40; 2, 3; Earl of Dalkeith, Feb. 1729 (4464); Crawford, Jan. 14, 1774 (4486); Durie, Nov. 30, 1791 (4624); Ross, July 4, 1809 (F. C.); Bedwell and Yates, Dec. 2, 1819 (F. C.)

Respondent's Authorities.—3 Ersk. 2, 40; 8, 17; Falconer, Dec. 11, 1627 (4501 & 5465); Sinclair, July 16, 1636 (4501); Erskines, Dec. 15, 1664, and Scott, Nov. 28, 1676 (4502); 3 Ersk. 8, 20; Grierson, Feb. 25, 1780 (7591); Douglass, June 29, 1796 (1623); Ersk. B. 3, tit. 5; Turnbull, June 12, 1751 (871); 3 Ersk. 5, 4.

MACDOUGALL and CALENDER,—CURRIE, HORNE, and WOODGATE,—Solicitors.

No. 33.

MURDO MACKENZIE of Ardross, Appellant.—*Mr. Serjeant Spankie—Dr. Lushington.*

THOMAS HOUSTON of Creich, Respondent.—*Lord Advocate (Jeffrey)—Mr. A. M'Neill.*

Title to pursue—Jus Tertii—Salmon Fishing—Process. A party having brought an action, libelling that he was tacksman of the whole salmon fishings in a firth, and proprietor of other fishings incertain rivers flowing into it, against a proprietor of lands situated on the firth, to have it found that the defender had no right to to fish salmon ex adverso of his own lands, at which part of the river the pursuer had no right of fishing either in tack or property:—Held (affirming the judgment of the Court of Session) 1st. That although a preliminary objection to his title had been repelled, it was still competent to the defender to object to it as a title to prevail; and 2d. That the title was not sufficient to warrant his obtaining a declarator of no right of fishing against the defender.

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2D DIVISION.
Ld. Medwyn.

THE river Shinn in the county of Sutherland flows into the Kyle of Oykell, the upper part of the frith of Dornoch, and formed by the confluence of the Oykell, Cassley, Shinn, and Carron rivers. Mackenzie of Ardross, the proprietor of Eastern Fern and Mid Fern on the south side of the frith, raised an action of declarator and damages against Houston of Creich, a proprietor on the north side, setting forth, "That the pursuer is the "sole and exclusive proprietor of the river Shinn in the county of "Sutherland, and of the haill salmon fishings thereof, in which "the pursuer stands regularly infeft and seised in virtue of un- "questionable titles; and the pursuer is tacksman of the whole

" salmon fishings of the rivers Oykell and Carron, and of half " the salmon fishings of the river Cassley, situated in the said " counties of Sutherland and Ross; and moreover the pursuer " is tacksman of the whole salmon fishings in the Kyle, or water " or frith of Dornoch, which frith is formed by the confluence of " the said rivers Shinn, Oykell, Cassley, and Carron: That " Thomas Houston Esq., of Creich, is proprietor or trustee, or " manager and occupant of the lands of Meikle Creich, adjacent " to the said frith; but he has no right or title whatever to fish " or kill salmon in the said frith, or in any river flowing " thereto; that nevertheless the said Thomas Houston has " illegally and unwarrantably been in the use and practice, " which he still continues, as shall be specially condescended on " in course of the process to follow hereon, of killing salmon in " the said frith at or near Meikle Creich, and ex adverso of " the said property, and of obstructing salmon in their course up " the said frith to the rivers aforesaid, of which the pursuer is " the proprietor and tacksman, to the injury and damage of the " pursuer: Therefore it ought and should be found, decerned, " and declared, by decree of the Lords of our Council and " Session, that the said Thomas Houston has no right or title " whatever to kill or to take salmon in any manner of way in " the said water or frith of Dornoch, or Kyle of Sutherland; " and the said Thomas Houston ought and should be decerned " and ordained by decree foresaid instantly to cease and desist " from fishing or killing salmon in any manner of way in the " said water, frith, or Kyle at Meikle Creich, and at all and " every other part of the said frith," with a conclusion for payment of such a sum as may be " an adequate compensation to " the pursuer for the great injury and damage which he has sustained in and through the killing and obstructing of salmon " by the defender in the said water or Kyle of Sutherland, and " in and through the usurpations, encroachments, intrusions, " operations, and obstructions of the defender in the said water " or Kyle of Sutherland." In the condescendence which followed the pursuer stated himself as the " proprietor of Easter " Fern and Mid Fern, which are adjacent to the south side of " the said frith and below Bonar Bridge, together with the " salmon and other fishings appertaining thereto;" but in the summons no mention is made of Mid Fern at all, and Easter Fern

