Counsel for Defenders Mrs Marshall and Mrs Fraser—W. Campbell, Q.C.—M'Clure. Agent—R. Addison Smith, S.S.C.

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Tuesday, January 23.

FIRST DIVISION.

[Lord Low, Ordinary.

LYALL AND OTHERS *v.* CARNEGY.

Fishing—Salmon-Fishing—Bye-Laws of Commissioners—Jurisdiction—Act 1696, *c.* 33—*Salmon-Fisheries Act* 1862 (25 *and* 26 *Vict. c.* 97), *sec.* 6, *sub-sec.* 1, *and sec.* 29.

An action raised in the Court of Session by the proprietors of salmon-fishings against the proprietor of a dam-dyke for the purpose of having the defender ordained (1) to make the dam water-tight, and (2) to construct a salmon-pass or ladder capable of affording a free passage for salmon, *dismissed* as incompetent, the Court holding that as these conclusions amounted merely to the enforcement of a bye-law made by the Fisheries Commissioners, under the authority of the Fisheries Act of 1862, the only competent remedy was that provided in section 29 of that Act, viz., by summary petition to the sheriff at the instance of the District Fishery Board.

By the Act 1696, c. 33, it is provided— . . . "And in respect that the salmon-fishing in this Kingdom is much prejudged by the height of the mill-dams that are carried through the rivers where salmon are taken, His Majesty, with consent of the Estates of Parliament, ordains a constant slop in the mid-stream of each mill-dam dike, and if the dike be settled in several grains of the river, that there be a slop in each grain (except in such rivers where cruives are settled), and that the said slop be as big as can conveniently be allowed, providing always the said slop prejudge not the going of the mills situate upon such rivers."

By sec. 6, sub-sec. (6), of the Salmon Fisheries Act of 1862 it is provided that the Commissioners shall have power to make general regulations with respect to . . . the construction and alteration of mill-dams so as to afford a reasonable means for the passage of salmon."

Section 29 provides that—"In the event of any person refusing or neglecting to obey any bye-law made by the Commissioners or any regulation made by the District Board, the clerk may apply to the sheriff by summary petition in ordinary form praying to have such person ordained to obey the same, and the sheriff shall take such proceedings and make such orders thereupon as he shall think just."

The following bye-law in regard to mill-dams was made by the Commissioners under the Act of 1862, and embodied in the bye-law in Schedule D of the Salmon Fisheries Act of 1868:—"Every new dam and every portion of any dam that may require to be renewed or repaired after this time shall be made and maintained water-tight, or as nearly so as possible, so that no water that can reasonably be prevented shall run through the dam. . . . (6) . . . There shall be a salmon-pass or ladder on the down stream face of every dam, weir, or cauld capable of affording a free passage for the ascending fish at all times when there is water enough in the river to supply the ladder." . . .

Section 37 of the Salmon Fisheries Act 1868 (31 and 32 Vict. cap. 123) provides that "any proprietor of a fishery shall be held to have a good title and interest at law to sue by action any other proprietor or occupier of a fishery within the district, or any other person who shall use any illegal engine or illegal mode of fishing for catching salmon within the district."

An action was raised by Mr David Lyall and others, upper proprietors of salmon-fishings upon the North Esk, against Miss Carnegy of Craigo, Forfarshire, also an upper proprietor of salmon-fishings, and proprietor of the Craigo Dam-Dyke on the North Esk.

The summons concluded for declarator "that the defender is bound to repair the said dam-dyke, and maintain it water-tight, or as nearly so as possible, so that no water that can reasonably be prevented shall pass through the said dam-dyke, and to construct and keep in proper condition a salmon-pass or ladder on the down-stream face of said dam-dyke capable of affording a free passage for the ascending fish when there is water enough in the said river to supply the said ladder: And further, it ought and should be found and declared, by decree foresaid, that the said dam-dyke is in a state of disrepair, and is not water-tight, and that large quantities of water percolate through said dyke, and that the said dyke is not so constructed as to afford a reasonable means for the passage of salmon, and that the salmon pass or ladder which has been inserted by the defender or her authors in the down-stream face thereof is incapable of affording a free passage for the ascending fish when there is water enough in the said river to supply the said ladder: And the defender ought and should be decerned and ordained by our said Lords to repair said dyke, and maintain the same in a water-tight condition, or as nearly so as possible, and to construct and keep in proper condition a salmon-pass or ladder on the down-stream face of the said dam-dyke capable of affording a free passage for the ascending fish at all times when there is water enough in the said river to supply the said ladder, and that at the sight and to the satisfaction of a man of skill to be appointed by our said Lords."

