

doctrine, because there is little danger that consent will be refused where an adequate consideration is offered; at all events, the right of private property is sacred.

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Others thought, that as there was no property in running water, each conterminous heritor might take every lawful use of it, without the consent of the other. How far the erection of machinery is a lawful use, (it was observed,) will depend upon the circumstances of the case; it must be considered as such wharver the opposite heritor is not thereby prevented from doing the same on his side of the river.

"THE LORDS suspended the letters *simpliciter*, and continued the interdict." And, upon advising a reclaiming petition and answers, "they adhered."

Lord Reporter, *Dreghorn*. For the Suspenders, *Dean of Faculty, M. Ross, John Millar, jun.*  
For the Chargers, *Lord Advocate, Solicitor-General, Wight, Rolland, Arch. Campbell, jun.*  
Clerk, *Sinclair*.

D. D. *Fol. Dic. v. 4. p. 175. Fac. Col. No 43. p. 89.*

1793. December 21.

SIR JAMES COLQUHOUN *against* The Duke of MONTROSE and OTHERS, and  
The MAGISTRATES of DUMBARTON.

SIR JAMES COLQUHOUN has a right of salmon-fishing in Lochlomond and the river Leven, which his predecessors had, for some time prior to the 1760, (how long, was disputed, and was the subject of proof,) been accustomed to exercise by means of masking-nets, the meshes of which were from six to eight inches wide. These nets were put loose into the water, a little above the mouth of the river, and reached as near the shore on each side as there was depth of water for a coble. They were sunk on the one side with slates, and kept up on the other by cork; and to prevent their being carried down the stream, they were supported by, but not fastened to stakes stuck into the channel at certain distances from each other, leaving an empty space of about twenty feet in the middle, in order to allow boats to pass.

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No length of possession can authorise any obstruction to the navigation of a public river.

In 1760, this fishing was let to an English Company, who made several alterations in the mode of conducting it. The stakes were now brought much closer to each other, and nets of a much stronger texture, and narrower in the mesh than those formerly used, were fastened to them both at top and bottom. Besides, at one place there was an opening left in the nets, by which the salmon were allowed to get into a *stell*, *i. e.* a complete inclosure of stakes and close nets, from which the salmon could escape only at the place of their entry.

Certain heritors claiming a right of salmon-fishing in Lochlomond, or the river of Enrick, which runs into it, brought an action of declarator, complain-

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ing of the injury done to the fishing, and the obstruction in the navigation of the river, occasioned by this practice.

The Magistrates and Town of Dumbarton, who have a right of salmon-fishing in the Leven, brought a similar action, which was conjoined with the former.

THE COURT, 4th December 1789, found, That the Town of Dumbarton had a right to insist in the action, and that Sir James Colquhoun had produced no right to a cruive-fishing in the river Leven, nor to erect therein the engines complained of.

Sir James then raised an action of declarator, concluding, *imo*, That the upper heritors had no right of salmon-fishing, and consequently none to controul him in the exercise of his right; *2do*, That the mode of fishing practised before 1760 was legal.

All the three actions were conjoined, and a hearing in presence was ordered. The Upper Heritors and Magistrates of Dumbarton

*Pleaded*; *imo*, The various enactments of the Legislature, relating to salmon-fishing, from the statute of Alexander II. c. 16. downwards, have had in view the interest of the public, in the preservation of the breed of salmon, and that of the heritors who have a right of salmon-fishing. Indeed the interest of both coincides; and as one heritor might so exercise his right as to destroy the interest of all the rest, any obstruction in the channel river, whether occasioned by set-nets or otherwise, which should have that effect, must have been illegal, even at common law.

The most common obstruction was that of cruive-dykes, and accordingly to them the attention of the Legislature has been chiefly directed. Various enactments have been made with regard to the width of the hecks, Saturday's slop, &c. and cruives are prohibited altogether, unless in the case of persons who are infest in, and have possessed a right of using them; 1581, c. III.

But it was just as necessary for the Legislature to prohibit every other obstruction, and particularly that occasioned by nets, which should be equally destructive of the salmon; and accordingly several statutes have been made for that purpose; 1469, c. 37.; 1685, c. 20. Similar regulations also take place in England; Babington on the Statutes, Magna Charta, 2 Henry VI. c. 15.

The Court have already found, that Sir James has no right to cruive-fishing; the mode practised by him is much more dangerous to the salmon, as it cannot be regulated with the same precision, and it falls both under the letter and spirit of the acts; 26th February 1704, Carnegie of Finhaven, *voce* SALMON-FISHING; 7th December 1762, Callander of Craigforth, *IBIDEM*; 4th July 1769, Brotherton, *IBIDEM*; 21st December 1750, Mackenzie of Rosehall, *IBIDEM*. Besides, Sir James has not even had possession of the method complained of, during the years of prescription. At any rate, no length of time can authorise an illegal practice.

2do, The mode practised impedes the navigation of the river, and on that account alone any heritor may insist on its being stopped.

