" said lands is properly comprehended in the summons of sale. " Therefore find, That Sir Robert Preston has now right to redeem " said lands, on payment of the sum of £307. 13s. 4d., mentioned in " said back bond, and decern accordingly."

Professor Bell, in a note in his Commentaries, as to this case, says, (vol. i. p. 28,) that " though the judgment does not determine the effect of the back bond, and so the point is not precisely decided; yet the judges, in delivering their opinions, had no doubt of the efficacy of such a condition, if inserted in the titles. And Lord Armadale, in particular, stated, that his father in law, Lord Justice Clerk M'Queen, and Lord Justice Clerk Miller, were clearly of opinion, that such clauses constituted a real burden."

The Right Hon. Viscount Arbuthnott, Thomas Gillies, and Others, . } *Appellants*;

James Scott of Brotherton, and the Representatives of the deceased Charles Fullerton of Kinnaber, and John Webster, ... } *Respondents*.

House of Lords, 25th May 1802.

Salmon Fishing—Dam Dyke—Immemorial Possession—Res Judicata.—The upper heritors on the river North Esk complained of the dam dyke erected by a lower heritor, of a certain construction, without any openings or gaps being left to afford a passage for the fish upwards, and apparently to benefit his fishings below. They also founded on an agreement, which bound him to leave an opening in the dam dyke for the passage of the fish. The defence to the action was, 1. Res judicata, by a decree in 1769, settling the rights of parties; and, 2. Immemorial possession of the dam dyke, as so constructed, which was necessary for the supply of the defenders' mills with sufficiency of water. The Court of Session, after a proof, sustained the defences. Reversed in the House of Lords; and held, that it was obvious, from the structure of this dam dyke, that the object was as much to serve the purpose of the defenders' cruive fishing as their mills, and therefore that it ought to be altered, so as not to injure the access of the fish to the upper grounds, while the service of the mills could not be enjoyed or exercised emulously, negligently, or otherwise, in prejudice of the rights of fishing, nor to a greater extent than what was fairly necessary for a supply of these mills.

The appellants are proprietors of salmon fishings in the river North Esk. Further down the river, and about two

1802.

VISCOUNT ARBUTHNOTT, &c. v. SCOTT, &c.

miles from the mouth thereof, the respondents, Mr. Scott and Mr. Fullerton, are the proprietors of mills on either side of the river. And, at this place, Mr. Scott, the only real party in the present cause, had also a right to a salmon fishing, which he is entitled to exercise, either by means of cruives, or net and coble.

In consequence of an illegal exercise of the right of fishing on the part of Mr. Scott, disputes arose between him and the adjacent heritors, which was the occasion of several law suits, one of which terminated in a decree (1684), ordaining Mr. Scott to observe the Saturday's slap, in *all* the cruives, and to have the hecks of the cruives three inches wide. Another, in 1701, complained of his not making the hecks of his cruives three inches wide, as required by law; and a third action in 1743. A fourth action followed in 1763; and a fifth was decided against Mr. Scott with costs in 1769; and, on appeal to the House of Lords, was partly affirmed and partly reversed in 1772. The interlocutor of the Court of Session, in that case, found, that he had a right to a cruive fishing, as well as by nett and coble; and that he was not bound to alter the then present breadth of the cruive dyke. "But in respect of the alterations made thereon "since the year 1726, *appear to have been made not with* "*an intention to improve the cruive fishing, but the fishing* "*by nett and coble, and that they are prejudicial to the* "*superior heritors, and to the preservation of the breed of* "*salmon in the river;* therefore find, that the shoeing and "causeway in the river, further down than the lower end of "the keying-stones, and which extends to twelve feet in "breadth, as at present constructed, must be taken away "and removed," &c. "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 that they "remain open for the purpose of a Saturday's slap."

In consequence of this judgment, which was affirmed, except the part regarding the removing the inscales, which was reversed and varied, Mr. Scott could no longer use the cruive dyke as a means of preventing the passage of the salmon up the river, and therefore he resolved to abandon that dyke, in order to furnish a pretence for erecting another dyke. Accordingly, some years afterwards, he resorted to the plan of erecting a new dam dyke. This erection proved much more objectionable and detrimental to the fishing than the former, from its peculiar construction; it being made

of a heap of loose stones, so placed together as to allow the flow of water to filtrate through them, at same time preventing the possibility of the river from flowing over the top of the dyke, in order to enable the fish to get up the river.

