(M. 12827.)

SIR JAMES COLQUHOUN of Luss, Bart., *Appellant;*

The PROVOST and MAGISTRATES of Dumbarton, His Grace the DUKE OF MONTROSE, PETER SPIERS of Culcroich, and Others, } *Respondents.*

House of Lords, 18th June 1801.

SALMON FISHING—STENT NETS ILLEGAL—IMMEMORIAL USAGE.—The appellant's lessees having, in the exercise of the right of fishing in the river Leven, resorted to a mode of fishing, by means of fixed stobs and nets placed at the mouth of the river, so closely together, and the nets so close in the meshes as to prevent the fish from getting up the river, to the injury of the rights of fishing of the upper heritors. And this mode of fishing being claimed in virtue of immemorial usage of such fishing: Held in the Court of Session, that as the appellant had produced no right to a cruive fishing, he was not entitled to exercise his right of fishing by these stent nets. In the House of Lords, the case was remitted for reconsideration, with doubts expressed, whether the statutes in regard to cruive fishings could apply to the mode here practised, and also, whether an immemorial usage of such fishing could be destroyed, by its merely bearing an analogy to cruive fishing.

The appellant's ancestor, Sir John Colquhoun of Luss, acquired by purchase from the Duke Lennox, certain lands in the county of Dumbarton called Baloch, "with the fish-"ings of salmon, and other fishings, in the river of Leven "and loch of Lochlomond," or Lochmouth.

The respondents, the town of Dumbarton, had a right of fishing salmon on the lower part of river Leven, at the mouth near to the sea.

The other respondents were superior heritors, having rights of fishing above that of the appellant.

When the appellant's ancestor fished his own salmon, this was done by fixing a row of stobs or stakes into the channel of the river, about eight or ten feet apart, and running in a curved line bending upwards across the river, in the middle of which an opening was left of twenty or thirty feet wide, through which boats passed. Their nets were put into the water at some distance above the stobs, and one net tied to another, till they extended as near the bank on each side as a boat could reach—the top of these nets being kept afloat, and the bottom sunk with slates.

1801.

COLQUHOUN v. MAGISTRATES OF DUMBARTON, &c.

The fish got entangled by running against them, were caught by the gills, and were suspended there until, on the fisherman seeing the cork sink, rowed to the spot and secured the salmon, and, according to this fashion, it was alleged by the appellant that he had immemorial possession of the fishing.

But, in 1760, the appellant's father let his fishing to an English company, who made considerable alterations in this mode of fishing. They brought down the row of stobs to the mouth of the river, and placed these stobs much closer. They fastened nets to them with strings at top and bottom. These nets were thicker in the twine, and closer in the mesh, so as not to serve the purpose of hanging and catching the fish by the gills, but of detaining them in the river below, until the fishermen caught them with their draught nets.

The result of this fishing was to injure that of the superior heritors, and, in particular, the inferior fishing immediately below, belonging to the town of Dumbarton. Various complaints arose, and litigation took place.

The town of Dumbarton raised at last a declarator against the appellant's father, afterwards transferred, on his death, against him, to have it found that he had no right to erect cruives upon the said water of Leven, nor to keep up unlawful engines at present employed by him in the said fishing, to the great hurt and prejudice of the respondents' salmon fishing, and hurt of the navigation of the river, and thus preventing the fish to get up the river, and that the defender (appellant) had only a right of salmon fishing by net and coble, in the usual and legal manner.

Dec. 4, 1789. In this process, the Court found that "the magistrates of "the town of Dumbarton have a sufficient title to insist in "this action; finds the defender has produced no right to a "cruive fishing in the river Leven, nor to erect therein the "engines complained of; and he is bound to remove the "same, and decern."

The appellant, conceiving that this interlocutor did not affect his mode of fishing, as practised previous to the lease to the English company, brought a declarator to have his right declared against the magistrates, as well as against the superior heritors, viz. that "he has a right to fish the salmon "in the same manner as was practised by his ancestors for "time past memory, and that in virtue of his special grants "of salmon fishing in the said loch and river, he has good

" right to exercise his salmon fishing in the said loch and " river by all lawful ways and means, by net and coble, or " by shooting rows of nets wholly across, and sinking the " same to the bottom with weights, and floating them to the " surface with cork; and to drive the rows of stobs or posts " across the bed of the river, for preventing these nets from " being carried down by the current, and to fix hanging or " masking nets by the one end to the posts, for masking the " fish."

These two declarators were conjoined: and afterwards a proof was allowed and taken by both parties.

