

1775. *January 27.*

The MAGISTRATES and TOWN-COUNCIL OF INVERNESS, *against* WILLIAM DUFF of MUIRTOWN, and others.

THE river of Ness, by which the water running from Lochness is discharged into the arm of the sea, called the *Murray Frith*, has but a short course of about six miles between the loch and the sea. The town of Inverness stands upon the lower part of the river.

The fishings of the river Ness from the stone of Clachnahagaig to the sea appear to have been very anciently granted by the Crown to the borough of Inverness. The original charter does not appear; but there is extant a charter dated in 1591, ratifying former grants in favour of the community, and of new containing, ‘*Totum et integrum dictum nostrum burgum de Inverness, terras, territorium, et communitatem ejusd. omnesque et singulas terras, tenementa, domus, ædificia, ecclesias, capellas, capellarias, pomaria, templa, hortos, acras, toftos, croftos, molendina, multuras, piscationes, piscarias, tam salmonum quam aliorum piscium, tam in aquis salsis quam in aquis dulcibus, annuos redditus, fructus, loca, mansiones,*’ &c.

After this general clause, follows a particular grant of the fishings in these words : ‘*Totam et integram aquam de Ness, omnesque partes, et utrumque latus ejusdem, inter lapidem vocat. Clachnahagaig et mare, cum omnibus piscationibus et piscariis, tam salmonum quam aliorum piscium, portubus, receptaculis, et cum omnibus lie ports, havens, et creeks, privilegiis, proficuis, et commoditatibus dictæ aquæ; et de, in, et super eadem aqua, et ex utraque parte, et utroque latere ejusdem, a dicto lapide usque ad mare, in quo dicta aqua currit, apud piscariam vocat. lie Stell; cumque piscaria paludis vocat. Red Pool, ex occidentali parte freti lie Ferry de Kessock; ac cum omnibus piscationibus et piscariis, tam salmonum quam aliorum piscium, et omnibus portubus, receptaculis, privilegiis, proficuis, et commoditatibus Ostii, lie Mouth dict. aquæ de Ness, ac de, in, et super dicto ostio, ex utraque parte et latere ejusdem, cum speciali potestate, facultate, licentia, et privilegio dicto nostro burgo de Inverness, præpositis, balivis, consulibus, et communitati ejusdem, præsentibus et futuris, per se suosque servos et subtenentes, omnibus temporibus futuris, incipere piscare dictam aquam de Ness, cymbis et retibus, annuatim et singulis annis, decimo die mensis Novembris; ac sustinere et reparare crates et corvos suos lie cruives, ab et ex utraque parte et latere ejusdem aquæ de Ness, secundum antiquum usum et consuetudinem, una cum privilegio et potestate trium cistarum, lie Three Kists infra lie Water-work, ut usus est, cum omnibus earundem cistarum proficuis et commoditatibus; et similiter, totum et integrum dictum fretum de Kessock, littoraque ejusdem freti, lie Landing-places, ex utraque parte et latere dicti freti, dictæque aquæ de Ness, potestatemque transfretandi, lie Ferrying,*’ &c.

No. 8.

Indefinite grant, under the denomination of co-ble fishing, may be explained by possession, both for ascertaining its limits, and likewise for inferring a right to cruive fishing, in which the author has been vested, although cruives be not expressed in the grant from him.

No. 8.

Notwithstanding this general right granted to the town, it appears that there were particular rights of fishing within the said bounds belonging to others, and which probably were coeval with the grants in favour of the borough. Thus, a charter appears from the Crown in favour of Alexander Earl of Huntly in 1509, of the office of heritable keeper of the castle of Inverness, together with certain lands therein mentioned, given and allocated for the keeping of the said castle, *cum piscariis sub muro dicti castri et eidem pertinent.* ; and these lands, and the space of water below the castle wall, which lies immediately above the bridge, and into the middle of the river, belong to the family of Gordon to this day ; but it was said, the stream here is so rapid and so full of large stones, that, though different attempts have been made to fish it, these have not turned to any advantage.

Thus also the Friar's fishing, which, before the Reformation, belonged to a religious house, appears to have been exercised in a part of the river adjacent to the said house. It belongs now to one Scot, a merchant in Inverness, who pays a feu-duty to the town, and whose rights describe it by special boundaries, as follows :
' Totam et integram aquam vocat. *lie Friar's water* de Ness, et salmonum piscariam ejusd. aquæ, quæ quondam pertinuerunt ad prædicatorum Invernessæ, bondan. inter *lie Cherry* ad boream, et communem venellam quæ descendit apud cæmiterium *lie Kirk-yard* ad austrum.'

The stell fishing in the ferry of Kessock, contained in the town's charters, is properly a sea fishing, being without the mouth of the river ; and having been long ago feued by the borough, is now the property of Mr Duff of Muirtown. The feu-duty paid for this stell is £2 16s. Scots yearly.