By an agreement in 1774, Mr. Scott had become bound to leave an opening in the dam dyke for the passage of the fish. The present action was brought, concluding to have it found and declared that the respondents "had no right to "erect said bulwark of the extraordinary dimensions above "described, and therefore that these new erections ought "to be demolished, and the said bulwark altogether al- "tered in its dimensions, and of new constructed, in such a "manner, and with such openings or gaps as the said Lords "shall direct, so as to admit the free passage of salmon at "all times up the river; and the defenders ought and "should be prohibited and discharged from making any al- "teration upon or addition to the new dam dyke so to be "erected under the directions of the said Lords, or of lay- "ing any causeway in the channel of the river, either above "or below said dyke, and from every other operation that "may in any shape impede the free passage of salmon up "the river, under the penalty of £50 sterling, liquidated "by said decree for every offence *toties quoties;* and, in the "meantime, till these regulations take effect the said James "Scott, in terms of his agreement, ought to be ordained to "make an opening of an ell wide in said bulwark at the "deepest part of the river." The appellants also brought advocation of their original application to the Sheriff *ob contingentiam;* and both processes were conjoined.

In defence to this action, the respondents pleaded, 1st. RES JUDICATA, by the decret obtained in 1772. 2. That the check dyke complained of was in the same situation in which it had been past memory of man, and therefore, that the respondents were entitled to keep it in that situation in all time coming. It was answered, 1. That there was no *res judicata*, because the respondent, Mr. Scott, had averred, and was successful in proving, that the check dyke, in its then situation, was no obstruction to the appellants' right of fishing, as it was constantly covered with water, by the regurgitation of the river from the cruive dyke; in consequence of which, the pursuers of that action, had, *in hoc statu*, departed from their conclusions in the summons respecting the check dyke; and, accordingly, no decision was given in regard to it by the decree of 1772. 2. Since the year 1772,

1802.

VISCOUNT ARBUTHNOTT, &c. v. SCOTT, &c.

an alteration has taken place on the check dyke, in two respects, 1. In consequence of the cruive dyke having been removed, there was now no stagnation, or regurgitation of the water; and, 2. It was stated that the dyke had been materially altered and greatly enlarged since that period.

The questions which thus occurred for the determination of the Court, were, 1. Whether, in point of fact, since the decree 1772, any alteration had taken place by which the fishings of the appellants were prejudiced; and, 2. Whether, in point of law, the respondent could be compelled to give relief to the appellants, either by replacing his cruive dyke, and regulating the same in terms of the above decree; or, by making an opening in the present dyke in terms of the statute, and of the respondent's obligation to that effect?

Evidence as to the situation and effects of the former dam dyke was adduced, by producing the proof led in the former process in 1772; and also, evidence as to the situation of the present dam dyke, to show the present was more injurious than the former in interrupting the passage of the fish up the river. And also, evidence adduced to show that the dyke might be so constructed as to give a sufficient supply of water to the mills, and, at same time, to admit of a gap or opening for the passage of the fish. The Lord Ordinary, and afterwards the Court, took the opinion of surveyors on the subject, who reported and produced plans and reports.

Nov. 20, 1797. The Court pronounced this interlocutor,—"Having advised the mutual memorials for the parties, proof adduced, "and writings produced, they sustain the defences pleaded "for the defenders, assoilzie them from the whole conclu- "sions of this action, and decern: Find the pursuers liable "to the defenders in the expenses of the proofs and reports "in this cause, and appoint an account thereof to be given Dec. 8, 1797. "into Court." On reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—All obstructions to the passage of salmon up rivers are illegal, and have been the objects of several enactments, in order, 1. to preserve in rivers the breed of salmon, by encouraging the fish to deposit their spawn in the higher parts of the rivers; and, 2. That the rights of the upper heritors might be preserved. Hence, the regulation as to the height of dam dykes, the Saturday's slap, &c. In the present case, the respondents, Mr. Scott and his predecessors, for more than a century past, have

