

Though that deed had been an effectual title, the just construction of the grant would not permit the right to be extended to that part of the bay which was opposite the defender's lands. At the time of the grant, the Earl of Breadalbane was in possession of the lands of Thurso-east; and though he was also in possession of the defender's lands of Stangergill, he had then no right to the estates of Murkle and Clairdon, which lay along the coast of the bay, interjected betwixt the lands of Thurso-east and Stangergill. According, therefore, to the true interpretation of the grant, a right of fishing was conveyed, so far only as the lands of Thurso-west extended from the mouth of the water eastward, which did not comprehend the defender's lands.

So conscious was the pursuer of his defective title, that he had presented a petition to the Lords of the Treasury, praying for a grant in his favour "of the salmon fishing in Dunnet bay, from Holbourn-head along the bay to Dunnet-head;" and though the intention of this application was to obtain a grant of the fishing the defender exercised opposite to his own lands, the encroachment was so obvious, that the Barons of Exchequer had reported, that the new grant should be limited to that part of the bay which was contiguous to or fronted the petitioner's own lands.

THE LORD ORDINARY found, "That the pursuer has not instructed any right to the salmon fishings opposite to the defender's lands;" and upon advising a petition and answers, the Court adhered.

Lord Ordinary, *Gardenstone*.  
Clerk,

For Sinclair, *Crosbie*.  
For Murray, *Lockhart*.

R. H.

*Fac. Col. No. 41. p. 113.*

\* \* \* A similar decision was pronounced in the case, 9th January 1750, *Towrie of Perth* against Lord Gray, No. 19. p. 12792. *voce* PROPERTY.

1771, *Nov. 19. and 1772, Feb. 21.*

The DUKE of QUEENSBERRY and others, Heritors of Fishings upon the River of Annan, Pursuers, *against* the MARQUIS of ANNANDALE and others, his Tenants, Defenders.

THE pursuers, who are the superior heritors upon the river of Annan, brought an action against the defenders, the inferior heritors, complaining of injuries done to their salmon fishings, both by the erection of a dam-dike across the river, and by an improper and illegal mode of fishing.

The facts alleged, and either admitted or established by the proof, were the following:

1<sup>mo</sup>, About twenty-five years ago, the Marquis of Annandale's mill for the barony of Newby, formerly supplied with water from Newby Loch, was removed, and erected upon the Annan. A mill-head was taken off, and a caul or mill-dam

No. 16.  
Regulation of the salmon fishing upon the Annan.—Demolition of a mill-dam dike erected by an inferior heritor refused.—The stenting of nets, either entirely across

No. 16. the river, or placed alternately from side to side, but overlapping one another, so as to obstruct the fish from getting up, found to be illegal, and prohibited.— The placing of other engines or contrivances, which frightened and deterred the fish from coming up the river, likewise prohibited.

thrown across the river, which was raised about four feet two inches perpendicular above the bed of the river. In the middle of this dike there was a slop six feet three inches wide, and twenty inches lower than the top of the caul. There was evidence also to show, that this erection had, in some measure, injured the superior fishings, in preventing the fish from coming so readily up, and in making them lie longer in Milbie pool than formerly, where they were taken by the defenders.

*2do,* The defenders, mode of fishing, it was said, was illegal, and, by obstructing the running of the fish, highly prejudicial to the superior fishings. The fishing, it appeared, was carried on in this manner: A net was fixed at one end upon the beach, while the other end was carried in beyond the middle of the current of the river, and there fixed with a heavy stone. Another net from the opposite beach was then fixed in the same way, at about fifteen feet above the former; which it accordingly overlapped about four or five yards. In this manner, the whole nets, sometimes ten, and at other times upwards of twenty, were fixed in the river in alternate positions, each running so far across as mutually to overlap one another; and as they had all stones at the bottom, and cork at the top, they rose with the tide to their whole breadth or deepness. It farther appeared, that, upon some occasions, the defenders had stented nets across the river from beach to beach.