The pursuers averred that the dam-dyke in question formed an insuperable obstacle to the passage of salmon except when the river was in high spate. "(Cond. 4) That the said pass is radically defective and insufficient either in original construction or

through the effects of floods, ice, and other causes. They maintain that they are not called upon to specify said defects, but they believe and aver that, *inter alia*, the stops are so low that they do not sufficiently arrest the velocity of the current; the openings in the stops are wider than the intake; the width of the pass is in no place more than one and a-half times greater than the width of the openings in the stops; and the gradient at the top is so steep that it causes the water to descend with excessive velocity. The said pass is, moreover, disconform to the rules laid down for such passes in Schedule G of the Salmon Fisheries (Scotland) Act 1868. It is not capable of affording a free passage for the ascending fish at all times when there is water enough in the river to supply the ladder. . . . (Cond. 5) In addition to the defective condition of the said pass, the said dam-dyke is itself in a thoroughly bad state of repair, and a great quantity of water percolates through at various parts of said dyke in contravention of the rules laid down in the foresaid Schedule G of the Salmon Fisheries (Scotland) Act 1868." . . .

The pursuers pleaded—"(1) The said dam-dyke being an illegal obstruction to the passage of salmon, both at common law and under the Acts relating to Salmon Fisheries in Scotland, and, *inter alia*, the Act 1696, c. 33, and the Salmon Fisheries (Scotland) Acts 1862 and 1868 and relative bye-laws, the pursuers are entitled to decree in terms of the conclusions of the summons."

The defenders averred that in 1867 the District Board had applied to the Sheriff of Forfar to have the proprietor of the dyke ordained to satisfy the requirements of the bye-laws of the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862 by constructing a proper pass; that after sundry litigation the Second Division found that it was necessary to alter the pass in terms of a report by Mr Stevenson, C.E., and that the dam-dyke had been put into a proper condition at his sight. [See report *voce Myers* v. *Grant*, March 4, 1871, 8 S.L.R. 404.]

The defender further averred that in 1897 a report had been made to the District Board on the condition of the dyke, and that no action had been taken by them.

The defender pleaded—"(1) No jurisdiction, or at all events the action is incompetent in the Court of Session. (2) No title to sue. (3) The pursuers' averments are irrelevant and insufficient in law to support the conclusions of the summons."

The Lord Ordinary (LOW) on 16th August 1899 found that the action was incompetent, and dismissed the same.

Opinion—"The pursuers are upper proprietors of salmon-fishings upon the North Esk, and the defender is proprietor of the Craigo Dam-Dyke, which the pursuers aver obstructs the passage of the salmon to the upper reaches of the river.

"The summons concludes in the first place for declarator 'that the defender is bound to repair the said dam-dyke and maintain it watertight, or as nearly so as possible, so that no water that can reasonably be prevented shall pass through the said dam-dyke, and to construct and keep in proper condition a salmon-pass or ladder on the down stream face of said dam-dyke capable of affording a free passage for the ascending fish when there is water enough in the said river to supply the said ladder.'

"That conclusion is in the words of the bye-law in regard to mill-dams passed by the Commissioners under the Salmon Fisheries (Scotland) Act 1862.

"The declaratory conclusions of the summons are followed by petitory conclusions to have the defender ordained to make the dyke watertight, and to construct a salmon-pass of the nature described in the declaratory conclusions.

