

that there has been a difference of opinion in this case, seeing the way in which the matter has been dealt with since 1607 in the titles and otherwise; but upon the whole, with all deference to the learned Judges composing the majority in the Court below, and for whose opinion I entertain every possible respect, I cannot arrive at the conclusion that the right of Lord Napier has been established. In this case it was necessary for him to make out his right. He set up an exclusive title and right as against what would be the ordinary construction of the titles of other parties, and he having failed in that, I see no alternative but to reverse the judgment of the Court of Session.

LORD CAIRNS—My Lords, I entirely agree with the opinions expressed by your Lordships; and, inasmuch as the reasons I proposed to offer you in support of that view have been entirely exhausted by what has been already said, and more especially by my noble and learned friend who has just sat down, I do not think I should be justified in going over the same grounds again. I simply, therefore, wish to give my adhesion to the motion proposed to be made.

Interlocutors appealed from reversed, with declaration, and directions as to expenses in the Court below.

Agents for Appellant—Scott, Moncreiff, & Dalgety, W.S.; Connell Hope, Westminister.

Agents for Respondent—Hunter, Blair, & Cowan, W.S.; Preston Karlake, Regent Street, London.

COURT OF SESSION.

Tuesday, July 20.

SECOND DIVISION.

JOHNSTON v. MACKENZIE AND OTHERS.

Salmon Fishings—Stake-Nets—Estuary—Old Scotch Statutes. Held that the Solway Firth was exempt from the restrictions of the old statutes which made fishing for salmon by stake-nets in the estuary of a river illegal.

In this action Lieutenant-General Johnston of Carnaloch, heritable proprietor of the salmon fishings in the River Nith, seeks to have it declared that Mr Mackenzie of Newby, and the tenant of the fishings on the estate of Newby, have no right or title to use stake-nets or other fixed engines for catching salmon in the rivers Annan and Nith, or either of them, or in the estuary thereof, and asks for interdict against their so doing. The pursuer, founding on the Act 25 and 26 Victoria, cap. 97, sec. 6, "The Salmon Fisheries (Scotland) Act 1862," and subsequent relative statutes (26 and 27 Vic., cap. 50, and 27 and 28 Vic., cap. 118), under which the Commissioners defined the estuary of the rivers Esk, Annan, and Nith, alleges that the defenders have been in use, especially in the years 1865 and 1866, to place stake-nets in the rivers Nith and Annan, or in the estuary thereof, where the tide ebbs and flows, being localities where the use of stake-nets is illegal under the old Scotch statutes relating to salmon fishings, and the foresaid Acts.

The pursuer pleaded:—"(1) The stake-nets or fixed engines in question having been placed and used by the defenders in the said rivers or estuary, and in a locality falling within the prohibitions of

the statutes, the same are illegal. (2) The said stake-nets or other fixed engines having been placed and used by the defenders within the limits of the said rivers Annan and Nith, or one or other of them, or in the estuary thereof, as fixed by the statutory Commissioners, and in violation of the statutory prohibitions, are illegal. (3) The stake-nets and other fixed engines placed and used by the defenders as aforesaid having been illegal, they have not acquired, and cannot acquire, a right or title to use the same by prescription or immemorial usage. (4) The said stake-nets or other fixed engines placed and used by the defenders as aforesaid being illegal, the same ought to be removed, and the pursuer is entitled to decree of declarator and interdict at his instance against the defenders, in terms of the conclusions of the summons."

The defenders contended that their fishings of Newbie had always been fished by means of stake-nets; and, owing to the strength of the current of the Solway, were not capable of being fished otherwise. Having been in use for time immemorial, their right was within the exception of the statute, and was not affected either by the Scotch or English Acts. The use of stake-nets in those fishings had been recognised in *M'Whar v. Oswald*, H. L., April 13, 1835, 1 Shaw and Maclean, 393.

