

‘ from the pulpit, or from the reader’s desk, three weeks before the meeting at least, on a Sabbath, when the congregation is assembled, and before it is dismissed.’

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Upon occasion of a vacancy of the charge of second minister of South Leith, Mr Snodgrass and Mr Logan were set up as candidates; and the constituent members of the collective body, in whom the patronage vested, having split into two parties, the delegates from the kirk session, and the delegates from the shipmasters, chosen at a meeting on the 6th of August 1771, voted for Mr Snodgrass. The delegates from the maltmen, the trades, and the traffickers, and another set of delegates from the shipmasters, chosen the 27th August, the admiral-bailie, the two resident bailies, and the first minister, voted for Mr Logan; and these several parties signed different presentations to the respective candidates for whom they voted.

Mr Snodgrass, and the voters on his side, brought a process of reduction and declarator against Mr Logan, and his adherents, before this Court. Mr Logan and his party repeated a counter-process of a similar nature.

It occurred to some of the Judges, that there was a preliminary question, viz. touching the competency of this Court to try the merits, in respect that here there was but one patron, and the question is only with regard to the mode of presenting; but it carried that the Court had jurisdiction, for that it resolved into a point of civil right, which of the two presentees was legally elected? and, after a long litigation, the final interlocutor of the Court (18th November 1772), was as follows:

“ Repel the reasons of reduction of the presentation in favours of Mr John Logan, and assoilzie him and others from the conclusions of reduction and declarator at the instance of Mr John Snodgrass and others, and decern; sustain the reasons of reduction of the presentation to Mr John Snodgrass, reduce, decern, and declare accordingly.”

Act. M^eQueen et M^eLaurin. Alt. D. Dalrymple et Solicitor Dundas. Clerk, Ross.

Fol. Dic. v. 3. p. 343. Fac. Col. No 14. p. 35.

N. B. The above recited judgment on the merits proceeded on circumstances; chiefly on the irregularity of the meeting of shipmasters, 6th August, and of the proceedings therein.—See PATRONAGE.

1775. February 17. JAMES COURTTS against SIR FRANCIS BLAKE.

MR COURTTS, in virtue of his infetment in the estate of Greenside, locally situated in Scotland, has a right to a fishing in the river Tweed, thus described in his rights: ‘ All and whole that fishing upon the river Tweed, commonly called the *Fishing of Upsattlington*, betwixt the west ford of Norham and the ford called Bendibus, beside Newbigging, with the pertinents, lying in the

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An action of trespass instituted by a Scots heritor against an English one, for his having de-

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 molished a
 cauld or dam-
 dyke, of
 which the pur-
 suer had been
 immemorial-
 ly in posses-
 sion in the
 river Tweed,
 for the benefit
 of his salmon
 fishing, found
 cognizable
 by this Court.

' Sheriffdom of Berwick.' Within the bounds of this fishing, the bed of the river Tweed is divided into two branches by an island in the middle of the course of the water, called the Island of Anna, consisting of several acres of ground, and Mr Coutts and his authors have been in the immemorial and uninterrupted possession of the sole and exclusive right of fishing in the stream on the north or Scots side of the island, so far as it lay within the bounds of their fishing; and, for the purpose of carrying on this fishing to advantage, there was a cauld or dam-dike erected in that branch of the river, which began within 26 feet of the north bank of the river, and run across till within 57 feet of the island, when its direction was altered, and it run nearly in a parallel line with the island up the river for a space of about 145 feet. The intention of this dam-dyke was to deepen the water for the purpose of drawing the nets, and making still and deep water for the fish to lie in; and this dam-dyke hath always been in use to be repaired by Mr Coutts, his authors or tenants.

Mr Coutts brought an action of declarator, molestation, and damages, before this Court, against Sir Francis Blake, setting forth, that the defender, who resides in the bishopric of Durham, and claims a right to a fishing on the opposite side of the river, in the month of July 1773, had broke-down and removed about 60 yards of the pursuer's dam-dyke, carrying away the stones, which he applied to his own use, and cut the bed of the river in such a manner as that the pursuer's fishing is become waste and of little value: That the pursuer had arrested in the hands of Captain Dickson, as debtor to the defender *jurisdictionis fundandæ causa*; and concluding, that the defender should be decreed to rebuild the dam-dyke on his own expense, and to repair the bed of the river within the pursuer's property; and discharged from molesting the pursuer in the peaceable possession of the said fishing, and also to pay damages and expenses: And, after executing the foresaid summons, the pursuer not only arrested of new upon the dependence, but likewise used an inhibition against Sir Francis.

