

Appellant's Authorities.—Hamilton, March 5. 1793, (12,824.); 2. Stair, 12. 11.; 3. July 8. 1828., Ersk. 7. 39.; Kinnaird, Feb. 26. 1662, (14,502.); Nicolson, Nov. 14. 1762, (11,291.); Duke of Roxburgh, June 5. 1713, (10,883.); 1617, c. 12.

Respondents' Authorities.—1. Bankton, 3. 4.; 1. Craig, De Feudis, 16. 10.; 2. Ersk. 6. 17.; M'Kenzie, Feb. 15. 1822, (1. Shaw's Appeal Cases, No. 23.); Duff, May 22. 1826, (2. Wilson and Shaw's Appeal Cases, No. 19.); 55. Geo. III. c. 42.; 59. Geo. III. c. 35.; 6. Geo. IV. c. 120.; Tait on Evidence, p. 491.; Montgomery, June 24. 1663, (12,722.); Ker, Feb. 12. 1714, (12,723.); Nicolson, Nov. 14. 1662, (11,291.); Beaton, July 13. 1670, (10,912.); 3. Ersk. 7. 38.; Wright, Dec. 11. 1717, (11,268.); Rugby Charity, 11. East, 376.

MONCREIFF, WEBSTER, and THOMPSON—ALEXANDER DOBIE,—
Solicitors.

EARL OF KINTORE and Others, Appellants.—*John Campbell—Keay.* No. 13.

J. FORBES and Others, Respondents.—*Spankie—Adam—Lumsden.*

Salmon Fishing—Title to Pursue.—Found, (affirming the judgment of the Court of Session), 1. That stake-nets erected on the proper shore of the sea, are not illegal; and, 2. That proprietors of salmon fishings in an adjacent river, have no title to object to heritors on the sea-coast, who hold a right of fishing by net and coble from the Crown, exercising their right by stake-nets.

FORBES, and other proprietors of land, stretching northward along the sea-shore six or seven miles, from about two miles from the mouth of the river Don in Aberdeenshire, (a river that issues into the ocean without any frith or estuary), held by their title-deeds the right of salmon fishing by net and coble ex adverso of their estates. These fishings they let to tenants, who erected stake-nets in the sea, and caught white fish and salmon. The Earl of Kintore, and other proprietors of the salmon fishings in the river itself, and of the sea fishings at its mouth, challenged these erections, and raised an action of declarator before the Court of Session, concluding that it should be declared, that Forbes, and the other proprietors, had 'no right, by themselves, 'or other persons employed or authorized by them, to erect or 'use the said dams, stake-nets, yairs, or machinery aforesaid, or 'other machinery of the same nature, within the salt water that 'ebbs and flows, or upon the sands and schaulds adjacent thereto: 'that the defenders should be'ordained to demolish them, and pay 'damage for the loss already sustained by these erections; and be 'interdicted from erecting or using in future the machinery fore- 'said, or any other machinery of the same nature, within the salt

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' upon the sands and schaulds within the said water, where they
' were not before, in all time hereafter.' The defenders objected
to the pursuers' title to pursue; and, on the merits, maintained
that the statutes relied on, as prohibiting these erections, did not
apply to stake-nets on the shore of the ocean.

The Lord Ordinary having reported the case to the Court on
informations, their Lordships, after a hearing in presence, assoil-
zied the defenders on the 31st May 1826, ' In respect that the
' stake-nets and machinery complained of are confessedly erected
' and placed in the sea, and not in any river or estuary.' *

The pursuers appealed.

Appellants.—I. (*Title to Pursue*). The appellants have an im-
portant interest to put down these stake-nets. Salmon, by a
law of nature, return to the river where they were spawned;
in their progress they coast the shore, are intercepted by the
respondents' erections, and thus the profits of the appellants'
fishings in and at the mouth of the river are reduced, if not
annihilated.

