

June 28. 1825. their right of fishing in the stream. These facts have not been inquired into at all. I cannot give any opinion whether it will turn out or not that these embankments are injurious to the right of fishing. It may turn out that they are not an injury at all; but the question is, whether your Lordships can decide that, not having the facts before you. They have alleged on the one side, that it is not an injury; and on the other side, that it is; and, without any proof, the Court have said, the embankment shall stand, although it may injure the right of fishing. Under these circumstances, although I regret very much that in this case there should be further expense and further inquiry, I do not see how it can be disposed of without remitting it to the Court of Session for further inquiry, to be obtained in the best way the Court can obtain that information. It may be that it is not a serious prejudice to the right, but when I find it is alleged that it is a prejudice, it appears to me that it would be rather unjust to the parties to determine that question without farther inquiry; and therefore I should request your Lordships to affirm all the interlocutors complained of, except in so far as in the said action of declarator the Court sustained the defence, and assoilzied the defender from the conclusion of the libel respecting the bulwark or embankment erected against the said river; as to which part of the said interlocutor, remit the cause back to the Court of Session to review the same, and to inquire, in such manner as the said Court may think right, whether the said bulwark or embankment is so constructed as to be injurious to the right which the appellant has of fishing in the said river, and in a manner not necessary to its utility as a bulwark or embankment, which is the allegation made on the part of the appellants. It seems to me that justice cannot be attained in the case without inquiring, if the appellants choose to prosecute it.

Appellants' Authorities.—Lord Monymusk, July 15. and Dec. 18. 1623, (10,840. and 14,264.); Mathew, Jan. 18. 1612, (14,263.); 1. Dallas's Styles, 208.

Respondent's Authorities.—2. Ersk. 6. 15. and 1. 5.; Farquharson, June 25. 1741, (12,779.); Fairlie, Jan. 26. 1744, (12,780.); Magistrates of Aberdeen, Nov. 22. 1748, (12,787.); Trotter, July 9. 1757, (12,798.); Earl of Kinnoul, Jan. 18. 1814, (F. C.)

DUTHIE—FRASER,—Solicitors.

No. 51. WILLIAM DALGLIESH, Esq. of Scotsraig, Appellant.

JOHN DUKE OF ATHOLE, and Others, Respondents.

Interdict—Salmon Fishing.—Circumstances under which (reversing the judgment of the Court of Session) a party, who had been interdicted from fishing by stake-nets within certain bounds, was held not to have committed a breach of the interdict.

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2D DIVISION.

IN 1804 the respondents, proprietors of lands on the upper banks of the river Tay, raised an action of declarator and interdict against the appellant, and others, inferior heritors, holding rights of salmon fishing both in the river Tay and in the sea, setting forth, that these inferior heritors had unlawfully made use of stake-nets, and therefore concluding, that ‘ it ought and
‘ should be found and declared, by decree of the Lords of
‘ Council and Session, that the said defenders have no right, by
‘ themselves, or others employed or authorized by them, to
‘ erect or use the yairs, stake-nets, or machinery aforesaid, or
‘ other machinery of the same nature, for the purpose of catching
‘ salmon or other fishes in the said river of Tay;’ and for interdict ‘ against erecting or using in future the machinery foresaid,
‘ or other machinery of the same nature, for the purpose of catching salmon or other fishes in the said water or river of Tay, in all
‘ time hereafter.’ On the 7th March 1812, the Court of Session sustained the respondents’ title for having the ‘ yairs, stake-nets,
‘ and other machinery of the same nature removed, as having
‘ been placed within the high-water mark, for the purpose of
‘ catching salmon, or other fishes, opposite to lands bounded
‘ by the river, firth, or water of Tay, on those sides or parts
‘ where such yairs, stake-nets, or other machinery, are placed,
‘ and as far down as Drumley-sands, without prejudice to the
‘ rights of such of the defenders as have fishings in the sea; repelled the defences, and found and declared, that the defenders
‘ have no right, by themselves, or others employed by them, to
‘ erect or use yairs, stake-nets, or other machinery of the same
‘ nature, for the purpose of catching salmon, or other fishes, within
‘ the foresaid bounds; decerned and ordained the defenders to desist and cease from using the yairs, stake-nets, and other machinery complained of, and to demolish and remove the same; and
‘ prohibited and interdicted them from erecting or using in future
‘ the machinery foresaid, or other machinery of the same nature,
‘ for the purpose of catching salmon, or other fishes, within the
‘ said bounds, and decerned accordingly.’ On appeal, the House of Lords ordered and adjudged, ‘ That the said interlocutor
‘ complained of be varied, by inserting after the words “ as far
‘ down as” the words “ the east end of,” and by leaving out
‘ after the word “ sands” the words “ without prejudice to the
‘ rights of such of the defenders as have fishings in the sea.”
‘ And the Lords find, that the river, frith, or water of Tay, extends at least as far down as the east end of Drumley-sands.
‘ And it is declared, that attending to the nature of the sum-

