

allegation by reference to the lease, and incorporation with it. If so, it is a stipulation of the lease, and can only be proved by writ or oath. Authorities—*Maxwell*, M. 12,351; *Alexander v. Gillon*, 22d January 1847; *Walker v. Caledonian Railway Company*, 11th June 1858; *Walker v. Flint*, 20th February 1863; *Philip v. Cumming's Executors*, 3d June 1869.

At advising—

The LORD JUSTICE-CLERK thought the first point one of importance; but on the whole he considered the reclaiming note competent. The Act of Sederunt of March 1870 made important changes on the 27th section of the Court of Session Act, and carefully detailed the mode in which procedure was to be conducted. The restrictions in the second section, however, only applied to interlocutors appointing, refusing, or postponing proof; and it was evident, therefore, that the section was intended to refer only to interlocutors properly of procedure. But the Lord Ordinary's interlocutor neither refused, postponed, nor appointed proof; and therefore he thought it did not fall under the second section.

On the matter of what proof should be allowed, it was to be observed that the Lord Ordinary had grounded his decision on the view that the alleged contract could only be proved by writ or oath, and that as the parties had made a written contract, they could not import a verbal stipulation into it. This was in fact just a stipulation of the lease, if it was anything. But he preferred rather to go on the ground that there had been no completed contract; and in this view the action would fall to be dismissed as irrelevant. If the contract alleged was made before the lease, it was excluded by it, for it could not stand apart from the lease, its duration being fixed by it. It might be a matter of some nicety whether, if the contract had been formed after the lease, the subject of it would be heritable. But in the circumstances set forth there were no relevant allegations of a contract.

LORD COWAN considered that though the interlocutor was connected with the matter of proof, it was not one appointing or refusing it. It had been ingeniously attempted to bring the interlocutor into the category of one appointing a proof, on the ground that appointing a proof was intended in the third sub-section to correspond to the parties being at variance whether any or what proof should be allowed; but he did not think this was the meaning of the Act of Sederunt.

On the merits, it was plain that the judgment of the Lord Ordinary was correct. The pursuer himself averred that the matters embraced in the alleged parole agreement and in the lease had been arranged at the same time; but that only the latter had been embodied in the written lease executed a month later. But if that were so, the agreement would be just a stipulation of the lease, anterior to it, yet not in it. It was impossible to allow it to modify the lease. And in the incomplete state of the agreement it could not be held there was any relevant allegation of contract separate from the lease. If the pursuer had been induced to enter into the lease by misrepresentations of what he would receive under it, that might be a ground for a reduction of it. But as it stood there was no room for proof of this agreement other than by writ or oath; and of the agreement itself there was no relevant allegation.

LORD BENHOLME thought the question of com-

petency one of considerable difficulty, as the Lord Ordinary had refused parole proof, and in effect appointed proof by writ or oath; but he felt inclined to agree with their Lordships. He was for adhering to the Lord Ordinary's interlocutor as it stood. There was indeed no relevant allegation of an agreement other than as connected with the lease, but it might be proved by writ or oath.

LORD NEAVES said the difficulty as to the question of competency seemed to him to be in the word "import." There were two things involved here—the constitution of the agreement, and the breach of it. The breach would be proved *prout de jure*, and not by writ or oath; but proof of it had not been appointed. The constitution of the agreement could however only be proved by writ or oath, and that was the only point the Lord Ordinary had dealt with. It had been attempted to be argued that the disputes between the parties as to procedure narrated in the first section were commensurate with the appointing, postponing, or refusing proof in the second; but legislators did not always deal with all that they proposed to do, and an interlocutor settling what proof was to be allowed, and restricting it to writ or oath was not one either appointing, postponing, or refusing it. In regard to the alleged contract itself, it was useless for the pursuer to try for a separate contract, as it was deficient in the *essentialia* of a contract, and that was all he had alleged.

The Court adhered, with expenses since the date of the Lord Ordinary's interlocutor.

Agents for Pursuer—J. B. Douglas & Smith, W.S.

Agents for Defender—Gillespie & Paterson, W.S.

Saturday, March 4.

MYERS v. GRANT.

Fishery Act, 25 and 26 Vict., c. 97—Bye-law—Salmon Ladder. Circumstances in which a proprietor of a dam-dyke on the river North Esk ordered to make sufficient provision for the free passage of salmon, in terms of the bye-laws of Salmon Fishery Commissioners.

The nature of the question in this case, which was an appeal from the Sheriff-court of Forfarshire, is sufficiently apparent from the following opinion of the

LORD JUSTICE-CLERK—When this case was last before us, after hearing it fully stated from the bar, we repelled the technical objections stated to the constitution of the Fishery Board; and, before deciding the other points raised, we remitted to Mr Stevenson to consider a proposal made on the part of the defender. We have now his report, which is unfavourable, and therefore the case substantially presents itself as it did when decided by the Sheriff.

