

1765. *March 4.* FRASER *against* DUKE of GORDON.

No. 27.

The upper heritors on Lochness pursued the inferior heritors for correcting abuses in their mode of salmon fishing, and particularly the non-observation of the Saturday's slop. Urged in defence, The Saturday's slop had been in disuse in that river for above forty years. The Lords were of opinion, That laws made for the improvement of the salmon fishing cannot be abrogated *non utendo*; and they ordained the law with regard to the Saturday's slop to be observed in all time to come.

*Fol. Dic. v. 4. p. 261.*

\* \* This case is No. 50. p. 10742. *voce* PRESCRIPTION.

1769. *July 4.*

WILLIAM LORD HALKERTON, and other Proprietors of Salmon Fishings on the river of Northesk, *against* JAMES SCOTT of Brotherton.

No. 28.  
Construction  
of cruives and  
cruive-dike.

THIS process for regulating the defender's cruives, was confined by the pursuers to seven articles. They complained of innovations and irregularities in the construction of the cruives, and contended, That, prior to a decision in 1763, regulating the defender's cruives, there were seven cruives placed in the dyke, at or near an equal distance from each other.

2. That since that decision, the defender had taken out all the above said seven cruives, and had placed three new cruives at the north end of the dike upon dry ground, or where water never runs but in time of speat or floods, so that no fish could pass through them but in time of great speats.

3. That the place where the cruives were formerly erected, had been rebuilt nearly of equal breadth and height with the other parts of the dyke; and that it was fortified in such a manner with wood, as to resist the utmost violence of the river.

4. That there was no cruive in the middle of the dike till the fishing season in 1767 was mostly over, and then one cruive only was placed in the middle of the dike.

5. That in the new erected cruives two iron rods had been placed and fixed to the inscales, by which the inscales were kept from opening wider than three inches, and of consequence no fish could push in against the current, unless they happened to strike exactly upon the middle of the opening; whereas, by law and common practice, the inscales ought to open and shut by the force of the current.

6. That, if any fish should get through these cruives, they were intercepted by another dike with an angle in it so barricadoed with whins and brush-wood, that it was almost impossible a single fish could get over it.

No. 28.

As the defender had established the necessity of this check-dike for the service of the mills upon the sides of the river, the pursuers only insisted, that the defender should make no use of it for the purpose of fishing, as being contrary to act 1696, and that there should be a gap in the middle stream of the river.

7. That the cruives were not constructed with an intention to catch fish, but to be subservient to the defender's coble-fishing; and to keep them below the dike; that, for this purpose, there were knots of wood placed precisely in the entry betwixt the inscales, which effectually impeded the passage of the fish into the cruives; and as the defender fished with cobbles and nets, both below the old cruive dike, and betwixt it and the new rampart which is built above it, he had it in his power to catch the whole fish, without allowing any to pass to the upper parts of the river.

The pursuers therefore pleaded, That the defender is not entitled to maintain his cruive-dike in its present construction, to the prejudice of the superior heritors, and that he ought to be debarred from fishing by net and coble, till he should produce documents in support of such right. They do not understand the assumption of the defender, that a right of cruive fishing, is the paramount or supereminent method of fishing, and that as such it contains in it a right to fish in every more subordinate and inferior way; it indeed requires more express grants than the other kinds of fishing, but this is owing to the circumstance of its being thought pernicious to the navigation of a public river; and a more express right is therefore requisite to authorise it.

When a right of salmon fishing by cruives is given, and that right carried into execution, by the construction of a cruive-dike, the grant, explained by uniform possession, cannot be altered or inverted, to the prejudice of the rights of the other heritors.

The grant of cruives in favour of the defender, is no better nor stronger than the grants of other fishings, in favour of the other heritors. The extent of each of their rights is, therefore, to be determined by the mode in which it has been exercised, consistent with the public law; and the original meaning of the grants must be presumed such as immemorial possession has explained them; 26th January, 1665, heritors of Don *contra* town of Aberdeen, No. 107. p. 10840.

Answered for the defender: That, by the 215th charter of David Bruce, king of Scots, there was granted perpetually in feu to the burgesses and community of the borough of Montrose, one of the defender's authors, the aforesaid borough and pertinents, with fishings within the rivers of Southesk and Northesk by *cruives, zairs, and nets*, as antiently used, and pertaining to the said borough.

That the defender, his authors, and predecessors, for some hundreds of years past, have been in the uninterrupted possession of fishing salmon in the river of Northesk, both by cruives, and by net and coble.

That, though it may be competent to the crown to challenge him, yet that the superior heritors have no title to challenge his right of fishing with net and coble, which are no unlawful engines, unless they can shew a right to fish in those parts

of the river, where he exercises that mode of fishing. These heritors do not dispute his right to a cruive fishing, which, as it is the most super-eminent mode of fishing known, must, of necessity, include every other manner of fishing.