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 ‘ with respect to any rights of fishing claimed in the sea. And
 ‘ it is further declared, that this judgment is to be without pre-
 ‘ judice to any application made, or to be made, to the Court of
 ‘ Session in this cause, for the purpose of ascertaining whether
 ‘ the river, water, or frith of Tay, doth or doth not extend far-
 ‘ ther to the eastward than Drumley-sands; and in case the
 ‘ Court shall find that such river, water, or frith doth so extend,
 ‘ nothing in this judgment contained is to prevent the Court
 ‘ from making any such order as may be just and according to
 ‘ law, touching or relating to any yairs, stake-nets, or other ma-
 ‘ chinery of the same nature, within the high-water mark, placed
 ‘ for the purpose of catching salmon or other fishes opposite to
 ‘ any lands to the east of Drumley-sands, which shall be found
 ‘ to be bounded by the said river, frith, or water of Tay. And
 ‘ it is farther ordered and adjudged, that, with these variations
 ‘ and declarations, the said interlocutor complained of in the
 ‘ said appeal be, and the same is hereby affirmed.’ The
 case having then returned to the Court of Session, their Lord-
 ships, on the 8th July 1817, pronounced this interlocutor:—
 ‘ Find, that the eastern end of the Drumley or Drumlaw-sands,
 ‘ is the eastern end of the sand-bank denominated Abertay on
 ‘ some of the charts referred to, lying on the southern side of the
 ‘ river or frith of Tay, and as delineated and marked Abertay on
 ‘ the plan in process, made by John Bell, and referred to and
 ‘ signed by Mr James Jardine, civil engineer, as relative to his
 ‘ report: remit to the said James Jardine to draw a straight line,
 ‘ south and north, from the said eastern end of the Drumlaw or
 ‘ Drumley-sands, now called Abertay, as delineated on the afore-
 ‘ said plan, and mark the points where the said line intersects
 ‘ the northern and southern shores: Find, that the river, frith,
 ‘ or water of Tay, extends as far down as the line so to be drawn;
 ‘ sustain the title of the pursuers in this action to have such yairs,
 ‘ stake-nets, and other machinery of the same nature, removed;
 ‘ as have been placed within the high-water mark for the purpose
 ‘ of catching salmon or other fishes opposite to the lands bounded
 ‘ by the river, frith, or water of Tay, as herein described, and
 ‘ to be marked on the said plan; repel the defences, and find
 ‘ and declare that the defenders have no right, by themselves, or
 ‘ others employed by them, to erect or use yairs, stake-nets, or
 ‘ other machinery of the same nature, for the purpose of catch-
 ‘ ing salmon or other fishes within the aforesaid bounds as now
 ‘ extended; decern and ordain the defenders to desist and

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‘cease from using the yairs, stake-nets, and other machinery
 ‘complained of, and to demolish and remove the same; and
 ‘prohibit and discharge them from erecting or using in future
 ‘the machinery aforesaid, and other machinery of the same
 ‘nature, for the purpose of catching salmon or other fishes
 ‘within the said bounds, and decern accordingly.’ On ad-
 ‘vising a report by Mr Jardine, their Lordships, on the 21st
 ‘November, ‘approved of the report, and of the additions to the
 ‘printed plan in process, which is subscribed by the Lord Justice-
 ‘Clerk, of this date, as relative hereto : Find, that the river, frith,
 ‘or water of Tay extends as far down as the line described in the
 ‘petition ; and that the prohibition and interdict contained in the
 ‘judgment of the Court extends to all the fishings above, or to
 ‘the westward of that line, and decern.’

The estate of the appellant, Mr Dalgliesh, is bounded on the north by the river, and on the east by St. Andrew’s Bay, forming part of the North Sea or German Ocean. The respondents, alleging that he and his tenant, James Halliday, were engaged in fishing salmon by stake-nets within the prohibited bounds, presented a petition and complaint to the Court of Session against them for breach of interdict, and praying that they should be ordered to remove the stake-nets, and be found liable in damages and expenses. In defence they stated, that the stake-nets were placed within the tide-mark of the North Sea or German Ocean, and not within the prohibited bounds. The Court, before answer, remitted to Mr Jardine ‘to visit and inspect the situation of the
 ‘stake-nets complained of, and to report to the Court whether
 ‘the complaint appears to him to be founded or not; and to
 ‘accompany his report with a plan, shewing the exact situa-
 ‘tion of the stake-nets, with such explanations as he shall
 ‘think necessary.’ A report was accordingly made, which, after describing the various localities, stated, that ‘in fine I
 ‘am of opinion, that the stake-nets complained of are all
 ‘placed within the tide-mark of the North Sea or German
 ‘Ocean, and that no part of any of the stake-nets in ques-
 ‘tion is placed within the tide-mark of the river or frith of Tay.’ Objections were then stated by the respondents to this report, in which they contended, that it was proved by ancient documents and title-deeds, that the place where the stake-nets were erected was within the bounds pointed out by the Court, and therefore, although Mr Jardine was of a different opinion, yet it could not rule the decision of the case. Their Lordships, on the 28th June 1823, on advising the proceedings, found the ap-