We may assume, on the authority of the recent case of *Kennedy v. Murray*, that the bye-law which the Fishery Board are desirous of enforcing is legal in itself; that it is within the competency of the Board to see it enforced, and that at the owner's expense. I think, also, that neither the titles under which the dam-dyke in question is held by the appellant, nor its past history, can constitute any defence to the requisition of the Fishery Board. The appellant holds the right to this dam-dyke, subject to the obligation of afford-

ing a free passage for the salmon, an obligation which he has nominally professed to fulfil, although by structural alterations connected with the dyke the passage has become virtually useless. I am by no means prepared to say that if this state of things had continued for forty years it would have liberated the appellant from an obligation which is implied in the nature of his right. But it has certainly not continued for forty years, or for nearly so long a period. On the contrary, there is evidence that the dyke itself has been altered and raised on various occasions within forty years, and it is certain that the stone platform or shoeing, which extends down the stream from the base of the embankment, and is the main bar to the passage of the fish, is a comparatively recent construction. In giving the order complained of, therefore, the Fishery Board did not interfere with any right belonging to the appellant by charter or by immemorial usage.

The only remaining question therefore is what operations are necessary in order to carry out the bye-law of the Commissioners. That bye-law requires that there shall be a salmon-pass or ladder on the down stream face of every dam, weir, or could 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. The question, What alterations on the dam may be necessary to produce this result? is one of engineering skill; and the Sheriff took the assistance of a very able scientific adviser, Mr Stevenson, who received suggestions from the parties, and modified his original views in some respects in consequence of representations from the appellant. The Sheriff has acted on his report, and has directed the appellant to construct the works described by him; and I am of opinion that we should not disturb that judgment.

The dispute between the parties ultimately resolved into two considerations; first, the nature of the pass; and secondly, the position in which it should be placed. The appellant did not dispute that the shoeing in front of the dam rendered the pass substantially useless; but he proposed to extend the existing ladder to the edge of the stone platform, so as to connect it with the deeper part of the stream. Mr Stevenson, however, is of opinion that the construction of the ladder itself is faulty, and that its position is unsuitable to the existing state of the river. On the first of these matters, which is entirely one of engineering science, I do not see that we can do otherwise than follow the views of the judicial reporter, which I do with the more confidence, that some experiments made on the part of the appellant, in the way of improving the present ladder, were admitted to have been unsuccessful. Mr Stevenson, it is true, only says of the last proposal of the appellant that he has no confidence in it; and in the face of that opinion I do not think we can sanction it as effectual. In regard to the position of the passage, Mr Stevenson's views are very strong and clear, and are in a large measure supported by the practical knowledge and experience of many of the witnesses examined. From various causes the channel of the river has altered of late years, and it is reasonable that the salmon-pass should be so placed as to communicate with that part of the bed of the river where the fish may be expected chiefly to run.

I concur with the appellant in thinking that he is not bound to furnish the very best passage for

the fish, if he furnished one capable of accomplishing what is required by the bye-law. But it must be efficient, and I cannot hold that what the appellant proposes would be so.

The other Judges concurred.

Appeal dismissed.

Agents for Appellants — Mackenzie, Innes, & Logan, W.S.

Agent for Respondent—James Webster, S.S.C.

Monday, March 6.

FIRST DIVISION.

(Before the First Division, with three Judges of the Second Division.)

(SMITH CUNINGHAME *v.* ANSTRUTHER'S TRUSTEES)

MERCER *v.* ANSTRUTHER'S TRUSTEES.

Marriage Contract — Provisions to Children — Discharge — Power of Apportionment — Reduction — Essential Error. By antenuptial contract £4000 belonging to the husband, and the wife's whole estate, were settled on the spouses respectively and the survivor in conjunct fee and liferent, and the children of the marriage in fee, declaring that the father should have power to apportion among them the £4000; while in regard to the wife's estate the same power was conferred on the parents jointly, or the survivor; failing apportionment the funds were to be divided equally. There were three children, all daughters. The mother had at her marriage about £8000, and she succeeded to about £50,000. The marriage-contract of the eldest daughter, to which her father and mother were parties, contained a discharge of her whole claims under the marriage-contract of her parents in consideration of £5000 paid to trustees for her in liferent, and her children in fee.

The marriage-contract of thesecond daughter was in like terms, but her father only was a party to the deed, her mother being dead.

Thereafter the father contracted a second marriage, and left a settlement by which he directed £20,000 to be paid to his youngest daughter in full of her claims; £30,000 was settled upon his second wife in liferent and the youngest daughter in fee, and his two elder daughters were expressly excluded from any interest in his succession. The youngest daughter signed the trust-deed in token of her acceptance of the provisions in her favour.

The eldest daughter raised an action after her father's death against his trustees to have it declared that there had been no valid apportionment in terms of the marriage-contract, and that she was entitled to a third part of the provisions in favour of the children, deducting £5000, and to have her marriage-contract reduced on the ground of essential error so far as adverse to her claims. *Held*, unanimously, that the pursuer had shown no ground for reduction; and, by a majority of seven Judges (*diss.* Lords Neaves, Ardmillan, and Kinloch), that the mother being in a position to take an effectual discharge of claims on her estate, and the father of claims on the £4000, all claim on her part under the