

*Respondents' Authorities.*—Cullen, p. 229 (edit. 1800); Hunter and Co. Feb. 25, 1825 (3 Shaw and Dun. No. 395); Dickson, &c. Dec. 2; 2 Shaw's App. No. 33; 1 Rose, 434. Feb. 23, 1831.

HINDMAN and GODDARD—MONCRIEFF and WEBSTER,—Solicitors.

HUGH ROBERT DUFF, Appellant.

No. 7.

THOMAS ALEXANDER FRASER, Respondent.

*Title to pursue—Fishing.*—Circumstances under which (affirming the judgment of the Court of Session) a party was found entitled to challenge a yair erected by another in a loch for catching salmon, although it was alleged that it was erected in virtue of a title derived from the predecessor of the objector.

SIMON, Master of Lovat, was infeft in the Lordship of Lovat, Feb. 23, 1831.  
comprehending the Barony of Beaully, through which the river  
Beaully (anciently called the Ferne) flows, and “in totis et  
“integris salmonum piscationibus super aquam de Ferne a  
“Carncross usque ad mare cum lie cruives et omnibus aliis  
“proficuis eisdem pertinen.” After passing through part of  
Inverness-shire, the river enters Loch Beaully, or Beaully Frith.  
This was said by Duff to be an arm of the sea, while Fraser  
averred that it formed part of the river. In 1638 the Master  
of Lovat granted a feu charter to Thomas Sheviz of the estate  
of Muirton, to which Duff had now right. The charter con-  
tained the following clause:—“Ac etiam salmonum piscationes  
“aliasque piscationes ad dictas terras spectan. ac potestatem  
“ædificandi lie zairs aut stells, et occidendi et captandi omnia  
“genera piscium tam salmonum quam leuchpheatorum piscium,  
“lie blue fishes, cum lie coble vel reta seu aliter intra lie pool  
“vocat. lie Roodpool, intra omnes bondas predict. terrarum de  
“Muirton, versus illam partem Maris vocat. Roodpool et  
“utendi omnia genera machinarum ad illud propositum neces-  
“saria modo in juribus et infeofamentis in favorem dicti Gu-  
“lielmi Duff mentionatis.” The deed also contained a clause  
of warrandice in these terms: “Et ab omnibus aliis periculis,  
“damnis, actionibus, impedimentis, et inconvenientiis quibus-  
“cumque, tam non nominatis quam nominatis, quæ huic  
“infeomento ledi seu prejudicare poterint dicto contractui  
“confirmiter in omnibus, contra omnes mortales warrantiza-  
“bimus ac quietabimus, et in perpetuum defendemus.”

2D DIVISION.  
Ld. Mackenzie.

Feb. 23 1831.

In 1746 Lord Lovat, the lineal descendant of the granter of the charter, was attainted of high treason, and his estates forfeited to the Crown. They were restored in 1774 to his son, General Fraser, who, after executing a strict entail, died without heirs of his body. Thomas Alexander Fraser eventually succeeded to the estates in virtue of this entail. He made up no title to the Master of Lovat; but in 1823 he obtained a service as heir male to a descendant of the Master, with the view, in the event of the restoration of the honours which had been enjoyed by the family, of having them conferred upon him.

Duff having begun to erect stake-nets within the Beauly Frith, about a mile westward from the entry to the Caledonian Canal, Fraser presented a bill of suspension and interdict to the Court of Session, which was passed. Duff thereupon abandoned the stake-nets, but proceeded to build a yair on the southern shore of Loch Beauly. Fraser then presented another bill of suspension and interdict, which was also passed, and the suspensions were conjoined. Duff maintained,—  
 1. That Fraser had no title to pursue, because his grant of salmon-fishing was confined to the River Beauly, and did not embrace the loch, which in his titles was described as the sea; 2. That, supposing he had a title, he was barred from objecting to the yair in respect that he represented the Master of Lovat, who not only granted right to a yair, but bound himself in absolute warrandice; and, 3. That as Loch Beauly formed part of the sea, and the yair was situated there, it was not objectionable. To this it was answered: 1. That Fraser did not represent the Master of Lovat, nor derive right to the estate from him; 2. That even if he did, the Master of Lovat could not authorize the erection of yairs, which were prohibited by statute; and, 3. That the loch did not form part of the sea, but fell under the description of “waters” mentioned in the statute prohibiting the use of yairs.

