

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."

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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-

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The necks of a cruive ought to be perpendicular.

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tion by the procurator-fiscal of the sheriff-court of Stirling; and the cause being brought before the Court of Session, it was found, That the hecks ought to be perpendicular, for the following reason: It would have been to no purpose to fix so accurately as is done by ancient statutes the wideness of the hecks, if it were lawful to give them such a position as to make that wideness of no avail. Our forefathers were no fools, and in fixing the wideness of the hecks, they undoubtedly intended that every fish within that dimension might pass up the river. But to place the hecks horizontally, though three inches wide, makes a greater obstruction to the passage of the salmon than to place them perpendicularly one inch wide. And therefore, the placing them horizontally is acting against the meaning of the statutes, though not against the words. Suppose the hecks to be perpendicular, but indented in a waving line with very acute angles; this form would be a greater obstruction than a straight line would be with the distance of less than an inch betwixt the hecks.

Fol. Dic. v. 4. p. 260. Sel. Dec. No. 201. p. 267.

* * * This case is thus stated in the Faculty Collection :

Mr. Callender has cruives on the river Forth, the hecks of which were placed horizontally. Lord Moray, and other superior heritors, brought a process, insisting, *inter alia*, to have Mr. Callender ordained to change his hecks, and make them perpendicular.

Pleaded for Lord Moray: Hecks placed horizontally do not give such room to the salmon to pass as those that are perpendicular. The statutes all enact, That hecks must be three inches *wide*; and this undoubtedly means *broad*, or from side to side, and cannot mean upwards or downwards. This is clear from the opinion of all the grammarians. There are very few instances of hecks placed horizontally in Scotland, but most of them are perpendicular.

Answered for Mr. Callender: That the intention of the distance betwixt the hecks is to give a passage to the fry of salmon, as the statutes expressly bear; and the Saturday's slop is intended for the grown salmon. None of the statutes say whether the hecks must be horizontal or perpendicular; and therefore custom is the best interpreter of law. In the present case, the hecks have been horizontal from time immemorial. Many other cruives have their hecks horizontal, and, among others, those belonging to the pursuers themselves. The opinions of grammarians can be of no use; because wideness is only a relative term opposed to length, and has no respect to the position in which bodies may be placed, whether horizontal, perpendicular, or diagonal.

The Lords found, "That the hecks must be perpendicular."

Act. *Sir D. Dalrymple.*

Alt. *Wal. Stewart.*

P. M.

Fac. Coll. No. 100. p. 222.