

obstructing their passage, like stent-nets, it was not struck at by the interlocutor in the former action.

No. 18.

The complainers, on the other hand, maintained, that the hang-net had the same object, and nearly the same effect, with the stent-net; the former being stretched across that part of the river by which alone the salmon attempted to pass; and extremely detrimental to the complainers, both by the obstruction which it occasions, and, when the fish caught are left hanging in it, by frightening other salmon from coming at all up the river; and that, consequently, these nets were illegal, both in terms of the former interlocutor, and of the principle of the decision, 21st December, 1793, Sir James Colquhoun against the Duke of Montrose and others, No. 17.

The Lords, upon advising the petition, with answers, replies, and duplies, prohibited the defenders "from erecting any engines, or using any method, not for the purpose of catching fish, but for obstructing or preventing them from passing up the river; and, in particular, from using stent-nets or hang-nets, of any sort or denomination."

A petition, and additional petition, were (16th May, 1797,) refused without answers.

Act. Hay.

Alt. H. Erskine, Hope, Williamson.

Clerk, Menzies.

D. D.

Fac. Coll. App. No. 1. p. 1.

1804. July 4.

SIR JAMES COLQUHOUN, *against* The DUKE of MONTROSE and Others, and MAGISTRATES of DUNBARTON.

SIR JAMES COLQUHOUN having carried the judgment of the Court by appeal to the House of Lords, in the declarator of his right to salmon fishing in the river Leven, by means of stob-nets, (No. 39. p. 12827.) it was ordered and adjudged, (June 28, 1801,) "That the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of with respect to the interest of the town of Dunbarton to insist in the present action; and to proceed, at the same time, to consider and pronounce upon the title and interest of the superior heritors; and also, generally to review that part of the several interlocutors which relates to the right of fishing claimed by Sir James Colquhoun; and more especially, as far as these interlocutors connect the right of fishing, as claimed by him, with his having, or not having, a right of cruive-fishing."

To apply this judgment, the cause was remitted to the Lord Ordinary, who allowed a proof to be reported to the Court. After hearing parties, memorials were ordered upon the whole cause, both in regard to the titles and interests of the superior and inferior heritors to object to the mode of fishing used by Sir James Colquhoun, as well as to the legality of the fishing itself.

So far as regarded the title and interest of the town of Dunbarton, the inferior heritor, Sir James

No. 19.

An inferior heritor, having a right of salmon fishing, may prosecute a superior heritor for using an illegal mode of fishing.

No. 19.

Pleaded: Every party bringing an action into a court of law, for establishing and making effectual a right, or for remedying a wrong, must show that he has both a title and an interest to insist in that action. The town of Dunbarton being infeft in a right of salmon fishing at the mouth of the Leven, have no doubt a title to insist in every action necessary for maintaining and preserving that right, by preventing any one from fishing within these bounds, nay, even within his own bounds, provided they can shew that they sustain injury by his operations, if illegal and unwarranted. The interest of a superior heritor to prevent an undue quantity of fish from being caught before they reach the place where he has an opportunity of profiting by their instinct, of always pushing up the river, may be conceived; and accordingly, all the numerous processes which this right has given rise to, have been, without one single exception, at the instance of the superior heritors complaining of illegal operations carried on in the lower parts of the stream. But the interest of the inferior heritor it is very difficult to conceive; because it is undisputed, that the only fish worth catching, are such as are going up the river from the sea: those which, after having spawned, return to the sea, are foul fish, and of no use; so that before any of the salmon can be taken by the contrivances in the river above, they must have escaped the cruive-fishing below, by which time the interest of the inferior heritor in these fish has ceased. Thus, in whatever way Sir James may fish within his own bounds, the interest of the town of Dunbarton cannot be affected by it, and consequently, they have no right to insist in any action for the purposes of limiting, or restraining his mode of fishing.

Answered, The proprietors of lands adjoining to a river, having a right of salmon fishing in it, are held to have a joint property in the fishing; and although each proprietor is prohibited from fishing beyond his own limits, yet he is entitled to insist that his neighbour shall not fish in a manner which the law has declared to be illegal. A system has been laid down by the Legislature, by which this valuable fishing may be exercised most beneficially for all who are interested; but the right of enforcing these regulations is not limited to certain heritors whose property is locally situated in a particular manner in relation to the operations complained of: every heritor indiscriminately, interested in the joint property, enjoys the privilege of protecting his right. But even the interest of an inferior heritor in such a case can scarcely be questioned; for if the superior heritor, instead of using a destructive mode of fishing, were restricted to the ordinary way by net and coble, every person having an interest in the fishing would have a better chance of catching more salmon, his chance being exactly in proportion to the quantity in the river; and it does not admit of dispute, that the quantity of salmon in a river must be materially affected by the mode of fishing practised in it.

The Court, (6th July, 1804,) almost unanimously sustained the title of the town of Dunbarton to insist in this action. They likewise sustained the title of some of the superior heritors, and continued of opinion, that Sir James Colquhoun's modes of fishings were illegal.

