

No. 11. and an instance was given, in the case of a bookseller who had sold the play called *The Second Part of the Beggar's Opera*, to the prejudice of the proprietor of the copy.

THE LORDS, 12th June, 1746, “ found, That the defender might keep up his cruive-dike, as to the heighth and breadth, in the same manner as now possessed by him; and adhered to that part of the Lord Ordinary’s interlocutor, finding that the Saturday’s slop, viz. an ell wide of a sluice in each cruive from six o’clock Saturday evening till Monday at sun-rising, was and ought to be observed, and that, during that time, the in-scales in all and every one of the cruives ought to be taken out and laid aside, and that the cruives behoved to be placed in the very channel or bottom of the water, and not above the same: As also adhered to that part of the Lord Ordinary’s interlocutor, finding that each of the hecks of the cruives ought to be three inches wide or distant from one another, and that the teeth or rungs of the hecks ought to be entirely removed in forbidden time to fish, and the same kept clear and void; and found, that the defender was obliged to place his cruives, and regulate the hecks thereof, in manner before prescribed, under the penalty of £50 Sterling; but that they could annex no penalties to future transgressions, leaving the pursuers, in such cases, to complain as should accord.”

On mutual bills and answers, the Lords having determined, that penalties ought to be annexed, and it being questioned among them whether the heritor ought to be liable in any, solely for the fault of a servant, which might be the case in the infraction of some of the regulations; and it being also observed, that by the Lord Ordinary’s interlocutor it was not made sufficiently distinct to whom they were due, since they ought not to belong simply to the representatives of the pursuers, but to their successors, though singular, in their fishings:

They found, That penalties ought to be annexed, and remitted to the Lord Ordinary to call and hear parties procurators as to the extent, and whom they should affect, and by whom they might be pursued for; but adhered to their former interlocutor as to the other points.

Act. *Ferguson & Burnet.*

Alt. *Lockhart, W. Grant & Mailand.*

Clerk, *Gibson.*

D. Falconer, v. 1. No 132. p. 160.

1763. February 24.

Thomas Lord ERSKINE, Mr. JOHN ERSKINE of Balgownie, and others, Heritors upon the River of Forth, *against* The MAGISTRATES and TOWN-COUNCIL of STIRLING, MICHAEL POTTER of Easter Liveland, and others, Proprietors of Salmon Fishings upon the River of Forth.

No. 12.

Stoop-nets prohibited to be used upon certain parts of the river Forth, by act 1698.

In the year 1757, the pursuers raised a process of declarator, whereby, *inter alia*, they insisted to have it found and declared, that they, as having right to certain salmon fishings on the river Forth, were entitled to fish within their respective bounds with pock-nets, stoop-nets, cobles, and other nets or engines not ex-

pressly discharged by law; and that they ought not to be disturbed or molested in the premises by the defenders.

The defenders contended, That it was not allowable for the pursuers to exercise their right of fishing by making use either of herry-water nets, pock-nets, or what the pursuers call stoop-nets; because these instruments were expressly prohibited and discharged by the 3d act, parliament 1698, 'Whereby his Majesty, with advice and consent of the states of parliament, prohibits and discharges all salmon fishing, or other fishing whatsoever in the river Forth, above the Pow of Alloa, on both sides of said river, with pock-nets, herry-water nets, or other engines or devices whatsoever not expressly allowed by law, and to the prejudice of the heritors and their right of salmon fishing on the said river; and empowers, warrants, and commands the sheriff-principal of the shire of Stirling, bailie of the water of Forth, and his deputes, to suppress the foresaid unlawful and prohibited manner of fishing, and to punish the users of the foresaid pock-nets, herry-water nets, and other unlawful engines, by fining, not exceeding the sum of £20 Scots *toties quoties*, or imprisonment, as they shall see cause, and to destroy all the foresaid unlawful engines; and that this they do as they shall be answerable.'

