

[HOUSE OF LORDS.]

H. L. (Sc.) ALEX. PIRIE & SONS, LIMITED . . . APPELLANTS ;
 1906
 July 16. EARL OF KINTORE AND OTHERS . . . RESPONDENTS.
 (ET È CONTRA)

Salmon Fishing—Impeding Passage of Fish by Abstraction of Water.

Interference with the free passage of salmon up a river is a wrong against the proprietors of the upper fisheries, and if it materially obstructs the passage of fish can be restrained by interdict.

In 1882 mill owners on the Don river, which is a salmon river, increased their diversion of the water from its natural channel into artificial channels serving the uses of their mill. This was done to such an extent as to leave the natural channel in the neighbourhood of the mill at times bare of water. In 1900 the proprietors of the salmon fisheries in the upper reaches of the river objected to the mill owners' diversion of the water, and asked for an interdict :—

Held (affirming the decision of the First Division of the Court of Session), that they were entitled to an interdict.

APPEAL from the First Division of the Court of Session, Scotland. (1)

This was an action for declarator and interdict raised by the Earl of Kintore and others, the respondents, proprietors of salmon fishings in the river Don, against Messrs. Pirie & Sons, the appellants, who were paper makers and proprietors of Stoneywood Works, Waterton, on the south bank of the river Don near Bucksburn, Aberdeen, five miles from the estuary, and at a point a long way lower down the river than the respondents' fishings. The complaint of the respondents was that the appellants' operations in connection with their intake of water for working their mill had dried the river Don at some portions of its course, and thus prevented or impeded the progress of salmon up river to the respondents' fishings. The respondents asked, first, to have it declared that certain alterations carried out by the appellants upon their dam dykes, sluices, and lades in 1882 had had the effect of obstructing the passage of salmon ;

secondly, that the appellants be ordered to restore their water intakes and dams to the position before 1882; and, thirdly, that the appellants' intake of water for power purposes should be limited to such a quantity as may have been so drawn off for the prescriptive period.

The fisheries belonging to the Earl of Kintore and the other proprietors who had joined in raising this action were all situated on the upper reaches of the river at a considerable distance above Messrs. Pirie's works. The action was raised by the respondents in their capacity of owners of salmon fishing only, not as riparian proprietors. By the law of Scotland the right of salmon fishings is a separate feudal tenement, independent of property in either bank, although it generally happens that the riparian proprietor is also the owner of the salmon fishings ex adverso of his property. But in this case no right or interest of the respondents in the river qua riparian proprietors was alleged to be interfered with, and none such were in controversy; nor was it alleged that any interference was made with the waters where the respective fisheries were situated. The sea fisheries are all miles from the neighbourhood of Messrs. Pirie's works, and are unaffected by them. What was alleged by the respondents was that Messrs. Pirie's waterworks, by obstructing the passage of migratory fish, were prejudicial to the general interests of salmon fishing in the river as a whole, and therefore justified a complaint at the instance of each and all of the owners of salmon fisheries on the river.

The evidence proved that previous to 1882 the appellants had a prescriptive right to take 7000 cubic feet of water per minute, and that the principal abstraction of water from the river was at that period by means of an intake called the Waterton Dyke, the water, after being used for power purposes, being passed back into the river about 666 yards below the Waterton Dyke, and water abstracted at the Stoneywood Dyke was returned to the river about 640 yards below that dyke and above the Waterton Dyke, but the result of the appellants' operations in the Stoneywood Dyke between 1879 and 1882 was that a very much larger quantity of water was withdrawn and kept out of the channel of the river for a distance of 1300 yards. The

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The Lord Ordinary pronounced several interlocutors which are dealt with in the opinion of Lord Robertson. It is sufficient to state here that the Lord Ordinary found that damage had been done to the respondents' fishings, and, after receiving the report of two men of skill, he granted an interdict. The First Division also held that the fish had been obstructed (1), and affirmed the Lord Ordinary's judgment.

May 17, 18, 22, 25. *James Avon Clyde, K.C.*, and *W. J. Cullen, K.C.* (with them *E. B. Nicolson*) (all of the Scottish Bar), for the appellants. This is a controversy, not between rival owners of fishings, but between owners of fishings and mill owners. The upper owners of the fisheries objected to the lower proprietors legitimately using the water of the river; and the only question is, Has there been an invasion of the fishery rights possessed by the respondents? The respondents contend that fish have a natural road up this river, and that the least change in the state of the river is an illegal alteration, so that an owner of fishings which may be fifty miles away from the property of the mill owner might raise an action against the latter for taking more water than his prescriptive right gave him: see *Menzies v. Macdonald* (2); *Menzies v. Wentworth*. (3)

The respondents' summons charges the appellants with illegal acts, and it is urged that they have no right or title to impede the free passage of salmon—in fact, that they have no right to take water at all if they impede the passage of the fish. The respondents treat the question as if it arose between opposite riparian owners, where one has a right of veto against the other doing anything to alter the condition of the alveus. The respondents' argument would extend the right of veto in this case to the owners of fishings miles away, so as to deprive the appellants of

(1) 5 F. 818.

