

It was averred in support of the complaint that between six o'clock on Saturday night, the 5th July 1873, and six o'clock on Monday morning, the 7th July 1873, or during part of the said time, "being the Weekly Close Time as fixed by 'The Salmon Fisheries (Scotland) Act 1862,' the said George Tough did omit to remove and take out of the water, as required by the said bye-law schedule D to the 'Salmon Fisheries (Scotland) Act 1868,' which was then in force within the said district, the netting of the leader of six or thereby bag nets belonging to or in the possession, or under the charge of the said George Tough, set, fixed, or placed, during, or previous to the commencement of the said Weekly Close Time by the said George Tough, or by his directions." The petitioner therefore prayed that the respondent should be found liable to the statutory penalties, viz.:—*First*, In the forfeiture of the said nets with regard to which the said omission occurred. *Second*, To pay in respect of each of the said nets a sum not exceeding £10, with expenses, said penalties and expenses to be recovered by poinding and imprisonment for any period not exceeding six months.

It appeared that the offence charged against the respondent was alleged to have been committed by his replacing the nets (which had been removed in due time on Saturday evening) before the expiry of the close time on Monday morning.

The respondent objected that the complaint was irrelevant, in respect that section 24 did not apply to nets placed during close time, as referred to in the words "during or" in the complaint. The complaint should have been under section 15, which provides:—"Every person who commits any of the following offences,—(2) Who fishes for, takes, or attempts to take, or aids or assists in fishing for, taking, or attempting to take, salmon (except during Saturday or Monday by rod and line) during the Weekly Close Time, or contravenes in any way any bye-law in force regarding the observance thereof;" "(8) Who in any way contravenes any bye-law," shall be liable to a penalty, &c., not exceeding Five pounds.

The Sheriff-Substitute having heard parties' procurators on this objection, sustained the same, dismissed the complaint, and decerned.

The Sheriff-Substitute in his note said:—"I am unable to see that the language used in the section and bye-law founded on as to the omission for which the penalty is there imposed can apply except to nets placed previous to the commencement of close time. Once these nets are effectively removed, without any evasion or fraud, it is difficult to see that there can be any farther omission in regard to them within the language of the Act. The Act evidently does not contemplate their being replaced before the expiry of the close time; but if after a substantial interval they should be replaced, their being so replaced appears to belong to a different category of procedure than that of "omission," and is dealt with as belonging to a different class of offences under section 15 sub-section 2 of the Act, to the penalties of which, if the respondent has committed the offence implied in the words in question, he seems to be liable."

The appellant appealed to the Circuit Court.

At advising—

LORD DEAS—The bye-law which the tenant of the fishery is said to have contravened enacts

"that the netting of the leaders of each and every bag-net shall be entirely removed and taken out of the water." And this bye-law bears to be "made with respect to the due observance of the weekly close time."

Coupling this bye-law with the professed object for which it was made, I read it as enacting that the netting of the leaders of every bag-net shall be entirely removed and taken out of the water during the whole weekly close time. The bye-law therefore was not complied with by the tenant of the fishery removing or taking out the netting of the leaders during part of the close time. If he failed to have it removed during part of the close time, he omitted to do what the bye-law required. He did not, in terms of section 24, do what the bye-law required, but, on the contrary, he omitted to do it, and thus became liable to the penalties imposed by that section.

It is not a sufficient answer or objection to a complaint under that section and relative bye-law that a prosecution might have been instituted under the more general terms of section 15. The enactment in section 15 could not have been intended to supersede the special enactments in other sections of the statute imposing particular penalties in particular cases, and under specified circumstances and conditions.

The object, on the contrary, seems to have been that no evasion of the purposes aimed at by the statute might escape punishment. Accordingly, while section 24 is applicable only to proprietors or occupiers of the fisheries, section 15 is applicable to all persons whatever who may contravene any bye-law, be that bye-law what it may.

Whether, therefore, a complaint under section 15 might have been competent or not, I am of opinion that a complaint under section 24 and relative bye-law was clearly competent by the express terms of the enactment.

Counsel for the Appellant—Pearson. Agents—Cooper & Wink, Elgin.

Counsel for the Respondent—Campion. Agent—A. Morrison, Elgin.