The circumstances of the cruives, prior to the decision in 1763, can have no influence on this question, as they have ever since been regulated agreeable to the judgment of the court.

2. The number of cruives are fewer now than formerly; but the number of cruives to be placed in a cruive-dike not having yet been regulated, nor the proprietor of a cruive-fishing tied down to keep up an equal number of cruives, the pursuers have no title to inquire, whether there are fewer or more now than were in former times. The three cruives now in the dike are not nominal, nor are they placed where no part of the river runs; when the river was extremely low, there were 16 inches of depth of water within the inscales, which was more than sufficient to carry up a fish of any size.

3. The old cruive-holes have been filled up for the benefit of the cruive, and to prevent the mills of the defender and of Kinnaber from being deprived of water. Though the cruive-dike, in 1742, was several feet higher than it is at present, the court found the cruives might be raised as high above the water as the cruive-dike.

4. The cruive-dike had been destroyed by the break of the storm in 1767; it was repaired, and two cruives put up in April, and a third was erected, on the pursuer's complaining of the want of it.

5. At all times, till of late, the two bars in which the rungs of the inscales are placed across, were fixed to the bottom of the cruive, so as to be immoveable by any force of the water; but still, there was sufficient space left for fish of any kind to pass into the cruive, without which no benefit could be reaped from it; the two iron rods complained of, were only tried for a short time, to keep the inscales steady, and they are now removed. The inscales are now rendered moveable at all times, so as not to make the least resistance to the entry of the fish, except what is occasioned by the stream of the water; which no art can prevent.

6. The pretended barricade is no other than a cheque-dike, kept up time out of mind in its present form, to convey water to the mills on both sides of the river, which could not possibly be served without it.

7. The pursuers are in a mistake, in supposing the defender fishes with net and coble, betwixt the cruive-dike and the cheque-dike, that being impossible, as the cheque-dike would prevent the drawing of the nets. As to the construction of the cruives, the dike in which the cruive-boxes are placed, is made to slop on both sides, which is absolutely necessary for its security. The cruive-boxes, which must of necessity have a foundation of stone to rest upon, are placed as near as possible to the channel of the river, and only about six inches above it. The length of the cruive-box is equal to the thickness of the dike in which it is placed, the ends of the box being on a line with the stones of the dike. The dike is built of no greater breadth than is necessary for its security, and the causewaying or shocing

No. 28. lately added is very material for that purpose. The inscales, in place of being taken out at the time of the Saturday's sloop, are now, during that period, fixed close by a staple to the sides of the cruive-box, having a full ell of wideness for fish to enter the cruive, and knobs of wood, of about three inches, are placed in the bottom and lid of the cruive-box, to prevent the inscales from going too close.

“ The Lords found the defender had right to a fishing by net and coble, as well as a fishing by cruives ; and found, that he was not bound to alter the present height or breadth of the cruive-dike ; but, in respect that the alterations, made thereon since the year 1762, appear to have been made, not with an intention to improve the cruive fishing, but the fishing by net and coble, and that they are prejudicial to the superior heritors, and to the preservation of the brood of salmon in the river ; therefore find, that the shoeing or causewaying in the river, further down than the lower end of the keying stones, must be taken away and removed ; that when, in forbidden times, the cruives are taken away, the defender is not entitled to fill up, with loose stones, or other materials, the hecks or places from whence they are so removed ; and, as to the cruives themselves, find that the same must be built upon the channel or bottom of the river, and that the defender is bound to remove the nob or sole at the bottom of the mouth of the cruives ; but, as to the inscales, find, that he is not bound to take the same out from the cruives in fishing time, but that it is sufficient to fix them back, so as they remain open for the purpose of the Saturday's sloop ; and, as to the number of cruives, in respect of the immemorial usage, and that the defender has not diminished the number, with an intention to improve the cruive fishing, find, that he must place seven cruives as formerly, instead of three, which he now uses.”

Upon a reclaiming petition and answers, the Lords adhered.

*Act. Solicitor Dundas & Rae.*

*Alt. Wright.*

*Fol. Dic. v. 4. p. 261. Fac. Coll. No. 101. p. 185.*

\* \* \* This case was appealed. The House of Lords, 3d Feb. 1772, ORDERED and ADJUDGED, That the several interlocutors complained of in the original and cross appeals be affirmed, with the following variations, viz. in the interlocutor of the 4th July, 1769, complained of by the cross appeal, after the words, ‘ take the same out from the cruives,’ to leave out the words, ‘ in fishing time ;’ and, instead thereof, to insert the words, ‘ in times of flood ;’ and, after the words, ‘ but that it is sufficient,’ to insert the words, ‘ at such times.’ And it is further ordered, That the appellant in the original appeal do pay to the respondents in said appeal £.100 for their costs.

\* \* \* See No. 14, p. 14276.