The question was argued as if it were one between the magistrates of Dumbarton and the appellant, leaving the appellant's case with the other respondents to be afterwards disposed of. It was maintained that the magistrates had no title to insist in this action, in so far as the mode of fishing by him in the upper part of the water, because they had no interest so to question his right and mode of fishing, they being lower heritors on the river, and not higher heritors, so that his mode of fishing could not, from the nature and habits of the fish, be detrimental to the right of the lower heritors. Before the salmon got to the appellant's fishing grounds, they must necessarily have come through and have got out of the fishing grounds belonging to the town of Dumbarton, and, consequently, the moment this took place, the interest of the town of Dumbarton ceased and determined, and they could catch no salmon but such as had already passed beyond the bounds belonging to the town. It was answered, that the magistrates' title to insist in this action relative to their fishing, was beyond all dispute. It was enough for the town of Dumbarton to aver and show, that their fishing, at one time good, was, since the erection of the engines in question, entirely destroyed, and though it might seem at first sight very plausible in theory, that the barrier or structure erected by the appellant in a higher part of the river, could not prevent the fish from coming to the fishing grounds belonging to the town of Dumbarton, yet the fact was indisputable, and could be proved, that such structure had diminished the fishing to less than a fourth of what it was; and this was the general tendency of cruive fishing. Besides, it was hurtful to the fishing otherwise, because, as salmon are led by natural instinct into these rivers to spawn, if engines are so erected as to prevent a single salmon from getting up to deposit its spawn, the

1801.

COLQUHOUN v. MAGISTRATES OF DUMBARTON, &c.

Dec. 21, 1793, and Jan. 16, 1794.

river, in the course of time, would become entirely barren. The appellant further maintained, in reply to what was said as to these structures hurting the right of navigation, that if he had such a right, then it could not be affected by the allegation that it may prove hurtful to the navigation of the river.

The Lords, of this date, pronounced this interlocutor:—

"In respect the title of magistrates and town council of "Dumbarton to insist in the present action against Sir "James Colquhoun has been already sustained, find it un- "necessary in *hoc statu* to determine upon the titles of the "other pursuers: find that Sir James Colquhoun, having "produced no right to a cruive fishing, he is not entitled to "exercise his right of fishing by stobs and nets, as claimed "by him previous to the year 1760, nor to interrupt the "navigation either in the river, or in the mouth of Loch "Lomond, and in so far decern and declare in the action at "the instance of the town of Dumbarton. And in the ac- "tion of declarator at the instance of Sir James Colquhoun, "assoilzie the magistrates and town council of Dumbarton "from the whole conclusions thereof, and decern; but remit "to Lord Craig to hear the other parts thereon."*

---

* Opinions of the Judges.

Lord President Campbell said,—"This is a question, whether stent nets across a river are lawful.

"In three instances, at least, they have been found unlawful. The first is Fountainhall, 10th Feb. 1693, Fishers on Don. This decision has escaped the counsel, as it happened not to be reported in the Dictionary; but it concludes with these words:—'And the 'Lords further discharged either party to make use of a stent net, 'as that which had been the *origio mali*, and bone of contention be- 'tween them.'

"The second case is the Duke of Queensberry against the Magis- Mor. 14,279. trates of Annandale in 1771, Nov. 19. In it the Court found:—As to salmon fishing in the river of Annan, 'Find that although the Mar- 'quis, the inferior heritor, and his tenants, have right to use all legal 'engines and methods for catching the fish conform to law, and to 'their possession; yet they have no right, either in time of actual 'fishing, or in any other time, to erect any engine, or use any me- 'thod, not for the purpose of catching the fish, but for preventing or 'obstructing them from passing up the river; and therefore find that 'the method used by them of stenting nets across the river are 'illegal.'

"The third case was the former judgment in this very case, 4th

Against these interlocutors the present appeal was brought.

Pleaded by the Appellant.—The town of Dumbarton has no interest either to insist in a process for limiting the appellant's right of fishing, or to oppose the conclusions of the summons; because the salmon fishing belonging to the town of Dumbarton, in the lower part of the river, never can be affected by any mode of fishing which the appellant may follow in the upper part, as it is an undisputed fact,

---

Dec. 1789, where two points were decided, first, that Sir James had no right to cruives; 2dly, That he had no right to use the engine in question, which was no other than a stented net across the bottom of the loch, according to an improved plan, and somewhat more destructive than formerly.

"Another point was decided, viz. that the pursuers had a title to complain, and their title is the same now.

