

there is here two different subjects, one to be carried by arrestment, the other by adjudication, it was a groundless notion was always my opinion, and so the Lords continued to think; and that were there no payment made to Earl Cassillis, but that the subject remained *in medio*, the Lord Cassillis could not take his payment otherways than, in the first place, in extinction of his annual-rents, as I have fully stated on a former paper; and indeed to say otherways, were to introduce a new form of ranking hitherto never heard of before."

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1755. *August 9.* STRAITON of Kirkside *against* SCOTT of Comiston and FULLERTON of Kinnaber.

IN this case Lord KILKERRAN was Ordinary, and reported it to the Court.—His Lordship's report, bound up with the Session Papers, is in the following terms:—

"In 1581, A charter is granted to the predecessor of Straiton of Kirkside, of his lands of Kirkside, in the shire of Kincardin, *cum piscariis salmonum in mari infra limites et bondas dictarum terrarum*, in terms of which charter it is admitted, at least supposed, that he and his predecessors have been in use to fish upon the sea opposite to his said lands.

"In 1672, A charter is granted to Fullarton of Kinnaber of the lands and barrony of Kinnaber, in the shire of Forfar, *cum piscationibus salmonum in aqua de Northesk tam intra fluxum maris tam extra eundem in quavis parte dictæ aquæ ex adversa dictarum terrarum et baroniæ de Kinnaber*.

"There is produced for Colonel Scott a charter granted to his father, in 1708, of the lands of Wardroperton, which lie on the north side of the river Northesk, in the shire of Kincardin, for the river is the march of the shires, *juxta et infra bondas predictarum terrarum de Wardroperton*. These are all the clauses in the charters that are necessary to mention; for though Kinnaber had also a part of the fishings on the north side of the river, respecting one half of the lands of Wardroperton, which also belonged to his predecessors, yet that has no influence in the present question, and therefore shall not trouble your Lordships with resuming these rights, though you have them stated in the information for Kinnaber, and Colonel Scott.

"Had the river continued to run in the manner it did when these several rights were granted, there could have been no question betwixt the parties, as their rights stood clear of each other; the river Northesk, which is the march between the two shires of Forfar and Kincardin, did then empty itself into the sea, within the bounds of the lands of Kinnaber; and while it did so, Kinnaber had his fishing in the river, *tam intra tam extra fluxum maris*, without any body to interfere with him; so had Colonel Scot's predecessors his fishing in the river on the north side thereof, without any body to interfere with him; and so had Kirkside the free exercise of his fishing in the sea, *ex adverso*, of the lands of Kirkside, without interfering with any of the other two.

"But it has happened that the river, which formerly ran into the sea at low ebb, *ex adverso*, of the lands of Kinnaber, has, by degrees, taken its course so far

northward, that now, when the sea is at low ebb, the river keeps its course through the sands, not only till it passes the lands of Wardroperton, but till it is considerable in, by all the south march of the lands of Kirkside.

“ And that change in the course of the river, is what has occasioned the question between the parties, which I am now to state.

“ Kinnaber claims a right to fish upon the sea, as far as the river extends, at low ebb, and so backwards, as the sea advances towards the lands, and to debar Kirkside from fishing in the sea, where it covers the course of the river, notwithstanding it be within the description of his grant, *ex adverso* of his lands.

“ And accordingly he *via facti* interrupted Kirkside's fishers, when fishing in the sea, opposite to his lands of Kirkside, as an incroachment upon his right of fishing in the river *intra fluxum maris*.

“ Of this, Kirkside complained to the Sheriff of Kincardin, within which shire the lands of Kirkside, as also the lands of Wardroperton lie, who after taking a proof of Kirkside's possession, pronounced an interdict, whereby, after finding Kirkside's possession proven, and that the persons complained upon had voluntarily dispossessed him, he ordered them to cede the possession against a day certain, under a penalty of L.20, and discharging them for thereafter to disturb him, under a penalty of L.5 *toties quoties*, but prejudice the defenders to declare their right as accords; but the Sheriff afterwards declining to put his interdict in execution, as Kinnaber himself, against whom it was pronounced, did not reside within his jurisdiction, and who continued to fish himself and debar Kirkside, it became necessary for Kirkside to pursue the present process, for having it found and declared, that, in terms of his grant, he had the sole right of fishing in the sea, *infra limites et bondas* of his lands.

