

1815.

BERRY, &C.
v.
STEWART, &C.
Jan. 31, 1809.
Feb. 1, 1809.

The Court adhered to the interlocutor complained of, of this date.

Against these interlocutors the present appeal was brought to the House of Lords; but, after hearing counsel, their Lordships were pleased to affirm the judgment of the Court of Session.

For the Appellants, *A. Gillies, D. Monypenny.*

For the Respondents, *John Dickson, Patrick Walker.*

NOTE.—Unreported in the Court of Session.

JOHN BERRY, of Inverdovat, and WILLIAM

BERRY, W.S., - - - - - *Appellants;*

ARCHIBALD CAMPBELL STEWART, of St

Fort, and his Tutors, - - - - - *Respondents.*

House of Lords, 14th April 1815.

SALMON FISHING—RIGHT “CUM PISCATIONIBUS”—POSSESSION.—

Held that the appellants had only a general right to fishings in the Frith of Tay, and that they had not proved forty years' possession of salmon fishing *ex adverso* of their lands, in order to entitle them to fish salmon under that title. Affirmed in the House of Lords. (2) Held that they were not entitled to erect a new quay and pier on their own lands, prejudicial to the right of salmon fishing in the respondents. Cause remitted as to the pier.

This action was raised about the right to fish salmon in the Frith of Tay, *ex adverso* of the lands of Inverdovat, belonging to the appellants.

The fishings to which the appellants laid claim were two in number. The eastmost one was called “Low Water Fishings,” and the other was situated *ex adverso* of those portions of the lands of Inverdovat, called in the plan Wellgate, and in another place, “Welgate,” and “Pluck the Crow.”

The respondents, on the other hand, maintained that the appellants had shown no right to these fishings; and, further, that they were part of the fishings of Broadheugh, and of that marked “W. Gordon's fishings” on the plan, now belonging to the respondent, Mr Stewart.

But the appellants argued, 1. That there was a general right of salmon fishing annexed to their lands of Inverdovat,

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and which, consequently, must give them a right to fish *ex adverso* of every portion of the same, except in so far as their general right is limited by special grants in favour of the respondent, and his authors; and, 2. That the fishings of Broadheugh, and the fishing marked "W. Gordon's fishings," belonging to the respondent, were limited in their nature, and did not comprehend those particular fishings claimed by the appellants. Besides, the appellants' right to make those operations on the quay of Newport harbour (which the respondent has been found entitled to prevent), is beyond all doubt, and did not interfere with the respondents' fishings.

The title-deeds of the appellants did not contain any grant from the Crown express of salmon fishing. Their titles contained only the general conveyance of fishings, but this, they contended, together with forty years' possession of salmon fishings *ex adverso* of their lands, was, in the law of Scotland, sufficient to entitle them to that right, where there was no express right of salmon fishing in favour of another. The Lord Ordinary ordered a proof of immemorial possession of fishing salmon opposite to their lands, on reporting which the Court pronounced this interlocutor: "The Lords having ad-
" vided the state of the conjoined processes, and heard parties'
" procurators in their own presence in the process of declara-
" tor, Find that the pursuer (John Berry) has instructed no
" right to the salmon fishings claimed by him; therefore sus-
" tain the defences, assoilzie the defenders from the conclu-
" sions of the summons and decern. And in the two pro-
" cesses of suspension and interdict, at the instance of Mr
" Berry, find the letters orderly proceeded and decern; find
" Mr Berry liable in expenses in the said process of declara-
" tor, and the said two processes of suspension, and that to
" both classes of defenders and chargers; appoint an account
" to be given in, and remit to the auditor to tax the same;
" but supersede extract," &c. The Court also, in the sus-
pensions and interdict which had reference to the appellants erecting, on their own property, new quays or piers, opposite to Newport, and to prevent them from proceeding with these as injurious to the respondents' fishings of Broadheugh of same date, suspended the letters *simpliciter*. On reclaiming petition the Court adhered.

June 30, 1810.

Against these interlocutors the present appeal was brought. July 6, 1810.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed, save so

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far as they relate to the erecting of the new pier at Newport harbour. And it is further ordered, that the cause be remitted to the Court of Session, to review the interlocutors, so far as they relate to such pier.

For the Appellants, *John Clerk, Jas. L' Amy.*

For the Respondents, *Sir Saml. Romilly, J. Moncrieff.*

NOTE.—Unreported in the Court of Session.

JOHN BAYNE, HUGH STEVENSON, The OBAN TAN WORK COMPANY, The OBAN BREWERY COMPANY, DONALD M'INTYRE, and Others, Feuars in the Village of Oban, - - - - -	}	<i>Appellants;</i>
DAVID CAMPBELL, of Combie, Esq., -	-	<i>Respondent.</i>

House of Lords, 14th April 1815.

SUPERIOR AND VASSAL—FEU RIGHTS—GRAZINGS.—Feus having been granted by a common agent on the estate, with a right to grazing, in an action at the instance of the purchaser of the estate, these feu rights were reduced, in so far as they conferred privileges of grazing on particular lands, it appearing from the original bargain that these grazings were only to be let on lease, and not granted in feu, and therefore *ultra vires*.

An action of reduction was brought by the respondent, of the several feu charters granted by his authors, “in so far as they severally contain grants in property of the privilege of grazing horses and cows, or other bestial, upon the pasture lands of the farm of Lower Glencrutten” granted in favour of the appellants.

In defence, the appellants, the feuars, stated the following circumstances:—That at a time when it was proposed to erect the village of Oban, by the then proprietor, Donald Campbell of Dunstaffnage, he advertised the lands of Glencrutten and Oban to be feued. It was only on his offering certain privileges and encouragements that the projected plan of feuing and erecting the town could succeed. Accordingly the appellants became feuars, each of them taking feus, and these feus were granted, with the privilege of grazing a number of horses and cows upon the lands of Lower Glencrutten. No missive letters or minutes had been drawn out or exchanged between them; and no charters or feu rights were