been endeavouring to evade the laws and regulations with respect to the exercise of their right of fishing, for the purpose of preventing the fish from having a free passage up the river. In resisting these attempts, the appellants were successful in all the former actions before the Court of Session and House of Lords; but, notwithstanding, he still persists; and the present dam dyke, from the extraordinary manner in which it is erected, being composed of stones loosely thrown together, and industriously preserved in that state, by the operation of trenching, &c., the great body of the water filtrates through, while the top of the dyke, which is very broad, and is completely dry, leaves no possible chance of the fish getting over it; and, consequently, is an obstruction injurious to the appellants' right of fishing in the upper part of the river. Independently of the statute, and at common law, the appellants are entitled to insist in their alternative demand, viz. that the respondents shall either restore matters to their former state, by rebuilding or properly regulating the cruive dyke, or that they shall erect their dam dyke in such form as to render it incapable of obstructing the appellants' fishings in a greater degree than it did formerly. And as the respondent can only exercise his own right of fishing in such a manner as not to injure the interests or rights of fishing of the upper heritors, he is not entitled to maintain the dam dyke in its present condition; because this is a total obstruction to the passage of the fish; and also, because, by the obligation in 1774, Mr. Scott is bound to leave an opening in the dyke, so as to allow a free passage for the fish. Nor is it any answer to this to say, that by immemorial possession had by the respondents of the dam dyke as it stands, cuts off all ground of complaint; because such possession has not been proved, and even if proved, could not be pleaded against the express terms of a statute, and also against the express terms of his own obligation, to leave an opening for the fish.

Pleaded for the Respondents.—The dyke in question has remained in the same form and structure past the memory of man. The appellants have not proved that the respondents have ever raised the height of the dyke. On the contrary, it is established, that it is rather lower than while the cruive dyke existed; and that, when repaired, it was always made, as nearly as possible, of the *same* height as *before*. The check dyke is indispensably necessary for the supply of the mills with water. It is, besides, proved that the gain-shots, or the eyes of the intakes, of

1802.

VISCOUNT ARBUTHNOTT, &c. *v.* SCOTT, &c.

the mill leads, never were increased or enlarged; and that the dyke itself is not higher than is sufficient to convey a sufficient supply to the mills, even when the eyes or the intakes are full. It can therefore admit of no opening or alteration, without endangering the going, security, and supply of the mills; for it is proved, that when any breach is made in either limb of the dyke, the mills on both sides of the river are laid idle till such breach is repaired. If any alterations were at all practicable, they must have in view the supply of the mills, as well as the appellants' right of fishing; but, from the report of the engineer, which declares, that an alteration of this kind could only be effected at an expense considerably beyond the value either of the respondents' mills, or the appellants' fishings, it is out of the question to suppose that the respondent is bound, either at common law, or by the statute 1696, to make any alteration or opening.

After hearing counsel,

LORD ALVANLEY,* said,

"My Lords,

"This cause was argued before your Lordships some time ago. It respects the rights of the respondents to maintain a certain dam or wear, which, it is alleged on their part, is necessary for the supply of their mills with water, but which the appellants contend is unnecessarily prejudicial to their superior fishings. The matter in dispute was of a nature peculiarly proper to be regulated by a jury, if the law of Scotland had admitted of such a mode of determining the question.

"It is matter of satisfaction to me, that I am enabled to state that my sentiments upon this cause coincide with those of a noble and learned Lord, of great experience in such questions, who attended the hearing of this cause, but who is now unfortunately absent. (Here his Lordship stated the proceedings in the cause, and interlocutors appealed from).

Lord Thurlow. The Chancellor did not attend the hearing, having been confined by indisposition.—(Note by D. R.)

"The right of fishing in this view, at the place in question, has produced no less than six actions at law.

"The first of these was in 1684. The ground of dispute then was, if the cruive dyke of the then defenders was properly constructed, and regulated according to law. A decree was then made to regulate and alter the construction of the cruive dyke, which had been improperly constructed before.

"In 1701, another action was determined, with regard to this

---

* Lord Alvanley was previously Sir Richard Pepper Arden, Master of the Rolls. He gave judgment in the well known case of Lord Somerville's domicile, reported in Mr. Robertson's Treatise on Personal Succession.

cruive dyke, and the Court entered into minute regulations as to its construction; but still there was no objection made to the dam dyke for the supply of the mills.

"In 1746, there was a third action, and the squabble between the parties was still entirely with regard to the cruive dyke. By a fourth action in 1763, upon the same point, the cruive dyke was more minutely regulated.