*3tio,* It was complained of, and established by the proof, that one of the Marquis of Annandale's tenants had, in the fishing season, always kept a net stented across the arch of Annan bridge, at the head of the bridge pool, where the run of water is: That he, in the same manner, stented his nets across both the head and foot of another pool; and that he had fixed leisters or poles in another arch of Annan bridge, to prevent the fish from running up the river. It was also averred, and of which there was some proof, that, in order to scar the fish, and deter them from coming up, a rope, with bones of horses fixed thereto, had been stretched across the river.

Upon advising memorials, the following interlocutor was pronounced: "As-sailzie the defender George Marquis of Annandale and his tutor, and also John Johnston and the representatives of Bryce Blair, from the conclusions of the libel, so far as concerns the caul or mill-dam dike built by them across the river of Annan, for supplying with water the new mill of Milbie: And as to salmon fishing in the river of Annan, find, That although the Marquis, the inferior heritor, and his tenants, have right to use all legal engines and methods for catching the fish, conform to law and to their possession, yet they have no right, either in time of actual fishing, or at any other time, to erect any engine, or use any method, not for the purpose of catching fish, but for preventing or obstructing them from passing up the river; and therefore find, That the methods used by them, of stenting nets across the river, either reaching altogether from side to side, or overlapping each other in the manner mentioned in the proof; or stenting them across the arch of Annan bridge, or of putting leisters with long shafts in

the said bridge, or the method of stretching a rope in the river, with bones tied to it, are illegal methods, intended for preventing or obstructing the fish from passing up the river, and are not only prejudicial to the superior heritors, but destructive of the fishings, and ought to be discontinued in time coming."

No. 16.

Both parties petitioned against this judgment. The pursuers maintained, *1mo*, That as salmon fishings were *inter regalia*, and those rivers in which they could be carried on *flumina publica*, the right to the river and *alveus* thereof must be vested in the Crown: and as the Marquis of Annandale had no right from the Crown to erect a mill-dam in this river, the superior heritors were entitled, as it interfered with their fishings, to have it demolished. L. 5. D. De Divis Rer. L. 7. § 5. D. De Acquir. Rer. Dom. L. 1. § 12. D. De Flumen. *2do*, They were, at any rate, entitled to demand, that, in terms of the enactment 1696, c. 33. there should be an opening left in the said dike as wide as possible, and going as low as the bottom of the river. *3tio*, That the defenders' fishing, at the back of the mill-dam, which it was admitted they did with sailing nets, was a contravention of the above statute, which "discharges all fishing at such mill-dam dikes with nets stented or otherwise, or any other engines whatever."

The defenders, in their petition, maintained, That in all the different statutes relative to salmon fishings, viz. 1469, c. 38—1489, c. 15.—1503, c. 72.—1597, c. 261.—1696, c. 33.—1698, c. 3.—nets were mentioned as being legal engines; and, in some of them, nets set or stented were particularly noticed. The prohibitions, in these statutes, as to the use of nets, were, that they should not be set in forbidden-time, for catching the fish going up to spawn, and the young fry on their way to the sea—by the act 1696, that they should not be stented at dam-dikes: and as these were the only particular restrictions that were expressed, every other mode of using nets, more especially where it had been immemorially practised, was allowed. 21st December, 1750, Robertson *contra* Mackenzie, Sect. 3. *h. t.* 1760, Sir William Dunbar *contra* Brodie, respecting the fishings of Findhorn, (not reported.)

1772, February 21.—As to the pursuer's craving, relative to the demolition of the dam-dike, the Court adhered; but, before answer as to the proposed alteration, desired a report of neutral skilled men, in what manner it could be made, with the least prejudice to both parties. As to the defenders' mode of fishing at the back of the dam-dike, the Court also adhered; and as to what was craved by the defenders, adhered *simpliciter*.

Lord Ordinary, Pitfour.

For the Duke of Queensberry, Crosbie, Armstrong.

Clerk, Ross.

For the Marquis of Annandale, Sol. H. Dundas, Macqueen, Baillie.

R. H.

Fac. Coll. No. 123. p. 366.

1793. December 21.

SIR JAMES COLQUHOUN *against* DUKE OF MONTROSE and Others.

THE Lords found, That an heritor who had simply a right of salmon fishing in Lochlomond and the river Leven, was not entitled to exercise the same, by

No. 17.