Observed on the bench: The town of Dunbarton, being infeft in a salmon fishing in the Leven, have clearly a right to insist in having the mode of fishing adopt-

ed in the river such as is prescribed by the Legislature ; and therefore, as in all cases where there is a clear and undisputed title, a very slender interest will entitle them to carry on this action ; it is sufficient that the superior heritor's operations may destroy a greater proportion of fish than a legal mode of fishing ; and therefore that the inferior fishing may be injured. This rule has been adopted in similar cases, where there was clearly a right, though but a very small interest. Hamilton of Westburn could qualify very little damage, in having a small portion of such a river as the Clyde taken off for the purpose of machinery ; but he had a right, as heritor of the property on one side of the river, and therefore was entitled to enjoy the whole of it as usual ; Hamilton against Edington and Company, No. 38. p. 12824. In another case, an inferior heritor, by damming up a stream in his own ground, made the water regorge upon the superior heritor, through which he could then shew no damage whatever arising to him. But his right was unquestioned, to prevent any alteration of the natural state of the river within his own property ; and it was sufficient for him to urge, that by losing one inch of level, if at any future time he should propose to cut a drain to the river, it would be less effectual for the purpose than it formerly would have been. In Jameson against Lord Abercorn, 7th December, 1791, (not reported) the principle of the judgment was precisely the same. See APPENDIX.

The interlocutor on the whole points in the cause, was in these words :

“ The Lords having resumed consideration of the remit from the Lords Spiritual and Temporal in Parliament assembled, and having heard counsel for the parties, and advised the state of the conjoined actions, with the memorials, and other writings given in, and proof adduced, Find, That James, Duke of Montrose, and Mrs. Jean Buchanan, and her husband Hector Macdonald Buchanan for his interest, as proprietors of the lands mentioned in their title-deeds founded on, and the magistrates and town-council of Dunbarton, for the community of the said burgh, respectively, have produced and instructed sufficient titles and sufficient interest to insist in the conjoined actions of declarator against Sir James Colquhoun, Baronet, and to defend against the action raised at his instance respecting the salmon fishings in question : Find, that the other pursuers of the said conjoined actions have not instructed any sufficient right or title to insist therein, or to defend against Sir James Colquhoun's action ; and therefore dismiss the said conjoined actions, so far as they are concerned, and decern against them, at Sir James Colquhoun's instance, to desist from exercising any right of salmon fishing in Lochlomond or the river Leven : Find, that Sir James Colquhoun has a right to a salmon fishing within the boundaries described in his title-deeds, which he may exercise in the usual manner by net and coble ; but that he has no right to a cruive-fishing in Lochlomond, or any part of the river of Leven : And *separatim*, find, That the mode of fishing claimed by him in the mouth of the river Leven, by means of stented nets, and stobs or stakes stretching nearly across the mouth of the said river, as described by him in his memorial to the Court, being of a very destructive nature, and impossible to be regulated in the manner of a cruive fish-

No. 19. ing, is illegal, and cannot be sanctioned by any usage; and therefore prohibit and discharge the said Sir James Colquhoun from constructing, or continuing to use any such engine; and in so far decern and declare conform to the conclusions of the conjoined actions; and assoilzie the said first mentioned heritors from the conclusion of Sir James Colquhoun's action, and decern."

Lord Ordinary, *Craig*. Act. *H. Erskine, Robertson, Boyle*, Agent, *William Callender*.  
 Alt. *Solicitor-General Blair, Jo. Clerk, Monyfeunny*. Agent, *Arch. Ferrier, W. S.* Clerk, *Ferrier*.  
 F. *Fac. Coll. No. 172. p. 388.*

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SECT. III.

Cruives.—Saturday's Slop.—Act 1581. Cap. 3.

1665. *January 26.*

No. 20. HERITORS of the FISHING of DON, *against* TOWN of ABERDEEN.

CRUIVES may be transplanted within the bounds of the heritor's possession, the former cruive dikes being demolished, so that the fishing above be in no worse situation than formerly.

*Fol. Dic. v. 2. p. 360. Stair.*

\* \* This case is No. 107. p. 10840. *voce* PRESCRIPTION.

☞ The sequel of this case is also reported by Stair:

1665. *July 29.*

THIS day report being made concerning the cruives of Don, The Lords found, that there was no necessity to keep always open a mid-stream, notwithstanding the several acts of Parliament made thereanent; which, upon inquiry through the kingdom, they found to be in desuetude, and especially in these cruives, to be made past memory, with Saturday's slop only, and ordained the distance of the hecks to be three inches Scots measure, whereof 27 make an ell.

*Fol. Dic. v. 2. p. 360. Stair, v. 1. p. 305.*

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1684. *March 18.*

WILLIAM BARCLAY of Balmacleun, *against* SCOTT of Comiston.

No. 21.

THE Lords find the mid-stream acclaimed by the pursuer's declarator to be in desuetude, and therefore assoilzie Comiston from it: Find, he must observe the