*Answered*; Every heritor on the banks of a river, unless in so far as restrained by positive regulation, has a right of occupancy in the salmon it contains, which he may exercise as he thinks proper. None of the enactments on this subject were meant to regulate the rights of individuals. Their object was, as a matter of police, to prevent the breed of salmon from being destroyed; and so great is their fecundity, that provided the fry are preserved, there is no occasion, for this purpose, to take charge of the grown salmon. Accordingly, no mode of catching the latter, whether by cruives or otherwise, though some of them have been subjected to regulations, has ever been prohibited as illegal; Kames's Statutes Abridged, Alexander II. c. 16. Robert I. c. 12.; 1477, c. 73.; 1489, c. 15. while on the other hand certain practices, destructive of the former, have been altogether forbidden, 1424, c. 10.; 1457, c. 85.; 1469, c. 37.

The act 1581, c. 111. did not prohibit cruives in general; and it appears from the statute 1685, that a person claiming a right to them must be infeft in a right of salmon-fishing, which by possession may be explained to be a right to cruives, in the same manner as a right of fishing in general may be extended to a right of salmon-fishing. For the same reason, Sir James has acquired right to the fishing in question, which is of an inferior sort to that of cruives, and being prohibited by no statute cannot be illegal; 26th January 1665, Heritors of Don, *voce* SALMON-FISHING.

*Observed on the Bench*; Every heritor, through whose lands a public river runs, has a right to all the ordinary uses of it; but the channel is *juris publici*. The Crown may give a right of salmon-fishing, but it can give no right of placing any permanent obstruction in the channel. The fishing claimed being on that account illegal, every heritor has a right to prevent, and no length of time can authorise its continuance.

The Crown may indeed, under certain regulations, and which are intended partly for the benefit of the heritors, grant a right of cruives. This, however, is to be considered as an exception from the common law. The pursuer (Sir James) has no express grant of cruive-fishing, neither has he had possession of it, it is unnecessary, therefore, in this case to enquire how far such right may be acquired by prescription. Besides, the fishing in question is nearly as detrimental to the salmon as the mode which the former interlocutor of the Court declared to be on that account illegal. Stent-nets have been declared so; 10th February 1693, Heritors of Don, *voce* SALMON-FISHING; 19th November 1771, Duke of Queensberry against Marquis of Annandale, *IBIDEM*.

THE COURT almost unanimously, "In respect the title of the Magistrates and Town-council of Dumbarton to insist in the present action against Sir James Colquhoun has been already sustained, found it unnecessary *in hoc statu* to determine upon the title of the other pursuers: Found, That Sir James Col-

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quhoun having produced no right to a cruive-fishing, he is not entitled to exercise his right of fishing by stobs and nets, as claimed by him previous to the year 1760, nor to interrupt the navigation either in the water of Leven, or in the mouth of Lochlomond; and in so far decerned and declared in the action at the instance of the Town of Dumbarton; and in the action of declarator at the instance of Sir James Colquhoun, assoikied the Magistrates and Town-council of Dumbarton from the whole conclusions thereof, and decerned; but remitted to the Lord Craig Ordinary, to hear the other parties thereupon, and to proceed and determine as to his Lordship shall seem just."—See SALMON-FISHING.

Lord Ordinary, *Craig.* For Sir James Colquhoun, *Dean of Faculty Erskine, Geo. Fergusson.*  
 Alt. *Solicitor-General Blair, Rolland, Morthland.* Clerk, *Gordon.*

D. D.

*Fac. Col. No 87. p. 192.*

1796. June 14.

JAMES BRODIE *against* The MAGISTRATES and TOWN-COUNCIL OF NAIRN,  
 The Earl of FINLATER, and DAVID DAVIDSON.

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When a person has a grant of salmon-fishing in a river, which, at the date of the grant, ran into the sea opposite to his own lands, upon its afterwards changing its course, and discharging itself into the sea opposite to the property of his neighbour, who has a right to the sea fishing there, the former continues to have an exclusive right to the fishing in the river, so far as it is distinguishable from the sea.

THE property of the burgh of Nairn, on the Murray Frith, is bounded on the east by the barony of Lochloy and Inchoch, belonging to James Brodie. In 1589, James VI. granted a charter to the Magistrates of the burgh, and their successors, confirming their former privileges, and particularly, that "lie zaires infra fluxum maris dicti portus construendi, ac super lie stellis, tam in aqua dulci quam salsa, infra omnes bondas et libertates, dicti nostri burgi piscandi, cum libertate de lie tug-net infra mare, aliisque omnibus privilegiis, asiamentis, libertatibus et commoditatibus in quibus ipsi, eorumve predecessores, aliquibus temporibus, retroactis in usu et possessione extiterunt infra dictum nostrum vicecomitatum de Nairn."

These fishings were afterwards feued out by the burgh, and now belong to the Earl of Finlater and David Davidson.

Mr Brodie and his predecessors have, from time immemorial, been infeft, "in all and sundry fishings of the said lands of Lochloy and Inchoch, as well of salmon as other fishings, as well in salt as in fresh waters."

The burgh, or their vassals, had been accustomed, besides their sea or stell-fishings, to possess exclusively the fishings in the river of Nairn, which ran eastward into the sea, opposite to, and considerably within, the property of the burgh; but as the coast consists of loose sand or gravel, the river frequently shifts its channel; and about twenty or thirty years ago, it came to run into the sea, at low-water, opposite to the property of Mr Brodie.

In order to settle a variety of questions which arose in consequence of this change in the course of the river, Mr Brodie brought an action of declarator against the Magistrates of Nairn and their vassals, in which a proof was led.