Pleaded for the pursuers, That, at common law, and by the general regulations of the statutes which affect the whole kingdom, the only restraint which the lieges lie under, in the exercise of the rights of fishing granted to them from the crown, is, not to exercise those rights in such manner as may be destructive to the fishing of the country in general, and may hinder the multiplying of salmon in our rivers. But, after the general safety of the fishing is secured, law does not interpose, or make any regulation to restrain inferior heritors in the exercise of their right in favour of the superior. It leaves both of them to enjoy the privileges granted to them in the most extensive and beneficial manner they can; as it is the same thing to the public by whom the fishes are caught, provided they be allowed to increase and multiply in the rivers in the natural manner. And no heritor does hurt to the nation by carrying his industry to the greatest length, in catching as many as possible; but rather the contrary; for the trade of the country is thereby increased.

Upon this principle it is, that fishing has been discharged during a certain season of the year; and, for the same reasons, regulations relating to cruives have been introduced, these being necessary regulations, which prevent the species of salmon from being totally destroyed.

But, laying aside these regulations, there is no limitation imposed by any statute upon heritors, as to the manner or extent of their fishing. It being impossible, in the nature of things, that any fishing carried on by men's hands in the lawful season, with the assistance of any kind of nets whatever, can destroy or extinguish the salmon fishing in a river, the law could have no just motive to restrain them in this particular. And therefore, proprietors of fishings being, *de jure communi*,

No. 12. at liberty to exercise the same by nets of any form whatever, the question is, Whether the act 1698 intended to put the heritors of fishings on this river under a new limitation as to fishing by nets, in which they had before enjoyed an absolute freedom, in common with all the heritors of fishings in other rivers in Scotland? The pursuers deny that such was the intendment of this statute.

1mo, Because there was no reason to move the legislature to alter the regulations of the public law, which, after taking care to restrain such practices as appeared destructive to the fishings of the country in general, left every proprietor in the kingdom at liberty to exercise his right of fishing by nets in such manner as he should find most expedient.

2do, If the legislature had thought that the regulations already made, with respect to the fishings, stood in need of any alteration or amendment, they would not have confined this amendment to one particular river, or denied the benefit of it to the proprietors of fishings in other rivers, and indeed, to the nation in general.

3tio, It is not contested, that this act was obtained upon the application of the heritors who had grants of fishing on this river; and particularly of the late Earl of Mar, who had by far the most considerable fishing in it. But it is not to be imagined that they would apply for a law to limit themselves, and to transfer the profit arising from their property to the upper heritors, who had never before enjoyed, or had any title to enjoy it.

4to, The reason of this act appears to have arisen from the peculiar situation of this river, and of the adjacent country. From the bridge of Stirling to the Pow of Alloa, the river Forth flows in a vast variety of windings, so as to make a course of water about five or six times as long as the extent of ground through which it runs. This long tract of water, passing through a small spot of land, was a great temptation for interlopers to encroach upon the right of the proprietors of the fishing.

These interlopers had devised an engine called a pock-net, which a man could carry under his coat: This engine is a small net fixed to two staves, with which the fisher goes into the water, and, putting the two staves to the ground, he holds the net there till he finds a salmon striking it; he then closes the staves, goes to the shore, and carries it off. So portable an engine gave great opportunity to interlopers to carry off large quantities of salmon undiscovered; and it therefore seems to have occurred to the heritors, as a proper expedient to suppress this nuisance, to apply to the Legislature for a prohibition to use those unlawful engines, unlawful while in the hands of those who had no right to fish, but by no means so when in the hands of themselves: For, as this fishing is only discharged, in so far as it is *to the prejudice of the heritors, and their rights of salmon fishing on said river*, it is plain that it was not intended to impair the right of the heritors, or to limit them in the exercise of it. It was framed for their advantage, and obtained at their suit; and it would be against all rule to invert it to their prejudice.

5th, That the stoop-net is quite a different kind of net from the pock-net, being a much larger net, with the mouth of it fastened to three pieces of wood, fixed in the form of a triangle. To this triangle is fixed a large pole, by which a person in a boat holds it while he is fishing: And, though the pock-net may be prohibited by the act 1698, yet there is no prohibition with regard to the stoop-net, which is a machine of a very different kind, and used in a very different manner.