Aug. 13, 1831. is only introduced incidenter in another part of the declarator as land belonging to the pursuer opposite to Creich, to which, as was alleged, Houston's boats unwarrantably ferried over and landed persons who had no right to trespass there; neither is it set forth in the summons that the pursuer was proprietor of the salmon fishings appertaining to these ferns.

Houston maintained in defence preliminary,—1. That the pursuer has no title to pursue; being proprietor of the fishings in the river Shinn (which is not admitted) can give him none, and he is not a proprietor of any of the fishings in the Kyle or frith of Dornoch. Supposing these not to have been yet disponed away by the Crown, they are still Crown property; and therefore, supposing this right to be exercised by any person wrongfully or without title, it is the Crown that has a title to challenge its exercise; neither is the pursuer the tacksman of the whole salmon fishings in this frith, and in the rivers connected with it; and if he were, a tack is not a valid title to insist in a declaratory action as to property.

2. On the merits.—If the pursuer had any title to insist, the defender avers that the estate of Creich had a right of salmon-fishing from time immemorial in the Dornoch frith, ex adverso of that property, and that this right has been constantly exercised beyond the years of prescription.

The Lord Ordinary (21st June 1827) repelled the preliminary defence, and decerned, and, in respect the defender had given notice of his intention to bring the judgment under review, found him liable in expenses to the pursuer of this preliminary discussion; and the Court (16th January 1828), on advising a reclaiming note, adhered *; Lord Glenlee observing, "Holding the title "to be sustained only to the effect of allowing the pursuer to be "heard, not as entitled to prevail, I am satisfied that the inter-"locutor is right."

The case returned to the Lord Ordinary; and condescendence and answers having been lodged, with pleas in law, and the record being closed, cases were ordered to the Court, who, on advising them, (24th November 1829,) † "in respect the pursuer has not

* 6 Shaw and Dunlop, 359.

† *Lord Justice Clerk* observed. The first question is, whether there is res judicata here? I am satisfied that our former determination does not interfere with what is now

"produced or proved any sufficient title to salmon fishings ex "adverso of the defender's lands in question," sustained the

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asked. It was on the title as libelled that we decided the pursuer's title to be heard. For any thing we knew, this defender might have had no title at all, or this might have turned out to be an illegal fishing. Now we have to decide a different question. Mr. Houston produces, as his title, a decree of sale, with fishing, and says that he has had possession of salmon-fishing; and further he says, that as the pursuer pretends to no right in that part of the river where his fishing is challenged, he has no right to bring a declarator of his want of title. It is an important question; but giving every attention to the argument, and the case of Sir James Colquhoun, in which latterly I was counsel, I am satisfied that it is no bar to the judgment which I think ought to be pronounced here. Sir James brought his declarator against the upper proprietors, to get rid of them as pursuers in the action against him. This is not the case in the present instance, neither is there any complaint here of an illegal mode of fishing, but only that the defender's fishing opposite his own lands injures Mackenzie's other fishings, and he brings a declarator, without alleging any right there himself. The judgment of the First Division, in the similar case with Gilchrist, appears to be well founded in law. Those in the cases of Tay, Don, &c. are no authority here; and I have no doubt that our former judgment does not fetter us now, and that the judgment of the First Division should be followed.

