by the masters and managers of Allan's mortification in Stirling against the tenant of the Tulliallan fishings the complainers seek to have an interdict against a net or engine which the tenant has erected for the purpose of carrying on fishing in the part of the Forth leased by him, and which he has been making use of during the past five years. The ground upon which they seek to have the respondent interdicted is, that the net which he has been using is a fixed engine contrary to the rules laid down by the Court in a number of cases on this subject.

The facts are short and simple, and instead of leading a proof the parties had the good sense to agree upon a minute of admissions, in which all the facts are set forth with sufficient distinctness. The extent of the river which is let to the respondent is about four miles, so that the question is of great importance to him.

Now, as I understand the case for the complainers, it is not said that there is any actual obstruction to the passage of salmon up the river beyond the fact that fish are caught; and the case is rested solely on the ground that the net is illegal because it is a fixed engine contrary at once to common law and to the various statutes on the subject. The description of the mode of fishing is contained in the 3d, 4th, and 5th heads of the minute. It appears from the third head that the net is made of much lighter material than is usual, and that the meshes are larger. There are floats running along the top, and sinkers at the bottom, the object being to keep the net in an upright position in the water. The time during which the net is in use is stated under the fourth head. It is kept in the water for three or four hours each tide, and is never in the water except when fishing is actually going on. The mode in which the fishing is carried on is stated in the fifth head, and as the whole case turns upon this it is necessary to attend to the description very carefully—[*His Lordship then quoted the fifth head as above*]. Then under the sixth head it is explained that when a fish is taken, the part of the

net in which it is entangled is drawn on board, the fish taken out, and the net then put back into the water.

Now, it is said by the respondent that this is just a variety of the ordinary use of net and coble. On the other hand, the complainants say that it is of the nature of a fixed engine declared to be illegal in *Colquhoun v. The Duke of Montrose* (December 21, 1793, M. 12,827 and 14,283, and 4 Paton's App. 221) and subsequent cases. The question therefore which your Lordships have to determine is—Does the present mode of fishing come within the rule of these cases, or is it a mere modification of net and coble fishing, and within the rules laid down by the House of Lords in *Hay v. The Magistrates of Perth* (*supra*).

I am unable to see that the nets which are the subject of this case are within the description of those declared to be illegal. No doubt the nets are not hauled in as in net and coble fishing, but they are drifted in much the same way in both cases; whereas in the case of the fixed engine they are attached to the bank, and are stented across the river either entirely or partly so as to overlap one another, and thus obstruct the passage of the fish. Then in that case the nets are left all night. And thus not only are fish prevented from coming up, but they are also deterred from making the attempt. I can see nothing of that kind in the mode of fishing adopted here. It differs from net and coble in this only, that there is no hauling of the net and no rope, but in all other respects it appears to me to be precisely the same. It was argued that fishing by net and coble could be practised only in one way, but that idea is distinctly negated by the Lord Chancellor (Westbury) in the case of *Hay*, and as I understand him, if the net is always kept in motion, any fair modification of net and coble is within the power of the party having the right of salmon-fishing. Now here, when the boat leaves the shore, instead of the net being hauled out by means of a rope, as in ordinary net and coble fishing, the boat is taken out into the stream and the net is then paid out, and the boat continues to move across to the opposite shore in such a direction as will bring the net into a perpendicular position with reference to the shore, for when the net is parallel with the stream it is useless for fishing purposes. The net is then ready for fishing, but instead of hauling it through the water by rowing the boat, the fishermen rely upon the action of the stream. It is necessary, however, to use the oars in order to keep the net in the proper position with reference to the shore, for the influence of the tide gradually tends to take it out of the perpendicular position. The fish are caught by being entangled in the net.

Now, in the opinion of Lord Westbury, the fishing is legal so long as the net is kept in the hand of man, but whenever the hand of man is withdrawn it becomes illegal. I do not however interpret the meaning of his Lordship to be that the net must never leave the hand of man, provided it is kept in motion all the time. His Lordship explained that if the net was kept in motion by the movement of the Bermoney boat, then there would be no illegality from the fact of two boats instead of one. The way in which the Bermoney boat is worked is this—One peg is fixed in the stream and another on the shore further down,

at the spot where the nets are in use to be hauled in; a rope is extended between these two pegs; and the Bermoney boat is worked along this rope. A coble takes the net out from the Bermoney boat, and the fishing is carried on from the Bermoney boat instead of from the shore, but in other respects in the ordinary way. The importance of the arrangement lies in this, that the fishing may be carried on at full tide when it would be impossible to take the nets out to the proper fishing ground owing to the depth of the water.

Now, the decision in that case was, that as the boat was always in motion the mode of fishing was legal. As Lord Westbury explains—“The net still continues in the hand of the fisherman; the net still continues in motion; the net is not fixed for any period during the time of the operation. The operation in order to be effectual must of necessity be as rapid as possible, for anyone conversant with that mode of fishing knows that the great object is to make your sweep with great rapidity, and to bring the ends of your net together as quickly as possible, otherwise the fish strike away in the spaces which are still open to them between the ends of the net and the shore, and escape the haul; the net therefore always remains a thing in motion, and being so, it cannot be brought within the principle of any of the decisions, or within the prohibition against fixtures or fixed engines, which is either contained in or ought to be derived from the language of the statutes. I cannot therefore find, when the matter is looked at with an understanding of the subject, anything that in the least degree distinguishes this mode of fishing from the ordinary mode by net and coble. It has the peculiarity of that mode, and it has its requirements, because it is only carried on, and only takes the fish, whilst the net is kept in motion, while it also preserves all its distinctive peculiarities, taking a grasp, as it does, of a portion of the river during such a time only as is required for the boat to row round the net. The rapidity of the operation is assisted even by this apparatus, the object of which is merely to carry the tow-line from one end to the other in a locality in which it is not possible to carry it on by the ordinary mode.”