Sir Francis *pleaded* a declinature of the jurisdiction of the Court upon two grounds, *1mo*, He maintained the trespass alleged to have been committed by him, and upon which the action was founded, was committed within England, and consequently only competent to be tried in the Courts of law in England; and, *2dly*, he maintained, that the debt due to him by Captain Dickson being secured by an heritable bond and infestment, an arrestment was an inhabile mode of attaching it, so as to found a jurisdiction.

The pursuer, on the other hand, *contended*, That the act complained of was committed on Scots ground, and therefore cognisable in the Courts of Scotland; and that the defender's effects being properly attached by an arrestment *jurisdictionis fundandæ causa*, the jurisdiction of the Court of Session was a proper one to resort to with this action.

Upon this point, it was *argued* for the defender; By the judgment of the House of Lords in the question between the Duke of Roxburgh and Earls of

Home and Tankerville, the middle of the river Tweed was declared to be the boundary between the two kingdoms, (see June 29. 1768, *voce* SALMON FISHING.) The general position, therefore, being laid down, that a line bisecting the *alveus* of the river where it runs between the two kingdoms, forms the exact limits of the realms, and several jurisdictions thereto belonging; the *first* question to be determined is, what is the English, and what the Scots side of the river? for that being determined, the drawing the line between the two is a mere mechanical operation; it is no more than measuring the distance between the two sides in any part, and fixing on a point equidistant from both sides, which will be the boundary of the jurisdiction in that particular part.

From the very showing of the summons, it appears, that the pursuer himself understood that there was an English and Scots side of the river in the place where his cauld or dam-dyke stood; for he takes particular care upon every article in his summons, and upon every mention of the cauld or dam-dyke, to tell the Court, that it was erected on the Scots side of the river.

And in prosecution of the same idea, he hath not pretended to set forth that he is possessed of any property on the other side of the river, or that his charter of the lands in question gives him any right of possession beyond the river side; particularly, he hath not pretended to show, that either he himself, or any other person, by virtue of a charter issuing under the Great Seal of Scotland, hath a title to any part of the Anna or Island, opposite to that part of the river where the pursuer's cauld or dam-dyke is built.

The defender hath all along insisted, that this Anna, or Island, is a part of the realm of England, being situated locally within the bishoprick of Durham, and possessed as part and pertinent of that bishoprick; and, by the proof that hath been taken under the authority of the Lord Ordinary, (before answer to the point of jurisdiction,) this is established beyond a possibility of doubt.

It seems therefore clear, that the bank of the river on Mr Coultts's side is Scots property, and the bank of the river on the north side of the Anna or Island, is English property; of consequence, according to the above principles laid down, the middle point between the two is the boundary between Scotland and England in this particular place.

When the breadth of the river in the point where the cauld or dam-dyke in question is laid down, is examined by the scale upon the plan, it appears to be 80 or 81 yards; that is to say, 240 or 243 feet, the half of which is 120 or 121 and a half feet. Now it appears, that the dam-dyke is still standing to within 57 feet of the English side of the river; and that the part of it that is complained of being taken away, approached that side of the river in a sloping direction up the stream, till it came within 38 feet of the English side; of consequence, there is still left standing about 63 or 64 feet of the dam-dyke within the English side of the river; with respect to which, it is not pretended that the defender hath had the least interference, and of consequence, the very acts complained of were all that distance removed from Scotland, within the realm of England.

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And, in confirmation of this argument, the possession, that appears to have been had of the river, in the way of fishing, is very strong and decisive. The whole fishing on the north side of the river opposite to the island in question, belongs to the pursuer; but the fishing on the south side is divided between two proprietors, both Englishmen, and is possessed conform to the particular boundaries thereof mentioned in the proof.

The possession, therefore, that has actually been had of the fishings on this river, and the ideas of the whole neighbourhood, do exactly coincide with the plea that is maintained on the part of the defender, viz. That the middle of the stream, or *alveus* of this river, forms the true limits between the realms of Scotland and England, and separates the jurisdiction of the Courts of law in the one country from those of the other.

And this being the case, the defender is well entitled to maintain, that, as the nature and effect of the acts brought under challenge by the summons, supposing them to be true, can only be judged of according to the law of England, and by an English jurisdiction; since what might be deemed a trespass by the law of Scotland, may be a justifiable act by the law of England, and *vice versa*; so, whether the facts themselves set forth in the summons are true in whole, or in part, is only proper for the cognizance of an English Court of judicature. Indeed, the defender believes that this is the first instance that has occurred of an attempt to try a real action, the grounds of which occurred in England, in Scotland; and, therefore, precedents in our law books cannot be expected. The authorities, however, of the writers on the law of nations and on the civil law, are numerous. Vide in particular Voet, in his commentary on the title of the Pandects, *De judiciis*, § 77.

