(Mor. p. 14301.)

JAMES HUNTER, Esq. of Seaside, and JOHN LITTLE, WILLIAM LITTLE, ANDREW LITTLE, and GEORGE LITTLE, his Tacksmen of his Salmon Fishings, } *Appellant;*

Right Hon. ROBERT, EARL of KINNOUL, WILLIAM LORD GRAY, SIR THOMAS MONCRIEF, Bart., and his Tutors, The Provost and Magistrates of the Town of Perth, &c. } *Respondents.*

House of Lords, 9th May 1804.

SALMON FISHING—NEW MODE OF FISHING.—The appellant's lands of Seaside were situated on the Tay, about fifteen miles below the city of Perth, where it is about two miles broad at full tide; but, when the tide retired, the proper channel of the river Tay was only about half a mile in breadth, and, consequently, a great area of fifteen acres of sand was left dry. On this he made an enclosure, by means of stakes and netting, contrived in such a manner as to open as the tide flowed, and shut when it ebbed. He alleged, that as the water was always salt at that place, and as the acts of Parliament did not apply to arms of the sea, or to friths or estuaries, but only to rivers, he had a right to do so. In an action at the instance of the superior heritors, held these stake nets illegal. Affirmed in the House of Lords.

The appellant, Mr. Hunter, is proprietor of lands situated on the north bank of the Frith of Tay, and about fifteen miles farther down the frith than the town of Perth. His grant was simply of a fishing in the *Water of Tay*, opposite to, or bounding his estate of Seaside and Auchmuir. He had let his right of salmon fishing to the other appellants; and, at the place where the tide rises, the land on the side where Mr. Hunter's property lies, being covered with water to a great extent, exhibited *at low water* a large tract of sand. Upon these sands, by means of netting fastened to stakes, and which rose and fell with the tide, the Messrs. Little formed an enclosure of fifteen acres, having the stakes so disposed obliquely up and down the frith as to snare the fish into the netting. The netting was ten feet high, supported by poles. The meshes of the netting were of strong cord. At the end, and near to the south extremity, at a small run of water, there was an opening furnished with sort of valves, contrived for admitting all the fish which came with the rising tide, and for preventing their passage out

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when the tide fell. The valves were formed of nettings, which were fastened at the top, but were loose at the bottom, and floated with the tide. The respondents are proprietors of the salmon fishing above Mr. Hunter's, and soon finding their fishings much injured, if not entirely destroyed, by these erections on the part of Mr. Hunter's tenants, they presented a bill of suspension and interdict, and also brought a declarator. The question was, Whether the acts of Parliament, regulating the salmon fishing in Scotland, and which prohibit, in general, the use of cruives, yairs, and *similar machinery*, in that part of the river where the flow and ebb of the tide is perceptible, prohibited the erection of such machinery as the present, on the sands opposite to Mr. Hunter's lands of Seaside?

On the one side, it was contended that the machinery here used was nothing more than what was called a yair in Scotland. On the other side, it was maintained that the acts of Parliament could not be construed to include and apply to estuaries or friths which are mere arms of the sea; but it was admitted here, where the nets were fixed, that the water was at all times salt.

The acts seem only to mention rivers. The act 1563, c. 68, has this exemption, "Providing always, that this act "shall in no way be extended to the cruives and yairs upon "the *water of Solway*." On the one side, it was argued that this exemption proved that all waters in the situation of the Solway, that is, all arms of the sea, or estuaries, were exempted. While, on the other hand, it was contended that it proved the reverse, namely, that all estuaries except the Solway were included under the acts, and, consequently, that the Tay was to be held as included. It was, besides, pleaded, that the custom uniform among all the proprietors of fishings on the Tay was by net and cobble.

The Court of Session passed the bill of suspension, to the effect of trying the question along with a declarator at same time brought and conjoined with it. The defenders (appellants), besides objecting to the want of title, argued, 1st, That the machinery complained of was not such as the statutes prohibited; the statutes only mentioned cruives and yairs, but their machinery was confessedly not a cruive, and neither was it a yair, which, at the time of the enactments founded on, was said to be a dam or enclosure in the bed of a river, formed of boards and wicker work. 2d. That the *situation* of their machinery was not *that* in which the statutes meant to prohibit the engines complained of. The acts were di-

rected against engines in the bed or alveus of a river, whereas their machinery was upon the *lands*, at a considerable distance from the river or channel at low water. And it was clear, from the whole tenor of the statutes, that they had in view the fisheries in rivers only; or, at most, on the sides of rivers, whereas the machinery in question was really in the sea, or on land covered at full tide only by the ocean, and by salt water. 3d, That the works were constructed so as not to impede the passage of the fry, or young salmon, up and down the river, the meshes of the nets being twelve inches in circumference.