And they pleaded:—"(3) The provisions of the Acts 24 and 25 Victoria, cap. 109, and 25 and 26 Victoria, cap. 97, and of the subsequent Acts, do not apply to or affect in any way the fishings belonging to and enjoyed by the defenders, and this in respect of the terms of these Acts taken in connection with the bye-laws issued by the Commissioners. (4) Under the provisions of the Acts 24 and 25 Victoria, cap. 109, and 25 and 26 Victoria, cap. 97, section 33, the prohibition against fixed engines does not affect the defender's fishings, which have been enjoyed by means of stake-nets in virtue of ancient rights and immemorial usage. (5) The defender and his authors having, for far more than the prescriptive period, fished by means of stake-nets without interruption, and this mode having been judicially recognised, and being the only mode practicable, the prohibitions in the statutes do not apply. (6) The bye-laws founded on by the pursuer being unintelligible and impracticable, and disconform to the provisions of the statute, they cannot be enforced. (7) The bye-laws founded on by the pursuer not having been framed, communicated, enacted, published, or approved in terms of the statute, the same are null, and cannot be enforced against the defenders."

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—

"*Edinburgh, 25th March 1869.*—The Lord Ordinary having heard counsel on the proof and whole cause—finds, as matter of fact, 1st, that the defender Mackenzie, his predecessors and authors, have themselves, and by and through their tenants and others acting on their behalf, or under their authority, used and exercised the right of fishing for salmon by means of stake-nets, and other like fixed engines, on and along the northern shore or coast of the Solway Firth, from a point at or near Annan Waterfoot on the east, to a point at or near the junction of the river or water of Lochar with the Solway Firth on the west; and 2d, That the Firth of Solway, including the portion thereof within which the right of fishing on the shore or coast to which the preceding finding relates is situated, does not in its true character form a river, or estuary of a river, but is an arm or other like

portion of the true sea, into which the several fresh water rivers, the Annan, the Nith, and other fresh water streams flow; and finds, as matter of law, that the salmon fishings as exercised by the defenders as aforesaid were and had been so exercised by them lawfully under a sufficient title for forty years, and for time immemorial, prior to the date of the statute of the 24th and 25th Vict., cap. 109; and with reference to the preceding findings, assilizes the defenders from the conclusions of the summons, and decerns; Finds the pursuer liable to the defenders in the expenses of process, of which allows an account to be lodged, and remits the same to the auditor to tax and to report.

"*Note.*—The question which the Lord Ordinary has now disposed of, in so far as its determination rests with him, is one of much interest and importance, not only to the parties to the suit, but in a more general aspect.

"In endeavouring to explain briefly the leading grounds of his judgment, the Lord Ordinary believes he is justified in assuming at the outset, that the matter to which the whole inquiry truly relates, with a view to ascertain the grounds on which a final judgment is here to rest, is, whether or not fishing by stake-nets, or other the like fixed engines, was lawfully exercised by the defenders in the locality to which the conclusions of the summons apply.

"The solution of the question thus put involves of necessity, as the Lord Ordinary holds, the determination of another and further difficult inquiry, whether or not the Solway Firth, and more particularly that part of that firth *ex adverso* of the lands

of the defender Mackenzie, is merely the estuary of a river, or is a portion of the true sea.

"The Lord Ordinary holds, as the result of a consideration of the whole evidence, and in relation to previous judgments of the Court in cases of the like class, that the Solway is truly an arm of the sea. It receives the waters of many rivers, and its character as a portion of the true sea could, it is thought, have scarcely been called in question, had not the want of salt in its waters, as compared with that of more open seas, or of the ocean, imparted to this firth a peculiar character in that respect. But an inspection of any ordinary map of the general coast of the country in which this locality is included will tend strongly, in the opinion of the Lord Ordinary, to support the conclusion that no sufficient reason exists for treating this firth otherwise than in accordance with the view which is maintained on the part of the defenders."

The pursuer reclaimed.

BLAIR for him.

SOLICITOR-GENERAL and JOHNSTON in answer.

The Court adhered to the interlocutor of the Lord Ordinary without resting their judgment on the same ground. They held, in conformity with one of the statements and pleas of the defenders that, according to the old law of Scotland, fishing by stake-nets was lawful in the Solway Firth, and therefore that these fishings were exempt from the operation of the old Scotch Statutes.

Agents for Pursuer—Hunter, Blair, & Cowan, W.S.

Agents for Defenders—Hope & Mackay, W.S.