"It appears that in 1867 the District Board of the river North Esk instituted proceedings before the Sheriff in terms of the 29th section of the Act of 1862, against the defender's predecessor, to have him ordained to construct a salmon-pass in the dam-dyke in accordance with the bye-law of the Commissioners. After prolonged litigation a salmon-pass was constructed in 1871 at the sight of Mr Stevenson, C.E., to whom a remit had been made by the Court. In 1881 a part of the dam-dyke was destroyed by floods, but the dyke was rebuilt. The pursuers do not aver that the salmon-pass as now existing differs in any way from that which was constructed in 1871 under the orders of Court.

"It further appears that in 1897 the condition of the dam-dyke was brought under the consideration the District Board, which, after obtaining a report from Mr Archer of the Fishery Board of Scotland, resolved to take no further action in the matter. The pursuers then brought the present action, and the question is whether it was competent for them to do so.

"By the 6th section of the Act of 1862 the Commissioners appointed by the Act are authorised to make general regulations, *inter alia*, with respect to the construction and alteration of mill-dams. The Commissioners accordingly passed the bye-law to which I have referred, and which was subsequently incorporated in the Act of 1868.

"By the 29th section of the Act of 1862 it is provided that 'in the event of any person refusing or neglecting to obey any bye-law made by the Commissioners,' the clerk to the District Board 'may apply to the sheriff by summary petition in ordinary form praying to have such person ordained to obey the same.'

"The pursuers aver that the dam is not watertight, and that the salmon-pass or ladder does not afford free passage for the ascending fish at all times when the water is high enough in the river to supply the ladder. That is an averment that the dyke is not in conformity with the bye-law, or in other words, that the defender is neglecting to obey the bye-law, and the object of the action is to have the defender compelled to obey the bye-law.

"Now, the bye-laws of the Commissioners are entirely the creation of the Act of 1862,

and that Act specifies the way in which a bye-law is to be enforced. The power and duty of enforcing a bye-law is given to the District Board acting through their clerk, and the method of proceeding is by way of summary petition to the sheriff. That being so, it seems to me that an action by a private individual to enforce a bye-law against an alleged offender is excluded, and is incompetent.

"The pursuers, however, maintained that this was truly an action to enforce the provisions of the Act 1696, c. 33, which provides that there shall be a constant slope in the mid-stream of each dam-dyke as wide as convenient, without prejudicing the going of the mill. The pursuers argued that the bye-law in regard to the dam-dykes must be regarded as the method sanctioned by Parliament for carrying out the provisions of the Act of 1696.

"Now, the Act of 1696 has not been repealed, but I think that it has been practically superseded as regards rivers to which the bye-law in question applies. In any event, I do not think that the pursuers can be allowed, under the guise of an action under the Act of 1696, to usurp the functions conferred upon the District Board alone, and enforce compliance with the bye-law.

"I shall therefore dismiss the action."

The pursuers reclaimed, and argued—The dam constituted an illegal obstruction at common law, and the pursuers were entitled to an effective pass as good as modern science could provide compatible with the legal rights of the millowner. They were therefore in this action doing nothing more than enforcing the legal condition under which alone the defenders could exercise their right of dam-dyke. There was a continuing obligation upon them to take the best known means for the passage of salmon, and while a mere hole in the dyke was thought enough in 1696, that was not sufficient now. Accordingly, the "slop" of 1696 would now be construed to mean the best passage or ladder known to science which did not unduly interfere with the defender's rights—*Grant* v. *M'William*, 1846, note to 10 D. 666; *Hay* v. *Magistrates of Perth*, May 12, 1863, 4 Macq. 535, 1 Macph. (H. of L.) 41; *Arbuthnott* v. *Scott*, May 25, 1802, 4 Pat. 337; *Scott* v. *Gillies*, July 20, 1813, 5 Pat. 750; *Duke of Roxburgh* v. *Earl of Home*, June 16, 1774, 2 Pat. 358. Accordingly, the pursuers were asking no more with regard either to the ladder or to the regulation against percolation than they were entitled to under the Act of 1696. That being so, the only remaining question was whether their right of enforcing the remedy by means of the present action was taken away by anything in the Acts of 1862 and 1868. There was no specific direction in the statutes to that effect, and such a right as this could not be curtailed by implication. On the contrary, the effect of these statutes was to confer higher rights on fishing proprietors; in the words of the preamble to the Act of 1862 the legislation was intended for "the removal of obstructions and the prevention of illegal fishing," not to modify the owner's remedies by preventing him from raising an action in the Court of Session. The words of sec. 6, sub-sec. 6, of the Act of 1862 did not suggest that this was intended. This statutory tribunal with its bye-laws had strictly limited powers, and it was not intended to cover the whole ground of remedies. It was suggested that sec. 37 of the Act of 1868 excluded the pursuer's right by implication because dam-dykes were not mentioned in it. That section, however, was intended to create a new right, to adapt the law to the new state of matters, and to annul the decision that a proprietor of salmon-fishing in the sea had no title to sue, which had been given in the case of *Munro* v. *Ross*, July 7, 1846, 8 D. 1029. The mere omission of dam-dykes in such a clause in no way affected the pursuers' rights.