COURT OF SESSION.

Thursday, June 4.

SECOND DIVISION.

[Sheriff of Wigtown and Kirkcudbright
(M'CULLOCH AND SMITH v. THE DUMFRIES
AND MAXWELLTOWN WATER-WORKS
COMMISSIONERS.

*Interdict—Warrandice—Onus of Proof—13 and 14
Vict. c. 34.*

Under the Act 13 and 14 Vict. c. 34, the Dumfries Water Works Commissioners acquired right to the water of Lochrutton for the purpose of supplying the town with water, and obtained conveyance "according to the true intent and meaning of the said Acts of the permanent servitude of taking as much water as might be necessary." *Held* (1) that pollution of the loch by washing of sheep previously dipped in a noxious preparation was against the warrandice of the conveyance, and (2)

that the onus of proving that the water conveyed to the town was notwithstanding of a wholesome quality lies with the party so polluting the water.

This was an appeal from a decision of the Sheriff of Wigtown and Kirkcudbright, upon a petition at the instance of the Dumfries and Maxwelltown Water Works Commissioners, against Walter M'Culloch, of Ardwall, and James Smith, farmer, Lochside, both in the parish of Lochrutton and stewartry of Kirkcudbright. The petitioners set forth that, by virtue of the powers conferred upon them by 13 and 14 Vict., c. 34, and the Dumfries and Maxwelltown Water-Works Amendment Act, 1852, they had acquired right to the water of Lochrutton Loch for the purpose of supplying Dumfries with water, and that they had paid the various proprietors interested all claims in respect thereof, in terms of the Lands Clauses Consolidation (Scotland) Act, 1845, and had obtained conveyances by which the various parties made over to their predecessors, "according to the true intent and meaning of the said Acts the permanent servitude of taking through their pipes so much of the water of Lochrutton as might be necessary for the purposes of their works in addition to the servitude right of taking eighty-three cubic feet of water per minute." The petitioners alleged further that the respondent Smith, with the concurrence of his landlord, was in the habit of washing sheep, which had been previously dipped in chemical substances, in the Loch and so fouling the water, and they craved the Court to "interdict the respondents and all other tenants of the said estate of Hills from washing or causing to enter into the said Loch any sheep or other animal, or otherwise fouling the water of the petitioners."

The pleas in law for the petitioners were, *inter alia* :—The petitioners, by virtue of their title to the water of Lochrutton Loch, so far as necessary for the purposes of their works, are entitled to interdict against the respondents and all other persons interfering therewith by making the said water unfit for these purposes. The respondent Walter M'Culloch and his predecessors having received payment of and discharged all their claims of compensation in respect of the petitioners' right to the water of the said loch, and of any contingent damage arising from the exercise of such right, he is personally barred from interfering with the petitioners in the exercise thereof.

The pleas for the respondents were, *inter alia* :—The petitioners have acquired no other right to the loch than the privilege of taking and carrying off so much of the water of the said loch as may be necessary for their said works, and the said loch not being a stream, reservoir, aqueduct, or other water-works belonging to them within the sense and meaning of the statutes referred to, the loch and rights of the respondents remain the same as before the said servitude right was acquired. The servitude right of taking water from the loch acquired by the petitioners does not entitle the petitioners to interfere with the exercise of the respondent's said rights as one of the proprietors of the loch. Neither the respondent Mr M'Culloch nor his predecessors have renounced or conveyed any right, or been paid a compensation therefor, in connection with the said loch, or the uses thereof competent to him and his tenants prior to the passing of the petitioners' Acts, except as regards the said servitude right. The

operation complained of not being injurious or deleterious to the water supply of the petitioners, there are no grounds in fact for this application.

The Sheriff-Substitute pronounced the following interlocutor.

"*Kirkcudbright, 22d October 1873.*—The Sheriff-Substitute having heard parties' procurators, and considered the closed record, productions, and whole process, before further answer allows to both parties a proof of their respective averments, so far as not admitted, and to the petitioners a conjunct probation: Grants diligence against witnesses and havers, and assigns the day November next at ten o'clock forenoon, within the Court-house here, for proceeding with the proof hereby allowed, and decerns.

