

No. 1. of cruive-fishings in the Don, (not reported;) 1779, Sir James Colquhoun against Smollet, (not reported.) It is not a *jus regale*; 30th July 1605, Gallies against Torhouse, No. 2. p. 14249. And if it be not a common law right belonging to every proprietor on a salmon river, who is infest *cum pertinentibus*, it is at least a right which they generally enjoy by tolerance, and from motives of good neighbourhood.

Answered: No species of salmon-fishing can pass to an heritor, without either an express grant or an infestment *cum piscationibus*; Stair, B. 2. T. 3. § 69. The pursuer's infestment would have entitled him to have fished with net and coble; (4th August 1773, Duke of Queensberry, No. 7. p. 14251,) if the shallowness of the river had admitted of this mode of fishing. But his right is nevertheless a *jus per se*, and as affording a valuable source of subsistence to his family and tenants, is entitled to a legal protection.

The decisions founded on, on the other side, are not applicable. In all these cases, the rivers admitted of being fished with net and coble, which created a strong presumption that rod-fishing was not practised as a matter of right, but by tolerance.

The Lords, influenced by the authorities founded on by the defenders, altered the interlocutor, and found, that Mr. Chisholm had not a sufficient title to insist in the action.

Lord Ordinary, *Armadale*.
Clerk, *Siaclair*.

Act. *Burnet*.

Arch. Campbell, junior.

R. D.

Fac. Coll. No. 239. p. 540.

1807. June 18.

EARL OF FIFE *against* GORDON.

No. 2.
The mode of fishing practised in this case, though immemorial, found to be illegal.

PETER GORDON of Abergeldie is infest on a Crown-charter of the lands and barony of Abergeldie, "cum salmonum aliorumque piscationibus super aqua de Dee aliisque, et lacubus ad dict. terras spectan." The channel of the river is too rocky to admit of fishing easily by the ordinary means of net and coble. It has been immemorially the practice, in the summer season, when the river is low, to collect together a dike of loose stones thrown up across the channel of the river, in the centre of which is placed a basket with its mouth up the river. The consequence of this is, that the water is accumulated above the dike; and the river, being disturbed by poles and spears above, the fish are driven down, where they are intercepted in their progress by persons stationed on purpose with pock-nets, or caught in the basket. The dike was never repaired during the season, but was allowed to fall to pieces by the violence of the stream, which happened sometimes within a week from its erection, and never exceeded a few weeks.

The Earl of Fife, one of the heritors of the fishings in the river Dee, presented a petition to the Sheriff of Aberdeenshire, to have Mr. Gordon prohibited from exercising his right of fishing in this manner. A proof was taken, when the Sheriff (6th July 1803) found, "That the defender is not entitled to build the dike complained of across the river Dee; and prohibits and discharges him from doing so in time coming, under the penalty of £50, *toties quoties*."

No. 2.

The cause was brought into this Court by advocacy, when the Lord Ordinary, on advising memorials, (10th July 1804) found, "that the mode of fishing practised by the defender Mr. Gordon, and complained of by the pursuer, is illegal."

Mr. Gordon reclaimed, and

Pleaded: No express prohibition against the mode of fishing here exercised can be pointed out in the statute book, neither does the spirit of the various enactments on this subject reach the present case. It is entirely a fishing *sui generis*. The dike is loosely constructed, and the first swell in the river carries it away; and the practice has been immemorial, and till now uninterrupted; and it is only for the supply of the proprietor's own family, having never been sufficiently productive to make it an object of commercial speculation. Such a fishing has been found sanctioned by prescription; Robertson against Graham, 21st December 1750, No. 25. p. 14290.

Answered: The mode of catching fish here employed, is directly prohibited by 1469, C. 37. It is a destructive mode, which it was the object of the Legislature to prevent. Cruives are not so destructive, for they are subject to well known regulations; and yet it is necessary to have an express grant to entitle any person to fish with cruives. The right of fishing by a bulwark erected across the channel, with a creel to intercept the fish, cannot be conveyed by grant; nor can it be acquired by possession; Taylor against Cunningham, 18th May 1804, (not reported.)

The Court, (22d May 1807,) upon advising a petition and answers, adhered unanimously to the interlocutor of the Lord Ordinary, and afterwards (18th June) refused a reclaiming petition for Mr. Gordon, without answers.

Lord Ordinary, *Armadale*.
Alt. *Gillies, A. Skene*.

Act, *Campbell*.
Agent, *J. F. Gordon, W. S.*

Agent, *J. Laidlaw, W. S.*
Clerk, *Pringle*.

F.

Fac. Coll. No. 284. p. 641.