The general right of fishing in the river and mouth thereof was likewise feued out by the borough, to different burgesses and heritors, the predecessors and authors of the defenders, in quarter-cobles and half-cobles, without specifying any boundaries thereto, but making in whole four cobles-fishing. None of the original feus have been recovered ; but there was produced a paper which tends to show they were very early feued by the town. It is a resignation, dated 16th May 1595, by Peter Vass, in favour of Andrew M'Connel, bearing, that the said Peter Vass resigned and overgave, in the hands of Finlay M'Phail, one of the bailies of the borough of Inverness, by staff and baston, as use is, his forty-two shilling mailing and salmon-fishing of an half-coble of the water of Ness, with parts and pendicles belonging thereto, and that in special favour of the said Andrew M'Connel, M'Thomas Roy, his heirs and assignees, being actual burgesses of Inverness ; which renunciation and resignation the said bailie accepted, and disposed the said forty shilling mailing and half coble of the said salmon-fishing of the water of Ness again to the said Andrew M'Connel, who paid judicially £4 Scots money, as for this double entry of said half-coble and fishing thereof. Another of the older writings recovered, is a resignation in 1596, by Robert Vass, in favour of James Cuthbert, which describes the fishing there disposed to be a half-coble on the water of Ness, extending to a forty shilling mailing of old extent. The

titles produced by Clerk Fraser, another feuer, and which bear date in 1648, quadrate entirely with the above description; and the titles produced by Duncan Fraser, which are in 1690 and 1692, describe his fishing as a half-coble, or eight part of the salmon fishing of Ness.

Several other of the later rights to these fishings are produced. One of them describes the fishing thus: ‘Totam et integram dimidietatem cymbæ seu scaphæ salmonis piscatariæ super aquam de Ness, olim vocat. *lie forty-two shillings meal-ing of old extent, upon the water of Ness*, cum omnibus privilegiis, commoditatibus, et pertinentiis ejusd. quibuscunque, jacen. infra libertates dicti burgi, in locis solitis et consuetis.’ In another it is: ‘Dimidietatem cymbæ salmonum piscariæ super longa aqua de Ness, cum omnibus et singulis privilegiis, asiamentis, casualitatibus, proficiis, et pertinen. ejusd. et eandem, vel quæ pertinere nota fuissent, secundum usum et consuetudinem.’ In another it is: ‘Totam et integram illam dimidiam cymbæ salmonum piscationis super aquam de Ness quondam pertinen. ad demortuum Georgium Cuthbert de Castlehill, extenden. ad octoginta quatuor solidos, *lie Money meal-ing*, cum totis privilegiis, libertatibus, et universis pertinentiis usitat. et consuet. jacen. infra territorium dicti burgi de Inverness, et vicecomitatum ejusd.’

The feu-duty payable for those fishings by the vassals of the town, is, by the *reddendo* of their charters, at the rate of £2 2s. Scots for each half coble, ‘*aliaque servitia burgagia usitat. et consuet.*’ Besides the feu-duty, they pay a considerable part of the minister’s stipend, cess, and other burdens.

The coble-fishings belong now to the different heritors of them as follows: One whole coble to Mr Forbes of Culloden, another to Mr Duff of Muirtoun; a third to Mr Duncan Frazer, merchant in Inverness; the fourth to William Frazer, town-clerk of Inverness, and George Baillie of Leys, each of whom has a half coble; which two halves they have been in use to set to one person.

In January 1773, the magistrates and council did set in lease to certain persons a stell fishing, to be exercised upon the east side of the mouth of the river, and at a place called the *Long-man’s grave*, described in the tack as follows: ‘All and haill the fishing at the Long-man’s grave, bounded as hereafter expressed, viz. at the south-west 80 yards or paces east from the east end of the bank or bulwark which keeps the sea off Lotland, and from thence extending eastward along the Long-man’s grave, as far as the town’s property extends.’

Of this new erected stell fishing upon the east side, under colour of which the heritors alleged the town’s tacksmen thought proper to come into the very mouth of the river, where it is divided into three channels by the scalps or shoals at the mouth of it, they first complained by bill of suspension; and mutual processes of declarator of property were afterward brought by both parties, in order to ascertain the rights of salmon fishing in the river Ness.

The libel at the instance of the magistrates concluded to have it found, that the town has right to exercise the foresaid fishing at the Long-man’s grave, and all fishings in the river below the stone of Clachnahagaig, and in the mouth of the

No. 8. said river Ness, in all places and stations different from those anciently occupied by the four coble-fishings, the Friar's fishing, and the fishing of Kessock feued out by the town ; and that the defenders, the feuers of the foresaid fishings, and their lessees, should be prohibited and discharged from fishing in any place or station different from those at which they have been anciently in use of exercising their respective rights of fishing, or in any manner different from what they are permitted to exercise them by their respective rights and titles.