Lord Cringletie.—In point of form, there is no interference with the previous judgment; and on the merits, if the property of salmon-fishing was not of an anomalous nature, there would be no doubt. It is clear that a man cannot challenge any one shooting or trespassing on his neighbour's property; but the right of salmon-fishing is somewhat anomalous. In the case of the Duke of Queensberry v. Marquis of Annandale, (M. 14,279,) a party was found entitled to interfere to prohibit an inferior heritor from throwing stones into a river to prevent the salmon going up to him; though a proprietor of an estate, in a district where there is deer, could not prevent his neighbour from following the practice of placing people on his march, at the quarter whence the wind blows, to frighten the deer from leaving his property. There is an admitted title to challenge fishing in an illegal way. Now it is very difficult to distinguish between this and fishing illegally without any right. The pursuer could, under the authority of the case of the Duke of Queensberry, have complained of the defender frightening and stopping the salmon, without killing them; and, if so, why cannot he complain of his stopping them by killing them?

Lord Glenlee.—This was formerly pleaded as a preliminary defence; and all we could consider was, whether a proper title was libelled, not whether a proper title was possessed. The only thing in the defence was the denial of the fact of the title libelled, though it also bore, esto, you have the title, it is not good. The Lord Ordinary, without determining if he had the title libelled, repelled the objection, that if he had, it would not have been a good title; and it was here libelled that he had a tack of the whole fishings, of course including those opposite Mr. Houston's lands. Undoubtedly, where there is a public law prohibiting any thing being done every person injured by a violation of it has a title to complain; but when the act is not illegal in itself, and there is no allegation that the pursuer has any right to the fishing challenged, it is a totally different thing. Mr. Mackenzie has now produced all his tacks, and it is not averred that he has any right to the fishing

Aug. 13, 1831. defences, and assoilzied the defender from the conclusions of the action, with expenses.*

Mackenzie appealed.

Appellant.—1. The Court has sustained the appellant's title to pursue; and that, in this case, is equivalent to a judgment on the merits, as the defender has failed to show that he has any right to the salmon fishings in question. The distinction taken between a title to insist and a title to prevail has no foundation.

2. The appellant is proprietor of the lands opposite to the lands possessed by the respondent and owner as proprietor or tacksman of the upper fisheries and the fishing in the frith. He has an interest that no person, without a right to fishing, shall fish in the river opposite or below. It is plain that the respondent would not be entitled to obstruct or destroy the fish in their progress up the frith to the higher rivers, neither can he be permitted to kill the salmon by fishing, unless he shows that he has a right of salmon fishery. The titles of the appellant in the lands of Easter and Mid Fern give him a right to fish ex adverso of those properties, a right which he has always exercised by sweeping across even to the opposite shore; and this right the respondent, who shows no title, cannot impair. Salmon fishing is inter regalia, and only those proprietors having right of fishing from the Crown can fish. The respondent therefore is a mere trespasser. It is a misapprehension of the law to maintain that the respondent is not bound to show a title, if the appellant cannot show a title to the fishings challenged. That very point was decided in the case of Colquhoun, where upper heritors, who could show no title, failed in their opposition to the action challenging their right, at the instance of an under heritor, who did not pretend to a right ex adverso of the upper heritors' lands.

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opposite to Mr. Houston's lands, and I am satisfied, therefore, that he has no title to interfere.

Lord Pitmilly.—I do not see how it is possible to sustain his right to insist in this action, and I concur entirely in the doctrine laid down by Lord Corehouse in the other case of Gilchrist.

* 8 Shaw and Dunlop, 117.

3. The nicety of special pleading recognized in England is not known in Scotland; and it would be unjust to introduce it now, to the effect of dismissing the appellant's action, who has framed his summons in the form and fashion usual, and held as sufficient in the Scotch Courts.

Respondent.—1. Although the appellant's title to pursue was sustained, that title was only to insist, not to prevail.

2. The proposition that an upper heritor can prevent an under heritor from fishing, merely because thereby salmon are killed which otherwise might have proceeded up the river, is altogether untenable. If the upper heritor can show a right to the lower fisheries, then he will obtain an injunction against the lower heritor, but until he shows that right he cannot disturb the adverse party. He, having no right to the fishings below, has no title to inquire whether the lower heritor has a right or not. The case of Colquhoun does not bear the construction contended for; and so the Court held, on inquiring as to its facts and circumstances, in the case of Gilchrist,—a question between this very appellant and a proprietor on the south side of the frith, who, without alleging any grant of piscatory, killed salmon opposite his own properties.

