

considering the question, but this case presents none. I am therefore for adhering.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for the Reclaimers—Sir Charles Pearson—Sir Ludovic Grant. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Respondents—Guthrie—Baxter. Agents—F. J. Martin, W.S.

Wednesday, November 16.

## FIRST DIVISION.

THE TAY DISTRICT FISHERY BOARD *v.*  
ROBERTSON AND OTHERS.

*Fishings—Salmon Fisheries (Scotland) Acts 1862 and 1868 (25 & 26 Vict. cap. 97, and 31 & 32 Vict. cap. 123)—Fishery Board—Title to Sue—Interdict.*

*Held* that a district fishery board constituted under the Salmon Fisheries Acts 1862 and 1868, which empowered the board to prosecute for offences and recover penalties, and to apply to the Sheriff by summary petition for the enforcement of regulations and by-laws, had no title to present an application for interdict against what was alleged to be an offence at common law.

This note of suspension and interdict was presented by the Tay District Board constituted under the Salmon Fisheries (Scotland) Acts 1862 and 1868, and Messrs Mackenzie & Dickson, solicitors, Perth, clerks to the board, to have the respondents Andrew Robertson and others, who were owners of fishing-smacks on the river Tay, interdicted from "fishing with, or using in the river Tay, from and after the 20th day of August, being the commencement of the annual close time in the said river, until the 15th day of September following in any year, the species of bag-net known as a spirling-net, or any other net of similar construction, attached to a smack, or other boat or vessel, anchored, or otherwise kept stationary, in the said river; or otherwise, to interdict, prohibit, and discharge the said respondents from using at any time in the said river the said spirling-nets, or any other nets of similar construction, for the purpose of taking salmon, or other fish of the salmon kind, in the said river."

The claimants averred—"Immediately after the close of the salmon net-fishing season on the Tay, which takes place on the 20th of August, the respondents have, in the years 1885 and 1886, commenced to use fishing smacks in the river below Newburgh, ostensibly for the capture of spirlings by means of spirling-nets, and have continued to use these nets until the 14th day of September, being the day on which the river Tweed is closed for salmon-fishing by net. Nearly all of the smacks then ceased to fish for about a fortnight, when a certain number returned to their fishing-ground. The proper season for spirling fishing does not commence

until about the beginning of October, as it is only in cool weather that spirling can be conveyed to a distance. During the period from the 20th August to 15th September large quantities of salmon were consigned in the years 1885 and 1886 by rail from Newburgh to Manchester, and and various other places, and the claimants aver that these salmon were caught by the respondents in the spirling-nets, and that the main object of the respondents in fishing with these nets in the time between 20th August and 15th September was the capture of salmon. Since the close of the salmon net-fishing season on the Tay on 20th August the respondents have resumed the illegal fishing complained of, and on Thursday, 25th August, a large quantity of salmon caught by the respondents in their spirling-nets were landed near Newburgh, and were seized on behalf of the claimants. . . . The smacks of the respondents were anchored for the whole period above mentioned in the open channel of the river, and were stationary except so far as they swung round with the tide, their catch being sent ashore by boats. Their position was in the main channel, where the salmon run, and where few spirlings are to be got."

The respondents denied that the salmon seized as aforesaid were caught in their nets, or that there was any special season for spirling-fishing. They averred that their smacks occupied the only possible position for spirling-fishing, and that the net they used was not adapted for salmon-fishing, and was the net universally used for spirling at all seasons when that fishing was carried on.

The claimants pleaded—" (1) The nets complained of being intended for the taking of salmon during the period of time in question, the respondents are not entitled to use them, and interdict should be granted against their use during that period, as craved. (2) *Separatim*—The nets being of the nature of fixed engines placed in the river, the claimants are entitled to interdict against their use."

The respondents pleaded, *inter alia*—" (1) The claimants have no title under the statutes mentioned to sue this action."

The Salmon Fisheries Act 1862, sec. 28, provides that "All offences under this Act may be prosecuted, and all penalties recovered, before any sheriff, or any two justices acting together, and having jurisdiction in the place where the offence was committed, at the instance of the clerk of any district board, or of any other person." Section 29 provides—"In the event of any person refusing or neglecting to obey any byelaw 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 Salmon Fisheries Act 1868 (31 and 32 Vict. cap. 123), sec. 15, imposes a penalty upon every person who fishes for salmon during the annual close time by any means other than rod and line. Section 21 imposes a penalty upon any person who shall "buy, sell, or expose for sale, or have in his possession, any salmon taken within the limits of this Act between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district." Section 30 re-enacts the provisions

of section 28 of the Act of 1862. Section 37 enacts—"That any proprietor of a fishery shall be held to have a good title and interest at law to sue by action any 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."