(2) (1854) 16 D. 827; (1856) 2 Macq. 463.

(3) (1901) 3 F. 941.

their riparian rights except as protected by prescription. The old statutes dealing with salmon fishings shew that regulation between competing rights in the water was the mode in which disputes were settled in ancient days. The earliest Act was an Act of 1175, to be found in *Lord Leconfield v. Lord Lonsdale* (1), and the other important Acts were those of 1696, c. 33, 1424, c. 12, and 1828, 1862, 1868; and see Lord Westbury in *Hay v. The Magistrates of Perth*. (2) A pass for salmon was made by the Don Fishery Board, but everybody agreed it was most unsatisfactory, and the appellants cannot be held responsible for that. It may be conceded that a lower proprietor has a right to complain if his water is carried away, altered in quality, or the flow impeded—in fact, if the natural state of the water is interfered with. But the same law does not apply to an upper fishery proprietor whose water ex adverso his land is not interfered with. For eighteen years the respondents have acquiesced in the appellants' mode of taking the water; and after so long a lapse of time the respondents ought not to be allowed to interfere. Then there was an agreement with the opposite riparian owner which in effect placed the appellants in the position of owners of both banks, and gave them power to divert much more water than their own prescriptive right. The remit to the Lord Ordinary ought to have been as to what quantity of water could be taken without causing injury to the fisheries.

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[They commented on *Baillie v. Lady Saltoun* (3); *West v. Aberdeen Harbour Commissioners* (4); *Duke of Sutherland v. Ross* (5); *Lord Forbes and Others v. Leys, Masson & Co.* (6); *Robertson v. Foote & Co.* (7); *Hunter and Aikenhead v. Aitken* (8); *Orr Ewing v. Colquhoun's Trustees*. (9)]

W. Campbell, D.F. (with him *Lord Kinross*), for the respondents. The appellants were doing away with the whole of the water of this portion of the river and impeding the progress of

(1) (1870) L. R. 5 C. P. 657, 673.

(5) (1877) 4 R. 765; (1878) 3 App.

(2) (1863) 4 Macq. 535, 542.

Cas. 736.

(3) (1821) 1 S. (1st ed.), p. 227;

(6) (1831) 5 W. & S. 384.

(2nd ed.), p. 216.

(7) (1879) 6 R. 1290.

(4) (1876) 4 R. 207.

(8) (1880) 7 R. 510.

(9) (1877) 2 App. Cas. 839.

H. L. (SC.) the salmon. The question was whether that was legal. Our right is to have the river preserved in its natural state, not merely as a roadway for fish, but where fish can live.

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[He was stopped and asked to confine his argument to the terms of the interdict the respondents desired, in the view that the present interdict of the Lord Ordinary could not stand.]

James Avon Clyde, K.C., in reply.

The House took time for consideration.

LORD LOREBURN L.C. My Lords, I have had the advantage of reading in print the opinion of my noble and learned friend Lord Robertson, and I so fully concur in it that it will not be necessary for me to enter upon the merits of this appeal.

I desire to add that my only difficulty in this case has been in regard to the terms in which the decree should be framed. In England the ordinary course is to grant an injunction in general terms prohibiting any invasion of the rights declared by the Court. It works well in practice, and leaves those against whom the injunction is directed as much freedom as is compatible with a due observance of the rights of their adversary. In the course of the argument a suggestion was made to the counsel on both sides that this course might with advantage be adopted in the exceptional circumstances of the present case. On both sides, however, counsel were disinclined to accept this course, and alleged that it is the custom in Scotland to prescribe in the decree with particularity both what is permitted and what is prohibited. I do not presume to question the wisdom of the course they prefer or the propriety of the rule usually followed in Scotland, but in those circumstances I feel that no alteration of the decree appealed from is possible beyond that suggested by my noble and learned friend Lord Robertson.