3. It is absolutely necessary that pleading in Scotland shall be accessible, and calculated to bring out, in proper form and shape, the true question between parties. Here the summons is fatally defective.

Lord Chancellor.—My Lords, if, on a complete understanding of this case, I had entertained any doubt that the Court of Session had decided well on the matter of law, or indeed if I had doubted the propriety of the decision on the grounds upon which I think your Lordships ought to affirm it, I should certainly have been disposed to call on the respondent to support the judgment. Even if those grounds on which the decision must rest were such that the interlocutor of the Court, which I am about to move your Lordships to affirm, would exclude for ever the party from bringing his rights into discussion again before the Court below in a more competent form, I should have hesitated before I recommended an affirmance without hearing all that could be urged; but as I do not consider that the interlocutor, on whatever principle pronounced or affirmed, will exclude this party from trying his rights

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again if he shall be advised, subject to such observations as were made in the Court below, and one or two which I am about to submit to your Lordships, I have not the least hesitation in sparing your Lordships the trouble of hearing the counsel on the opposite side. The question here arises between Mackenzie, the exclusive proprietor, as he says, of the salmon fishery in the Shinn, and tacksman of the salmon fisheries of the rivers Oykell and Carron, and the half of the salmon fishery in the river Cassley, and of the whole salmon fisheries in the Kyle, or water or frith of Dornoch, which frith is formed by the confluence of the rivers Shinn, Oykell, Cassley, and Carron, and Houston, the proprietor and occupant of the lands of Meikle Creich, adjacent to the frith, but below the Shinn, below the Cassley, below the Oykell, and opposite or nearly opposite to the East Fern and the Mid Fern land, the property of Mackenzie; and Mackenzie claims a right to prevent Houston from fishing, not merely in any illegal way, not merely in any way prohibited by the statute law respecting fisheries in Scotland, (which, as your Lordships know, is in some respects very precise and strict in its arrangements, the value of these salmon fisheries being very great, and the proportion of their value to the rest of the property in some parts of the country still greater,) but that he shall not fish opposite his own land, nor in the neighbourhood of his own land. That he has no right to fish there is placed on several distinct grounds; and one is, that he has no right to fish there at all, because he has no grant of a salmon fishery from the Crown. Now, it is quite clear that that would be distinctly what they call in Scotch proceedings a jus tertii, which means, that unless I am damnified, and not only damnified, but have received damnum cum injuriâ, unless I am not only hurt by what is done by my neighbour, but hurt by something which he does illegally, I have no right to complain between him and myself that he does a thing which may injure another. It is as true, it might be very agreeable to Ardross, the upper proprietor, and very advantageous to him, to say to Creich, "What business have you to fish there? "Every fish you catch is so much taken from my net; and you have "no right of piscatory in your grant from the Crown; and you can "show no user from which the Court might presume a lost grant;" but Ardross is not entitled to say, that, unless he can show that he (Ardross) has such a right against him (Creich), not only Creich has damnified him by taking his fish, but he (Creich) had no right, as against Ardross's rights, to take those fish as they came up; for this right, if not Houston's, is the right of the Crown. What signifies it whether the Crown or Creich takes the fish? Mackenzie is not entitled to set up the dormant right of the Crown, although he may confine the exercise of that right to that which is consistent