The Lord Ordinary pronounced this interlocutor:—“ Finds  
 “ that the suspender (Fraser) has a sufficient title to complain  
 “ of the yair erected or proposed to be erected by the  
 “ respondent (Duff) in case it shall appear that the said  
 “ yair is, or is proposed to be placed, not in the sea, but  
 “ in the River Beauly; and appoints the cause to be en-  
 “ rolled, that an order may be made for trying the question,  
 “ whether the place of the said yair or proposed yair be in  
 “ the sea or not.” His Lordship at the same time issued

the subjoined note of his opinion.\* Both parties reclaimed; Feb. 23, 1831.  
 Duff to the effect of being assoilzied, and Fraser to have it found that he had a title to pursue, although it should appear that the yair was not in the river, but was in Loch Beauly. The Court, on the 13th of November 1829, pronounced this interlocutor:—“ Find that the suspender (Fraser) has a sufficient title to complain of the yair erected or proposed to be erected by the respondent (Duff) on the suspender’s instructing that it is so situated as to fall within the prohibition of the statutes made as to the fishing of salmon; and with this variation they adhere to the interlocutor reclaimed against, and remit to the Lord Ordinary to proceed farther in the cause as to him shall seem just; all claims for expenses of process being reserved entire.” †

Duff appealed.

*Appellant.*—1. In the Court below the judgment was pronounced against the appellant, not on the ground taken by the Lord Ordinary, that the agreement was *pactum illicitum*, but on the construction of the clause, which, it was alleged, did not confer on the appellant a right to catch salmon by means of the yair. This, however, was an erroneous construction, for it is not disputed that a right of salmon-fishing was bestowed on the appellant, and at the same time, and in the same clause, the power of building yairs, and taking “ *omnia genera piscium tam*

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\* “ The Lord Ordinary is unable to see any ground of doubt that a *yair* in a river is even more clearly illegal than a stake net—stake-nets being not expressly prohibited, but held illegal, because equivalent to yairs, which were expressly prohibited; nor can he see sufficient evidence of a dispensary power in the Crown of Scotland from public statutes, such as could render yairs in rivers legal by Crown-charter; nor can he admit prescription or special custom against general statutes which are still in vigour. If, then, this yair was in the River Beauly, he considers that it was illegal; and if it was illegal, any warrandice in a grant of it was *pactum illicitum* and utterly null. The Lord Ordinary does not think that it could be pleaded even in bar of the right of the granter to enforce the statute, still less in bar of the right of the present complainer, who cannot represent him in a *pactum illicitum*. It would be particularly difficult to derive such a representation through the Crown by a gift of forfeited estates. The Lord Ordinary was averse at first to pronounce the above judgment, in consequence of the case of *Dumbarton*; but as he does not find that the Court held that case to be undoubted law, he does not think himself at liberty to rest upon it, in the face (as it seems to him) of the statutes.”

† 8 Shaw and Dunlop, 14.

Feb. 23, 1831. “salmonum quam leuchpheatorum piscium.” The plea of pactum illicitum is inapplicable, and has been suggested by confounding the right of challenge for public benefit with the private right of challenge for patrimonial interest.

2. The respondent admits that he has served heir to a person who connects him directly with the granter of the charter; and although it is said that the service was obtained merely with a view to the honours, yet it is unqualified, and necessarily imports a representation. He is therefore as much bound by the terms of the grant as if the question were with the Master of Lovat himself, and it is certain that he could not have objected to the erection of the yair which he had expressly authorized.

