

No 21. the *ostium fluminis* is that precise point where the river runs into the sea, at whatever time of the tide; and, therefore, that the *ostium fluminis* is a variable point, sometimes higher and sometimes lower, according as the sea approaches or recedes from the land. The House of Peers were of a different opinion. They interpreted a grant of a salmon-fishing *in ostio fluminis* more benignly. They judged the *ostium fluminis* not to be confined to a point, but to comprehend the whole space betwixt the lowest ebb and the highest flood-mark; and thereby to be an immoveable space instead of a moveable point. Therefore it was adjudged, "That the Earl of Murray has the exclusive right of fishing in the river Spey, downward to the place where the line which the sea makes upon the coast cuts the river at high water; and that he has no right to fish beyond that line: That the appellant the Duke of Gordon has the exclusive right of fishing from and below the said line to the sea; and that he has no right to fish above that line." Hence it appears, that the point in that case was to determine betwixt two parties, having both right to fish in the same river, but in different places. In the present case, the point was to determine what effect the alteration of the course of the river should have, by which two parties, who had originally distinct rights, came to interfere.

Fol. Dic. v. 4. p. 176. Sel. Dec. No 33. p. 36.

* * * This case having been appealed, the judgment was thus varied; Find that the pursuer Straiton has the exclusive right of salmon-fishing in the sea, within the bounds of the lands of Kirkside, as far west as a certain line, (described in the judgment), but has no right of salmon-fishing in the river Northesk, so far, and at such times as the water or stream of the river can be distinguished from the water of the sea; and find that the defenders Fullarton and Scott have no right to fish eastward of the line.

Journal of House of Lords, April 8. 1756.

1757. July 9.

HENRY TROTTER of Mortonhall *against* JOHN HUME of Ninewells and Others.

No 22.

If the proprietor of a salmon-fishing can erect any thing within his own bounds, by which a superior fishing may be hurt?

HENRY TROTTER brought an action against Mr Hume of Ninewells and others, *1st*, For ascertaining the boundaries of his fishing on the river Tweed; *2dly*, For obliging them to remove a gallows and ladder erected at the east end of the island of Annabat, for the purpose of viewing the fish in the river, and to demolish a bridge between the north-bank of the river, and the east or lower part of that island.

The marches were ascertained in consequence of a proof; but with respect to the gallows and bridge, it was *argued* for the defenders, That as these were erected within the limits of their own property, and were of considerable use

to them, they could not be obliged to demolish them, if it were even true, which was not admitted, that they proved hurtful to the pursuer's superior fishing; because every man is entitled to use his own property as he pleases, provided he does not use it *in æmulationem vicini*; and the only mischief the pursuer suffers by the gallows is, that the defenders are enabled to see the fish, and to catch them, before they pass the boundary.

Answered, The bridge in question is 226 feet long. It is supported by three stone pillars, and thirteen pillars of wood, by which the course of the water is greatly interrupted, and the salmon frightened from coming up that stream; and by the means of speats or land-floods, this channel of the river may, by the obstruction of this bridge, be much filled up, which would lead the salmon into the other branch belonging to a different proprietor. Besides, this is a navigable river, and therefore an article of public right; upon which it is not lawful to erect a private bridge, as is expressly decided in the civil law, l. 4. D. De flum.

With respect to the gallows and ladder, it is a machine erected eighteen feet and a half high, the water near it is shallow, and it is impossible it should fail to frighten the fish when coming up; and the island upon which it is erected is not the separate property of the defenders, but common to them and the town of Paxton; and the gallows stands within the line of the pursuer's fishing.

"THE LORDS, at first, found, That the defenders had no right to erect a bridge betwixt the banks of the river and the said island; and ordained them to demolish the bridge already erected by them there, and discharged them from erecting any bridge there in time coming; but assoilzied them from the conclusion of the declarator as to the gallows."

But upon a reclaiming petition,

"THE LORDS assoilzied the defenders from the conclusion of the declarator as to the bridge, and adhered as to the gallows."

Act. *And, Pringle, Scrymgeour.*

Alt. *Montgomery.*

W. J.

Fol. Dic. v. 4. p. 172. Fac. Col. No 42. p. 69.

1761. August 6. WILLIAM ROBERTSON against JOHN GIBSON of Durie.

WILLIAM ROBERTSON took a feu of a piece of ground from Mr Gibson of Durie, in order to erect a saw-mill and iron-mill upon it. Above this mill there was a dam and dam-head; and in order to secure the water, Mr Robertson got in his feu-right a privilege "of employing all the water running from the foresaid dam-head to the sea, or what more water he can bring in from the foresaid dam-head, by widening and deepening the said lead to the saw or iron-mills, excepting so much of the said water as shall be requisite for the service

No 23.

After a feu of the water of a dam for the use of a mill, the original proprietor cannot put a cruive into the dam-head.