with his adverse right, or possible adverse right as superior heritor. But then it is said, and that is a proposition in law to be met, that the Crown has all the right to the fishery of salmon in Scotland; that the salmon is inter regalia, or a royal fish; and that no man can claim a right to the fishery of salmon in Scotland but by a grant; and that must be established by the production of the grant, or by long user, which may presume a grant. But before I go to that I shall just state what the law is in this country, as it is laid down with singular precision, like all the decisions of Lord Mansfield, in the case of Carter *v.* Murcot, though the law here is materially different, generally speaking, as respects arms of the sea and navigable rivers on the one side, and private streams on the other. An arm of the sea, between high and low water-mark, is within Admiralty jurisdiction; but there is a common right of all the King's subjects to fish in arms of the sea and public rivers, unless there has been a grant to an individual excluding others, and that can be established only by the production of the grant or by prescription, the Crown having a right to grant several fisheries in an arm of the sea; but that is immaterial to the present argument, generally speaking. Independent of all grants or acts of parliament, the right of fishing in an arm of the sea or a navigable river is in the public at large; but in a private river, in a river not navigable, the right, unless there is some grant or act of parliament to take it out of the provision of the common law, would be primâ facie in the owner of the close over which the private river flows; and if there are two owners on the different sides, as is very often the case, the river being the common boundary, each has unquestionably his right ad filum aquæ; that is the rule of law, and that is the distinction taken. Now, whether or not this Dornoch frith, if in England, would be held to be an arm of the sea, so that every man, unless there was a particular right constituted exclusively, would have a right to fish, I do not take upon me to say. I dare say it would not be admitted here, though it does look very much like an arm of the sea, as it has the water flowing up very near to the Shinn. But I now take it to be understood by Scotch lawyers that salmon fishery is not open to the public at large, and that there must be evidence of a grant; but the proposition in law I am called upon to meet is this, that the Crown having granted (which grant shall be proved by the production of instruments, or by user, for so many years,) a right of salmon-fishing, fifty miles above the mouth of a certain river, and that right of salmon fishery extending over ten furlongs, or ten yards across the river, or in the length of the river, though there is not a single word of exclusion in the grant, though there is nothing to make it a fishery except quoad that spot, with nothing to exclude the right of fishing above or below, yet, inasmuch as the people for fifty miles

Aug. 13, 1831. below might, by killing the fish as they went up, create a more effective obstruction to the exercise of the right of salmon fishing during those ten yards, unless they can show a separate grant of the same, or of an earlier date by the Crown, the Crown has no right to make a grant to those below; but that the mere grant of those ten yards of fishery is effectual, even as against the Crown, and creates a right to exclude all the inferior heritors, all those who hold between those ten yards and the sea. Now, if I should say that this is a strong proposition, I should mean to distinguish it, not with reference to the argument by which it was supported, but to the amount of its own force. If I were to say it is a new proposition, I should ascribe to it no originality in argument, nor any great felicity in expression, but I should say it was new in respect of its strangeness. If I were to say it was a wild proposition, I should probably apply a term to it which was justified; for I cannot conceive any thing more wild than contending that if I grant to A. B. a right to fish salmon for ten furlongs, I exclude all the rest of my subjects from that spot down to the sea for ever from taking a single fish, salmon, sprat, or any other fish that can grow out of spawn. That I think one of the wildest propositions I ever heard as regards the Crown. Even as regards a private individual, it is contrary to every principle of law. Supposing an individual possessed of a salmon fishery along the banks of a river, and that he grants a fishery over a certain spot, as against him, (though against him, as a private person, all things are to be presumed,) the proposition would be untenable for the grant to an individual over that spot would not convey the exclusive use. But then it is said, provided the person so having the grant has been in use all along to exercise that right without interference from the people below, he may now claim it; but that is merely taking another proposition, for if the heritor above has been in use to exercise the right of fishing without interruption, as it is called vaguely, (to conceal the effect of that argument, suddenly altering the proposition from an untenable one to one which is almost a truism,) without the people below stopping the fish in their way to his net; if that alone is meant, it is a perfect truism in point of law, for it implies a grant; it is, exclusive user—a user in me, exclusive of you, Creich; and then, whether I have it upon parchment, with a seal from the Crown, or have it from long or immemorial usage, it is perfectly clear I have a grant of the fishery above, exclusive of other men having a fishery below; and if the words do not mean that, then the proposition is just as bad as it was before this new colour was given to it. But, my Lords, if Mackenzie has that grant, if he has that user to show a lost grant, he should have set it forth. But he has not averred it, he has not pleaded it