“ I having already stated the terms in which either party's charters are conceived, and the question is, whether Kirkside's right to fish in the sea *infra limites et bondas* of his lands of Kirkside, be restricted by the accident of the river's happening to keep its channel in the sands, when the sea is out, and liable to be yet farther restricted, as the river shall keep its course in the sands yet more, notwithstanding which in time may cross the whole lands, and so extinguish his fishing altogether, or if Kinnaber's right of fishing in the river must cease how soon it comes to be lost in the sea, within the bounds and limits of Kirkside's lands.

“ It is in general observed for Kirkside, that this were a new way of extinguishing a man's right of fishing in the sea, that the water happens, by accident, to change its course and run into that part of the sea whereby it does not cease to be sea, as before, and the water itself is incapable of fishing by nets, till by flowing of the tide it be sunk into the sea. This in general, says Kirkside, is a method of extinguishing or transferring property unknown in the feudal law of Scotland.

“ But more particularly it is observed for the pursuer, that Mr. Fullarton of Kinnaber's right of fishing, which is only in the water of Northesk, does not convey any right to fish in the sea at all, but only in the river; true the grant of fishing in the river is *tam intra quam extra fluxum maris*, where the sea flows as where it does not reach; but still that is only in the river; and how soon or how long the river is sunk into the sea, the fishing, which is only in the river, does not extend to the sea.

“ But, *2dly*, says the pursuer, I have no occasion to plead the point so high, for supposing the grant to comprehend fishing in the sea, when it covers the channel of the river, yet that can by no construction go farther than the bounds and limits of his barony; the words are, *in quavis parte aquæ ex adverso dictarum terrarum et Barronie de Kinnaber*; and as for Colonel Scot, the pursuer observes, that there is no word of the sea in his right.

“ It is to this ANSWERED for the defenders,—That the pursuer’s construction of these words, *tam intra quam extra fluxum maris*, as if that meant only a right to the fishing in the river, while it retains its name, is erroneous, for that it plainly comprehends also fishing in the sea, where it covers the channel of the river, and that so their possession, past memory of man, has explained it; and that being the case, insist that they have a right to fish in the sea whenever it covers the channel of the river, whatever change the river may happen to make in its course, for still it is the river.

“ And as to the argument from the tenor of the grant, as limiting the fishing in the river, *ex adverso dictarum terrarum et Barronie de Kinnaber*;

“ That the intention of these words in the clause, was no otherwise than to point out the upper bounding of the fishing, to settle marches between Kinnaber’s fishing and the fishing of the superior heritors, and so the words are, *tam extra eundem ex adverso dictarum terrarum*; but by no means to limit the fishing towards the sea, the grant as to that being general, *intra fluxum maris*; that is, as far down as the lowest ebb, and which, as has been said, comprehends the sea so far as it covers the channel of the river.

“ It was in the last place said for the pursuer, that suppose the grant to Kinnaber were to be taken as large as he pleads it, that it was to be understood to follow the river whatever course it should take, which the pursuer does not admit, yet it cannot be farther than this, that he can follow his fishing on the river as long as the river continues to be known at low water, at any place where no other party has a right of fishing in the sea; but if the river shall, by changing its course, come to run into the sea within the bounds of the right of another, he cannot follow his fishing on the river when it comes within the bounds of the pursuer’s right, which cannot be hurt by the change of the course of the river.

“ The answer to this, the contrary proposition, is rather true, that when the river comes to take its course, so as to enter the sea within the bounds where the pursuer was in use to fish upon the sea, the pursuer must retire, because he has no right to fish upon the river, but only in the sea.

*Nota.*—“ It is sea when the tide covers the channel, though the channel of the river be under the sea. It is also river so far as the channel is known when the water is at low ebb, and remains to be river when the tide flows, though the channel be covered by the sea; *ergo*, both have right, Kinnaber to the river fishing, and Kirkside to the sea-fishing, which fully justifies the second interlocutor.”

[LORD KILKERRAN’S report ends here.]