II. (*Merits*). Fixed machinery, similar in principle to stake-
nets, placed in situations within the influence of the tide, was
used in Scotland as early as the beginning of the sixteenth cen-
tury. By degrees it appears to have been abandoned, except on
the Solway, where it is protected by statute. When attempted to
be revived in the firth of Tay, the erections were challenged and
declared illegal. No doubt these stake-nets were in an estuary:
But the statutes prohibiting their erection in the mouths of rivers,
when properly understood, apply also to the shores of the ocean.
These statutes distinguish between fixed machinery in fresh and
in salt water. Cruives and yairs in rivers are not in themselves
illegal; but the party claiming to erect them must hold a special
right to the privilege, and obey the regulations of the statutes en-
acted for the purpose of allowing the fish free access to the upper
part of the sea, and to preserve the fry. But this sort of machin-
ery, and the regulations applicable to it, are not calculated for situ-
ations open to the influence of the tide. Accordingly, the prohi-
bitions in the statutes are invariably directed against machinery,
under the general denomination of cruives, yairs, &c. set where the

* 4. Shaw and Dunlop, No. 397. where the opinions of the Judges will be found.

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sea ebbs and flows, and that whether in the very sea, or elsewhere in which the tide is influential; in 'all manner of watteris,'—in 'omnimodis aquis,' as the statute of Robert I. expresses it;—the object of the Legislature being to protect every kind of fish, whether white or salmon. This is apparent from an attentive comparison of the various statutes on this subject. No doubt, the word 'water' sometimes signifies river, but not always. It is a flexible term, explainable by the subject and the context; and in the statutes clearly means 'sea.' Besides, in several statutes, the word water is not used at 'all.' The allegation, that the law of England prohibits wears (zaires) in rivers, and allows kiddels (open wears) erected on the sea-coast, is of no moment; for the law of England, in a question of Scotch statutory law, must be quite irrelevant. But, independent of the illegality of the erections in question, they are not warranted or covered by the titles of the respondents, who have merely a grant from the Crown to fish with net and coble, and not by stake-nets.

Respondents.—I. (*Title to Pursue*). The appellants have no title to sue. They have no right to fish ex adverso of the respondents' land; and if they had a title, they have no interest, for their fishings have not been diminished; and even if their fishings had become less productive, that could not be traced to the erection of the stake-nets. Neither have they any title to object to the mode in which the respondents exercise their right.

II. (*Merits*). The statutes regulating salmon fishings arose from general and public views, and not merely with reference to private interests. Their object was to protect the fry and unspawned salmon, and therefore secured a free access to the sea. The appellants' whole argument rests on the fallacy that 'water' signifies ocean. But there is not a single authority for such an assumption. In the statutes, the word uniformly means 'river.' What could be more absurd than to enact prohibitions as to machinery placed where 'the sea ebbs and flows,' when round the island there is no spot where it does not ebb and flow? In the statute of King Robert, the expression is 'in omnibus aquis;' and even if 'in 'omnimodis aquis' were the true reading, that would only mean, 'rivers of all sorts and sizes.' There is something preposterous in the appellants saying that they have a right of embargo on all the proprietors on the sea-coast. According to their argument, that embargo would extend to a proprietor a mile from the mouth of the river, or even to a party whose lands were a hundred miles off. The law of England supports the respondents' views. As to the separate ground of appeal, the respondents' titles

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The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, and the appeal dismissed.

LORD CHANCELLOR.—My Lords, There is a case of the Earl of Kintore against Forbes and others, which was argued some time back at your Lordships' Bar,—a case of very considerable importance in point of value, and important also as relating to a public question. The appellants in this case are owners of fisheries in the river Don in Scotland. The respondents are owners of the property along the sea-coast, not far from the mouth of the river Don. The property of Mr Forbes, who is one of the respondents, lies about two miles from the river Don. General Gordon Cumming Skene, I think, has property contiguous to that of Mr Forbes. Mr Forbes's property is beyond that of General Gordon Cumming Skene;—in fact, the property altogether comprises about seven miles, commencing at a part about two miles from the mouth of the river Don, their property being on the sea-shore, for the purpose of catching salmon among other fish. The proprietors of the fisheries of the river Don have complained of this as being an injury to the fishery.