as your Lordships will see clearly from the pleadings. He says he has the haill salmon fishing in the river Shinn ; now, whether it is the river Shinn or the Dornoch frith, is perfectly immaterial, for it would be indifferent whether it was the Dornoch, or the rivers running into it above; but he says, " that the pursuer is the sole and exclu- " sive proprietor of the river Shinn in the county of Sutherland,"— that may be,—" and of the haill salmon fishings thereof;" that means, the haill salmon fishings of the river Shinn, and no more; that he is " tacksman of the whole salmon fishings of the rivers " Oykell and Carron,"—those are the other rivers,—" and of half " the salmon fishings of the river Cassley, situated in the said coun- " ties of Sutherland and Ross;" that is to say, all those rivers above situate; that he " is tacksman of the whole salmon fishings " in the Kyle or water or frith of Dornoch, which frith is formed " by the confluence of the said rivers;" that he is tacksman of the whole of those salmon fishings. Then, how does he go on to complain? He complains, not that Houston injured his (Mackenzie's) right as tacksman of the whole salmon fishings, that is to say, a fishery in gross; but after setting forth that he is tacksman of the whole salmon fisheries—that he is lessee, as we should say in England, of a fishery in gross—he complains, not that the fishery in gross is interfered with, but that a fishery regardant is interfered with. He says, " I am also proprietor of the lands of Easter Fern " and Mid Fern, which are adjacent to the south side of the said " frith, and below Bonar Bridge, together with the salmon and " other fishings appertaining thereto; but you, an inferior heritor, " have interfered with the fishery of which I am not tacksman, but " which I claim to have regardant to two closes of which I am pro- " prietor, and not tacksman." Was there ever such a case put upon pleading? and this is endeavoured to be met by saying that one fishery is included in the other, as if a lease of a fishery in gross included the right to a fishery in respect to those closes; as if, because I have a lease of a fishery in gross, I have, as included in that lease, the fishery attendant on the close. The appellant proceeds, " that nevertheless the said Thomas Houston has illegally " and unwarrantably been in the use and practice, which he still " continues, as shall be specially condescended on in the course of " the process to follow hereon, of killing salmon in the said frith " at or near Meikle Creich, and ex adverso of the said property, and " of obstructing salmon in their course up the said frith to the " rivers aforesaid, of which the pursuer is the proprietor and tacks- " man, to the injury and damage of the pursuer." Now, there cannot be the least doubt that a person who is the owner of the fishery of the river above has, in respect of the estate of

Aug. 13, 1831. which he is owner, a right to prevent obstruction below, not by fishing, which another might do, but by building a wall, by throwing across a weir, or by erecting cruives right across the river, to create a total obstruction;—there cannot be a doubt that, by law, he has a right to prevent that; but I cannot help remarking upon an expression or two which appears in the report of the judgment of the Lord Justice Clerk (probably from the largeness of the manner of reporting), in which he is made to say, "That unless I "am the owner of some land opposite to the place where the ob- "struction is complained of, or unless I claim the right of fishery "opposite to that, I have no right to come by action on the case for "consequential damage done to my upper fishery by something "wrongly done in the lower fishery." That cannot, I feel assured, be intended by him; but I remark upon it, finding it in print, as I know not whether the end of this may be another action, making the condescendence answer to the summons, in which case these expressions might lead to mistake. His Lordship is made to say, "This is "not the case in the present instance, neither is there any complaint "here of an illegal mode of fishing, but only that the defender's fishing "opposite his own lands injures Mackenzie's other fishings." If that were done in such a way as to exceed the bounds of his own private right, something ultra the mere taking fish, though he may use his own property in the way he has a right to do, that is, subject to the exception of his not injuring me; his catching the fish lower down would no doubt be injurious to me, but that would not come within this description, for that he has a right to do, but he has not a right to go beyond that; and the going beyond that, without coming within the provisions of the salmon fishery regulation acts, would nevertheless be damnum cum injuriâ, of which I should have a right to complain. But I take still greater exception to what follows: "The "complaint is, that the defender's fishing opposite his own lands "injures Mackenzie's other fishings, and he brings a declarator "without alleging any right there himself." He is not bound to allege any right there. If I have a fishery a mile above, you can use, on your own property, your own fishery, and I have not a right to complain; but if you use your own fishery below, in a manner contrary to law, you entitle me to an action. If you use your lower mill so as to put mine in back water, or you use your fishery against any right of mine, so as to deprive me of my fish, what signifies it that I do not claim a right below? My right is above; but you shall not use your right below, so as to incroach on my right above, by going beyond the limits of your right of fishery. If you do not interfere with my fishery, of course that can raise no proceeding. These are the grounds on which I cannot think that which is stated

can be supported. Possibly it was expressed more largely by the learned Judge than he intended, or probably it may be misreported by the learned counsel.

