

1701. *November 15.* FALCONER of Newton *against* SCOT of Comiston.

No. 23.

The cruive-dike ought to be only three ells broad, and a foot and a half high above the water, as the stream runs at ordinary times from the 15th of April to the beginning of May.

THERE being mutual declarators between Falconer of Newton and Scot of Comiston, as to their salmon fishings on the water of Northesk, and the probation being advised, the Lords found, That Comiston, in his fishings acquired from Graham of Morphy, had not observed the distance of hecks enjoined to be in cruives by the acts of Parliament, viz. three inches wide, (though one of the old acts, by mistake, calls it five inches), for it was proved that Comiston's were not two inches wide; therefore the Lords decerned him to demolish the same, and to put them up of the wideness enjoined by law; and likewise found he had observed the Saturday's sloop, as appeared by the probation, and therefore assoilzied him from that part of Newton's declarator; and farther declared, that his cruive-dike ought to be only three ells broad, and a foot and a half high above the water, as the stream runs at ordinary times, from the 15th of April to May, neither when it is in speat, nor too shallow and low; and ordained the cruive-dike to be so altered and regulated, both in its height and breadth; and, in the last place, the Lords modified Newton's damage by these contraventions, conform to what was proved to have been the profit made by the salmon fishing in former years, according to the number of the barrels they made, which were proved to be worth 50 merks *per* barrel at that time. See the like controversy decided the 26th of January, 1665, the Fishers on Don and the Town of Aberdeen, No. 107. p. 10840. *voce* PRESCRIPTION; and in Stair's Instit. B. 2. T. 3. And in the foresaid cause of Newton's and Comiston's, the Lords found the cruive-dike behooved to be built sloping from the top till it was two feet beneath the water, and then from that perpendicular to the bottom.

*Fol. Dic. v. 2. p. 361. Fountainhall, v. 2. p. 123.*

1704. *February 26.*

MR. JAMES CARNEY of Phineven, and the HERITORS of the Water of SOUTHESK, *against* the MAGISTRATES of BRECHIN.

No. 24.

Unlawful to put sheeting upon cruives.

MR. James Carnegy of Phineven, and the upper heritors of Southesk, pursue a declarator against the Magistrates of the town of Brechin, for contravening the acts of Parliament anent salmon fishing, regulating the wideness of the hecks to three inches, and enjoining the Saturday's sloop; all which they have violated, and likewise fallen on a new method to stop the fish wholly from going up to spawn, by sheeting the cruives, *i. e.* putting a sheet daubed with pitch all alongst their cruives, by which it is impossible for any fish to pass through, which damnifies the superior heritors in a considerable sum yearly, and renders their fishing wholly ineffectual to them; and concluding they may be discharged that unwarrantable custom of sheeting, &c. Alleged for the town, That what they did in this case