The question is, Whether persons occupying property on the sea-coast have, by the law of Scotland, a right, provided they have a right to fish for salmon, to place stake-nets for the purpose of fishing. This depends on the construction of certain Acts of Parliament passed in Scotland at a very early period, and continued down for many years; and it is proper I should state to your Lordships, in the first instance, that which is not disputed. It is not denied that persons are entitled by the law of Scotland, to place cruives and other machinery in rivers above the point the tide flows, under certain circumstances, and under certain limitations and restrictions as to the manner in which that machinery is to be used, as to the construction of the machinery, and as to the time and period for which it is to be used. What I have stated relates to those parts of rivers which are above the point to which the tide flows. No persons, by the law of Scotland, are entitled in those parts of the river where the tide flows, to place machinery of this description.

The question came on in the year 1816, with respect to the river Tay, before the Court of Session, and afterwards came by appeal to this House. The river Tay terminates in a firth or arm of the sea; and the question was agitated in the Courts of Scotland, whether or not, consistently with those Acts of Parliament, and by the law of Scotland, stake-nets could be put in the river Tay? or rather, I should say, in the waters of the firth of the Tay, consistently with the Acts of Parliament to which I have referred? The Court of Session in Scotland was of opinion, that the Acts of Parliament prohibited absolutely the placing of machinery of this description in that part of the water or firth of

Tay. The case then came to this House, and your Lordships affirmed the decision of the Court of Session; but in the argument that took place upon that subject, and finally in the judgment of your Lordships, care was taken not to decide the question with respect to the right of placing stake-nets on the sea-coast; and therefore the question between those parties who are the parties to this appeal came, on the present occasion for the first time, unfettered before the Court of Session in Scotland. July 11. 1828.

My Lords,—The case was argued at great length, and with very great minuteness and intelligence, in the Court below. It came up to your Lordships' House, and was argued very minutely, and with great ability, at your Lordships' Bar. The Court of Session was of opinion that those Acts of Parliament did not apply to the sea-coast; and the question for your Lordships' consideration will be, whether the judgment of the Court of Session in that respect be, or be not correct. Now, if your Lordships have adverted to the papers upon your table, you will have found there all the Acts of Parliament set out upon which this question principally depends; you will have found the case argued on both sides in those papers, with respect to the construction of those Acts of Parliament; and it is unnecessary for me therefore to detain your Lordships by going minutely through them. I will only state, that, as far as relates to the earlier of those Acts of Parliament, the language appears to be so clear and so distinct, as not to admit of any doubt with respect to the construction of them.

The first statute that was referred to was passed in the reign of Robert the First, as far back as the year 1318. I think it is quite obvious, upon the language and construction of that Act of Parliament, that it was never intended to apply to the sea-coast. It is very short,—the words are these:—‘Item ordinatum est et assensum quod omnes
‘illi qui habent croias vel piscarias vel stagna aut molendina in aquis
‘ubi ascendit mare et se retrahit et ubi salmunculi vel smolti seu fria
‘alterius generis piscium maris vel aquæ dulcis descendunt et ascen-
‘dunt tales croiæ et machinæ infrapositæ sint ad minus de mensura
‘duorum pollicum in longitudine et trium pollicum et latitudinæ ita
‘quod nulla fria piscium impediatur ascendendo vel descendendo
‘secundum quod libere possint ascendere et descendere ubique.’ It talks of ascending and descending,—that particular expression is repeated two or three times in the Act of Parliament; and it is clear, therefore, that it had reference to streams, or the continuation of streams,—that it had in point of construction no reference whatever to the sea-coast.

My Lords,—The next Act of Parliament was passed about a hundred years afterwards, in the reign of James the First of Scotland. It is in these words:—‘It is ordanyt, that all cruives and zaires’—which words, by the judgment of this House, have been interpreted to mean machinery similar to stake-nets—‘set in fresh waters, quhair the sea fillis
‘and ebbis, the quhilk destroyes the frie of all fisches, be destroyed and

July 11. 1828. ' put away for evermair, not again standing ony priviledge and freedome
 ' given in the contrairie, under the pain of ane hundreth shillings; and
 ' they that hes cruives in fresh waters, that they gar keepe the lawes
 ' anentes Satterdies slop and suffer them not to stande in forbidden time,
 ' under the said paine; and that ilk heck of the foresaides cruives be three
 ' inche wide, as the aulde statute requires.' It speaks, therefore, first
 of fresh water, and it speaks also of fresh water ' quhair the sea fillis
 ' and ebbis,' evidently denoting rivers, and channels similar to rivers.
 It has been said, that the word ' fresh' may possibly be a mistake; that
 we have not the original record of this Act of Parliament, and that
 the word ' fresh' may have been introduced; because, in reciting this
 Act of Parliament in a subsequent Act, the word ' fresh' is omitted;
 but still the words ' water quhair the sea fillis and ebbis' are retained.

