

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DALGLIESH and others—*Appellants*.DUKE OF ATHOL and others—*Respondents*.

SALMON fishing with stake-nets held to be illegal.

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

Description of
the stake-net
apparatus.

THE fishings of all the Appellants are situated in that part of the Tay where the sea ebbs and flows.

About thirty years ago, a mode of salmon fishing was introduced upon the shores of the Solway (the Scottish statutes regulating salmon fishing did not apply to the Solway), which, from the nature of the apparatus employed, is termed stake-net fishing. In its most improved form, it is practised in the following manner. In rivers; or friths where the sea ebbs and flows, a row of stakes is driven from high to low water-mark, for the most part obliquing down the river, or forming zigzags in that direction. The stakes are from four to six feet asunder, and are fastened together at the top, the middle, and the bottom, with strong ropes. Over these ropes a net is extended, the upper part of which is usually about the level of the highest flow of the tide. The meshes of the net measure from ten to twelve inches in circumference; that is to say, each side of the parallelogram measures from two and a half to three inches. In this manner a complete barricado is formed, from high to low water-mark, through which no salmon or grilse can penetrate. In this barricado, at convenient distances, openings

are left, which lead into enclosures of several acres in extent, surrounded with netting exactly similar to that which forms the barricado. The openings are from twenty to thirty yards in width; and across the top of them a net is fixed, which rises and falls with the tide; and which, of consequence, acts as a valve to prevent the fish which have entered with the tide from getting out when it ebbs. The enclosures vary in size and shape according to the nature of the ground. At the angles, openings are left which lead into smaller enclosures, provided each with a net valve of the kind already described; and, in this manner, a labyrinth is formed, out of which no fish that enters can extricate itself. The enclosures are termed by the fishermen courts or *yards*; and the barricado which conducts the fish into them is termed the leader. In this manner, it is scarcely possible that a salmon ascending the river between high and low water-mark should not either be detained in the yards, or entangled in the meshes of the leader. It is usual also to take advantage of the natural hollows, or to form artificial excavations behind the leader, where fish descending the river are left at the fall of the tide.

In 1797 the stake-net mode of fishing was introduced in the Tay at Sea-side, fifteen miles below Perth; but the Earl of Kinnoul and other superior proprietors having in 1799 brought an action of declarator, this mode of fishing, at least in that part of the river, was in 1801 declared to be illegal by judgment of the Court of Session, which was affirmed on appeal by the House of Lords. But the fishings of the Appellants being situate considerably below Sca-side, where the Tay is an arm of the sea,

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

Sea-side case,
1801.

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.
Action, 1804.

Libel of the
summons.

they maintained that the statutable prohibitions did not extend to their fishings ; and they continued to fish with stake-nets.

The Respondents as proprietors in the higher part of the river, in 1804, brought an action of declarator against all the proprietors of salmon fisheries along the Frith of Tay, setting forth in the summons:—“ That by the common law of this
“ realm, the proprietors of salmon fisheries are not
“ at liberty to exercise the same, or to take salmon
“ otherwise than by net and coble, where the tide
“ ebbs and flows, or in a way sanctioned by imme-
“ morial usage ; and that by several acts of Parlia-
“ ment, particularly by an act of the first Parlia-
“ ment of James I. passed in the year 1424, inti-
“ tuled, ‘ Of cruives, yairs, and Saturday’s slop ;’
“ the act of the tenth Parliament of James III.
“ passed in the year 1477, intituled, ‘ Anent
“ ‘ cruives ;’ the act of the first Parliament of
“ James IV. passed in the year 1488, intituled,
“ ‘ Anent cruives ;’ and the act of the ninth Par-
“ liament of Queen Mary, passed in the year 1563,
“ intituled, ‘ Anent cruives and zairs ;’ and other
“ acts of the Parliament of Scotland, the taking of
“ salmon in waters where the sea ebbs and flows,
“ by means of cruives and zairs or yairs, or other
“ machinery, is prohibited, and all cruives or zairs
“ so situated, or set upon sand, or schaulds or
“ shoals, and upon the water sands, are ordained to
“ be put away : that nevertheless the Right Ho-
“ nourable George Lord Kinnaird, the Honoura-
“ ble William Maule of Panmure, Alexander Wed-
“ derburn, Esq. of Wedderburn, James Morrison,
“ Esq. of Naughton, William Dalgliesh, Esq. of