3. In the titles the Beaully Loch is expressly described as the sea; and at all events the question, whether the statutes be applicable to such a local situation as that of the appellant's yair, being a point of law, ought to have been decided by the Court, and not sent to a jury.

*Respondent.*—1. All kinds of fish may be taken by yairs, with the exception of salmon, as to which there are repeated statutory prohibitions, directed not only against all the lieges, but even against the Sovereign himself. It is therefore not to be presumed that any such grant was intended or conveyed; and the clause on which the appellant rests truly imports merely a right of erecting yairs for taking other fish, and not a right to catch salmon with them. But, separatim, the grant of a right of salmon-fishing by yairs, being contrary to statute, is illegal; and any warrandice to the effect of enforcing it is pactum illicitum, and consequently not binding.

2. By the attainder of Lord Lovat the line of blood was cut off, and the estates became vested in the Crown. These were restored; and it is from the Crown, as the original author, without the interposition of the granter of the charter, that the respondent derives right to the estates, and therefore he does not in this respect represent him. Again, as to the service, it was taken merely to prove the respondent's collateral connexion with the family, and in order to have the honours conferred upon him in case they should be restored.

3. The question, whether Loch Beaully formed part of the sea, or not, is one of fact, and proper to be submitted to a jury, acting under the direction of a judge, who will tell them whether in point of law the yair falls within the prohibition of the statutes.

LORD CHANCELLOR.—My Lords, As I am to propose to your Lordships to affirm the interlocutor appealed from, I shall not detain you by any observation. I have no doubt that the Court of Session have come to a sound conclusion. As the Court, though unanimous, gave leave to appeal, I shall not propose costs. Feb. 23, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

*Appellant's Authorities.*—Forbes, Dec. 3, 1701 (7,812); 2 Stair, 3, 70; Chisholm, June 17, 1801; (No. 1. Appendix, Salmon-fishing;) Kintore, May 31, 1826; (4 Shaw and Dunlop, 641, and July 11, 1828; *ante* 3, 261;) Magistrates of Dumbar-ton, Jan. 16, 1813. (F. C.)

*Respondent's Authorities.*—Statutes, 1488, c. 16; 1563, c. 68; 2 Ersk. 3, 31.

PALMER—A. M'RAE,—Solicitors.

WILLIAM BRACK, Appellant.—*Robertson—Sandford.*

No. 8.

GEORGE JOHNSTON, ADAM HOGG, and Others, Respondents.—  
*Lord Advocate (Jeffrey)—D. M'Neil.*

*Writ—Foreign—Trust.*—Held (affirming the judgment of the Court of Session), that a trust-disposition of heritage duly tested, containing a direction to the trustee to convey to any person to be nominated by the truster, together with a testament executed according to the forms of Jamaica, where the truster resided, but not of Scotland, bequeathing his heritage to a particular person, constituted an effectual right in favour of that person, exclusive of the heir-at-law.

DANIEL VIRTUE, a native of Scotland, and proprietor of an heritable estate there, resided in Jamaica, where he possessed considerable property. On the 30th of April 1822 he executed a trust disposition in Jamaica, which was duly tested according to the rules of the law of Scotland. After narrating that he had confidence in the trustee therein named for executing the trust reposed in him, he “did by these presents dispone, assign, convey, and make over, to and in favour of George Johnston, farmer in Yetholm Mains in the county of Roxburgh, North Britain, and his heirs and assignees, as trustee for the uses and purposes after mentioned, all and whole, &c., with all right, title, and interest, I, my predecessors and authors, heirs and successors, had, have, or may have to the said subjects; but declaring always that these presents are granted by me, and accepted of by the said George Johnston, in trust for the ends

Feb. 25, 1831.

2<sup>D</sup> DIVISION.  
Lord Medwyn.