Without troubling your Lordships with going through other Acts, I think I am justified, upon the terms of this Act, in repeating that which I before stated to your Lordships, that in the earlier Acts it is perfectly clear that they do not in their terms embrace the sea-coast. Certainly, when we come to advert to Acts of a later period, the language is more equivocal and more general; but taking the later Acts in connexion with the earlier Acts, and construing the whole subject together, construing one by the other, I think I am justified in recommending to your Lordships to come to the conclusion, that the whole body of the Acts, taken together, refer not to the sea-coast, but to rivers, and to continuations of rivers; and therefore I should recommend to your Lordships to confirm the judgment of the Court, as far as relates to the construction of those Acts of Parliament.

In the case to which I have referred, of *Dalgleish v. the Duke of Athole*, with respect to the waters of the firth of Tay, when your Lordships come to look at that particular case, and to apply the language of the particular Acts of Parliament to which I have referred to that case, the construction which the Court of Session have put upon them now is perfectly consistent with the construction the Court of Session put upon the Acts in that former case, and to the construction which this House, when the case came under the review of this House, put upon those Acts.

My Lords,—It is remarkable also, that the writers on the Scotch law, I mean Bankton, Erskine, and Lord Stair, in referring to those Acts of Parliament, do not in any instance apply them to the sea-coast,—they speak of the prohibition as applicable to rivers, and to rivers only. I am not insensible of the argument which was urged at the Bar, that the attention of those writers was not directed to the question precisely as it is now raised; but it is impossible to suppose that those learned writers, in writing their institutional works, and advertng to those particular Acts of Parliament, should not have taken the pains to read them; and it is impossible to suppose, that if they had considered the interpretation of them as extending to the sea-coast, they would have expressed themselves in the limited way in

which they have expressed themselves, confining themselves to rivers, and to rivers only. July 11. 1828.

My Lords,—The case at your Lordships' Bar was also argued upon another principle, which is alluded to in the papers now upon your Lordships' table—the papers sent up from Scotland; namely, that even independently of the construction of these Acts of Parliament, the owners of the fisheries in the Don would have a right to complain of the erection of these works on the principles of the common law. Now, although that point was glanced at in the Court below, it does not appear to have been seriously argued before the Court of Session; and at your Lordships' Bar it was argued by one of the Counsel, not, I think, the Counsel from the northern part of the kingdom, but by an English Counsel, arguing it upon English principles, and citing English cases, most of which I have looked at with considerable attention, but which, when they come to be sifted and examined, appear to me to have no bearing whatever upon the present question. I think, therefore, that if your Lordships are satisfied upon my representation as to the interpretation of these Acts of Parliament, that they are not to be considered as extending to the sea-coast, the position of this question cannot be at all altered by any reference to the principle of the common law, either as applicable to Scotland or England.

My Lords,—Another point has been insisted upon in the papers, and also at the Bar; but it does not appear to me to be entitled to much attention. It is said, that the proprietors of these fisheries on the sea-coast have no right, by the terms of their grant, to fish in this manner; that they are entitled only to fish with what is called a net and coble; and that, having taken upon themselves to fish in a different mode, the proprietors of the fisheries in the river Don have a right to complain of it, and on that ground to sustain this suit. My Lords, I apprehend that is quite a mistake; these persons became proprietors of fisheries on the coast originally by grant from the Crown; and if their grants are so limited, that in point of law (upon which I do not wish at present to pronounce any opinion) they are not entitled to fish in the manner described, namely, by the use of stake-nets, that is a question between them and the Crown;—the Crown may have a right to complain that the exercise of the right conveyed by the Crown has, in that instance, been exceeded; and possibly, under such circumstances, the Crown might, by its public officer, institute some proceeding against them; upon which, however, I wish carefully to abstain from expressing any opinion; but the proprietors of the fisheries on the Don have nothing to do with that. The question with respect to the proprietors of the fisheries on the Don is, Whether they have a right, by the existing law, to complain, that persons who possess property on the sea-coast, and have a right of fishery on the sea-coast as extensive as the Crown can grant, are entitled to fish by means of stake-nets; and whether they can make out that the laws of Scotland prohibit, under such circumstances, where the sea ebbs and flows, the use of machinery of that description? Now I apprehend that, looking