The Lord Ordinary on the Bills (LEE) on 5th September 1887 refused the note as incompetent, and found the complainers liable in expenses.

The complainers reclaimed, and argued that they had a title to sue. They were unable to prosecute the respondents for penalties under the 21st section of the Act of 1868 because of the decisions in *Wilson v. Harvey*, Nov. 13, 1884, 12 R. (Just. Ca.) 12, and *Chalmers v. M'Glashan*, Feb. 2, 1886, 13 R. (Just. Ca.) 17, which decided that no conviction could be obtained so long as any river was open, and the Tweed did not close until 14th September. The only remedy therefore was an interdict. The view of the Lord Ordinary was that the complainers could only sue for penalties under the 15th section of the Act of 1868, but that they had no civil remedy; but by the 13th section of the Act of 1868 the board was authorised, *inter alia*, "generally to execute such works, do such acts, and incur such expenses as may appear to them expedient for the protection or improvement of the fisheries within their district." Moreover, the imposition of a penalty implied prohibition—Bell's Princ. sec. 36—and the only method of enforcing the prohibition was by interdict. The board had a duty to protect the river, and the Court would in such a case interpose to enable them to discharge that duty—*Cooper v. Whittingham*, L.R., 15 Ch. Div. 501 (*per* Jessel, M.R.). The offence complained of was not one collateral to the statute, but was directly against it. If any proprietor would be entitled to present an application for interdict, as he would be under the 37th section of the Act of 1868, *a fortiori* should the board be entitled, which was charged with the protection of the interests of all the proprietors. It was said that the board had no rights, but only powers conferred by statute. These powers, however, surely included the power to stop an intended wrong—*Stevenson v. Magistrates of Hawick*, May 19, 1871, 9 Macph. 753 (*per* Lord Neaves); *Vallance v. Falle*, 13 Q.B.D. 109; *Atkinson v. Newcastle Water Company*, 2 Ex. Div. 441, 46 L.J., Ex. 775.

The respondents argued—The complainers had no title to sue. Their powers were defined by the Acts of 1862 and 1868, and they could only act under those powers—*Blair v. Sandeman*, July 21, 1869, 1 Coup. 309. The offences for which they were entitled to prosecute were statutory, but the offence complained of here was alleged to be a common law offence. Where statutory procedure was provided this must be strictly followed—*Aberdeen Road Trustees v. Knowles*, Hume, 262; *Rex v. Robinson*, 2 Burr. 803; *Sim v. Hodgert*, Feb. 24, 1831, 9 S. 507; *Todd v. Higginbotham*, Mar. 7, 1854, 16 D. 794; *Thomas v. Keating*, July 18, 1855, 17 D. 1133. The 37th section of the Act of 1868 was strongly against the complainer's argument, for it declared that the proprietors of fishing should have a good title to sue a civil action, and this by clear implication excluded the idea of there being a

title in the board. Other provisions of the Acts, *e.g.*, sections 25 to 28, and section 40 of the Act of 1868, showed that the legislation did not intend the board to have a civil remedy. The case of *Cooper, supra cit.*, was one where an owner of property applied for interdict—*Wolverhampton New Waterworks Company v. Hawkesford*, 28 L.J., C.P. 242 (*per* Willes, J.).

At advising—

**LORD MURE**—The object of the present action is to interdict the respondents from fishing in the river Tay by means of nets generally used for the capture of spirling, but which are said to be used by the respondents in the estuary of the river for the purpose of catching salmon in close time as well as during the open fishing season, and which are alleged to be used in such a way as to amount practically to their being fixed engines placed in the estuary of the river to intercept the fish, and to be on that account illegal.

The action is brought by the complainers as the Fishery Board of the Tay District, constituted under the Salmon Fishery Acts, in name of their clerk, as required by the statute. But although raised by them in that character it is not, as I read it, founded on any alleged violation of any of the rules prescribed by the statutes which they are appointed to administer, or of any of the regulations or byelaws made by the complainers under the powers given to them to that effect. Neither does it bear to be founded on any express provisions of those statutes, but it is rested on the allegation that the mode of fishing complained of is illegal at common law, and it is substantially such an action as any proprietor of salmon-fishings would have been entitled to bring for the protection of his rights, if the statutes under which the complainers act had never been passed.

The Lord Ordinary has refused the note as incompetent, on the ground, as I understand, that the complainers, as pleaded in the first plea-in-law for the respondents, have no title to sue such an action. The only question therefore which is now to be disposed of is, whether that plea is well founded, and the solution of it depends mainly, if not entirely, upon the provisions of the Salmon Fisheries Acts of 1862 and 1868.