Answered, in the 1st place, it is a point that neither is nor can be disputed, that the pursuer has a right to a fishing in the river Tweed, known by the name of the Upsattlington, or Westford fishing, extending from the cauld or dam-dyke in dispute, a considerable way up that river; and, indeed, it appears from the proof, that the north stream of the river, in so far as, within the bounds of the Westford fishery, viz. above the cauld, has been solely occupied by the pursuer and his authors; it is likewise farther in proof, that the cauld, or dam-dyke in question, was always held to be the property of the pursuer and his authors the proprietors of the Westford fishing; and that the same was upheld by them and their tenants whenever it was necessary. On the other hand, it seems to be established by the proof, that the foresaid island has been chiefly, if not altogether, possessed by the proprietors on the English side of the river, and which is easily accounted for from this circumstance, that the access to the island from the north is difficult, whereas the access to it on the south side is extremely easy.

These facts being adjusted, the question now is, whether the present action brought at the pursuer's instance, concluding for damages on the account of

the demolition of the cauld, or dam-dyke in question, and to put the same in the condition it was formerly, is competent in this Court?

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It is a notorious fact, that neither is nor can be disputed, that the river Tweed, for a considerable way both above and below the cauld in question, is the boundary of the two kingdoms, and from which it must necessarily follow, that the middle of the *alveus fluminis* must be held as the line of division betwixt the two kingdoms. And indeed this was so found in the late case betwixt the Duke of Roxburgh, Earl Home, and Lord Tankerville, *voce* SALMON FISHING; and which line, as it determines the boundaries of the two kingdoms, must likewise determine the limits of the jurisdiction of the respective courts of law, that part falling to the south of an ideal line drawn down the middle of the *alveus* being subjected to the courts of law in England, and what lies to the north of that line being subjected to the courts of law in Scotland.

The cauld or dam-dyke in question lies upon the north side of the foresaid island, and at the distance of 57 feet from the north bank of the island; and it is very clear, from ocular inspection, that a line drawn along the middle of the *alveus* of the river, would at that place fall within the island, and not at all within the north stream of the river; and, in this view of the case, it seems to be perfectly clear, that the dam-dyke in dispute being locally situated in Scotland, every question relative thereto may be competently tried before the courts of law in Scotland.

The defender's argument, upon which he founds a declinature of jurisdiction; amounts to this, That the foresaid island is entirely English property; that; therefore, the south stream falls entirely to be laid out of the question; that it falls to be considered as an English water, not at all taken *in computo*; but that the march of the two kingdoms must be held to be a line drawn in the middle of the north stream, at an equal distance betwixt the English property of the island on the south, and the pursuer's lands upon the north.

But the pursuer cannot agree either to the premises or the conclusion. On the contrary, he apprehends that the middle of the *alveus*, or bed of the river, which comprehends the whole space betwixt bank and bank, falls to be considered as the boundary between the two kingdoms, and between the respective jurisdictions of the courts of law. This ideal line would fall to be continued down the middle of the *alveus*, notwithstanding of any island that might happen to arise in the bed of the river, and which would be either held as English or Scots property, according as they lay on the north or south side of this ideal line; and if the island should happen to be precisely in the middle of the *alveus*, the line would fall to be continued straight down the middle of that island, by which means the one half of it would be Scots property and the other half English, *L. 7. § 3. D. De acquirendo rerum dominio*. Neither will it be sufficient to give the exclusive property to the heritor upon the one side of the river, that some part of the island may be nearer the one side than the other; but, in order to give this exclusive property to one, it must, with respect to all its parts,

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be nearer the one side than the other ; for, when otherwise, as it plainly occupies the middle of the river, the decision of the law in that case is, that it becomes the joint property of those who hold the grounds upon each side of the river, *Voet. ad lib. 41. D. tit. 1. § 17.*

To apply this doctrine to the present case, it is clear that, even taking things as they now appear, there is no ground for appropriating the whole of the island to the proprietor of the lands upon the south side of the river ; because it is plain, from ocular inspection of the plan, that the island, as to all its parts, is not nearer to the English than the Scots side of the river, but that, on the contrary, by drawing a line along the island at an equal distance betwixt the north and south bank of the river, a considerable part of the island would fall upon the north side of that line.