was not *in æmulationem vicini*, but merely for preservation of their mill, which was a great part of their common good; and if they be not allowed this privilege of sheeting in low water, to gather their dam for making their mill go in drought, their mill-rent will fall at least the one half of what it presently pays, and their prejudice will be vastly more than all the advantage the upper heritors can have by the discharging and removing it; for they never put on that sheet on their cruives but when their mill cannot grind for want of water; and mills being a necessary instrument of human subsistence, and for public utility, must preponderate any casual or accidental damage arising to their fishings: And though there be more laws and acts of Parliament for the freedom of salmon fishing than perhaps there are upon any one subject whatsoever, yet even these laws had a due regard to the going of mills; and therefore the 33d act 1696, against the destroying the young fry, expressly excepts the case of mills situated on these rivers, that they be no way prejudged; and act 3. 1698, discharges pock-net fishing, with herry-water nets, and other engines, marring salmon fishing; but not one syllable against sheeting of cruives, which would not have been omitted had it been judged unlawful. Answered for Phineven and the superior heritors, That this practice of sheeting was against the public laws, and contrary to common utility; and though they had been forty years in possession of it, without interruption, (as they were not), yet it could not prescribe; neither was such a prescription to be allowed: And Lord Panmuir, and his factor, had several times torn off the said sheets, which was sufficient to accresce to the other heritors, though they had not done the same; and the pretence of making their mill go by the sheeting was notional and unjust; for they had proved that the town of Brechin had used that unjust practice, stopping all fish to swim up the river, as well in high water as in low. And suppose they put it on when the water was low, how does it appear they took it off when the water rose in a speat? So this excuse was a mere sham, to justify their transgression of clear laws; and the upper heritors can never be secure till it be totally discharged; and the reason why our laws have not condemned it is, because none have attempted to practise it but the town of Brechin. It was farther alleged, The hecks were not full three inches wide. Answered, That the timber bulging and swelling might be the cause of that. Replied, It is not sufficient that they be so at their first in-putting, but they must continue of that wideness as long as they stand. The Lords, by plurality, found the sheeting an unwarrantable practice, and ordained them to be taken down; but thought if any method could be proposed for regulating the measure of the low water, when they may be put on, and the measure of the rising high water, when they should be taken off, that the damage to their upper fishings, in that case, could not be great, and the going of their mill in a drought might be likewise provided for; and also found the wideness of the hecks from top to bottom ought to be three inches, and continued so, and the Saturday's slop observed. For solving the inconveniencies on all hand, it was offered by the town, that a slop should be fixed in the river, on which there should be a mark or jedge for determining high

No. 24. and low water; and when the river sunk below the jedge, then they might sheet; and when it rose above it, then it should be removed. As to the question of the hecks, see the famous debate betwixt the Town of Aberdeen and the Heritors on the water of Don, 26th January, 1665, No. 107. p. 10840. *voce* PRESCRIPTION.

*Fol. Dic. v. 2. p. 361. Fountainhall, v. 2. p. 227.*

1750. December 21.

ROBERTSON and Others *against* STUART M'KENZIE and GRAHAM.

No. 25.

A salmon fishing established, by prescription, at a dam, falls not under the regulations of cruives.

M'KENZIE of Rosehaugh, and Graham of Balgowan, and their authors, have stood infest since the year 1614 in the fishing called the Keith-fishing of Rallrey, upon the water of Erich; their charter of apprising in 1614, ratified in Parliament, contains no other subject, and Rosehaugh has no lands adjacent to the said water, or other estate near it, but this Keith-fishing. The fishing is exercised at a particular kind of dam or bulwark erected in the river, at a place where the water is contracted to a narrow pass between two rocks; and so great a fall of water is occasioned by the dam, that no fish can get over it, except in time of great speats.

This river runs into the water of Islay, a short space below this dam, which again discharges itself into the Tay above Perth; and the heritors above the dam, whose fishing is greatly prejudiced by it, considering it as an illegal operation, brought a process for having it demolished, or at least that the defenders should be obliged to leave a Saturday's sloop, and to keep such an opening at all times as might give free passage to the smolt or fry, agreeably to the regulations in the case of cruives, which, being the highest kind of fishing known in the law, it was not to be thought that the regulations to which they are subject could be dispensed with in any inferior species of fishing; and this they insisted on, notwithstanding their admission, that the defenders had been in possession of this dam or bulwark in the same form as now *ultra memoriam*, because, said the pursuers, where a law itself has not gone into desuetude, no possession, however long, can establish a right in the face of the public law.

But it being answered for the defenders, That there was no resemblance between this dam and a cruive; that it is not intended for catching fish as a cruive is; that cruives, in forbidden time, are a direct contravention of the public law, whereas the defenders comply with the law, by giving over fishing in forbidden time, and then the bulwark stands, and no fish are caught at it: That the regulations therefore in the case of cruives have nothing to do with such dams or bulwarks more than with mill-dams, which they rather resemble; and it might be as well pretended that all the mill-dams in Scotland, which are built across waters, or navigable rivers, should be subject to the regulations of cruives, that they should have a Saturday's sloop, and a passage made for fry, and be demolished annually.