"A fifth action was determined in 1769, which was the subject of an appeal to this House (1772). The judgment in that action goes only to regulate the cruives, and to increase their number. (Here his Lordship read the interlocutor of the Court of Session, 4th July 1769.) In that action, the pursuers had also complained of the dam for the supply of the mills, as well as of the cruive dyke; but they did not insist upon that, and the decree went only to regulate the cruives. When it came here, by appeal, the interlocutors were affirmed, with a small variation, with £100 costs.

Down to 1780, there were no farther proceedings at law in this matter; but, before that period, a great alteration had taken place in the state of the fishings, the cruive dyke had been carried away by floods, and, on account of the alterations thereby occasioned, the action was brought, which is now before your Lordships by appeal.

"On the part of the appellants, it is alleged, and I think is satisfactorily proved, that while the cruive dyke stood it occasioned a stagnation, and the water being pent up, prevented any filtration in the dam dyke. It is alleged also, that the alteration being found of benefit to the respondents' fishings, the cruive dyke was not restored, but that, by heightening and widening the dam dyke, the respondent resorted to another mode of fishing, by which the run of salmon was more obstructed than before, while the stagnation of the water remained. It was insisted that this was done intentionally, that more water at all times filtered through the dyke, from its construction, than was necessary for the supply of the mills, and that, except in floods, no salmon could get over the dyke. It is obvious, if the facts be as stated, the effect alleged must be produced; the salmon cannot get over a dry obstacle of great height and breadth, they must necessarily have water to assist them in leaping.

"This is alleged upon one side, and there is little proof to the contrary on the other. The noble and learned Lord, already alluded to, concurs with me in opinion, that the removal of the cruive dyke, and the alteration of the dam, have been of prejudice to the appellants' fishings. If it be so, an action lies to abate the nuisance.

"If the case had occurred in this country, an action might have been brought for the prejudice done to the fishings; and the jury, if they found this proved, would have given nominal damages to abate the nuisance. Here we have no question peculiar to the law of Scotland. The law, as to nuisances, must be the same in both countries. The only question in this case is, if the right of the re-

1802.

VISCOUNT ARBUTHNOTT, &c. *v.* SCOTT, &c.

spondents be exercised, so as not to occasion a greater nuisance to the right of fishings in the river than the case requires.

"The majority in the Court below was of opinion that the pursuers had not made out their case; and the Lord President and some other judges, state their opinions to be, that mills, in the eye of the law, were prior in date, and of higher consideration than fishings. Though this position might perhaps be controverted, I shall at present take it for granted; and the only question then is, if the mill dam has been constructed as beneficially to the rights of others as they have a title to expect?

"With regard to the trial of this question, it is alleged, that while the cruive dyke stood, the salmon got easier up the river; it is asserted, and in my opinion is proved, that the dam is unnecessarily open and pervious to the water. The millers alone did not construct this dam to serve themselves with water. There was some other reason for its being thus constructed, and we can be at no loss to perceive this reason. All the former questions are questions as to the fishings; and as to the respondent, Mr. Scott, his fishings are the most valuable right. The moment he saw that his fishings could be carried on without his cruive dyke, with the assistance of this dam, then he abandoned his cruives altogether. There is a letter from him to the other defender, Mr. Fullarton, whose mills are more valuable than his own, that he was to advance the whole money for defending the action, and that Mr. Fullarton should only bear such proportion of the expense as he chose. If this letter had come before a jury, they would immediately have perceived that Mr. Scott's mills were not his only object. There is something, too, in evidence, that when Mr. Fullarton's millers were endeavouring to prevent filtration in the river, they were forbidden to do so by Mr. Scott's tenants.

"The Court, when the cause came before them, referred it to surveyors to report, if the dyke could be so constructed as to supply the mill with water, without prejudice to the appellants' fishings. Other surveyors seem to have mistaken this matter very much. Mr. Abercrombie, one of them, makes a calculation of what a dyke would cost in this rapid river, if made to last perpetually, giving a supply of water to the mills, and allowing the salmon to pass. He estimates this at the enormous sum of £5000; while he makes a calculation of another kind of dyke at £1700. All these are on wrong principles; it cannot be supposed that the defenders are to put themselves to so much expense. But, at the same time, it is necessary that they make such alterations on their dam as will leave the obstructions not more prejudicial to the appellants than before.