June 29. 1825. appellant and his tenant guilty of a breach of the interdict referred to, and ordained them to remove the stake-nets; ‘but in respect
‘the erection appears to have proceeded from mistaken notions
‘on the subject, and not from disrespect to the orders of this
‘Court, found no damages or expenses due.’*

Dalgliesh appealed.

Appellant.—The judgment finding him guilty of a contempt of Court, proceeds not only without evidence, but in direct opposition to the only evidence submitted to the Court, which was in his favour. From the report and plan of Mr Jardine it is established, that the stake-nets are situated not within the river, but in the sea; and as the interdict applies only to the river, it is impossible that the appellant can be convicted of a breach of interdict. Besides, the respondents did not allege that they were erected within the river, but only ‘near the mouth of the river
‘or frith of Tay.’

Respondents.—The river Tay flows from the west towards the east, and the mouth or embouchure is formed by Buddenness on the north side, and Tentsmoorness on the south. The point called Buddenness extends farther towards the east, or more to the ocean, than Tentsmoorness. From the latter point a long sand-bank, called Drumley or Abertay-sands, projects and stretches across to Buddenness, and has been uniformly considered as the boundary between the sea and the river. There are several channels through it, and particularly one which is denominated the West Pool, formed by a part of the bank stretching out towards the ocean. By the judgment in the declarator, the interdict was extended to the east end of Drumley-sands, meaning, of course, the extreme outer or southern edge. But the appellant has placed his stake-nets across the channel denominated the West Pool, being within the southern side of the bank, and consequently, both according to the spirit and words of the judgment, they are within the prohibited bounds.

The House of Lords ordered, ‘that the said interlocutor complained of in the said appeal be, and the same is hereby reversed, and that the petition and complaint be dismissed; but, inasmuch as the southern limits of the river, frith, or water of Tay, are not defined in the interlocutors pronounced upon this subject, to which the said petition and complaint bears reference, this judgment is to be without prejudice to the question, Whe-

‘ther the places where the stake-nets complained of in the said
 ‘petition and complaint were put, or any of such places, be or
 ‘be not within the limits of the said river, frith, or water.’

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LORD GIFFORD.—In this case it does not appear to me that the Court below ever fixed what was the southern boundary of the river or frith of Tay, or the limit betwixt it and the sea or St Andrew’s Bay. If that line or boundary were once fixed, it is my opinion that Mr Dalgliesh, or his tenant, might erect his stake-nets within six inches of that boundary line,—indeed, as close to that line as possible. I do not mean to give any opinion regarding the report of Mr Jardine, who was employed by the Court of Session to report as to the facts; and it appears to me to be of little consequence whether he be correct in principle or not. It is here quite clear, that the Court of Session never fixed a south boundary, and therefore there could be no contempt. Is it possible, if this case were remitted, that any further proceedings could take place under it?

Mr Keay.—My Lord, I am afraid not.

Lord Gifford.—Then the judgment must be reversed.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

MAGISTRATES of MONTROSE, and EWEN’S TRUSTEES, Appellants. No. 52.

ELIZABETH EWEN, Respondent.

Clause—Discharge.—Clause held (reversing the judgment of the Court of Session) to import a discharge by a daughter of all the rights competent to her as heir of provision under the postnuptial contract of her father and mother.

JOHN EWEN, a person of obscure parentage, commenced business in Aberdeen as a pedlar—then kept a stall, and latterly opened a shop there. In 1766, while his means were believed to be very scanty, he married Janet Middleton. By postnuptial contract of marriage, she conveyed to him her pro indiviso share of certain houses left by her father, and liferented by the mother; a bond for L. 100, also liferented by her mother; and her share of her father’s household furniture, valued at L. 43. 7s. On the other hand, Ewen, ‘in consideration of the said marriage, and of the disposition and assignation before-written conceived in his favour, ‘hereby, for him, his heirs, executors, and successors, and assignees, assigns, conveys, and dispones to and in favour of the said Janet Middleton, his spouse, her heirs and assignees whatsoever, in case she survive him, all and hail his whole goods, ‘gear, merchant-ware, and effects, of whatever kind, quality, or

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1ST DIVISION.
 Lord Kinnedder.