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EARL OF KINNOUL, &c. *v.* DALGLEISH, &c.

EARL OF KINNOUL and his Guardians, WM. LORD GRAY, The PROVOST and MAGISTRATES of Perth, &c., in behalf of the community thereof, and JOHN RICHARDSON PITFOUR, Esq., . . . } *Appellants;*

WM. DALGLEISH of Scotscraig, Esq., and MESSRS. LITTLES & Co., WM. SIMPSON, GEORGE SIMPSON, and JAMES MARTIN his Lessees, ... } *Respondents.*

House of Lords, 21st March 1805.

SALMON FISHING—STAKE NETS—RES JUDICATA—INTERDICT.—Question whether a new mode of fishing, by means of stake nets, was illegal, these being placed far below where the river Tay widens into an estuary, frith, or sea? On bill of suspension and interdict, the interdict was recalled, but bill passed to try the question, and held that the case of Hunter of Seaside was neither *res judicata* nor conclusive on the general question. Affirmed in the House of Lords.

This case was somewhat similar in its nature to Hunter of Seaside's case, (vide ante p. 561), with a difference in the situation where the stake nets were used, these being placed farther down the Tay, and on fishing grounds belonging to the respondent Mr. Dalgleish. The Honourable William Maule of Panmure was also proprietor of fishings on the Tay, so far down in the open sea as to be near Broughty Castle, and another in the Bay of Monyfeith, also on the banks of the Tay, near its junction with the sea, which were let to George Gray of Carse, his lessee. Their respective lessees had erected the stake nets where the river widens into the frith, and joins the ocean. Bills of suspension and interdict having been brought against them separately by the appellants, the actions went on separately in the Court of Session.

In both cases, it was alleged that their cases were different from Mr. Hunter's case, arising from the situation of the fishing grounds. The respondents maintaining that Hunter's fishing grounds were several miles *above theirs*, nearer, or in and upon the river, while their fishing, and engines for the same, were upon the shore of the main sea, far below where the Tay could with propriety be called a river, or even a

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frith; and as the acts of parliament did not apply to such situations, places, or estuaries, and indeed did not prohibit stake nets in such situations, but only prohibited cruives and yairs within rivers, their mode of fishing was perfectly legal and unexceptionable. In answer, it was maintained that the case of Hunter of Seaside must decide the present question. That the facts were the same, and as the parties were almost the same, for the Messrs. Littles were respondents in that appeal, it was to be held as a *res judicata*. To this it was replied, that as the parties were different, and the nature of the rights and situation of the fishings different, and as the case of Hunter did not settle the general point, that decision could neither be binding as an authority, nor bar as a *res judicata* the present actions. Separately, it was also contended by the respondents that Mr. Hunter's grant was different from Mr. Dalgleish's. Mr. Hunter had right to the lands of Seaside and Auchmuir, "with the fishing of salmon and other fishes, in the Water "of Tay, opposite to the lands of Auchmuir." Mr. Dalgleish's grant ran thus: "The lands of Carpit, with the "fisheries of salmon and other fisheries, and whole pertinents of the same," and "the lands of Causeyhead, and "salmon fishings belonging to the said lands called Greenside."

The grant of Mr. Maule, (respondent in the other appeal), was, "Totas et integras terras de Eagles Monichto Balmossie, cum duobus molendinis de Brachan, et terras binæ "partis de Kirkton de Monifieth et Justingleys, cum omnibus piscariis in mari et fluvio de Tay, juxta terras de Monifieth et Justingleys et Eagles Monichto a rapis et littoribus "earund. cum omnibus partibus* marinis infra easdem, cum "privilegiis maris et fluvii de Tay intra et erga præfatas terras "et earundem pertinentiis."† He therefore maintained that there was a grant of fishing in the sea, and also in *fluvio de Tay*. His charter gave a right of fishing *in mari*, and also *in fluvio de Tay*, that is, in the river, and he contended that his fishings at Broughty Castle were in the sea, and therefore not within the provisions of the statutes.

June 13, 1804. The Lord Ordinary pronounced this interlocutor, "Having again considered this bill with the answers, writs "produced, and memorials, and having advised with the

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* In the respondent Gray's case this is "*portubus*."