LORD DAVEY. My Lords, I think that both parties to this appeal have put their case too high. The appellants contended that the respondents had no right to any interdict, and that their only remedy was an order, either from the Court or from the fishery board, for a new salmon ladder. Of what use this would be to the respondents in a case like the present, where the

appellants for six days in the week leave the bed of the river dry but for a few disconnected pools, I do not know. I am of opinion that it is established by the cases which were referred to that to interfere with the free passage of the salmon up the river is a wrong against the proprietors of the upper fisheries for which interdict is the appropriate remedy. But what should be the nature and extent of the interdict? The respondents say their right is to have the river maintained in its natural condition, and any interference, however slight, to the natural flow of the stream is therefore a wrong which may be restrained by interdict. I think this puts the right of the fishery owners against the lower riparian proprietors too high, and that their right is only to require that no interference shall be made which materially obstructs the passage of the fish.

Having said this much, I can find nothing else in this case, which has been placed before your Lordships with such copiousness of material and such a wealth of illustration. There is no other question of law, and there is no question of fact in dispute, and the only real question is as to the form of the interlocutor. In substance I agree with my noble and learned friend Lord Robertson. The interdict and mandatory part of the order are in a form which is not common in England, but is preferred by Scottish lawyers. It is, however, said that the order is inelastic, and a change of circumstances may arise to which it is not adapted. In order to meet this objection my noble and learned friend Lord Robertson proposes to add some words which, I think, will have the desired effect. But in substance your Lordships confirm the interlocutor, and I think that the amendment should not affect the costs of the appeal, which should be paid by the appellants, and the cross appeal should also be dismissed with costs.

LORD ROBERTSON. My Lords, the record in this case is extremely voluminous, and your Lordships heard a very long and anxious argument for the appellants. In the result, however, the question before the House lies in comparatively narrow compass.

The Don is a salmon river, and the respondents own salmon

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fishings in some of its upper reaches. They have therefore clear right to insist that the appellants, who are lower proprietors of lands on the banks of the river, shall not obstruct the free passage of salmon up the river. The present action, although the summons contains a great many conclusions, is strictly confined to the enforcement of this one right, the right to secure the free passage of the salmon against artificial obstruction or denudation of the channel.

What the appellants have done is to divert the water of the Don from its natural channel into artificial channels serving the uses of their paper mills. This has been done to such an extent as to leave the natural channel opposite the mills at times bare of water, and therefore necessarily impossible of passage to salmon.

It is superfluous to add that the artificial channels do not furnish a safe passage for salmon.

What, then, are the rights of the appellants which can be opposed to those of the respondents? They come from two sources. First of all, as riparian proprietors having right (for this I shall assume) to both banks in this part, they are entitled within their own boundaries to divert the water of the river. The condition of this right is that the water must be returned, and this condition is merely one of the consequences of the general principle that the water of a running stream can only be dealt with by anyone so far forth as is consistent with the rights of the other proprietors interested in it.

Secondly, the appellants have by prescriptive use acquired right to abstract from the river, for a certain part of its course, a quantity of water stated at 7000 cubic feet per minute.

The operations complained of, however, cannot possibly be justified by this prescriptive use, for the abstraction of 7000 cubic feet per minute was for practical purposes harmless to the salmon; and this second of the appellants' rights is therefore immaterial to the controversy. The appellants have, indeed, attempted to piece on to their prescriptive use of the water in question, which was 7000 cubic feet, the use had of the river for another part of its course by themselves or by persons whose rights they have acquired. I do not think that this argument requires any elaborate refutation. The effect of forty years' use of

water of a river is to give the person so using right to continue that use *modo et forma* at the place where the use has taken place. It is not to give him a general right to encroach on the common subject, viz., the river, to the gross amount of his prescriptive abstraction.

Accordingly, the true position of the appellants must be found in harmonizing their right to abstract water, such as it is, derived from the two sources specified, with the respondents' right to the free passage of the salmon. *Prima facie*, on the facts found and not now disputed, the appellants are wrong-doers; they have exceeded their rights to the injury of the respondents. The logical result would be a general interdict against encroachment. In the practice of the Scottish Courts, however, it has been usual to avoid the controversies which might arise as to the effect of general interdicts by proceeding to practically harmonize the contending rights by prescribing remedial works or restrictions on use. This is what the Court of Session has done in the present instance. Such procedure generally, and what has been done here in particular, is subject to the criticism that the decree which ultimately is pronounced is apt to appear as rigid as the general interdict appears to be vague. Subject, however, to one safeguard, which I am to suggest, I think the Court have well performed this difficult administrative work.

I am bound to add that in the performance of this task the Court did not receive due assistance from the appellants, and if, in the sequel, they should suffer from the rigidity of the system established, they may impute it to themselves. When the appellants were found to be wrong-doers (and that they were exceeding their rights to the respondents' injury was manifest all along), their proper attitude was that of deprecating interdict, which was the strict legal consequence, and pointing out to the Court means which would in future safeguard the interests which they had injured. The initiative in this stage strictly speaking lay with them, to be allowed to propose remedial measures. This was not the course taken by the appellants; they have acted as critics of the action of the Court, and of the practical recommendations of the Court's skilled advisers. Now I am not disposed too readily to accept such criticism.

