

APPENDIX.

PART. I.

SALMON FISHING.

1801. June 17.

WILLIAM CHISHOLM *against* ARCHIBALD FRASER, and his Lessees of the Salmon-Fishing on the River Beaully.

THE conflux of the Glass and the Farrar in Inverness-shire, form the river Beaully.

Mr. Frazer of Lovat has a right of cruive-fishing on the Beaully.

Mr. Chisholm, who is an extensive proprietor on the rivers Glass and Farrar, alleging that Mr. Frazer and his lessees exercised their cruive-fishing illegally, brought an action for having the fishing regulated.

The defenders objected to Mr. Chisholm's title.

From the productions made by Mr. Chisholm, it appeared, that he and his authors had been infeft in the lands *ex adverso* of the two rivers in question for more than forty years, on charters from the Crown, bearing *cum piscationibus*; and he established, by parole proof, that he and his ancestors, servants, and tenants, for upwards of forty years, had been in the practice of killing salmon for their own use with the *rod* and *spear*; but there was no evidence of Mr. Chisholm or his ancestors having ever sold salmon, or let the right of fishing.

The Lord Ordinary "sustained Mr. Chisholm's title."

In a reclaiming petition, Mr. Frazer and his lessees

Pleaded: This not being a popular action, Mr. Chisholm must shew an interest, which he can do only by establishing that he is possessed of a proper right of salmon-fishing. But a rod and spear fishing is not of this description; 3d December 1701, No. 6. p. 14250; 1765, Frazer against the Heritors of the cruive-fishings in the Ness, (not reported;) 1773, Leith against the Heritors

No. 1.

An infeftment *cum piscationibus*, followed by forty years possession, of killing salmon with the *rod* and *spear*, found not to be a sufficient title to insist in an action for regulating the cruive-fishings of an inferior heritor.

No. 1. of cruive-fishings in the Don, (not reported;) 1779, Sir James Colquhoun against Smollet, (not reported.) It is not a *jus regale*; 30th July 1605, Gallies against Torhouse, No. 2. p. 14249. And if it be not a common law right belonging to every proprietor on a salmon river, who is infest *cum pertinentibus*, it is at least a right which they generally enjoy by tolerance, and from motives of good neighbourhood.

Answered: No species of salmon-fishing can pass to an heritor, without either an express grant or an infestment *cum piscationibus*; Stair, B. 2. T. 3. § 69. The pursuer's infestment would have entitled him to have fished with net and coble; (4th August 1773, Duke of Queensberry, No. 7. p. 14251,) if the shallowness of the river had admitted of this mode of fishing. But his right is nevertheless a *jus per se*, and as affording a valuable source of subsistence to his family and tenants, is entitled to a legal protection.

The decisions founded on, on the other side, are not applicable. In all these cases, the rivers admitted of being fished with net and coble, which created a strong presumption that rod-fishing was not practised as a matter of right, but by tolerance.

The Lords, influenced by the authorities founded on by the defenders, altered the interlocutor, and found, that Mr. Chisholm had not a sufficient title to insist in the action.

Lord Ordinary, *Armadale*.
Clerk, *Siaclair*.

Act. *Burnet*.

Arch. Campbell, junior.

R. D.

Fac. Coll. No. 239. p. 540.

1807. June 18.

EARL OF FIFE *against* GORDON.

No. 2.
The mode of fishing practised in this case, though immemorial, found to be illegal.

PETER GORDON of Abergeldie is infest on a Crown-charter of the lands and barony of Abergeldie, "cum salmonum aliorumque piscationibus super aqua de Dee aliisque, et lacubus ad dict. terras spectan." The channel of the river is too rocky to admit of fishing easily by the ordinary means of net and coble. It has been immemorially the practice, in the summer season, when the river is low, to collect together a dike of loose stones thrown up across the channel of the river, in the centre of which is placed a basket with its mouth up the river. The consequence of this is, that the water is accumulated above the dike; and the river, being disturbed by poles and spears above, the fish are driven down, where they are intercepted in their progress by persons stationed on purpose with pock-nets, or caught in the basket. The dike was never repaired during the season, but was allowed to fall to pieces by the violence of the stream, which happened sometimes within a week from its erection, and never exceeded a few weeks.