The Court, of this date, suspended the letters simpliciter, Mar. 3, 1801. and repelled the defences in the declarator. And, on reclaiming petition, adhered. The decree was in these Jan. 26, 1802. words:—"Find that the defenders' mode of fishing is in-"jurious to the pursuers' fishings, and that they have a "right to put a stop to the said mode, or to any other mode "of fishing not formerly used in that part of the Tay: "Find that the said James Hunter of Seaside, the proprie-"tor of the said fishing, and the said John Little, and the "other tenants thereof, and the servants employed by them, "have no right to use the fishing in the manner described, "or in any other manner not hitherto used in that part of "the river, whereby the pursuers' fishings in the higher "parts of the river are injured; and decern and ordain the "said *James Hunter*, the proprietor of the said fishings, "and his tenants, to remove and demolish the works de-"scribed, erected by them, or by their directions, in the "river Tay, and prohibit and discharge them from erecting "any such works in time coming."

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

Pleaded for the Appellants.—1. The appellants have an undisputed right of salmon fishing in the Tay, and experience has amply proved that there are abundance of salmon to be found on their shores. But it is undeniable that the appellants could not fish to any advantage by means of net and cobble, and that the machinery which has been made use of by them since 1797, or some other apparatus of a similar kind, is alone calculated for the situation. The patrimonial interest of the appellants, therefore, to maintain their right to carry on their salmon fishery, by a mode of fishing from which they derive material benefit, but without which their title to fish salmon would be little better than a name, is obvious and strong. 2. On the other hand, the respondents

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have no fair patrimonial interest to oppose the method of fishing for salmon practised by the appellants, and, of consequence, their title to insist in this action ought not to be sustained. They have not been able to show, neither have they ventured to assert, that the number of fish caught by them since the appellants began to fish for salmon in the manner now complained of, has been less than in former years. If, indeed, the method of fishing practised by the appellants is a legal method, it would not be a sufficient reason for preventing them to exercise it, that, in its effects, it had diminished the number of salmon taken by the respondents; for every person is entitled to use his property in the manner most beneficial to himself, whatever consequences may result to his neighbour, if only he does not act *in emulationem*. The respondents' fishing has never been decreased, and therefore they have no cause to complain. 3. To fish at all upon the Tay, opposite to the appellants' lands, resort must be had to other means than that by net and cobble, because such apparatus, with reference to the situation, would be next to useless, in carrying on the fishery in order to yield any practical benefit to the proprietor. It is therefore the necessity of the situation which forces the appellants to resort to other means of carrying on the fishing; and this necessity, and the peculiarity of the situation of the appellants' fishings, are just precisely what lead to the question, Whether acts against fixed machinery in fishing, can at all apply to his fishings? The statutes, they contend, are inapplicable, 1st, Because they do not apply to machinery placed on the shores of friths, at a distance from the alveus or channel of rivers, at low water, and on sands, as is the appellants' case. 2d, Because the statutes point only against fishing at the alveus or beds of rivers, by means of cruives or yairs only, or at mill dams; but do not contain any expression which can include the appellants' machinery. 3d, Because the main object of the statutes being to encourage the breed of salmon, by protecting, on the one hand, the fry, and, on the other, the growth of fish in going up and down the river, they cannot apply to the appellants' engines, placed so far from the channel of the river as to cause no obstruction whatever.

Pleaded for the Respondents.—1. The machinery used by the appellants in their fishings is of an illegal nature, not only at common law, but as being prohibited by various acts of Parliament. 2. This machinery is necessarily injurious to the fishings in the superior parts of the river, and therefore

prejudicial to the fishings of the respondents, by diminishing the number of fish which would otherwise frequent them, and this not only by exhausting the fish in the river, but by impeding the passage up the river of those fish which the appellants do not catch. 3. And the respondents having a sufficient title and interest to insist in this action, without the concurrence of any public prosecutor, they are entitled to interdict to stop these illegal fishings.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *C. Hope, Samuel Romilly, Math. Ross, M. Nolan, David Monypenny.*

For Respondents, *Wm. Adam, Wm. Alexander, John Clerk.*

NOTE.—For some account of what passed in the House of Lords, in disposing of this case, vide another case of the same kind, between the same parties. Infra.

DUKE OF QUEENSBERRY, . . . *Appellant;*
JOHN M'MURDO, Esq., late Chamberlain to the said Duke, ... } *Respondent.*

(*Et e contra.*)

House of Lords, 14th May 1804.

RECOMPENSE—QUANTUM MERUIT—CHAMBERLAIN AND FACTOR.—This was a question about the remuneration to the respondent, as the Duke's chamberlain and factor. A third party, in name of the Duke, proposed the appointment to the respondent, with a salary of £200, verbally. The reply was, that the estates were so extensive as to raise a fear that it could not be done on so small a salary, as the expense and trouble would be great. But he stated he would make a trial. A factory was drawn out in his favour, without specifying the amount of salary. At the end of the first year, he wrote the Duke's agent, with his account of outlay and expense,—amount £165, leaving the amount of salary blank. He continued to do so for eleven years, always leaving the amount of his salary blank. In mutual actions brought against each other, the Court of Session found him entitled to £550 per annum for salary and other expenses. In the House of Lords this sum was restricted to £450 per annum.

The Duke of Queensberry, previously to the respondent being engaged as factor over his estates in Dumfriesshire,