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I have already said, that the owner above cannot object to another exercising the right of fishing below on the ground that he fishes against the right of the Crown, for it is the business of the Crown to look after the fishery below; that is either in the Crown or in the person claiming it; and it is perfectly immaterial to the person above in which it is, unless he can show that he has a grant from the Crown which prevents such right being granted; and a long and uninterrupted user of the right would be very good evidence of that, as much as if he produced the parchment. But on being driven from that the appellant had recourse to the second article of his condescendence, and there he says that he claims the right below as an exclusive right. And how does he claim it? In these words, "that "the pursuer is also proprietor of the lands of Eastern Fern and "Mid Fern, which are adjacent to the south side of the said frith, "and below Bonar Bridge, together with the salmon and other "fishings appertaining thereto." That would be altogether correct if found in the summons, but the summons only states a fishery in gross; and under that I am clearly of opinion he cannot raise an issue of right inconsistent with the general rights, a right as arising from a fishery regardant, belonging to those two closes which are not named, though one of them, Eastern Fern, is named alio intuitu, inferentially only. Upon these grounds, my Lords, I clearly agree with the judgment of the Court below. At the same time I think it necessary to add, that I wholly concur in the able argument used by the learned counsel on behalf of the appellant as to the strictness of the rule I am now applying to this case, and that there is a laxity of pleading common in the Court below. I admit that, over and over again, I have seen cases where there has been as great a deficiency of accuracy and clearness and technicality, in raising a question upon the record of pleadings, as appears upon the pleadings now before your Lordships; but that shows the absolute necessity, which I fear exists, to enforce in Scotland a greater degree of strictness and technical accuracy in drawing those pleadings; and if the Court below will not confine the practitioner to something like accurate rules, I am quite certain the only way in which they can be ever kept to those rules is by the House supplying the defect. In the present case it may be said the appellant has no ground of complaint, for you are affirming the judgment of the Court below, and that Court may have proceeded upon those grounds; possibly they may, but I see no trace of that. They appear to have proceeded on other grounds, some of which are not quite so

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the land lower down, "Do not you catch that fish in the river in the "course of your territorial right, not because it interferes with my "right, but because the Crown has a right to the fish," — if that had been the ground of the decision in the case of Sir James Colquhoun, I should not have held myself bound by it. Such a doctrine is so contrary to all principle that one must have supposed some other ground for the judgment. I therefore would move your Lordships, that the interlocutor now complained of be affirmed, but I need hardly add without costs.

Spankie.—As Your Lordship was so good as to throw out, that it might be competent for the appellant to proceed afresh, if he shall be so advised, may I take the liberty of suggesting whether the words may not be introduced "saving such right of action as is competent?" The introduction of those words might prevent a long litigation to come, in the Court below, on the point whether your Lordships had not concluded us.

Lord Advocate.—The only judgment of the Court below, as respects the pursuer, is, that he has shown nothing; therefore, supposing he really has a good title, this can never shut it out in a case in which he can show something.

Lord Chancellor.—The ground of decision was, that "the pursuer "had not produced or proved any sufficient title." Proved was clearly a wrong word. The appellant never came to proof. If I were to propose any alteration, it would be to put out the word proved; but it is not worth while. Supposing, therefore, that he can prove an exclusive right—supposing, he can prove that the party below used the right nimiously—he may raise his summons, and bring his action in different words, and thus raise the question of new. I think the case may safely stand on the simple affirmance.

The House of Lords ordered and adjudged, That the appeal be dismissed, and the interlocutor complained of be and the same is hereby therein affirmed.

Appellant's Authorities.—Glengary, 20th Jan. 1826 (4 Shaw, p. 371); Don Fishings (4 Shaw, p. 643); Balfour's Practicks, p. 545; Dundas, 26th Nov. 1744; (Hailes, Dec. p. 601); Sir James Colquhoun, (Mor. Dec. 12,827); Fac. Col. 4th July 1804.

Respondent's Authorities.—Mackenzie (7 Shaw, p. 297.)

FRASER,—MONCRIEF, WEBSTER, and THOMSON,—Solicitors.