*July 8, 1752.*—The Court, upon advising informations, “ Find that John Fullarton of Kinnaber, and John Scott of Commiston, defenders, have right, in virtue of their several grants, to fish in the river of Northesk, notwithstanding its changing its course, till they come to the highest flood-marks where the sea touches the land along the shore; and that Arthur Straiton of

Kirkside, pursuer, has right to the fishing within the highest flood-mark, at all times, whether the sea be covering a part of the said river or not; and that each party has accordingly a right, exclusive of the other."

The defenders petitioned against this interlocutor; but before the petition and answers were advised, they presented an additional petition, setting forth that the arguments hitherto used in this question had proceeded upon the conception of the grants in favour of the several parties: but as the judgment formerly pronounced by the Court, was such as must necessarily have a great influence over all the other river fishings in Scotland, the defenders apprehended that the uniform practice which had prevailed with regard to other fishings, must have a considerable weight in the determination of the present question; that it might prove of most dangerous consequence to explain the grants of such fishings different from what they had been understood by the whole nation, or to give them a different effect from what they had universally received as far back as history or tradition go; that the defenders had reason to believe that the general practice of the river fishings in Scotland was such as would support their present claim; that they would only offer to the Court some instances of the most considerable fishings in Scotland; that Mr. Scott of Logie, and Mr. Rennie of Ulysses-Haven, have a general grant of the fishings on the river Southesk, without any particular addition or description,—yet, in consequence of these rights, they exercised their fishings in the river where it empties itself into the sea at lowest ebb,—and the town of Montrose, which has the right to the salmon fishing upon the sea coast adjacent to the river, always kept at a distance from the channel of the river; that in the same manner the proprietors of the fishings near the mouths of the rivers *Dee* and *Don* had always been in use to exercise an exclusive right of fishing upon these rivers, within the sea-mark, down to the lowest ebb, without any challenge from the town of Aberdeen, which had a right of sea-fishing on the coast adjoining to these rivers; that these facts were of consequence in the determination of the present question, and were a sufficient evidence of the general sense of the nation, that grants from the crown of salmon fishings in rivers had always been understood to extend to the lowest water-mark, and that grants of fishings on the sea coast have not hitherto given any right to the grantees to fish upon a river. The pursuer therefore prayed, that if these facts were disputed, or if any difficulty remained, they might be allowed a proof of the practice with regard to the above-mentioned fishings, and other fishings in Scotland.

Upon advising the petition and answers, with the additional petition for the defenders, 18th November, 1752, the Lords " Found that the defenders, notwithstanding the change of the channel of the river, have a right to fish down to the lowest flood mark; but found that the pursuer, in right of his infeftments in the fishing in the sea, has a joint right of fishing with the defenders above the lowest flood mark when the river is covered by the sea opposite to the lands of Kirkside, so long as the river occupies a channel opposite to the said lands; and remitted to the Lord Ordinary to proceed accordingly, and to hear parties upon the limits of their several lands, and to do therein as he should see cause."

Both parties petitioned against this interlocutor, (19th December, 1752,) and as they differed in sundry facts, the Court, " before answer, ordained each party to give in a condescendence how the lands lie, and how the river runs."

A proof was taken by both parties.

The pursuer maintained that the following facts were established by the proof in his favour:—

*1st*, That the Wynd-Path had immemorially been considered as the march betwixt the fishing of Kirkside, belonging to the pursuer, and the fishing of Wardropertoun, belonging to the defenders; and that the pursuer, and his ancestors, for time past all memory, have been in use to fish from that place eastward, along the shore and sands of Kirkside, at all times of the tide, without interruption, and exclusive of all others; till of late, and upon occasion of the river of Northesk's changing its course, and running to the east of the Wyndpath, along the aforesaid land, the defenders had pretended to fish to the east of the Wyndpath, along the sands of Kirkside, opposite to the pursuer's lands, where the new course of the river runs, till it joins the sea at low water.

*2dly*, The change of the course of the river, and situation of the several lands belonging to the parties as above described, and as taken down in a plan exhibited to the Court, is also clearly proved, and

*3dly*, It is proved, that the salmon fishing is much better up the river to the west of the Wynd Path, and in the defender's property, than to the east of the Wynd Path, where the pursuer has a right of fishing, which has been exercised by him and his predecessors; and this notwithstanding the defenders had alleged, that if the pursuer was allowed an exclusive right of fishing from the Wynd Path eastward, it would be a total forfeiture of their right.