Pleaded for the defenders: What may have been the Legislature's motives for confining the regulations in the act 1698 to the river Forth, or by whose means this law was procured, does not appear to be very material in the present question. But, whatever might be the motives for making this law, four things are expressed in it which can admit of no ambiguity. 1st, That pock-nets, herry-water nets, and other engines or devices, therein defined in general terms, are declared unlawful, and condemned as such. 2^{dly}, That the species of fishing, by means of these instruments, is prohibited and *simpliciter* discharged. 3^{dly}, That all and every person or persons using the same are declared delinquents, and to be punished as such. 4^{thly}, That the engines themselves being condemned as unlawful, are appointed to be destroyed, without any exception or distinction of persons; which clearly shows that the law was directed *in rem*, and against the persons only as guilty of using these engines; and that species of fishing.

It is in vain therefore for the pursuers to pretend, that this law strikes only against interlopers, but cannot be interpreted to the prejudice of the heritors, and their right of salmon fishing in the said river; for it would be involving the law in a manifest incongruity to suppose, that the legislature could mean to prohibit those only to fish with these unlawful engines, who had no right to fish with any engine whatever, even the most lawful. On the contrary, the law supposes a right, and an abuse of that right; and the injunction is *in rem*, and against the instruments themselves, not against any particular persons.

It appears therefore to be very clear, that pock-nets and herry-water nets, being particularly mentioned in the statute, stand prohibited and discharged to be made use of in this part of the river Forth; and it only remains to be considered, whether stoop-nets fall under either the particular prohibition of pock-nets, or the general words of "other engines or devices whatsoever, not expressly allowed by law."

It was evidently the intendment of the statute, by those general words, to prohibit every device and subterfuge, whereby the former special prohibition might be evaded; but the stoop-net appears clearly to be nothing else than a pock-net enlarged and improved, to render it more destructive; and therefore falls under both the special and the general prohibition of the statute.

The Lords, before advising the cause upon the printed papers, ordered a hearing in presence, after which they pronounced the following interlocutor:

"Having advising this petition, with the answers thereto, and having heard parties procurators thereon, find, That the act of parliament 1698 is general, re-

No. 12. regulating the fishing on the river of Forth : And that the stoop-net, being a species of the pock-net, the pursuers, and all the heritors, as well as others, are debarred by the said act from fishing on the said river, above the Pow of Alloa, with pock-nets, stoop-nets, or herry-water nets ; and assoilzie from that branch of the declarator, and decern."

Act. *Erskine, Ferguson.* Alt. *Monro, Lockhart.*

The decree, upon an appeal, was affirmed by the House of Lords.

J. M.

Fol. Dic. v. 4. p. 258. Fac. Coll. No. 106. p. 248.

1768. June 29.

DUKE OF ROXBURGH, *against* EARLS of HOME and TANKERVILLE.

No. 13.

A fishing in the river Tweed, possessed jointly by a Scots and English heritor, how far subject to the regulations of the act 1696, c. 33. and the cognizance of the Court of Session?

THE Earl of Home has right to Fairburn's-mill on the north side of the Tweed, with the fishings thereof, in virtue of grants from the Kings of Scotland. The Earl of Tankerville is proprietor of the opposite lands and fishing in the river, by grants from the Kings of England. The river is there so rapid, that it is impossible to fish by net and coble. There had been immemorially a dike running from the north side, considerably beyond the middle of the river towards the south, which, besides serving to convey the water to Fairburn's-mill, had been used by both Earls for the salmon fishing. In this dike were five holes, three towards the north, and two towards the south side of the river. On the upper side of these holes were fixed pock-nets, on the other side square barricades of stones, with openings in the sides, and over these openings frame nets, so placed as to allow the fish to go up the river, but to catch all that returned. This dike had been immemorially kept in repair at the joint expence of both Earls, and the fish caught there equally divided.

The duke of Roxburgh, proprietor of the superior fishings at Kelso and Mac-kerston, brought an action against Lord Home and his tacksman, concluding, that the defenders should be prohibited to use that mode of fishing in time to come, as contrary to the regulations established by the act 1696, c. 33. and for the penalties in that statute, &c.

The Earl of Tankerville sisted himself in the process. And the questions debated were, What was the boundary of the two kingdoms at the place? Whether any part of the river was subject to the regulations of the act 1696? and, Whether the matter was cognizable by the Court of Session?

The pursuer maintained, that a line drawn along the middle of the river divided the two kingdoms; and all that part of the river which was on the north side of that line belonged to Scotland; and was subject to the laws and jurisdiction of the courts of Scotland. In support of this proposition, it was argued, that this was the