† In the respondent's case this is "*pertinentias*."

"Lords, recalls the interdict, but passes the bill upon the "caution lodged, to the effect of trying the question."*

A like decision was come to at same time, in the interdict brought against the Honourable William Maule, and his lessee Mr. Gray.

Against this interlocutor, *in so far as it recalled the interdict*, the appellants brought an appeal to the House of Lords upon that point.

Pleaded for the Appellants.—By the decision of the late case respecting the fishery belonging to Mr. Hunter of Seaside, two points seemed to be settled as firmly as the most solemn and deliberate decree of the supreme court of Scotland, affirmed in the last resort, can settle any point of general law: First, That the sort of machinery called stake nets, introduced by Mr. Hunter and his lessees, and which the respondents in the present cause continue, notwithstanding that decision, to use, are prohibited by the *statutes in certain situations*, being truly a species of yair-dam, and of most destructive nature. Secondly, That situations similar to that in which Mr. Hunter's nets were placed are

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* Opinions of the Judges:—

Lord President Campbell said,—"These are sea fishings in the frith of Tay, and the question as to them is not the same which was determined, in the case of the river fishings, with Hunter of Seaside; at least, the parties must have an opportunity of being heard. In the meantime, no interdict ought to have been granted in the Bill Chamber, especially *ex parte mandata*.

"This is not the case of a possessory judgment, for there is no competition of rights here, but merely a question as to the mode of exercising a right; and the party who is in the actual possession of a certain subject, cannot be summarily turned out, till it be known whether he is rightly or wrongfully in possession. Any possession is better than none, and must be presumed to be lawful till the contrary be proved. An interdict never should be granted *ex parte*, unless in cases of imminent danger. Some regulation ought to be made about this by act of Sederunt, requiring a certain intimation to be given before the demand is made."

Lord Hermand.—"I am for removing the interdict."

Lord Craig.—"I am for doing the same. I refused it on the former occasion."

Lord Woodhouselee.—"I am of the same opinion."

Lord Meadowbank.—"I doubt whether the *res* are not concluded by the former decision."

Lord Balmuto.—"I am for removing the interdict."

Lord President Campbell's Session Papers, vol. 114.

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within the description and intendment of the statutes. The first of these propositions seems now to be conceded on all hands; the second cannot be conceded by the respondents, and the other persons with whom the appellants are now unexpectedly contending, without pronouncing their own condemnation. They insinuate, though they do not broadly say, that the decision in Hunter's case was erroneous; and they speak out their intention of having the question tried again, as, though it undoubtedly binds him, it does not bind them, nor can be pleaded by the appellants as a *res judicata*, since they were not parties. How far it was decent or justifiable to oblige the appellants to go over the same ground again, when the case decided was universally considered as a leading one; and, where there is no solid distinction, it will be for the Court of Session, and perhaps for your Lordships, to say, when the actions which the appellants have been compelled to institute come to be heard on the merits. The machinery at Seaside was placed at a great distance from the ordinary bed or channel of the river Tay, upon lands only covered with water when the tide flows, and entirely dry when it ebbs; Mr. Hunter asserted, and offered to prove, that the water which covered the sands was at all times salt, but the Court of Session and your Lordships refused to let him into such evidence, considering *that* circumstance to be of no importance; in truth, the only distinction between Mr. Hunter's case and that of the persons who are now disputing the point, is, that their fisheries are farther down, some of them more and some of them less distant from what is termed the open sea; some of them, as will be seen from the plan, are on the southern bank, nearly opposite to Seaside. The nearer the Tay approaches to the ocean, it has of course less the appearance of a river at low water, and this is gravely contended as distinguishing the inferior fisheries from that at Seaside, though there the space covered by the water is upwards of two miles in breadth, and has all the features of an arm of the sea at high water, as much as where the stake fisheries in question have lately been erected. The case now particularly under consideration has been singled out to take the lead, as being the fishery farthest down, and because, if it is to be decided in the appellants' favour, it is to be presumed that all the others must submit, though it does not follow that it will decide all the rest, if given against the appellants, because there are circumstances alleged to distinguish it from the Seaside fishery, whereas in some others there is

not a colour of distinction. They must be prohibited, unless the principle of the decision in the Seaside case is to be completely overturned. The respondents are perfectly sensible of this, and therefore dispute the principle. According to them, the acts of parliament regarding salmon fishings, had relation only to that part of the river where the water is fresh, and the stream generally perceptible, though it is influenced by the tide, just as the Thames is at London Bridge; lower down, (as for example, at Gravesend), the water being brackish, they say, it was not the intention of the legislature to impose the prohibition. But the acts regulating the fishings in Scotland do not countenance such a latitude of construction.