And indeed, whatever appearance the island now has, it is evident from the proof, that the bulk of the island had lain in the middle of the river, if not nearer to the Scots than the English side.

Hence, it is plain, that there is no ground in law for considering this island as entirely an English island ; on the contrary, as this island does occupy the middle space of the river betwixt the two banks, it must, agreeably to the principles of law, belong partly to the proprietor of the lands on the English side, and partly to the proprietor of lands upon the Scots side of the river, and of consequence, the south side of the island will be English property, and the north side Scots property. And this being once established, it will not alter the case, although it were to be admitted, that the possession which has been had in this case would be sufficient to appropriate the whole of this island to the proprietor of the English side of the river. There is nothing to hinder an Englishman to acquire Scots property either by purchase or prescription ; but his acquiring it, either in the one manner or the other, will not alter the nature of that property, or the known established boundaries of the kingdom ; but what was held to be in Scotland, when the property of Scotsmen, must still be held to be Scots property, although, by prescription or otherwise, it had become the property of Englishmen. And, in that view of the case, there cannot be a doubt that the cauld in question falls in every view to be considered as within Scotland ; for the north stream is bounded upon both sides by Scots property ; and, consequently, every question respecting that cauld is cognizable in the courts of law in Scotland.

But farther, it is undeniable, that the pursuer's fishing, which is locally situated in Scotland, and held under a feudal Scots investiture, must undoubtedly be held as a Scots estate. It is clear from the proof, that the cauld in question, which has remained there for time immemorial, has been erected and upheld for the benefit of the pursuer's fishings ; and accordingly it is in proof that it has been always repaired and upheld by the proprietors of the Greenside fishing ; and, therefore, supposing that the place upon which the cauld was erected were locally situated in England ; yet, as its sole use and purpose is being

subservient to a Scots fishing, and as it in that light falls to be considered as a pendicle of a subject locally situated in Scotland, the pursuer holds it to be perfectly clear, that the demolition of this cauld, which only becomes a wrong on account of a hurt and damage being thereby done to a subject locally situated in Scotland, must be cognizable before the courts of law in Scotland.

Observed on the Bench; The single question is, Whether this trespass was committed in Scotland or England? In Tankerville's case, the river was promiscuously possessed; there, the middle of the river was properly fixed as the boundary. But this river is not always the boundary between the two kingdoms. Here, no promiscuous possession; the island, English ground, but the river possessed by the Scotsman; and, therefore, for holding the trespass committed on Scots ground.

THE LORDS repelled the objection to the jurisdiction of this Court.

Reporter, *Kennet*.

Act. *M^cQueen*.

Alt. *Crosbie*.

Clerk, *Ross*.

Fol. Dic. v. 3. p. 345. Fac. Col. No 159. p. 32.

1775. December 16.

JOHN MAXWELL, Procurator-fiscal of the barony of Gorbals, *against* JAMES M^cARTHUR Smith in Gorbals, and JEAN STEVENSON his Wife.

JOHN MAXWELL, procurator-fiscal of the barony and justiciary court of Gorbals, instituted, before the bailie of Gorbals, a criminal libel against James M^cArthur, and Jean Stevenson his wife, which sets forth, that the keeping of a common stew or bawdy-house, and the harbouring or entertaining promiscuous companies of men and women of bad characters, commonly habit and reputed whores, for the purpose of lewdness and debauchery, cursing and swearing, and making a great noise, and by whom the neighbourhood are greatly alarmed, and the peace broke, and that at unseasonable hours, and by night as well as by day, and on Sabbath-days as well as other days; especially when such crimes are committed by persons convicted of the like crimes before, are all crimes of a very heinous nature, by law strictly prohibited and discharged, and the committers thereof severely punishable. The minor proposition subsumes in terms, but without charging that the defenders had been formerly convicted; and the conclusion is, that the defenders should be fined to the pursuer, and decerned to be imprisoned till payment, thereafter publicly punished in their persons, banished from the village of Gorbals, and liberties thereof, during their natural lifetime, and otherwise punished in terms of law, in terror of others to commit the like crimes in time coming.

The bailie afterward pronounced sentence in the following terms: 'Having considered the defence given in for the defenders, after the interlocutor on the relevancy, and during the course of the examination of the witnesses, together

The Lords sustained their own jurisdiction in reviewing a sentence of the bailie of Gorbals of Glasgow, on a criminal libel, viz. the keeping a disorderly house, for which the bailie had decreed banishment for life from the barony.