"*Note.*—If it were perfectly clear that the 61st section of the Water-Works Clauses Act is applicable to the operation here complained of, the Sheriff-Substitute would have considered the admission of the respondents as to the washing of sheep in the loch in question sufficient for the disposal of the case without a proof; but the questions, both of fact and of law, on which the parties are at issue, are of such importance, and some of them of such nicety, that the only thing quite clear at present to the Sheriff-Substitute is the necessity of a proof. The special points on which further information is required appear to be these—1st, The means, if any, whereby Lochrutton has been made, in the sense of the Water-Works Clauses Act, a "reservoir, aqueduct, or other water-works belonging to the undertakers. 2d, The nature and extent of the possession exercised by the parties respectively since the date of the last conveyance by the respondent Mr M'Culloch; and 3d, The nature and extent of the alleged pollution of the water of Lochrutton."

On appeal, the Sheriff pronounced the following interlocutor:—

"*18th November 1873.*—The Sheriff having considered the interlocutor appealed against and the debate, sustains the appeals for both parties, pursuers and defenders: Recals the interlocutor appealed against, and allowance of proof therein contained; and *quoad ultra* having considered the averments and admissions on the closed record, and the several statutes and other documents produced, finds that the pursuers are Commissioners for executing the purposes of the statute 13 and 14 Vict., cap. 34, passed 25th June 1850, for supplying the burghs of Dumfries and Maxwelltown and suburbs with water, and which statute proceeded on the preamble that the said burghs were not then sufficiently supplied with "water, but that an abundant supply of water can be easily and cheaply introduced into those burghs and suburbs from Lochrutton Loch, in the stewartry of Kirkcudbright, and the streams issuing therefrom and adjacent thereto, but that object cannot be effected without the authority of Parliament," therefore the Act was passed, and the several statutes therein specified (1) including the Water-Works Clauses Act, 1847, save as varied or otherwise provided, were incorporated with, and declared to form part of the said special Dumfries and Maxwelltown Water-Works Act, 1850: Finds that by the said special Act, 1850, it was (sec. 19) declared lawful for the Commissioners "to make and maintain the works therein referred to, and to enter upon, take, and use such of the said lands, waters, and streams as shall be necessary for the purpose:"

Finds that the pursuers' predecessors, as statutory Commissioners, commenced operations in or about the said year 1850, and have since been in possession of the water-works authorised by the statute, including the water in Lochrutton, and pipeage and other works for conveying the same to Dumfries and Maxwelltown for the use of the inhabitants: Finds that the pursuers' titles consist of the statutes and of the several notices, conveyances, and other documents referred to in the record and produced, and that the title of the pursuers' predecessors was by the Court of Session recognised and sustained against the defender Mr M'Culloch in a process of interdict at his instance regarding the quantity of water which the Commissioners might take from Lochrutton, and which process was decided against Mr M'Culloch (see report of case under date 29th January 1863, M'Pherson's Reports, vol. i. p. 334): Finds that in sec. 23 of the said special Dumfries and Maxwelltown Water-Works Act, 1850, there is a provision for the Commissioners furnishing to owners or occupiers of houses or parts of houses a sufficient supply of water 'for domestic use' at a rate not exceeding that specified; and in sections 24 and 25 there are provisions for supplying water not for domestic purposes at other rates to be agreed on; Finds that by section 35 of the general Water-Works Clauses Act, 1847, incorporated with and forming part of the pursuers' Special Act, 1850, it is enacted that 'the undertakers (Commissioners) shall provide and keep in the pipes to be laid down by them a supply of *pure and wholesome water* sufficient for the *domestic use* of all the inhabitants of the town and district within the limits of the Special Act, who, as hereinafter provided, shall be entitled to demand a supply, and shall be willing to pay water-rate for the same; and such supply shall be constantly laid on at such a pressure as will make the water reach the top storey of the highest houses within the said limits, unless it be provided by the Special Act that the water to be supplied by the undertakers need not be constantly laid on under pressure: Finds that the provisions in the said general Act for protecting the water of the Commissioners against being 'fouled;' and, in particular, section 61 provides that every person committing any of the offences therein referred to shall be subject to penalties, viz., 'every person who shall bathe in any stream, reservoir, aqueduct, or other water-works belonging to the undertakers, or wash, throw, or cause to enter therein any dog or other animal;' and amongst the other provisions in the same section against fouling there are penalties against persons who shall do any other act whereby the water of the Commissioners shall be fouled: Finds that the defender Mr M'Culloch is one of the proprietors of lands adjacent to Lochrutton, and that the other defender Mr Smith is one of his tenants: Finds that in violation of the pursuers' rights in the water of said loch, the defenders, in or about June last (1873), fouled the water therein by causing large numbers of dirty sheep to be washed therein, and threatened to do so thereafter, notwithstanding the pursuers' remonstrances: Finds that the defenders have failed to make averments relevant or sufficient to support their pretended right to foul the water in question by washing sheep therein: Repels their defences against this process of interdict, and, without prejudice to the interim interdict granted on 19th June last, grants of new interdict in terms of the prayer of the pur-