Pleaded for the Respondents.—The judgment of the Court of Session, affirmed in the House of Lords, in the action brought by the appellants against Mr. Hunter of Seaside and his lessees, on which, demand of an immediate interdict against the respondents has been founded, affords no precedent or authority for determining either the lawfulness of the mode of salmon fishing employed by the respondents, in the situation in question, or of the title and interests of the appellants to challenge his operations. In the case of Seaside, no general or abstract point of law was decided; it was merely adjudged, that under the grant from the crown, by which the defender had acquired a right of salmon fishing, and in that particular local situation to which his grant related, the pursuers had a right and interest to prevent the use of that kind of fishing-apparatus used by Mr. Hunter and his lessees. But unless it could be shown that, in these respects, the case of Seaside and the present case were similar, or identical, the decision given in the former would give no sufficient ground for a similar decision in the latter; and still less would it warrant a court of law in granting an immediate interdict before the question of right had been regularly tried. But, in point of fact, the grant under which the fishings in question have been conveyed by the crown, is in its terms essentially different from that to Mr. Hunter; and, in local situation, a difference still more essential has been pointed out. The acts of parliament do not apply to waters such as the Tay where it joins the sea, but to rivers only, and prohibits cruives and yairs in those rivers, unless there be a grant from the crown of such fishings; but they do not refer to stake nets erected on the sands at the mouth of the river. Here the fishings by stake nets are situated, not in the river, but on the coast

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of the German ocean, with the exception, perhaps, of one, which is situated westward of Broughty Castle.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,

My Lords,

"The motion which the forms of this House render necessary for me to put to your Lordships is this, that the judgment in this cause should be reversed;* but it is impossible for me here to reconcile my mind to such a conclusion.

"The present are appeals from unanimous judgments of the Court below. But the Court had not gone the length of considering the merits in these cases, nor are such merits before your Lordships. The nature of the proceeding is, that the pursuers in the proceedings in the Court below have undertaken to prove, *hereafter*, that the mode of fishing adopted by the respondents was injurious to their private and individual interests; but the nature of their request is, that before they prove their case, the Court shall abate the respondents' fishings, though this at the risk of depriving them of their legal rights.

"This also was a unanimous decision, in a case where the Court had under their immediate consideration what had been done by themselves in regard to the fishings of Mr. Hunter of Seaside, and what your Lordships had done in that case, after much doubt and difficulty felt thereon, and also what the Court had themselves done in the case of Lord Kinnaird's fishings.

"It was not only the act of a Court thus instructed, but (as what they have done, in so far as they have judged the matter, is to pass the bill to try the question, recalling the interdict, in order to keep things entire pending discussion), it also depended much upon a point of practice, which must be best known to that Court; even in a case of practice, your Lordships may reverse the judgment; but in doing so, you proceed with great caution, and not till you ascertain that the judgment is wrong.

Duke of Atholl.

"We have just received from a noble Duke all the information which an able and distinguished peer, acquainted with the local circumstances of the case, can give us; and the question for us to decide is, are we prepared to say that the unanimous judgment, in the case which I have stated, is wrong?

"The nature of the action is an action at the suit of private individuals, not stating a public abuse as the ground of action, but to secure their own private interests. It would, in my opinion, be not

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* In allusion to the form then observed in the House of Lords, of stating no reasons when a judgment was to be affirmed. When it was necessary to state reasons in such a case, a motion was usually made to reverse, and the Chancellor spoke in the negative of that motion. Now, however, the practice is different. The motion is always a motion to reverse, which the appeal itself necessarily raises.

a little singular were your Lordships to grant an interdict in this case against this unanimous judgment, and where it was admitted to us at the bar, that an analogous judgment in injunction in this country not only could not have been granted, but could not have been asked for.