“ Scotsraig, — Anderson, Esq. of Balgay, John
 “ Berry, Esq. of Tayfield, and Archibald Campbell
 “ Stewart of St. Ford, Esq. alleging themselves to
 “ be proprietors of the salmon fisheries, and to have
 “ right to fish salmon in the said water of Tay op-
 “ posite to their respective properties in the coun-
 “ ties of Perth, Fife, and Forfar, have, within these
 “ few last years, by themselves, and persons em-
 “ ployed or authorized by them, erected yairs or
 “ stake-nets, or other machinery of the nature of
 “ yairs, upon the sands opposite to their said re-
 “ spective estates in the said counties of Perth,
 “ Fife, and Forfar or Angus, between the high and
 “ low water-mark, and have thereby taken great
 “ quantities of salmon, and destroyed the fry of
 “ such salmon, and other fishes, contrary to law,
 “ and to the great hurt and prejudice of the pur-
 “ suers, and to the injury of them and all the other
 “ proprietors of salmon fisheries in the upper and
 “ higher parts of the said river of Tay; and that
 “ Francis Charteris, Earl of Wemyss, and others,
 “ alleging themselves to be proprietors of, or to
 “ have right to salmon fishings in the said river or
 “ water of Tay, have likewise either erected, or
 “ threaten to erect yairs or stake-nets, or machin-
 “ ery similar to those above complained of, upon
 “ the sands opposite to their respective properties
 “ within the counties aforesaid.” And the summons
 concluded, “ That therefore it ought and should be
 “ found and declared, by decree, &c. 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 pur-

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

Conclusions of
the action.

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

“ pose of catching salmon or other fishes in the said
“ river of Tay ; and the said defenders ought and
“ should be decerned and ordained, by decret
“ foresaid, to desist and cease from using the said
“ yairs, stake-nets, and other machinery, and to
“ demolish and remove the same, and to pay to the
“ pursuers the sum of 20,000*l.* sterling, in name of
“ damages sustained by them.”

After a proof allowed and taken as to the alleged diminution of the produce of the upper fisheries, the alleged destruction of salmon fry and injury to the breed of salmon in the river by the stake-nets, and as to the limit between the river and the æstuary of the Tay, and a variety of other proceedings, the Court on the 7th March, 1812, pronounced this judgment: “ The Lords having resumed consider-
“ ation of the state of this process, and advised the
“ same, with the mutual memorials for the parties,
“ writs produced, proofs adduced, and former pro-
“ ceedings, they sustain the title of the pursuers to
“ insist in this action for having 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 lands bounded by the
“ river, frith, or water of Tay, on those sides or
“ parts where such yairs, stake-nets, or other ma-
“ chinery are placed, and as far down as Drumly
“ Sands, without prejudice to the rights of such of
“ the Defenders as have fishings in the sea : repel
“ the defences, and find and declare, that the De-
“ fenders 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

Interlocutor,
March 7,
1812. Stake-
net fishing
illegal.

“ the purpose of catching salmon or other fishes
 “ within the aforesaid bounds: decern and ordain
 “ 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
 “ prohibit and interdict them from erecting or
 “ using in future the machinery aforesaid, or other
 “ machinery of the same nature, for the purpose
 “ of catching salmon or other fishes within the said
 “ bounds; and decern accordingly: find the de-
 “ fenders liable in damages and expenses to the
 “ pursuers,” &c. From this judgment the Appel-
 lants appealed.

June 16, 20th.
1816.

SALMON
FISHING.—
STAKE-NETS.

With respect to the facts which were the subject
 of proof, the Appellants contended that they had
 made out their assertions that the stake-nets were
 prejudicial neither to the breed of salmon in the
 river, nor to the produce of the upper fishings,
 while the Respondents contended that the evi-
 dence proved the contrary. But the Respond-
 ents further contended that, although all these facts
 were conceded to the Appellants, the stake-net
 mode of fishing was, notwithstanding, illegal, and
 that the Respondents were entitled to prevent it.

In combating this latter proposition the Appel-
 lants insisted upon the following points: 1st, Though
 various statutes prohibit cruives, zairs, and all ma-
 chinery, “ in salt waters, where the sea ebbs and
 “ flows,—in rivers that have course to the sea,” and
 “ within flood mark of the sea;” and though
 “ they are prohibited to be set on sands and shoals
 “ far within the water,” and, in general, “ upon
 “ the water sands;” yet the prohibitions do not
 extend to the stake-net apparatus, on account of its

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

peculiar construction. The legislature had two objects in view; namely, to prevent the destruction of red and black fish, or fish immediately before and after depositing their spawn; and to secure the safe passage of the fry to the ocean. But as the stake-nets are always removed during the breeding or forbidden season, they cannot destroy red or black fish; and as they are wrought on a mesh of three and a half or four inches in diameter, they cannot intercept the fry. As the construction is without the purview, so it is also without the letter of the statutes; for stake-nets confessedly bear no resemblance to cruives; they are essentially different from yairs, which are close dykes or pallisadoes, affording no passage to the fry, and they do not answer the description of any other prohibited engine.

2d, The situation, as well as the construction of the stake-nets, exempts them from the operation of the statutes, which, in so far as they contain an absolute prohibition of cruives and yairs, apply neither to rivers unaffected by the tide nor to the sea, but only to the intermediate space where the salt water meets the fresh, and where the fry in their way to the sea stop until they are habituated to the new element. But this point is far above the highest of the Defenders' stake-nets, which are erected on the shore of the sea, where salmon fry are never to be seen.

3d, All the statutes admitting a construction different from that which they contend for, were either expressly enacted as temporary regulations, or have fallen into desuetude.