Argued for respondents—At common law there were no restrictions of any kind upon dam-dykes. There was nothing in the Act of 1696 entitling the pursuers to sue upon either branch of their case. What they demanded by way of pass or ladder was clearly something quite different from the "slop" of the 1696 Act, which was nothing more than a hole or "vacuity." Again, nothing at all was said in that Act as to a dam being water-tight, that point having been considered for the first time in the case of *Arbuthnott* v. *Scott*, *supra*. When new requirements were attached to dam-dykes, a method for enforcing the bye-laws imposing these restrictions was provided, viz., a petition by the Board to the Sheriff. But if a special remedy were introduced by statute, and there was no antecedent remedy at common law, then the statutory remedy must be applied—*Blair* v. *Lumsden & Sandeman* (1869), 7 Macph. 1126; *Tay District Board* v. *Robertson* (1887), 15 R. 40; *Rex* v. *Robinson* (1759), 2 Burrows, 803; *Wolverhampton New Waterworks Co.* v. *Hampton* (1859), 28 L.J. (C.P.) 242, at 246.

At advising—

LORD PRESIDENT—The leading declaratory conclusion of the summons is expressed in the language of two regulations made by the Commissioners acting under section 6, sub-section 6, of the Salmon-Fisheries (Scotland) Act 1862, and embodied in the bye-law in Schedule G of the Salmon-Fisheries (Scotland) Act 1868. The first part of the conclusion is in terms of the first head of that bye-law, which, *inter alia*, declares that "every portion of any dam that may require to be renewed or repaired after this time shall be made and maintained watertight, or as nearly so as possible, so that no water that can reasonably be prevented shall run through the dam," and the second part of the conclusion is in terms of part of the sixth head of the same bye-law, which, *inter alia*, provides that "there shall be a salmon-pass or ladder on the down-stream face of every dam, weir, or cauld, capable of affording a free passage for ascending fish at all times when

there is water enough in the river to supply the ladder."

Section 29 of the Act of 1862 provides that "In the event of any person refusing or neglecting to obey any bye-law made by the Commissioners, or any regulation made by the District Board, the clerk may apply to the sheriff by summary petition in ordinary form, praying to have such person ordained to obey the same, and the sheriff shall take such proceedings and make such orders thereupon as he shall think just."

It appears that in the year 1867 the clerk of the Board of the district in which the dam in question is situated, applied to the Sheriff in terms of that section, and on 4th March 1871 the Second Division of this Court, before whom the case had been brought by appeal, found that it was necessary that the goil or passage in the dam-dyke should be altered in terms of reports made by Mr Stevenson, C.E., and the dam-dyke was put into a proper condition at the sight of Mr Stevenson—*Myers* v. *Grant*, 8 S.L.R. 404.

It further appears that in 1881 a part of the dam-dyke gave way, and that it was repaired or restored to the satisfaction of Mr Stevenson.