"The great object of these bulwarks, whether of stone or network, is to prevent the passage of the fish upwards, and to keep them in a pool below, where they are easily caught, either by net and coble, by stell nets, or other methods. The new mode was by a stell of a particular construction. The old was by hang nets,—masking nets,—trap nets, &c.

"A salmon, when stopped by a dyke, endeavours to make over it, but, when stopped by a net, seldom attempts this. Some of them may try to get through, and are caught in the meshes, but, in general, they keep below.

"The stobs are not placed at the mouth of the river, but within the loch, in order to make a pool below."

Lord Justice Clerk (M'Queen).—"Leven is a public river. The alveus as well as the river, is *juris publici*. No party, whether king or individual, is entitled to shut up a public river by any bulwark whatever. No doubt there is an exception of cruive fishing granted by the crown, but these are subject to regulations. I think stented nets across a river are illegal."

Lord Abercromby.—"Of the same opinion."

Lord Methven.—"Of the same opinion."

Lord Dunsinnan.—"Of the same opinion."

Lord Monboddo.—"Of the contrary opinion. This is an inferior mode."

Lord Swinton.—"The case is precisely the same as was decided at the Sessions in Carlisle, two years ago, between Lord Lauderdale and others. The engine was found to be illegal, and held to be a nuisance."

President Campbell's Session Papers, Vol. 71.

1801.

COLQUHOUN v. MAGISTRATES OF DUMBARTON, &c.

that the fishing is confined to salmon going up the river from the sea, and that the fish which are going down the river, after having spawned, are never killed, so that no fish are taken at the appellant's fishing but such as have already escaped the bounds of the fishing belonging to the town of Dumbarton. The appellant and his authors have from time immemorial been in possession of a salmon fishing at the loch mouth, by means of stobs and set nets, in the manner before described; and although certain alterations in this mode of fishing were introduced when the fishings were let to the English company and were challenged, yet the old mode of fishing by stobs and set nets, which had been so practised for time immemorial before the year 1760, was never interrupted or challenged by any party having interest, but, on the contrary, was acquiesced in by the respondents. And, having so fished, he has acquired an undoubted right to continue that mode of fishing in all time coming, and the possession which has thus followed must be held to be explanatory of the grants contained in the appellant's and his authors' titles. This being established, the mere allegation that this may impede the navigation of the river, cannot affect his right.

Pleaded for the Respondents.—There is no occasion to dispute the title of the magistrates of Dumbarton to raise this declarator in regard to their fishing, as that is beyond all dispute. The question of title in the other respondents, is not now in issue, that being reserved. The real question is, has the appellant a grant of cruive fishing in the river in question? His title confers only a right of salmon fishing in general terms. The possession had by him, whether prior or subsequent to 1760, cannot raise that title into a right of cruive fishing, and even if he had a right of cruive fishing in express terms, the mode of fishing resorted to by him prior and subsequent to 1760, would not have been warranted by such a right. The fishing by cruives and yairs has been regulated by acts of parliament, which were framed because fishing by cruives was more destructive; and although nothing was mentioned about the modes practised by the appellant, yet as the principle which dictated these enactments is the same, namely, the destruction of the fish by fixed machinery and such like devices, the acts must be held to apply to all such apparatus for catching salmon. These acts were intended to restrain the method of fishing by cruives, and it is not to be supposed that a more destruc-

tive mode of fishing, of a similar nature, was to be allowed and practised, devised probably to evade the acts. The appellant cannot defend the mode of fishing practised subsequent to 1760; he now confines the argument to the trade practised by him prior thereto; but this practice to which he refers, and on which he founds a prescriptive right of possession, being by fixed machinery, is equally objectionable, and equally illegal; and if his mode of fishing be contrary to law, then no length of time of use and possession can justify or give a right of fishing, by erecting wooden posts or stobs across the mouth of a river, for the purpose of enhancing the value of his own fishing, contrary to law. The interest of the town of Dumbarton, although lower in the river than the appellant, is undoubted. It is enough that the town show, by the machinery in question, their fishings have been hurt—that the salmon will be prevented from getting up to spawn—and that the mode practised is illegal in itself.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,—

"MY LORDS,

"The present appeal is brought from two interlocutors of the Court of Session, one as far back as the 4th December 1789, and the other of 21st December 1793.

"To make the proceedings in the cause intelligible to your Lordships, I must mention, that the appellant, Sir James Colquhoun, and his predecessors, were in possession of a salmon fishing, of some species or other, in the river Leven, which they had acquired from the ancient family of Lennox. It was stated, that of this fishing they had had undisturbed possession from time immemorial, and the mode contended for was by fixing stobs in the river and putting nets into the stream, so that they should fasten on these stobs, the nets being supported with cork at the top, and at the bottom sunk with stones. It was stated, that from time out of memory the fishing had received no interruption down to 1760.