The defenders on the other hand maintained, that by the proof it appeared that the lands on the south side of the river Northesk belonged in property to the defender, John Fullerton, and that the lands on the north side belonged to the other defender, Col. John Scott; that the defenders were in use to follow the course of the river, and to fish down to the lowest ebb without the least interruption or challenge, as far back as the witnesses can remember, till within these few years, that the pursuer began to claim a right to these fishings. That though the pursuer had been in use for several years to extend his sea fishing as far south as the line drawn from the gate-way of the house of Kirkside, through the Wynd Path down to the sea; yet there were two ridges or butts of land, lying on the north side of this line, which were the property of the defender Col. John Scott; and several witnesses depose, that the boundary of their respective sea fishings was even farther north than these two ridges or butts of land. That the defenders' fishings in the river were of considerable value, and paid feu-duties, minister's stipends, teind duties, and land-tax, to a considerable extent; and that the pursuer's fishings paid none of these, and only yielded L.30 Scots, or L.2, 10s. Sterling yearly, before the river began to alter its course and run more northerly.

26th July, 1755.—After hearing a debate upon the proof, the Court “Found that the pursuer, Arthur Straiton of Kirkside, has the sole and exclusive right of salmon fishing within the bounds and limits of the lands of Kirkside, at all times of the tide, as far west as a straight line drawn from the gate-way of the house of Kirkside, through the Wynd Path, down to the sea: And found that the defenders, John Fullerton of Kinnaber, and John Scott of Commiston, have no right to fish eastward of that line; and decerned and declared accordingly.”

*N. B.* This case having been appealed, the following judgment was pronounced by the House of Lords:—

“*Die Jovis 8 Aprilis, 1756.*—Ordered and adjudged, That the said interlocu-

tors of the 8th July and 18th Nov. 1752 be reversed, and that the interlocutor of the 26th July, 1755, after the words (sole and exclusive right of salmon fishing,) these words (in the sea) be inserted ; after the words (within the bounds and limits of the lands of Kirkside,) the words (at all times of the tide) be left out ; and that after the words (through the Wynd Path down the sea,) these words be inserted (but has no right of salmon fishing in the river Northesk, so far and at such times as the stream or water of the said river can be distinguished from the water of the sea.) And it is hereby further ordered and adjudged, that with these variations, the last mentioned interlocutor, and the interlocutor of the 9th August, 1755, adhering thereto, be and the same are hereby affirmed."

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1755. *November 26.* DAVID FORBES, minister at Bayne, *against* JOHN MILLER, factor upon the sequestrated estate of Carleton.

THIS case is reported in the *Faculty Collection*, (*Mor.* p. 5127,) where the facts and arguments of the parties are stated. Lord KILKERRAN has the following note of the decision:—

"June 21, 1755.—Found that the minister, being already possessed of glebes to a greater extent than a legal glebe, he is not entitled to more, and dismissed the action.

"The President took occasion to say that if there only be kirklands in the parish that are arable, then there is L.20 given, but if there are no kirklands in the parish, he has no right to the L.20 at all.

"There is indeed one decision which seems to favour a different doctrine from that which the Lords have established by the decisions now given. It is observed by Dury, 22d January, 1631,—Where the minister of Innerkeithing, who had no glebe at Innerkeithing, where he resided, and was found entitled to have designed to him, notwithstanding of his having the glebe of another parish that had been annexed to Innerkeithing; but the Lords were now of a different opinion from that decision, not moved by the only argument that occurred for it, that a glebe does not answer the purpose unless it be contiguous to the minister's residence; that argument having, as the President observed, been often overruled when pled for a minister to have his glebe brought together, which lay discontinuous, and the utmost length they could go could only be for an excambion."

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1756. *January 13.* M'ALLUM *against* Sir RO. GORDON, &c.

"JOHN M'ALLUM as executor creditor, confirmed to Mr. John Bouer, late minister of the parish of Duffus, pursued Archibald Dunbar of Newton, the patron of the parish, and Sir Robert Gordon as heritor of certain lands in the parish before the sheriff of Elgin and Forres, for payment of certain bygone stipends, due to the said deceased Mr. Bouer, and libelled the arrears due for each particular year,