The pursuers now allege that the pass or ladder is defective, and after specifying the alleged defects they say in condescendence 4—"The said pass is, moreover, disconform to the rules laid down for such passes in Schedule G of the Salmon-Fisheries (Scotland) Act 1868."

In condescendence 5 they allege that "in addition to the defective condition of the said pass the said dam-dyke itself is in a thoroughly bad state of repair, and a great quantity of water percolates through at various parts of said dyke, in contravention of the rules laid down in the foresaid Schedule G of the Salmon-Fisheries (Scotland) Act 1868."

It appears to me that the action is in truth and substance a proceeding directed to enforce regulations made under the authority of the Act 1862, although the pursuers in their first plea-in-law also maintain that the dam-dyke is an illegal obstruction to the passage of salmon at common law, and under the Act of 1696, section 33.

If there had been no common or prior statute law requirements relative to any of the matters dealt with by the regulations of which the first declaratory conclusion of the summons is composed, I should have thought it clear that these regulations could be enforced only in the manner provided by the Act of 1862—that is, under section 29—and as there was no rule of common or prior statute law corresponding to the regulation requiring the construction of a salmon-pass or ladder on the down-stream face of every dam, I consider that any complaint relating to such a pass or ladder could only be enforced under that section—*Wolverhampton New Waterworks Company* v. *Hawkesford* (1859), 28 L.J. (C.P.) 242, Willes, J., at p. 246; *Rex* v. *Robinson* (1759), 2 Burrows 800; and *The Tay District* v. *Robertson*, 15 R. 40. It was argued on behalf of the pursuers that the Act of 1696, section 33, in providing that there should be a "constant slop" in the mid-stream of each mill-dam in rivers where salmon are taken, in effect provided for a salmon-ladder, but the two things are, in my judgment, essentially different, a "slop" being merely a gap or opening in the dam-dyke through which the water could flow, without any structural provision for giving the salmon a lead up to the "slop," equivalent to the pass or ladder required by the regulations made under the authority of the Act of 1862.

The pursuers, however, maintain that the regulation directed against allowing percolation of water through a dam-dyke does not introduce a new requirement, and reference was made to the decisions of the House of Lords in *Arbuthnott* v. *Scott*, 4 Pat. App. 337, and *Scott* v. *Gillies*, 5 Pat. App. 750, in support of this view. These decisions may be taken to establish that the Court would prevent a colourable device, such as a barrier of loose stones, or a dam-dyke intentionally kept in such a condition that water could readily pass through it, from being used as an obstruction to the ascent of salmon, but they scarcely appear to me to be authorities for claiming from this Court the kind of regulation sought in this action. Even assuming, however, that before the regulations were made under the Act of 1862, it was within the power of this Court to require that *bona fide* mill dam-dykes should be maintained in such a condition as not to admit percolation, I think that where such a matter is taken up and dealt with, as it is by the Act of 1862, and regulations in regard to it are made under the authority of such an Act, any prior law directed to bring about the same result is superseded for the purposes of such a question as the present. It therefore appears to me that the existing regulation directed against percolation can, like the regulation provided for the making and maintenance of a proper class of ladder, be enforced only under section 29 of the Act of 1862. If the regulation relative to the pass or ladder having been made for the first time under the Act of 1862 can be enforced only in the method provided by section 29 of that Act, and it was competent to enforce the regulation against percolation by action in this Court, the result might be that different courts might simultaneously be making orders relative to the same dam-dyke under the advice of separate engineers, a result which can scarcely have been intended by the Legislature.

It is further to be kept in view that the dam-dyke in question was constructed, and the salmon-pass or ladder upon it established, under orders made in a proceeding taken under section 29 of the Act of 1862, and it would be inexpedient and anomalous that this Court, in the exercise of its common law jurisdiction, should make orders relative to a part (*i.e.*, the dam-dyke) of the structure which in 1871 was dealt with by it as a whole under sec. 29, while it could not in the exercise of that jurisdiction make any order with respect to the pass or ladder.

And even if the Court had power in virtue of its ordinary jurisdiction to regulate the dam-dyke, it would not, in my judgment, be expedient to exercise that jurisdiction as to a part of the structure when the whole of it could be regulated under section 29.