"This is the whole question at issue. Have the respondents then made such alterations as are not prejudicial? They have not. Might they do so? I think they might. It was said, that the alteration might be effected by facing the dyke with clay, or other ma-

terials, so as to prevent filtration. The respondents said, If the dyke was made closer, it must be carried away by the rapidity of the river. No doubt, it may be damaged, as it is at present, but the appellants have a right that it shall be made as little prejudicial as possible. The Court below were of opinion, that the dyke was a great nuisance to the appellants; but said, that the pursuers must be at the expense of altering it. This must be matter of future consideration, if it be found that the dyke may be altered. The defenders here have no right as fishermen, and they must keep their dyke as little prejudicial as if the cruive dyke had stood as before.

"Concurring, as I do, in opinion with the noble and learned Lord already alluded to, I do not feel the hesitation I otherwise should do in differing from that given by the Court below. Indeed, this is a mere question of fact; and I am sorry that the law of Scotland does not permit matters of this sort to be determined, as the case can best be determined, by a jury, upon views of the matter in dispute. The learned Lord had furnished me with his sentiments in the shape of a motion prepared by him, which state his and my statements so distinctly, that nothing can be mistaken on this subject.

"I shall now put this motion." This was done accordingly, and carried by the House as below.

Whereupon it was ordered and adjudged that the interlocutors complained of in the appeal be, and the same are hereby reversed: And find that the pursuers, as proprietors respectively of salmon fisheries in the river of North Esk, are entitled to have as free access of salmon to their several fisheries as can be had, consistently with the rights which others have in the lower parts of the said river: Find that the defenders are proprietors respectively of ancient mills, lying on each side of a certain part of the said river below the said fisheries, and that they are entitled respectively to draw certain portions of the water from the said river, for the use of their respective mills, for which purpose they and their predecessors have, time out of mind, set up and maintained dams to carry certain quantities of water from the said river into cuts made for the use of the said mills. And it is hereby declared, that it is a quality inherent in such easement, that it must be enjoyed and exercised so as not to prejudice other rights on the same river, emulously, negligently, or otherwise, more than is necessary to the fair enjoyment of such easement: Find, that before the year 1772, the water of the said river was pen'd back to serve the said mills, by the united efficacy of two dams, one called the Cheque

1802.

HALLIDAY
v.
MAXWELL, &c.

Dam, placed near the intakes of the said mill leads respectively, and the other a Cruive Dam, belonging to the defender Scott, and his predecessors, placed below the said Cheque Dam, and that by means of such dams, that the water was so put back, as rarely to leave the Cheque dam dry, or obstruct the ascent of the salmon which had escaped the said cruives. But when the said cruive was abandoned, and the Cruive Dam demolished, the Cheque Dam was by no means sufficient to keep the water back, so as to be overflowed as it had theretofore been, and to give the salmon such free access up the river as had theretofore been allowed them; on the contrary, the Cheque Dam, though made much broader, was still so constructed, that more water percolated it than would have served both the said mills. And it is therefore further declared, that so long as the defenders think fit to maintain the said Cheque Dam without a Cruive Dam below, so constructed as to prevent such percolation, the Cheque Dam ought, as far as circumstances will admit to be so constructed, that the water must flow over instead of percolating the same; and they must leave a slap in the said dam, in terms of the act 1696, if the same can be done without prejudice to the said mills: And it is hereby further ordered, That the said cause be remitted back to the Court of Session in Scotland to proceed accordingly.

For Appellants, *John Clerk, Ad. Gillies.*
For Respondents, *R. Dundas, W. Grant, Wm. Adam, John Burnett.*

NOTE.—Under this remit, considerable litigation again took place in the Court of Session, which ended in another appeal to the House of Lords, on 20th July 1813. Vide infra.

DAVID HALLIDAY, Grand-nephew and heir of line of John Carruthers, a Pauper, } *Appellant;*
AGNES MAXWELL and her Husband, - *Respondents.*

House of Lords, 9th June 1802.

SUCCESSION—DESTINATION—DISPOSITIVE CLAUSE AND CLAUSE OF RESIGNATION—HEIRS MALE—RES JUDICATA.—In the disposi-