"If a quite new invention was for the first time put in practice, and likely to destroy or to do irreparable mischief to the ancient property of another, the Court would say, you shall not take the judgment into your own hands, but that the matter shall be put in a course of trial, and will grant an injunction. But if a judgment were given against such invention in one case, and this judgment were used in another case, where there were different parties, it could not be used as a precedent in point of fact, but a precedent in point of law.

"The law says, that it is a most monstrous proposition that the rights of other individuals are to be decided in a case where they were no parties. The question, therefore, is open. Besides, the case of Mr. Hunter of Seaside, which the appellants found upon here as conclusive against the respondents, was one much doubted about. A noble and learned Lord, now no more, had great doubts with regard to it. Indeed, I know no individual who had not some doubts with regard to it. It does therefore appear to me strange to argue that that case of Mr. Hunter should conclude the present cases, and to the effect of granting interdict in these. Lord Rosslyn.

"As to patent rights, the law of the Court of Chancery, founded on the practice of ages is this, that if a man gets a patent, and lays out his funds in putting it into effect, the Court will grant an injunction against any infringement of his patent right, because such infringement may do the patentee irreparable injury; but he must come forward promptly to try the right if he is to have an injunction. No person ever said in this country, give me for my old possession an injunction against your possession of two or three years standing. The law says, you should have come in time to have entitled you to this remedy.

"The case of Hunter of Seaside concludes no such thing as that there should be an interdict in the present case, nor does what the Court have done in Lord Kinnaird's case,* conclude it. The case

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* This case is not reported; but it appears, that after the recall of the interdict in this case, Messrs. Little took a lease of fishings immediately adjoining to Mr. Hunter's, from Lord Kinnaird, and there proceeded to erect the same machinery, imagining that their case would be dealt with in the same favourable manner. But, on application to the Court for interdict, the Court (13th Feb. 1805) passed the bill, and granted the interdict, holding, that there was a difference between this and Mr. Maule and Mr. Dalgleish's cases, Lord Kinnaird never having had possession, until very recently assumed, and the situation of the fishings being the same as in Hunter of Seaside's case. *Vide* Lord President Campbell's Session Papers, (January, February, March, 1805.)

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of Hunter decides only that the species of fishing then objected to was illegal in that place. My notion of an interdict is, that an individual is not obliged to take notice of what is done in another case; the appellants, if they conceived themselves injured, should have promptly come into Court for an abatement of the alleged nuisances before the trial of the other case.

"It was urged that the stake nets were of small value, and therefore interdict might be granted; but this is not the whole case. To carry on the respondents' fishings, they might have a large establishment on the spot and elsewhere. If they were to be abated now, and if they could afterwards' show that they ought not to have been abated, the injury to these might be immense.

"Can it be said that the hardships on the other side are such as cannot be endured? A proprietor of a fishing higher up the river has a right to complain of impediments below if they are prejudicial to him. But the interest of the public is not at present before us, nor have the appellants any thing here to say on behalf of the public. If any person comes before the Court of Session pleading on the public behalf, that sort of case may have a different aspect.

"In a case like the present, especial regard is to be paid to the charters. The slightest and most ambiguous words, joined to usage, may have great effect. The public may perhaps be as much benefitted as prejudiced by these nuisances.

"On these grounds I subsumed to your Lordships, that it would be a very strong proceeding to reverse the judgment in this case.

"As to the case of the interdict granted in Lord Kinnaird's fishings, I cannot reason against the respondents on that case. It proves to me that the Court of Session, in that and in this case, saw that it was proper to discriminate between cases which were identically the same, and those which were not the same."

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Wm. Adam, R. Craigie.*
For Respondents, *Sir Samuel Romilly, M. Nolan, Thos. Thomson.*

NOTE.—An appeal was also brought by the same appellants, in the case with the Honourable William Maule of Panmure, and Charles Gray of Carse. It was disposed of at same time, and also affirmed, the Lord Chancellor's speech, as above given, having reference to both appeals. Both these cases are unreported in the Court of Session Reports.