The views now expressed appear to me to be sustained by the decision in *Blair* v. *Lumsden & Sandeman*, 7 Macph. 1127, in which the effect of section 29 was discussed by Lord Cowan in a carefully considered judgment. In that judgment his Lordship said—"If the person contravening" (a regulation made under the Act of 1862) "refuse to obey, the Sheriff is the only person who is to consider whether such party resisting the bye-law has a good defence to its enforcement against him, and that judgment may be brought under review, as in the case of any other judgment of the Sheriff." . . . "And it is to the 29th section, which has not been repealed by the Act of 1868, but is in truth embodied in the latter Act, that in every case of refusal or neglect to obey any bye-law, resort must be had for its enforcement."

It was maintained by the pursuers that the present case falls under the first of the three clauses mentioned by Mr Justice Willes in the case of the *Wolverhampton New Waterworks Company* v. *Hawkesford* already referred to. It appears to me, however, that his dicta relative to the first class do not apply, even to the regulation against allowing percolation at dam-dykes, which, as I have already indicated, seems to me to go somewhat beyond any rule either of common or prior statute law, and even if this were otherwise, I think that the rule should not be so applied as to require that part of the regulations relative to the same dam-dyke should be enforced by one tribunal, and another part by another tribunal, especially where, as in the present case, the structure as a whole had already been regulated by proceedings under section 29.

In this connection it is material to keep in view that the policy of the Acts of 1862 and 1868 was to treat the proprietors of salmon-fishings in a river as a community, and to vest in them—through elected district boards—large administrative powers with reference to these fishings. A provision that proceedings for the enforcement of statutory regulations should be instituted only by the District Board through their clerk would be quite in harmony with this policy, while it would not be so to leave proprietors of dam-dykes liable to as many separate actions at law as there are proprietors of salmon-fishings in the river.

For these reasons I consider that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—W. Campbell, Q.C.—J. H. Millar. Agents—W. & J. Cook, W.S.

Counsel for the Defender—Mackay, Q.C.—Macphail Agents—Lindsay, Howe, & Co., W.S.

Tuesday, January 23.

FIRST DIVISION.

[Dean of Guild Court Hamilton.

HAMILTON MODEL LODGING-HOUSE COMPANY, LIMITED *v.* WATSON.

Police—Street—New Street—Court—Width—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 4 (10) (31), *and* 152.

By section 152 of the Burgh Police (Scotland) Act 1892 it is provided that "It shall not be lawful to form or lay out any new street or part thereof, or court, within the burgh unless the same . . . be at least 36 feet wide for the carriageway and foot-pavements, and no dwelling-house shall be built in any such street or court which shall exceed in height . . . one and a quarter times the width of such street."

In an application for warrant to erect a lodging-house within a burgh, the petitioner proposed to take down part of the dwelling-houses fronting upon a street, and thus provide an open space to give entrance to the site of the proposed lodging-house, which was behind the existing houses. The open space thus formed also served as a through passage to a public washing-green. It was proposed to put up a gate at the entrance to the street, and a fence at other end of the passage adjoining the washing-green. The width of the proposed open space was less than 36 feet, and the height of the proposed building was more than one and a quarter times the width of the open space.

Held that the open space was not a "court" within the meaning of the section, inasmuch as the lodging-house did not constitute or contain "premises separately occupied," but that it was a street, and that accordingly the petitioners' proposals did not comply with the requirements of the statute.

Section 4 of the Burgh Police Act 1892 enacts that "The following words and expressions in this Act shall have the meaning hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say, *inter alia*—(10) 'Court,' where by the context it applies to a space contiguous to buildings, shall mean a court or recess or area forming a common access to lands and premises separately occupied, including any common passage or entrance thereto. (31) 'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage, or other place within the burgh used by carts or foot-passengers, and not being or forming part of any harbour, railway or canal station, depot, wharf, towing-path, or bank."

Section 152 enacts—"From and after the date when this Act comes into force within the burgh, it shall not be lawful to form or