

1802. *January 26.*

EARL of KINNOUL and Others, *against* HUNTER and Others.

JOHN, William, Andrew, and George Little, became, in 1797, tacksmen of the salmon fishings belonging to James Hunter of Seaside, who has right "to the fishing of salmon and other fishes in the water of Tay, opposite to the lands of Auchmuir." At this place, the Frith is two miles broad at full tide; but when the tide retires, the proper channel of the river is only about half a mile in breadth on this part of the Frith. At the distance of a mile and a quarter from the river, an inclosure, containing a space of about fifteen acres, is made by stakes and netting, contrived in such a manner as to open as the tide flows, and shut when it ebbs, keeping in all the salmon which may have entered it during the flowing of the tide. Besides this, a line of netting, 812 yards in length, running obliquely down the river, serves to direct the fish to the inclosure, as well as to take the fish coming down with the ebb-tide. The meshes of the nets are twelve inches in circumference.

In June, 1799, Lord Kinnoul and others, proprietors of the superior salmon fishings, complained of this mode of fishing, and

Pleaded: Cruives and zairs, in all fresh waters where the tide ebbs and flows, are ordained to be destroyed and abolished for ever, 1424, c. 11.; renewed and extended to waters in general by 1477, c. 73. 1489, c. 15. By 1563, c. 68. not only the ordinary judges, but every landlord, is empowered to enforce its enactments, that "cruives and fish dams within salt water that ebbs and flows," as well as "on sands and schaulds far within the water," should be taken down. 1581, c. 3. ratifies and approves all acts, without exception, regarding the destruction of cruives and zairs, as well as 1685, c. 20. which prohibits every kind of fixed machinery for catching salmon within those parts of rivers visited by the sea. Without regard to its description or extent, these were again renewed by 1705, c. 2.

The primary object of these acts was, to prevent individuals from injuring each other in the exercise of their legal rights, particularly 1698, c. 3. and not merely to preserve the fry; for cruives, and net, and coble, form no impediment to the fry, and yet they are put under strict regulations. Nor were these prohibitions meant to apply merely to the channel of the river; for they are prohibited in all waters where the sea ebbs and flows, which is strengthened by the exception in favour of the Solway, by 1563, c. 68.

Machinery similar to what is used here, was found illegal in Heritors of Don, 10th February 1693, No. 22. p. 14287., Duke of Queensberry against Marquis of Annandale; 19th December, 1770, (not reported); and though in these, for the most part, the unlawful mode of fishing occupied the whole breadth of the river, *majus et minus non variant speciem*, and the encroachment, though less here, is not therefore the less illegal.

No. 32.

A new mode of fishing, uncommonly effectual, found illegal, although not particularly prohibited by any act of parliament.

No. 32. This mode of fishing is new in the river Tay; and damage, by the unusual number of fish caught, has actually ensued to the upper heritors, who would have been entitled to pursue this action, had no detriment arisen; because, by law, such a mode of fishing is unlawful, and this right of prosecution has been bestowed upon heritors enjoying rights of fishing ever since the enactments of the various statutes.

Answered: The apparatus employed is different in construction from cruives and zairs, or any of the other engines specially prohibited, but also different in effect, as it does not destroy the fry, which seems to have been the intention of the Legislature, in their various enactments; Stat. R. I. c. 12.; 1424, c. 11.; 1457, c. 86. The act 1469, c. 37. is only a temporary statute. 1477, c. 73. and 1489, c. 15. renewing the former regulations, do not extend them farther than to water where the sea ebbs and fills, meaning the proper channel of the river, with this limitation likewise, that the machinery destroys the fry. 1563, c. 68. is not renewed by 1685, c. 20. and therefore is now in desuetude; but if it were not, the term "salt water that ebbs and flows," must mean the water of the river made salt by the flowing of the tide. Schauldes or shoals cannot apply to the sands of the sea left dry at low water; and "sands far within the water," as little describe the situation of this machinery, which are totally dry for more than one half of every tide, and are above a mile from the channel of the river. 1696, c. 33. as well as 1705, c. 2. refer to the case of the destroyers of the smolt of salmon, dropping all regulations about particular modes of fishing, which always become nugatory by evasions and ingenious devices.

The nets used are three inches wide by the square, and cannot destroy the fry. The mode of fishing is not specially prohibited by any of the acts of Parliament, nor is the machinery placed in the situation to which they refer; which distinguishes the cases decided by the Court from the present, in all of which the fishing was carried on in the proper channel of the river, the whole of which was occupied by the nets.

But the pursuers, though they have right to fish within their own bounds, are not entitled to take a single fish beyond them; nor can they have a right of action more extensive. The acts of Parliament all of them imply, and some of them expressly direct, that the law shall be enforced, not by an heritor prosecuting another as guilty of a private trespass, but by the public prosecutor of the country pursuing and punishing the delinquents as guilty of a breach of the public law of the land. If the pursuers have no title, as little can they qualify any interest to prosecute, as the amount of the produce of the superior fishings has not been diminished; for their rents have increased since the erection of the objected machinery. There would be no end of attending to the predictions of future detriment; so that it is not enough to apprehend that an inconvenience may arise at some future time.

The cause was reported on informations, and counsel were also heard in presence. The Court did not hesitate as to the right to prosecute; but they were much divided in opinion upon the merits. Several of the Judges thought, that as the engine in question did not reach the proper channel of the river at low water, there was no law now in observance to prohibit such a mode of fishing; and it was far from being clear, that any damage arose from it to the superior heritors. But the majority, chiefly on the act 1563, "repelled (March 3, 1801,) the defences;" and on a reclaiming petition and answers, (January 16, 1802,) "adhered."

Lord Ordinary, *Craig.* Act. *Rolland, J. Clerk, Craigie, Keay.* Agent, *J. Keay, W. S.*
 Alt. *Lord Advocate Hope, M. Ross.* Agent. *H. Davidson, W. S.* Clerk, *Home.*

Fac. Coll. No. 18. p. 38.

* * This case was appealed: The House of Lords, 9th May, 1804, ORDERED and ADJUDGED, that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

Right of salmon fishing, how regulated when the course of the river is changed;
 see PROPERTY.

See No. 11. p. 14264.

See APPENDIX.