On the other hand, the libel, at the instance of the feuers of the four coble-fishings, concludes to have it found and declared, that they have the only right to the whole fishings in the river to the sea, except the Friar's fishing, as fully and amply as the same were granted to the burgh by the foresaid charter of King James VI. ; and that the magistrates and community have no right or title to fish salmon or other fishes upon any part of the said water, or mouth thereof, or contiguous thereto ; and that they should be decerned to desist from troubling the pursuers and their tenants in the peaceable, sole, and exclusive right of possession of the said water and fishings thereof, and particularly, to flit and remove themselves and their subtenants, &c. from the foresaid fishing erected by them at the mouth of the river, at the point called the Long-man's grave.

In these processes a proof was allowed and led, and the cause was determined after a hearing in presence.

The pursuers, in the first place, endeavoured to establish by the proof, that the coble-fishings belonging to the heritors are limited to particular stations in the river : That they do not go so far up as the stone of Clachnahagàig, nor come so far down as the mouth of the river, but extend only from the place called the Island, where the highest station begins, to the place called the Cherry, where the lowest station is, and which ends either at the New Quay, or at farthest, no lower down than the Thief's ford, which is a considerable way from the sea. All above and below these points, they insisted, must be reckoned the town's reserved property, not having been given away by the feus of the coble fishings. *2do*, The pursuers endeavoured to make a distinction betwixt the fishings of the river and the right of fishing *in ostio fluminis* ; and it was said, that that distinction was made in the town's charter from the crown ; and that the grant in favour of the feuers can never extend to the fishing *in ostio fluminis* ; and they laboured to bring up the mouth of the river to the Thief's ford, or to the New Pier, or to some ideal line taken from the appulse of the sea upon the adjacent coast. And farther, it was said, that the heritors can have no pretence to claim the exclusive right to the fishing above the cruives, and above the island Shott, as they never exercised any fishing whatever there ; and that they have no title to fish in the mouth of the river, or in the lower part of it below the Thief's ford, because any possession they have had there has not been sufficient to establish their right.

In the *next* place, argued, That a salmon-fishing is a right of property, as much as a right of lands, which cannot be lost by the negative prescription, unless it be acquired in favour of a third party by the positive prescription ; and that, there-

fore, the want of possession upon the part of the town is a circumstance of no moment. No. 8.

Lastly, That a cruive-fishing does by statute require infeftment for its constitution; that a grant of coble-fishing from the Crown would not be a sufficient title to erect cruives, nor even to acquire a right thereto through prescription; and if this be so, that it is not so easy to conceive how a feu of such a coble-fishing given by the Crown's grantee, though followed with possession of the cruives, as well as the cobbles, should be sufficient to operate a transfer of the cruives, or to acquire to the feu a subject perfectly distinct from that which was specially conveyed.

Upon the *first* of these points, on the part of the heritors, it was

Answered: It is true that, from the nature of the channel of the river, the practice of drawing the nets has chiefly been at particular stations and pools of the river, where the water is deep and the bottom smooth; and, as the proprietors of the different coble and half-coble fishings could not all at once draw their nets in the same station or pool of the river; and some of these pools were better, some worse, the method followed by them, to prevent interference, was to draw lots for the different parts of the river, and so take them by turns. The first lot begun at the highest station called the Island; the second at the lower part of the river called the Cherry; the third at the bridge; and the fourth at the Silver-pool; and in these different stations they succeeded one another, so as that each of them fished the whole river upward as high as they could conveniently go, and downward to the sea, except within the boundaries of the Friar's and the Duke of Gordon's fishings.

It is quite a mistake to say that each coble had its particular station. Each coble had the whole water from top to bottom; and the description of the fishings by cobbles, was merely because the whole had been parcelled out in that manner, under the denomination of so many cobbles, as land is denominated by plough-gates or ox-gates. The fishing by net or coble was the most common in those days; and it was natural to give a denomination to those fishings taken from the most common way of exercising the right, but which was not meant to limit the exercise of it precisely to that mode of fishing; far less was it meant to limit the fishings to particular stations, not one word being mentioned from beginning to end of the feu-rights. The other denomination, by mailings of old extent, and the words *parts and pendicles*, &c. are so many additional proofs that the whole water was meant to be given off.

The water was divided into four cobbles, because four cobbles were fully sufficient for the whole fishing; and even more than sufficient, as evidently appears from this, that the Berwick fishers (the heritors' present lessees) have seldom employed more than two boats or cobbles for the whole fishings of this river down to the sea.