These appear to me to be the substantial grounds upon which the mode of fishing in the present case ought to be held to be strictly within the principles of the law, and to be not at all struck at either by the language of the statutes or by any decisions derived from the statutes.

No doubt here it unquestionably appears from the evidence that the hand of the fisherman does not continue to hold the rope while the fishing is going on, but the boat is always in motion, and the whole apparatus sweeps that part of the river as in ordinary net and coble fishing, although the motive force is the action of the river. It is explained that the man in the boat moves the net and keeps hold of it by having command of the rope which is attached to the boat. But if he were to hold the rope in his hands instead of fixing it to the boat, then the case would come up to the very letter of Lord Westbury's dictum. And I cannot hold that the mere fact of attaching the rope to the boat makes such a distinction as to warrant me in coming to a different conclusion in the present case.

LORD DEAS—I arrive at the same conclusion,

and so much upon the same grounds that I do not think it necessary to attempt to add anything. I may, however, say that it appears to me that there are two things which bring this case within the principle of the Bermoney boat—the one is this, there is here really a modification of fishing by net and coble; and the other, it is a modification which is rendered necessary by the state of the locality where the fishing is practised. It is admitted that no fish can be caught in this part of the river by sweeping it with a net in the ordinary manner. They are caught by using an engine of the kind described in this case. I think that the fact that fish could not be otherwise caught in this part of the river is very important, because it is not the policy of the Legislature in enacting these various restraining laws to permit the fish to escape being caught, and apparently if this mode of fishing were not adopted in this part of the river the fish would not be caught there. That, however, is not the point on which the case turns, although it enters largely into it. I have come to the same conclusion as the Lord Ordinary, and on the grounds stated by Lord Mure.

LORD SHAND—I am of the same opinion. The mode of fishing which is the subject of this case is undoubtedly novel, in this country at least, and that in two respects—In the first place, instead of the boat making a shot out into the river and then dragging the net after it with a sweep to the shore, the fish being caught by being enclosed in the net, a net of fine texture is used, as a means not of enclosure but of entanglement. The fish are caught by getting fixed in the meshes of the net, and are taken out of the water from time to time as they become entangled in their struggles to get free. That is one peculiarity. The other is that the net, instead of being pulled through the water at the rate usual in salmon-fishing, is permitted to drift down with the tide. It is indeed the object of the fisherman to keep the net in a proper position across the channel, regulating and retarding its motion with reference to the speed of the water at the time.

Now, it is said that these two peculiarities, and especially the latter, make this sort of fishing illegal, as being substantially the use of an engine which is a fixture or is made permanent in the water. I think the argument fails.

In the first place, there is no new engine used. The fish are taken by net and coble. No doubt the end of the rope is fixed to the stern of the boat, but it was explained that this is not essential to the mode of fishing. It is a mere matter of convenience for saving the services of a man or a boy. An extra hand would take away all ground of objection, and indeed this peculiarity was hardly insisted in by the complainers. Then as to the peculiarity that the fish are caught not by enclosure but by entanglement in the meshes of the net, it is to be observed that there is no law making illegal any peculiarity of this kind in the net used. A net may be used either for entanglement or for enclosure, and I know nothing in law to prohibit the one kind of use more than the other. The one may be more deadly than the other, but that is of no moment, provided the net is not part of a fixed engine.

There remains, therefore, only the question whether the fishing can be represented as being carried on by means of a fixed engine. Here I

think the admissions are conclusive against the complainers. It is admitted that in the course of the hour and a-half or two hours during which the respondent fishes before the turn of the tide he usually traverses a distance altogether of about three miles, so that the net progresses through the water at the rate of a mile and a-half or upwards in the hour. The action of the tide being in general stronger at the centre of the river than at the shore, the outer end of the net gets gradually in advance of the boat, until at length the net lies in a line parallel or nearly parallel to the shore. Being then in a position unsuitable for fishing, it is taken out of the water and again shot or payed out. Throughout the whole process the net and the boat are kept in motion. Now these admissions seem conclusively to show that that there is no use of what can be represented even in the widest sense of the term as a fixed engine. It may be true that the rate of progress is much slower than is usual with salmon-nets, but I suppose that even in the use of a net and coble in the ordinary way the rate of progress varies, being much less in some rivers or in some parts of the same rivers than in others. However that may be, the fact is that the nets are kept in motion, and I cannot hold them to be illegal because that motion is somewhat slower than the tide. Lord Westbury remarked (*Hay v. Magistrates of Perth*, 4 Macq. 546)—“The proper conclusion is that ‘net and coble’ is merely symbolical of the proper legal form of fishing, that legal form of fishing being by a net which is not to be fixed or stented or in any manner settled or made permanent in the river, but is to be used by the hand, and is not to quit the hand, but is to be kept in motion during the operation of fishing.” The net used by the respondent is not fixed, stented, settled, or made permanent in the river, and, as has been already observed, the fact that it is attached to the boat is of no consequence, because the hand of man could be substituted at once.

I have only to add with reference to what my brother Lord Deas has said, that I do not think because a particular mode of fishing is convenient, or, it may be, the only practical mode of fishing certain portions of water, that is a sufficient reason for holding it to be a legal method of fishing. This mode of fishing if lawful in one place must be so in all others. The question of legality must be determined as a general question applicable to all rivers in the country.

LORD PRESIDENT—I am of the same opinion.

The Court adhered.

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