By the first of these Acts—*viz.*, the Act 25 and 26 Vict. c. 97—these district boards were originally established, and very distinct provisions are in several respects made as to the powers and duties of district boards with regard to the way in which the Act is to be enforced, and penalties recovered for the offences specified in it. The more important of these offences are set out in sections 11, 12, and 13 of the Act. But by the 22d section power is given to boards, subject to the provisions of the Act and to the byelaws made by the commissioners, to make regulations for the preservation of the fisheries in the district, to appoint clerks, constables, water-bailiffs, and other officers, and to prescribe the duties of all persons appointed by them; while by the 25th section power is given to enact that any person committing a breach of any byelaws or regulations made by them in terms of the statute, shall be liable to a specified penalty for every such offence, to be sued for and recovered in the same manner as the penalties incurred under the provisions of the Act itself

The mode, again, in which all these penalties are to be enforced is regulated by the 28th section, and this is appointed to be done by petition before the Sheriff, or any two Justices of the Peace in the district, at the instance of the clerk of the district board. And for the further enforcement of these regulations and byelaws the 29th section expressly provides that "in the event of any person refusing or neglecting to obey any byelaw 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."

Under the Act of 1868 (31 and 32 Vict. c. 123) additional powers are given to district boards to purchase dams, weirs, &c., by agreement, to remove natural obstructions to the passage of fish, and to borrow money to defray the expenses incurred by them. But in other respects no material change is made in the powers or constitution of the district boards. Several new offences are, however, created by this Act, and by the 30th section the same powers are given to the clerks of district boards to prosecute for those offences as are given to them under section 28 of the former statute; and by the 37th section this important provision is made—"That any proprietor of a fishery shall be held to have a good title and interest at law to sue by action any 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."

Having regard to these various provisions of the statutes, I have come to the conclusion that the Lord Ordinary was right in holding that the complainers had no title to sue the present action. They are a purely statutory board, and can only act under and to the extent of the powers given to them by the statutes by which they were established. The matter of the remedy to be given for things done in violation of the statute, and the question who the parties were who were to have the right and title to enforce those remedies, were plainly under the consideration of the Legislature, and duly provided for, as they thought right, when those Acts were being passed. In neither statute, however, is any power given to district boards or their clerks to have recourse to actions at common law of the nature here in question.

In the first statute power is conferred upon them to prosecute for penalties for all offences created by the statute, or enacted in byelaws and regulations made by the board under the powers given to them by the statute. And they have also under the 29th section of that Act the important right to enforce by petition before the Sheriff obedience to the byelaws of the commissioners and to the regulations made by the district board for the preservation of the fisheries in the district, but their powers go no further. When the second Act was passed no alteration was made on these provisions in so far as the right and title of the complainers to take proceedings against offending parties are concerned, although that subject must have again been under consideration, because the right and title of the owners of salmon-fishings to prosecute such an action as

the present is specifically dealt with in the 37th section, by which the title of such owners to prosecute is expressly recognised and re-enacted, but no such power is given to district boards.

I have assumed in this opinion that the present action does not expressly bear to be rested on any alleged violation of the statutes. It was, however, suggested in the course of the discussion that as the first part of the prayer of the note of suspension refers to fishing during close time only, it might be said that this action is a complaint of a violation of the 15th section of the Act of 1868, which by sub-section (1) provides a penalty for the offence of taking salmon in close time "by any means other than rod and line." But even in this view the objection to the complainers' title appears to me to be well-founded, and the remedy asked incompetent, because of the rule which I conceive to be settled, that when an offence is created by statute which gives the remedy of a complaint for penalties, the only remedy which can be sustained at the instance of a statutory board is that provided by the statute, viz., a complaint for the recovery of penalties, or a petition before the Sheriff under the 29th section of the Act of 1862.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The LORD PRESIDENT, LORD SHAND, and LORD ADAM concurred.

The Court adhered.

Counsel for Complainers—Sol.-Gen. Robertson—Ure. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Respondents—W. C. Smith. Agent—W. B. Rainnie, S.S.C.

Wednesday, November 16.

## SECOND DIVISION.

[Lord Trayner, Ordinary.]

MACPHAIL & SON v. A. J. MACLEAN AND

E. ERSKINE SCOTT.

Agent and Principal—Trust for Behoof of Creditors—Lease—Security—Possession.

A person conveyed his whole estate to a trustee for behoof of his creditors. The trustee had previously, in security of advances made by him for the purpose of paying these creditors, taken from the truster a lease of his heritable estate, consisting of a farm, which bore that the truster had sold to him the whole stock on the lands let. The lease was qualified by a letter, which, *inter alia*, provided that the truster was to manage the farm for the trustee, and that the price of the stock under the lease should not be paid but be imputed to advances made by the trustee. The trustee's name was entered in the valuation roll of the county as tenant of the farm, but there was no other publication of the trust-deed and lease. The truster was afterwards sequestrated. A firm of merchants who had, in ignorance of the two deeds, supplied goods to the truster for the use of the farm, sued