

No 33.

*** This case was appealed :

The House of Lords, 3d March 1774, ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors therein complained of, be affirmed.

1781. *March 9.*SIR JAMES GRANT and Others *against* The DUKE of GORDON.

No 34.

Right of
floating tim-
ber in a river.
— Cruive
fishing.

THE Duke of Gordon's right to a cruive fishing in the river Spey was brought under challenge by the proprietors of salmon-fishings in that river, as against the public law, and destructive of the salmon-fishing. They were unsuccessful in this challenge; and the Duke's right was ascertained by the judgment of the Court of Session, upon a remit from the House of Peers, in the year 1777.

In the year 1778, the pursuers, as proprietors of lands adjacent to the river Spey, brought a process against the Duke, concluding to have it found, "That they had a right, at all times, to send floats of timber down the river, and to the navigation thereof, in every way of which it was capable, and to have every obstruction to this right removed; and, that the Duke of Gordon should be obliged to remove all dykes, braes, and other bulwarks impeding the navigation, and should be prohibited from erecting such for the future."

The object of this action was, the demolition of the cruive dykes, in which, it was said, great alterations had been lately made, very detrimental to the navigation. Formerly, a passage was left at one side, which allowed the currochs or small boats used by the Highlanders, to pass. The dykes were composed of loose smooth stones, which gave way to the least force; so that the floats met with little or no obstruction. Now a solid permanent dyke was made, reaching from bank to bank, which rendered the passage very inconvenient and dangerous.

This process came before Lord Gardenstone, Ordinary, who reported the question to the Lords; and the Duke of Gordon having consented that the pursuers should have right to float timber down the river, from the 26th of August to the 15th of March yearly, the Court gave a judgment in terms of this consent, 26th March 1779. Against this deliverance, the pursuers reclaimed, and

Pleaded; The Spey flows perpetually; it is navigated by rafts; and the inhabitants of the adjacent country have, for ages, made use of it for conveying, downwards to the sea, their timber and other commodities. It is, therefore, a public and navigable river; L. 1. p. 14. De Flum. (See APPENDIX.)

With respect to such, the Roman Prætor provided, "ne quid in flumine publico ripave ejus immittas; qua statio iterve navigio deterior fiat, L. 1. § 14. 15. De Fluminibus. Deterior statio itemque iter navigio fieri videtur, sive derive-

tur aqua ut exiguior facta quo minus sit navigabilis, vel si dilatetur, ut diffusa brevem aquam faciat, vel si quid aliud fiat, quod navigationem incommodet, difficiliorem faciat, vel prorsus impedit, interdicto locus erit ;” Ibid. § 14. 15.

By the feudal law, the principles of which are adopted in Scotland, these rights, which were deemed public by the Roman law, are vested in the person of the King, not as a patrimonial interest and alienable by him, but as a trust for the good of the community. Such are public rivers and highways. With respect to the latter, it is indisputable, that the king cannot erect edifices on these, nor throw any obstruction in the way of passengers. And in the same manner, with regard to rivers, Craig lays it down, L. 1. Dieg. 16. § 11. “Flumina navigabilia ad principem pertinent, licet jus navigandi ad privatos, ita ut nemo ex publico flumine aquam ducere posset ad privatam molam sine principis licentia, imo ne cum principis licentia, si usus publicus impediatur.”

The King, therefore, cannot bestow on the Duke of Gordon a right of shutting up the navigation of the river ; neither can he, by a grant of cruive or other fishing, indirectly incommode the public right ; and it was accordingly so found in the case of Sir Ludovic Grant against Sir Robert Gordon, February 19. 1761, (not reported).

Answered for the Duke ; The doctrine of the Roman law in this matter is inconsistent in itself, inapplicable to the present case, and repugnant to natural reason, and the practice of modern nations.

In one place it says, that the sea and public rivers, and the right of fishing therein, are incapable of appropriation, L. 13. De Injuriis. In another, it admits, that an exclusive right of fishing in the sea and public rivers may be acquired by long possession, L. 7. De diversis temporal. præscrip. L. 14. De Injuriis.

The Roman law relates only to rivers which are capable of navigation and passage up and down, with vessels of burden, at all times and seasons, L. 1. § 5. De Flum. The Spey is only capable of transporting floats of timber downwards from the Highlands to the sea, when swelled beyond its ordinary size by a high flood. And no vessel, even of the meanest size, can be navigated upward upon the river, beyond the influence of the tide.