July 11. 1828. at these Acts of Parliament, they do not apply to fisheries on the sea-coast, and that the proprietors of fisheries on the Don have no right to maintain this suit. I should recommend to your Lordships, under these circumstances, that the judgment of the Court below be affirmed.

Appellants' Authorities.—(Title.)—Colquhoun, July 6. 1804, (14,283.); Kinnoul, Jan. 26. 1802, (14,301.); Athole, March 7. 1812, (Fac. Coll.); Hamilton, March 5. 1793, (12,824.); Braid, Jan. 24. 1800, (No. 2. App. Prop.)—(Merits.)—Kinnoul, (supra); Athole, (supra, and Dow's Reports, vol. v. p. 291.); Leslie, June 29. 1593, (14,249.); Gairlies, July 30. 1605, (14,249.); Magistrates of Inverness, Jan. 27. 1776, (14,257).

Respondents' Authorities.—Boece, fol. 5. edit. 1574; *Discriptione del regno di Scotia*, p. 17.—(Title.)—Coble Fishers of Don, Feb. 10. 1693, (14,287.); Colquhoun, July 6. 1804, (14,283.); Athole, March 7. 1812, (Fac. Coll. and Buchanan's Reports, p. 263. and 300.); Grotius de Jure Belli, lib. 11. c. 2. § 3.; Puffendorf, lib. 4. c. 5.; Dig. 1. lib. 47. tit. 10.—(Merits.)—Balfour's Pract. p. 544.; Rhymer's *Fœdera*, tom. 7. p. 246.; tom. 8. p. 271. 551.; Bellend. *Descrip. de Alb.* c. 1.; Spalding's Troubles, 1. 60.; 2. Stair, 3. 70.; 2. Bank. 3. 8.; 2. Ersk. 6. 15.; Mag. Chart. c. 23.; 12. Edw. 42. c. 7.; 1705, c. 2. Queen Anne.

Statutes relied on by both Parties.—Alex. II. c. 16. (or William the Lion); Rob. I. c. 12.; 1424, c. 11. and 12.; 1427, c. 6.; 1429, c. 131. (c. 22. new edit.); 1457, c. 86. (c. 33. 34. new edit.); 1469, c. 38. (c. 13. new edit.); 1477, c. 73. (1478, c. 6. new edit.); 1488, c. 16.; 1489, c. 15.; 1535, c. 17.; 1563, c. 3.; 1579, c. 89.; 1581, c. 111.; 1685, c. 20.; 3. Jac. I. c. 12.

A. M'CRAE—RICHARDSON and CONNELL,—Solicitors.

No. 14.

MANNERS and MILLER, and Others, Appellants.

Dr Lushington—Keay.

The KING's Printers, (Sir D. BLAIR, and Others), Respondents.

Sugden—A. Bell.

G. BUCHAN, and Others, Appellants.—*Dr Lushington—Keay.*

OFFICERS OF STATE, and The KING's Printers, Respondents.

Att.-Gen. (Wetherell)—Sol.-Gen. (Tindal)—Sugden—A. Bell.

Literary Property—King—King's Printer.—Held, 1. (affirming the judgment of the Court of Session), That the right of printing Bibles, and certain other books, (enumerated in the patent granted by the Crown to the King's printers in Scotland), and of prohibiting their importation, belongs exclusively to the King, as part of the royal prerogative in Scotland, and, by virtue of his patent, to the printers appointed by him: And, 2. (reversing the judgment), That the privilege and prohibition extended to the 'Book of Common Prayer,' as well as to the other books mentioned in the patent.

July 21. 1828.

1ST DIVISION.

Lord Meadowbank.

IN 1785, the King, by a commission or letters patent under the Union Seal, after narrating a former grant of the office of King's printer, nominated and appointed James Hunter Blair and John Bruce, their heirs and assignees, for forty-one years,