That the heritors, and their tacksmen, have never been understood to be confined to particular parts of the river, but have been in use to fish the whole of it

- No. 8. down to the sea, and more especially, those parts of it which are said to lie below the Cherry station at the Thorn-bush, and Cairn-ark, &c. when it was convenient for them so to do; and that they at times tried to clear away the stones and seaware, in order to give them access to fish with more advantage in those parts, is clear from the proof.

This proof goes all, or most of it, back to the period when those fishings were in the hands of the different heritors, before the commencement of the lease to the present company of fishers from Berwick, which happened 18 years ago: As to the period since that time, it is an acknowledged fact, that these lessees, who pay a rent of £200 Sterling yearly to the heritors, have used and exercised the fishings without any interruption or impediment, till lately, in such places, and according to such mode, as they found most convenient for them; and particularly, that Mr Ord, their manager, did clear away the stones and rubbish in the lower part of the river, in order that he might fish it with advantage, and which he has uniformly done since the commencement of the lease.

Further, it appears from the proof, that, though before the commencement of this lease, the heritors and their tacksmen fished seldomer in this lower part of the river, because they could not do it profitably, yet they were careful to prevent every other person, and particularly the fishers of the stell of Kessock, from intruding into this part of the river, and even punished them when they attempted to do it, which was as strong an assertion of their right as could well be supposed.

Another reason of their not fishing so frequently in these lower parts, was, that they could catch the fish with greater certainty and advantage after they came up and settled in the pools or deep water, as likewise appears from the proof.

And as to the possession below the Thief's ford: In the *first* place, for these eighteen years past, the possession in the inferior parts of the river, by the present lessees, has been uniform and constant, without any interruption till now. *2dly*, Though it cannot be expected that a possession which goes beyond eighteen years can be established by as many witnesses as a more recent possession, yet, in the present case, there is as full and satisfactory a proof, even with regard to the more ancient period, as the nature of the case will admit of.

If the nature and meaning of the titles admitted of any doubt, they would fall to be explained by the uniform possession; and from thence, it is clear, the town must be understood to be totally denuded of these fishings.

To the *second* plea, that a salmon fishing could not be lost by the negative prescription, it was answered, That it did not apply. If the right of the parts of the river in controversy did clearly remain with the town, that right certainly would not be lost *non utendo*, but that was the very *questio de quo quaritur*. The sole point in dispute was, whether the grants in favour of the heritors were limited to four particular stations, each of which had known and distinct boundaries, or if they comprehended the whole right that was in the town; with regard to which the possession explained the grants.

As to the *last* plea, that a cruive-fishing, by statute, required infeftment for its

constitution; it was answered, That the argument proceeded upon an erroneous hypothesis in point of law, as if a right of cruive fishing could not be acquired by prescription, without a special infestment in cruives. The doctrine contended for was so far well founded, that a general grant of salmon fishing from the Crown would not be sufficient to confer upon the grantee a right to the cruives. That mode of fishing was not presumed to fall under the grant, unless so expressed, or something tantamount, to show that such was the intention of the grant. But although the grants made no express mention of cruives, nor even of salmon fishings, but only of fishings in general, yet if followed by a forty years possession of a cruive-fishing, that would be sufficient to establish a right of cruive fishing in favour of the grantee, as was decided 26th January, 1665, Heritors of Don against Town of Aberdeen, *infra*, *h. t.*

The law is the same with regard to teinds. See 5th July, 1748, Dunning against Creditors of Tillibole, No. 12. p. 6307.

The interlocutor of the Court ultimately adhered to was in the following terms: "Find, That the town of Inverness has been long since denuded of all their right of salmon fishing in the water of Ness by the grants made by the town in favour of the feuers of said fishing, and that the feuers have the sole right of salmon fishing in said river, by cruives, cibles, or other lawful ways, from the Stone of Clachnahagaig to the mouth of the river, where it joins the sea at low water, except the Duke of Gordon's fishing, and the fishing called the Friar's fishing, and decern and declare in the process at the instance of the feuers accordingly; but assoilzie the Magistrates of Inverness from the conclusions of declarator at the instance of the feuers relative to the fishing at the Long Man's Grave; and further assoilzie the said feuers from all the conclusions of the declarator at the instance of the Magistrates of Inverness against them, and decern."

For the Magistrates, *David Rae, James Grant.*

For the Feuers, *R. M^cQueen, Ilay Campbell.*

* * This decision was in part reported by Mr. Wallace, who had not finished it at his death. It has been concluded by the Editor from the Session papers.

SECT. II.

Privileges accessory to, and inherent in, a Right of Salmon Fishing.—
Regulations for fishing.

1612. January 18. MATHEW against BLAIR.

SALMON FISHINGS, being *inter regalia*, are privileged; and they who are infest by the King therein have thereby right and privilege to draw their nets to the