No reason whatever can be given why water, as well as land, should not be the subject of property, so far as its nature will permit. Modern nations, therefore, have uniformly exploded the idea of the sea and rivers being common, Novell. Leon. 56. Selden, Mare Clausum, c. 15. In particular, the law of this, and every country where the feudal system prevails, has transferred to the Sovereign these subjects, together with all others, which, by the Roman law, were called Public. They are held as his property, and are part of the Regalia ; Feud. lib. 2. tit. 56. Craig, lib. 2. dieg. 16. Thus wreck, fishings in the sea, whether of salmon, or oysters, muscles, &c. ; thus, the right of navigation in the sea, and that of ports and harbours, belong to the Crown. And these rights, with the powers of exacting certain tolls and duties, it may either retain or transfer.

No 34.

The Duke's right of cruive fishing was bestowed on his ancestors for honourable services. It has been recognised by the supreme courts of law. He is entitled to use it in the way most beneficial to himself, and cannot be prohibited from so doing, even on account of the public good, without the interposition of Parliament, and a due compensation made to him. Still less can his right be limited at the suit of these pursuers, who have no grants of navigation from the Crown, and, of course, have no title to challenge the erection of the cruive dykes, as detrimental to the navigation.

The Court, in giving their opinions, did not seem to regard the distinction betwixt public, or navigable, and private rivers. They considered a river, by which the produce of the country could be transported to the sea, to be a public benefit, entrusted to the King, as *pater patriæ*, for the behoof of his subjects in general, which could neither be given away nor abridged by him; and that this transportation, as the chief and primary use of the river, if incompatible with the cruive fishing, would prevail over it. They were, at the same time, of opinion, that these rights were not incompatible, if not emulously used, and, therefore, proceeded to fix certain regulations, according to which they were to be exercised.

By an interlocutor dated 18th January 1781, they found, "That the Duke of Gordon has a right of cruive fishing in the river Spey; but that Sir James Grant, and the other pursuers, superior heritors on the Spey, have a right and title to pass with floats and rafts down the said river to the sea, from the 20th of August to the 15th of May; and that, from the 26th of August to the end of March, they are entitled to the exercise of the said right of floating indiscriminately, without any restriction or limitation; but that, in the exercise of that right, from the last day of March, to the 15th May, the persons employed in the floating must give notice to the tacksmen of the Duke's cruive fishing, or their manager, personally, or at the wauk-mill of Fochabers, now called the fishing quarters, between sun rising and sun setting, and that at least four hours before the floats are to pass, that the Duke's fishers, or others concerned in the cruives, may make a passage for the floats or rafts passing the cruive dykes; and, failing their opening a passage to the floats or rafts, within four hours of such notice, allow the persons attending the floats to open a passage for themselves in the cruive dyke, and to pass freely, and without interruption."

And, upon a petition from the Duke of Gordon, advised with answers, replies, and duplies, they, of this date, found, "That the superior heritors are only to float from sun rising to sun setting; also, that they are to pass the cruive dyke *seriatim*, at the place pointed out to them by the Duke's fishers, who are always to make the said opening, so as to allow the floats to pass freely and conveniently.

Act. *Advocatus, Ilay Campbell, et James Grant.*

Alt. *M'Laurin et alii.*

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Fac. Col. No 52. p. 90.

* * * This case was appealed :

No 34.

The House of Lords, 20th February 1782, ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of, be affirmed.

1791. November. MILLER *against* STEIN.

No 35.

MILLER of Dalswinton bought the lands of Southfield, through which there runs a small stream of clear water fit for family uses; the banks of which Mr Miller planted and ornamented at considerable expense, and supplied a cold bath from the water. Stein having purchased a brewery in the neighbourhood, which had lain for some time unoccupied, converted it into a distillery, the refuse of which running into the stream rendered it putrid, and unfit for the use of man or beast, besides entirely destroying its amenity. Miller having presented a bill of suspension and interdict, Stein *urged* in defence, That the refuse of his distillery was not of a poisonous quality; that as superior heritor, he had a right to use the stream for any lawful purpose, which the present certainly was; and he *contended* moreover, That the distillery having been erected long before Mr Miller's house was built, he had come to the nuisance, and not the nuisance to him. THE LORDS were of opinion, That the primary use of water being to drink, no proprietor was entitled to employ the water passing through his ground in any purposes which could defeat that primary use to others who had before enjoyed it; they therefore passed the bill, and continued the interdict which had been granted by the Lord Ordinary. See APPENDIX.

Fol. Dic. v. 4. p. 173.

1791. November. RUSSELL *against* HAIG.

No 36.

RUSSELL of Roseburn brought an action against Haig, distiller at Lochrin, in the suburbs of Edinburgh, on the ground, that the refuse-water from that distillery running into a rivulet, which in its course passes through the pursuer's grounds, brought down a mass of filth, which rendered the water formerly used for domestic purposes, and by cattle, totally unfit for these uses, and tainted even the air in its vicinity. *Urged* in defence, It is not alleged that the water itself, issuing from this distillery, was a nuisance. The fact was, That the rivulet in question was nothing else than the draining of the common sewers from the south suburbs of Edinburgh, of which the filth had formerly