suers' petition against the defender Mr M'Culloch, and the other defender James Smith, and all other tenants of the estate of Hills, their servants and dependants, from washing, throwing, or causing to enter into the said Lochrutton or other water-works belonging to the pursuers any sheep or other animal, or otherwise fouling the water of the pursuers, and decerns: Finds the defenders jointly and severally liable in expenses of process, as these may be ascertained before the Sheriff-Substitute, and remits the account to the Auditor."

The respondent appealed.

On 5th February 1874 the case was sent to proof before answer, and the Lord Justice-Clerk took the proof.

At advising—

LORD JUSTICE-CLERK—I had the advantage of hearing the evidence in this case, and came to a clear opinion on the result. Until the proof in this Court there was no evidence on either side as to the nature of this process complained of, and the composition of the wash.

As to the rights of parties, there is no doubt the Commissioners by the conveyance in their favour have a right to pure and wholesome water, and that any pollution of the water is contrary to the warrantice in the conveyance. The respondents did not acquire a right of property in the loch except so far as was essential to a pure supply. The allegation is that M'Culloch washes sheep in the loch with a wash having deleterious ingredients, and that the water is thereby polluted, and it is admitted that they are smeared with arsenic; and that fact to my mind is conclusive. It is clearly improper to put deleterious matter into the water, and from the moment that was proved I felt it could not be defended. I think interdict should be granted.

LORD NEAVES—I concur. The water which supplies a town like this should be free from reasonable suspicion, and here, where the respondent is a party to the acquisition and dedication of the water for pure uses, he cannot be allowed to prejudice its salubrity. If the character of the substances used is noxious *sua natura*, we will not enter into the question of degree. If it were demonstrated that it was impossible the water at Dumfries could be contaminated, it might be different, but that has not been done. The water here, by consent and with the warrantice of the respondent, was dedicated to certain purposes, and deleterious matter has *de facto* been put into the loch, and that is quite sufficient to my mind to enable us to decide this case.

LORD BENHOLME—I concur. The question is whether the interdict shall be granted, and I am clear it should be granted. The Commissioners have made a purchase which entitles them to ask it, for the purpose of supplying Dumfries with wholesome water. It is not enough to say they must prove that a deleterious effect is produced by the complained of process. I think the other party must prove that it is impossible a deleterious effect could be produced. I think the warrantice in the conveyance prevents anything being done by which it is possible the people of Dumfries can be injured,—that is the possibility of pollution. We do not decide the question whether any additional compensation is due by granting the interdict.

LORD ORMDALE—I concur. The first consideration is, that the Commissioners acquired a title to the water and did purchase from the respondent a certain quantity of this water. The respondent knew the purpose of the purchase, and if so, it is clear there was an implied obligation on his part to do nothing to defeat the object of the Commissioners, and we have the conveyance which is "according to the true intent and meaning of the said Acts."