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Lord Kyllachy, in my opinion, accurately stated the conditions on which the Court entered on this inquiry about remedial works when, in his interlocutor of March 20, 1903, he laid it down that “when the defenders’ (appellants’) operations at Stoneywood do by themselves or in conjunction with similar operations or other causes affect the flow of the river between the point of abstraction and the point of return so as to impede the free passage of salmon between the said points, the defenders are limited, both with respect to the amount of abstraction and the point of return, to the usage existing prior to 1882, and are only entitled to innovate upon that usage when and so long as the river flows and continues to flow over Stoneywood Dyke and thence downwards to the actual point of return, in such volume as to ensure the free passage of salmon between the point of abstraction and the point of return.” I think also that the men of skill were properly directed to report—“(1.) what depth or volume of water, measured by inches or otherwise, would be, in their opinion, sufficient to secure the free passage of salmon in said part of the river; and (2.) whether any, and if so what, arrangements are possible which would automatically or otherwise ensure the observance by the defenders of the limitations attaching, as above expressed, to their right to abstract water from the river at Stoneywood Dyke.”

Now, my Lords, it is not my intention to examine minutely the report of the men of skill or the final order of the Court. That order prohibits the abstraction of more than the prescriptive quantity, 7000 cubic feet per minute, except when nine inches of water are flowing over the crest of the upper dyke and thence to the Green Burn, and lays it down that, even on these excepted occasions, they are not to withdraw a larger quantity than 31,850 cubic feet per minute, except when and so long as there shall be left to flow over the said dyke to the Green Burn at least one half of the whole water flowing down the river at the time. There follow detailed conditions about the return of the water, and about gauges and marks. All this is enforced by interdict against abstracting more than the prescriptive quantity, except on the occasions and under the conditions specified, and against deviating from the prescribed place and conditions of return of the water.

Now, having carefully considered this scheme, I think that it is as well adapted to the difficult problem to be solved as any that could be constructed; and, as I have said, it rests on sound principles. The learned judges who considered it have had much and successful experience in this branch of administrative justice. Lord M'Laren, in his interesting judgment, has made one criticism which, for safety's sake, may well be referred to. I do not understand the Court, in requiring one-half of the whole water of the river to flow down the old channel, to proceed upon or to assert any general principle of law, but to adopt that formula as an appropriate additional guarantee in the present case. Whether it has not a more general application, as founded on physical laws, has at least not been examined or decided in this action, and is a question which may recur in similar cases.

My Lords, in the result I am satisfied that this case has been dealt with in accordance with the rights and interests involved. I have, however, been unable to divest myself of the apprehension that, occurring as it does in a final decree which terminates the litigation, this order might prove inconveniently rigid. The flow of rivers is subject to inscrutable change, and it may be well to make it clear that the system now set up is calculated with reference to the existing condition of things, and might, in unforeseen contingencies, prove inadequate or inappropriate. Not, then, as inviting future litigation, but for preventing possible technical embarrassment, I suggest that, with our affirmance of these judgments, there should be coupled a declaration that, in the event of any future substantial change in the river affecting the interests of parties, neither party shall be held precluded by anything in the judgments affirmed from applying to the Court of Session, in any competent process, for remedy.

My Lords, I wish that I could say that I have any definite understanding of the theory of the cross appeal. As I consider the judgments impugned by it to be right, I think that it ought to be dismissed. It may be allowed to the cross appellants that Lord Kyllachy's later judgment purports, or at least may be read as purporting, to modify what had previously been done. But the ultimate decision was right, and, in my opinion, gives effect

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to the cross appellants' rights. The best that can be said of the cross appeal is that it has not substantially added to the costs of these elaborate proceedings.

LORD ATKINSON. My Lords, I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend Lord Robertson. I entirely concur in it, and have nothing to add.

Ordered that the orders appealed from be affirmed, with a declaration that, in the event of any future substantial change in the river affecting the interests of parties, neither party shall be held precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy : further ordered that the appeal be dismissed with costs.

Cross appeal : Ordered that the cross appeal be dismissed with costs.

Lords' Journals, July 16, 1906.

Agent for appellants : John Kennedy, W.S., for Morton, Smart Macdonald & Prosser, W.S., Edinburgh.

Agents for respondent : A. & W. Beveridge, for Alex. Morison & Co., W. S., Edinburgh.