Lastly, The Respondents have no title to insist

in an action for enforcing the statutes with regard to salmon fishing, which are regulations of police for the benefit of the public at large, not of private individuals interested in the fishings, and the execution of which, therefore, is entrusted to the public prosecutor alone. Neither have they any interest to enforce these statutes, because the stake-nets do not diminish the produce of the upper fishings, that part of the river being as well stocked with fish at present as it was before the erection. And this action is carried on for no purpose but that of preventing the market from receiving a greater supply of wholesome fish, and thereby injuring the monopoly of the Respondents, a purpose inconsistent with the public interest, &c.

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

On these points it was contended for the Respondents:—1st, That the preservation of the breed, as a source of national wealth, was not the sole object of the legislature in framing the laws for regulating salmon fishing; but that the private interest of individual proprietors was also contemplated; and they referred to the regulations of the mid-stream and Saturday's slap, and entered into a particular examination of the purview and enactments of the statutes. The stake-nets were yairs of the most destructive kind; but, even if they were not, the argument for the Appellants would not be improved, because the statutes applied to every species of fixed machinery.

2d, The prohibition was directed against machinery in *waters* where the sea ebbs and flows, and *flumen* or *fluvius* in Latin, *aqua* in low Latin, a *river* in English, and a *water* in old English and

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

Scotch, do not exclusively denote a fresh water stream, but apply to every stream, from its source, to where it falls into the main ocean, *mare altum*, including the whole æstuary, *intra fauces terræ*; and in support of this position the Respondents referred to many authorities in the English statute book, Hale *De Jure Maris*, &c.; and in Scottish authors from Jac. 1. of Scotland, to the end of the 17th century; in the Scottish statute books, and in Scottish charters; and the cases of *Leslie v. Ayton*, Dict. vol. 2. p. 359—and of *Gairlies v. Torhouse*—were cited.

Ersk. b. 2.
t. 6. s. 15.

3dly, The leading prohibition against cruives and yairs in waters where the sea ebbs and flows was clearly in force, and was so stated by Stair, Bankton, and Erskine. The statutes in general were admitted to be in force, and the statute, 1469, cap. 38. although temporary at first, and that of 1563, cap. 68., to which statutes the plea of desuetude had been applied, were continued by the general re-enacting statutes, or referred to in subsequent statutes, as existing acts. And the cases of *Fraser v. Duke of Gordon*, Sel. Dec. p. 316—*Gween v. Lady Innis*, and *Prior of Pluscardine v. Laird of Innis*, Balf. Prac. p. 545—*Heritors of Don*, 1693—*Colhoun v. Duke of Montrose*, 1793, 1804—*Queensberry (Duke of) v. Marquis of Anandale*, 1771—were cited.

4thly, With respect to the allegation that the Respondents had no title to insist in the action, the analogies of law, the practice in actions on the fishing statutes, and several express decisions, proved the contrary.

The following note of what the Lord Chancellor said was taken by one of the Counsel who argued the case in Dom. Proc.

Lord Eldon (C.) He thought the judgment was right, but that it would be necessary to make one alteration in it.

He was of opinion that these stake-nets fall within the meaning of the word yairs used in the statutes; he thought likewise there were other words in these statutes which would comprehend them, *as nets*, within the prohibitions enacted.

The judgment, therefore, was right, except that in one passage it was worded with some degree of obscurity, which it was necessary to remove. The passage is this, viz. "without prejudice to the rights of such of the Defenders as have fishings in the sea." These words in their natural import would mean that the judgment was not to apply at all to such of the Defenders as have fishings in the sea, which is certainly very different from what the Court intended. What the Court meant was, that the judgment did not apply to the sea fishings of any of the Defenders.

He did not see the use of having these words in the judgment at all; for the summons has no reference to any fishings in the sea, but is limited to those in the river and water of Tay.

It had been stated that there was a petition in Court praying that the judgment might be extended as far as the bar of the river; and he had that petition in his hand. He thought that to shut out the inquiry which that petition prays would be wrong: and the more so, because he had himself come to an opinion that the water of Táy, within

June 16, 20,
1816.

SALMON
FISHING.—
STAKE-NETS.

Judgment,
June 16, 1816.

Salmon fish-
ing with
stake-nets il-
legal.

June 16, 1816. the meaning of these statutes, does extend farther than the Drumly Sands, and down to the bar.

SALMON
FISHING.—
STAKE-NETS.

The Order of the House was as follows :—

June 20, 1816. “ Ordered and adjudged that the 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 Drumly Sands; and it is declared
“ that no judgment ought to be given with respect
“ to any rights of fishing claimed in the sea: and
“ it is declared that this judgment is to be without
“ prejudice to any application, made, or to be made
“ to the Court of Session, for the purpose of as-
“ certaining whether the river water or frith of
“ Tay doth not extend farther to the eastward than
“ Drumly 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, and other machinery 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
“ Drumly Sands which shall be found to be
“ bounded by the said river, frith, or water of Tay:
“ and it is further ordered and adjudged that with
“ these variations and declarations the said interlo-
“ cutor complained of be—AFFIRMED.”