Has the respondent done anything to pollute the water? Now I do not think that a mere suspicion of that would be sufficient to sustain the action, but on looking at the proof I think sufficient appears to shift the onus which was on the petitioners to shew that something deleterious has been put into the water. Thus, the onus was shifted on the respondents to shew that notwithstanding that the water was wholesome and there was no possibility of injury resulting from these operations, and this he has failed to do.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the appeal, sustain the same; recal the judgment complained of; and having considered the proof, find it established by the proof that the appellants have been in use at intervals to wash sheep in the Loch of Lochrutton, which had been previously dipped with solution composed partly of arsenic; find that this use of the loch is illegal and inconsistent with the rights acquired by the respondents; therefore interdict, prohibit, and discharge the appellants Walter M'Culloch and James Smith, and all other tenants of the estate of Hillis, their servants and dependants, from washing sheep in the Loch of Lochrutton, or other water-works belonging to the respondents, or otherwise fouling the water under their charge, and decern; reserving to the respondents all claim of damage against the appellants for fouling the said water aforesaid, and also reserving all competent proceedings against the appellants for recovery of the penalties incurred by them, or either of them; find the appellants liable in expenses in both Courts, and remit to the Auditor to tax the same and to report."

Counsel for Appellants—Marshall and Moncreiff.
Agent—George Wilson, S.S.C.

Counsel for Respondents—Watson and Johnston.
Agent—John Galletly, S.S.C.

Friday, June 5.

FIRST DIVISION.

BANKS & COMPANY v. WALKER.

Servitude, Constitution of.

Circumstances in which held that a servitude *altius non tollendi* had been constituted.

Servitude—*Altius non tollendi*.

A small building or cellar erected against the back wall of a house was subject to a servitude *altius non tollendi*. Held (*diss.* Lord Deas) that the owner of the said building was entitled to raise a chimney thereon up the wall of the adjoining house to a height sufficient to insure that it would be practically useful.

This was an appeal from the Dean of Guild Court, in the following circumstances:—

Messrs Banks & Co., printers and engravers, were proprietors of the tenement No. 10 North St David Street, Edinburgh (the house next the corner house of St David Street and Queen Street) with the back ground and certain buildings erected thereon, and Mr Walker was proprietor of the tenement No. 2 Queen Street, with the back ground. These two properties met in the back ground, and both Messrs Banks and Mr Walker held upon a singular title. Formerly these houses belonged respectively to Messrs William & George Veitch, and to Mr Gordon, and in 1777 these parties entered into a contract. This contract proceeded on the narrative that the said William and George Veitch were willing to give to the said Alexander Gordon a right to part of their ground or area behind their house, upon the terms and conditions therein mentioned; and, *inter alia*, on the condition—*First*, That the Veitchs and their successors, proprietors of the said house in St David Street, "shall have a servitude or *jus prospectus* 17 feet along their back wall, from the northmost point, over the said area to be given up by them to the said Alexander Gordon, and also over his own area to the extent of 10 feet further, extending in whole to 16 feet from their back wall, within which space the said Alexander Gordon should not be at liberty to erect any building or other incumbrance to interrupt the light to the back windows of the house built by the said William and George Veitch . . . *Fourthly*, That the said William and George Veitch do not mean to comprehend under the ground to be given by them to the said Alexander Gordon as aforesaid that piece of ground or area lying behind their house, extending about 5 feet along the wall adjoining to the southmost end of the said area which the said Alexander Gordon is to have right to as aforesaid, which piece of ground they reserve to themselves, and engage within four months from this date (30th January 1777) to erect a small building or cellar thereon, the whole breadth of the said piece of ground, in which they are to be at liberty to put one window looking into the said Alexander Gordon's back ground, but the said small building or cellar is only to be one storey in height. *Fifthly*, That the said William and George Veitch shall have right to the stones in the wall betwixt the said Alexander Gordon's area and that area which they are now to give him, which they are to make use of in erecting the said small building or cellar upon the piece of ground reserved."

By this contract, upon the subsumption that Mr Gordon was willing to accept of the back ground from William and George Veitch upon the said terms and conditions, "the said William and George Veitch on their part, in implement of the said agreement, disposed and conveyed to the said Alexander Gordon the said northmost end of the said back ground or area behind their said house, consisting of about 17 feet in length and 6 feet in breadth;" and they also obliged themselves and their successors "within the said period of four months, to erect the said small building or cellar, not above one storey in height, upon the southmost part of the said area, the whole breadth thereof; declaring always, as it is hereby expressly provided and declared, that these presents are granted by the said William and George Veitch under the