"At this period, the fishings are let to an English Company, who altered the mode formerly practised, rendering it much more productive. The superior heritors then complained, (and naturally enough if they had rights of salmon fishing,) that the fish were much diminished in their part of the river, and insisted that they had a right to abate the new erections. In the correspondence between the parties upon this subject, before any action was commenced, they do not seem to have complained of what the appellant calls his ancient and immemorial mode of fishing, but of this alteration in 1760.

1801.

COLQUHOUN v. MAGISTRATES OF DUMBARTON, &c.

"The town of Dumbarton, too, who had a fishing of salmon lower down the river, also complained that they were prejudiced by these new erections; they stated, that by them their fishings were diminished three-fourths in value. They did not make out clearly how this prejudice arose, but alleged that the salmon which had been spawned in the river continued to retain a great attachment to it, and naturally returned thither from the sea to deposit their spawn; but that, if the appellant's new erections were suffered to remain, no fish would be left which had that attachment to the river.

"The superior heritors, in 1786, brought an action of declarator, concluding in their summons that Sir James Colquhoun had neither a right to cruive nor to keep up "the unlawful engines at present "employed by him," which they considered to be different from cruives. (Here the conclusions of the summons were read.)

"The appellant contended, that these pursuers not having rights of salmon fishing, had no title or interest to insist in the action. It seems to be undisputed, that this was not the species of action suited to do away any interruptions to the public right of navigation.

"It is stated, that to help out their case, the superior heritors prevailed upon the town of Dumbarton to bring another action. There is no proof of this; but, in point of fact, this action was commenced, in which the conclusions were nearly the same as in the former action.

"The appellant contended, also, that the town had no title or interest to insist in the action, and that his stented nets could be of no prejudice to them. I do not hesitate to say, that I think it will be difficult to show that the town of Dumbarton had an interest to object to the fishing as practised before 1760, if they have nothing to urge on their part but the philosophical argument already alluded to; for if weight is to be given to this argument, long before 1760 not a fish would have been left in the river.

"These processes came on to be heard in July 1787, and condescendences were ordered to be given in, both for the superior heritors and for the town of Dumbarton. To this period, the only question between the parties was, as to the right of keeping up the erections of 1760. And it does not follow, that if the town of Dumbarton could make out an interest against that mode of fishing, that they could also against the old mode.

"On the 3d July 1787, the Lord Ordinary pronounced an interlocutor in favour of the appellant. (This interlocutor read by his Lordship).

"This argument proceeds on a matter of fact, and a principle of law drawn from it, that the defender, having made out a right to cruive-fishing, was entitled to exercise this mode of fishing which had been erected. It is not now urged that the appellant has a right to a cruive-fishing in point of fact, and I have not heard from the arguments at the bar sufficient to satisfy me, that a right to cruives would give also a right to this species of fishing.

"The two processes were then conjoined, and the Lord Ordinary, on the 4th December 1789, pronounced the first interlocutor appealed from.—(This interlocutor read by his Lordship.)—This does not contain so direct a proposition as the former interlocutor; but it is difficult to say why it should say one word of cruives. It must be considered as stating negatively on this point what the prior interlocutor had stated affirmatively.

"The appellant then argued, that if he should be found to have no right to keep up the erections of 1760, still he had a right to say, that showing an immemorial possession of a certain species of fishing before that period, his ancient fishings should not be cut up root and branch. The pursuer answered, that the Court had no right to decide upon that, the actions being only to do away the encroachments in 1760; and the Court seem to have been of the same opinion.

"The pursuers, however, went of their own accord, and destroyed every species of obstruction on the river. And the appellant then commenced his action of declarator to establish his right to the old mode of fishing.—(His Lordship read the conclusion of the appellant's summons.)—The declarator was conjoined with the two former actions.

"The operation of this, I conceive, was to bring distinctly before the Court the following questions:—Whether the superior heritors had a title or not to insist in their action against the appellant? Whether or not the town of Dumbarton had an interest to insist against the erections of 1760? And, also, against the former mode as it had been practised? If the erections of 1760 were illegal, whether or not the mode prior to 1760 was also illegal? If the appellant could make out an immemorial usage of it? And, also, the great and important question, Whether or not this right depended upon a right of cruive-fishing, and if the appellant had no right to cruives, he could not be allowed the mode he contended for.

