

No. 24. and low water; and when the river sunk below the jedge, then they might sheet; and when it rose above it, then it should be removed. As to the question of the hecks, see the famous debate betwixt the Town of Aberdeen and the Heritors on the water of Don, 26th January, 1665, No. 107. p. 10840. *voce* PRESCRIPTION.

Fol. Dic. v. 2. p. 361. Fountainhall, v. 2. p. 227.

1750. December 21.

ROBERTSON and Others *against* STUART M'KENZIE and GRAHAM.

No. 25.

A salmon fishing established, by prescription, at a dam, falls not under the regulations of cruives.

M'KENZIE of Rosehaugh, and Graham of Balgowan, and their authors, have stood infest since the year 1614 in the fishing called the Keith-fishing of Rallrey, upon the water of Erich; their charter of apprising in 1614, ratified in Parliament, contains no other subject, and Rosehaugh has no lands adjacent to the said water, or other estate near it, but this Keith-fishing. The fishing is exercised at a particular kind of dam or bulwark erected in the river, at a place where the water is contracted to a narrow pass between two rocks; and so great a fall of water is occasioned by the dam, that no fish can get over it, except in time of great speats.

This river runs into the water of Islay, a short space below this dam, which again discharges itself into the Tay above Perth; and the heritors above the dam, whose fishing is greatly prejudiced by it, considering it as an illegal operation, brought a process for having it demolished, or at least that the defenders should be obliged to leave a Saturday's sloop, and to keep such an opening at all times as might give free passage to the smolt or fry, agreeably to the regulations in the case of cruives, which, being the highest kind of fishing known in the law, it was not to be thought that the regulations to which they are subject could be dispensed with in any inferior species of fishing; and this they insisted on, notwithstanding their admission, that the defenders had been in possession of this dam or bulwark in the same form as now *ultra memoriam*, because, said the pursuers, where a law itself has not gone into desuetude, no possession, however long, can establish a right in the face of the public law.

But it being answered for the defenders, That there was no resemblance between this dam and a cruive; that it is not intended for catching fish as a cruive is; that cruives, in forbidden time, are a direct contravention of the public law, whereas the defenders comply with the law, by giving over fishing in forbidden time, and then the bulwark stands, and no fish are caught at it: That the regulations therefore in the case of cruives have nothing to do with such dams or bulwarks more than with mill-dams, which they rather resemble; and it might be as well pretended that all the mill-dams in Scotland, which are built across waters, or navigable rivers, should be subject to the regulations of cruives, that they should have a Saturday's sloop, and a passage made for fry, and be demolished annually.

The Lords found, "That in respect of the charter and act of Parliament, in favour of the defenders and their authors, produced, and of the immemorial possession had by them in virtue thereof, the bulwark in controversy cannot now be demolished or taken away, and therefore assoilzied and decerned."

No. 25.

Fol. Dic. v. 4. p. 259. Kilkerran (SALMON FISHING.) No. 2. p. 501.

* * * D. Falconer reports this case :

STEWART MACKENZIE of Rosehaugh, and Thomas Graham of Balgowan, had in their charters, *Salmonum piscationes de lie Keith de Rattray, super aquam de Ericht*: And for the conveniency of their fishing on this river, they had immemorially possessed a dam made cross the water, consisting of a tree, and other trees resting upon it and upon the channel; the interstices whereof were filled up with stones; so that nothing could pass through, but the water run over; and below this they fished. They had also a ratification of their right in 1685; and witnesses deponed that this dam was what had been constantly called the *Keith*.

Robertson of Balmakeilly, and other heritors on the waters of Strathardle and Glenshie, which run into Ericht, raised a process for having this dam demolished, as contrary to the laws concerning cruives and zairs; than which it was more prejudicial to the salmon-fishing: and affirmed the Keith fishing in the infestments was the fishing below the dam, not the dam itself.

Answered, this Keith is not affected by these laws; it is no means of catching salmon; but the sole use of it is to hinder the sand and gravel that come down the water, to spoil the ground of the fishing. Strathardle and Glenshie are only burns, where no salmon can be caught; and it might as well be pretended to cast down mill-dams. The act 3. P. 7. James VI. for execution of the law anent casting down cruives and zairs, has an exception of such persons as are infest, and in possession of holding cruives, lins, or louns.

The Lords, 2d November, found, "In respect of the charters and act of Parliament in favour of the defenders and their authors, produced, and of the immemorial possession by them in virtue thereof, that the bulwark in controversy could not be demolished or taken away; and this day adhered."

Act. *Lockhart & R. Dundas.*

Alt. *R. Craigie & Ferguson.*

D. Falconer, v. 2. No. 183. p. 207.

1762. December 7.
EARL of MORAY and Others, against CALLENDAR of Craigforth.

CALLENDAR of Craigforth, being entitled to a cruive in the river Forth for catching salmon, altered his hecks from the perpendicular to a horizontal position, which intercepted more salmon than formerly. A complaint being made of this altera-

No. 26.
The necks of a cruive ought to be perpendicular.