"On the 21st December 1793, the Court pronounced the second interlocutor appealed from.—(Read by his Lordship.) The depositions of the witnesses here mentioned were taken in the former actions of declarator, not in that at the appellant's instance. It mentions that the title of the town of Dumbarton "has been already sustained." But I entertain great doubts if it had been sustained, as to all the purposes of the conjoined process; it is true, it had been sustained as against the erections of 1760; but as to the prior mode, their interest appears to me so thin that I have difficulty in perceiving it. Your Lordships will see also, that it is distinctly stated to be the law of Scotland, that nothing but a right to cruives could support this mode of fishing.

"The effect of this interlocutor seems to be, that the Court of Session were satisfied that the interest of the town of Dumbarton had been duly sustained; that there was no right to cruives, and

1801.

COLQUHOUN v. MAGISTRATES OF DUMBARTON, &c.

even though the appellant's engines had existed from time immemorial, they were therefore to be destroyed; and that, in these circumstances, it was not necessary to enquire into the title or interest of the superior heritors.

"On this doctrine, with regard to cruives, I own I wish to have farther satisfaction. It has not been made out clearly to my mind from statutes, from writers of authority, from decided cases, or from arguments in this cause. I could therefore wish the matter to be again fully considered on this point.

"Upon the merits of this question, it would be unfit at present to say much. But if it appears that the mode of fishing contended for has been exercised from time immemorial, it ought not to be done away but on strong grounds; and it appears difficult to say that it has not been exercised from what, in this country, is deemed time immemorial, much more what is so deemed in Scotland. A broad species of fishing appears from ancient deeds; it is proved by leases, which from there being a rent stipulated, a *quid pro quo*, and a very stong species of proof. It is proved also by the testimony of living witnesses, with such difference only in their statements as tends to confirm the general truth of what they swear to. What signifies it, upon this point, if the stobs existed, whether they were a little nearer or more apart from one another?

"I own it is a very serious question with me, if this fishing of the appellant's has obtained in all time past, whether or not it shall be destroyed from analogy drawn from cruive-fishings? It is difficult to say, that the statutes can be applied to this mode of fishing. The decided cases, where there had been no immemorial possession, do not apply here. A net could not be set up in a river at the present day; but, from the immemorial possession, we are drawn necessarily to presume that the fishing must have been founded at first in a grant long since perhaps reduced to dust and ashes.

"This cause is not single and alone; other very valuable fishings have been attacked on the same grounds. This renders it more necessary to be duly considered. I conceive also this cause should be remitted back to the Court of Session to review the interest of the town of Dumbarton, and the title and interest of the superior heritors; for if the Court should be of opinion that the town of Dumbarton had an interest to object to the mode of fishing before 1760; and if your Lordships should afterwards be of opinion that they had none, it would be a pity were the cause to come here again, and these points not well considered. I conceive that the cause also should be fully considered, as well with reference to cruive-fishings as when taken by itself without reference to them. I shall, betwixt this and to-morrow, draw out the sketch of a judgment such as I conceive fit to be submitted to your Lordships.

"I have the satisfaction to know, that my opinion with regard to this cause, concurs with that of a noble and learned Lord now ab-

Lord Thurlow.

sent, for whom I so justly entertain the highest respect. It coincides also with that of a noble and learned person now near me, (Lord Rosslyn*) to whom I am much indebted for his assistance in enabling me to discharge the duty that I owe to my country."

It was ordered and adjudged that the case 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 Dumbarton 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.†

For the Appellant, *Ro. Dundas, W. Grant, William Robertson.*

For the Respondents, *W. Adam, J. Campbell.*

[M. 15539.]

MRS. ANN BRUCE of Arnot, and THOMAS BRUCE, Esq., her Husband, } *Appellants;*

JAMES BRUCE of Tillycoultry, and CHARLES SELKRIG, Accountant in Edinburgh, } *Respondents.*

House of Lords, 18th June 1801.

ENTAIL—DEFECTIVE RESOLUTIVE CLAUSE.— The entail of Tillycoultry contained prohibitions against selling the estate, or contracting debt, or breaking or innovating the tailzie in any way. This was followed by an irritant clause, declaring that *all which deeds* shall be null and void. Then followed this resolutive clause declaring that the said heirs of tailzie who might "contravene the said

---

* Lord Loughborough, on resigning the seals, was elevated in the peerage by the title of Earl of Rosslyn.

† Under this remit the Court of Session found, (6th July 1804, Mor 14284,) that the town of Dumbarton had an interest to insist in the action; and also sustained the title of the other heritors. They also found, that the mode of fishing by means of stented nets and stobs, stretching across the mouth of the river, adopted by the appellant, was illegal.