No 18.

1751. *November* 29.—In the cause betwixt these parties, whereof mention is made 5th January 1750, it did not appear that Captain Groset had paid any price for the horse in question, but that Captain Corneill, in account with the executors of Captain Groset, had allowed L. 10 for him; it was debated whether any salvage was due as to him by whose purchase the horse was come at by the pursuer.

Pleaded for the defender; Wherever any thing stolen is in such circumstances, as, according to the highest probability, it could never have been recovered, if the possessor had not purchased it, he ought to have salvage; and if this defender had not, on Captain Groset's death, purchased this horse, there is no probability the pursuer would ever have recovered him.

Pleaded for the pursuer, Without disputing the rule laid down, there was no greater improbability of recovering this, than any other stolen horse; he was taken from the rebels, and was in the country when he was purchased by the defender.

The Lords found Captain Corneill entitled to no allowance.

D. Falconer, v. 2. *No* 114. *p.* 131. *No* 237. *p.* 289.

1750. *January* 9.

The Town of Perth *against* The Lord and Lady Gray.

No 19.
An heritor having right to fish in a certain part of a river, it was found the opposite heritor, who was infeft in a barony *cum piscationibus*, but had never fished in that place, could not begin to fish so as to interfere with the former's fishing.

The Town of Perth had a charter 1375, from King Robert II. cum insulis nostris, jacentibus infra aquam de Tay, viz. lie lab de Incheret, Incharey et Sleepless, (Steples) et cum omnibus piscariis nostris, ad illas insulas, pertinentibus circumquaque ex omni parte, et utrobique ac qualitercunque adjacentibus, et adjacere quomodolibet valentibus in futurum; cum piscatura unius retis insulæ regiæ, et cum omnibus aliis piscariis nostris insularum dicti burgi.

Notwithstanding this right bore *cum insulis de Sleepless*, &c. yet this island did not belong to the Town of Perth; but they occupied the fishings around it, particularly one opposite to Lord and Lady Gray's estate of Kinfawns and Craigton, by departing from one part of the island and returning to another; and thus making a draught with their net, taking in the whole depth of the water; and this they did with two boats, the one whereof succeeded the other. The family of Kinfawns were infeft 1672, in the barony of Kinfawns and Pitsindy, cum piscationibus salmonum, alborumque piscium in aqua de Tay; and in the barony of Craigton, cum piscationibus earundem terrarum, vulgo nuncupat. Pilgartsheugh, Cambuspool, et Crook, et cum omnibus aliis piscationibus, tam salmonum, quam alborum piscium, in aqua de Tay, quæ ab antiquo ad abbaciam de Scoon pertinuerunt, inter lie Wood-dike de Kinnoul, et limites seu bondas terrarum de Little-Seggieden, in omnibus partibus infra dict. terras de Craigton, cum pertinen.

This was the first right produced, but it was affirmed the original was much older; and that the two baronies had now been so long in the same family, being united since 1557, that it could not be distinguished what part of the estate belonged to the one, and what to the other; but it was owned the Town of Perth's right was prior.

A tenant of Lady Gray's in 1741, cleared a piece of stony ground, opposite to a fishing of the Town's from Sleepless, so as to make it practicable to draw a net there, and began to fish; whereupon the Town insisted in a declarator, That they had the sole right of fishing in that part of the water, and the defender ought to be debarred, the rather that it was impracticable for the pursuers to fish alternately with two boats, as they had always done, if the defender had a boat, which could not fail to interfere with one or other of them; but the defender *alleged* it was found by experience to be very practicable, for the depth of the water lay near to the main land, and the boats of the island were thereby obliged to make a great compass, to take it in; and the second boat not setting out till the first had returned, the Kinfawns boat, which had but a little way to get to the depth, and followed the first boat as soon as it had drawn its net out of it, had time to make its compass, before the first boat got quite to shore, and the second could set out; so that what it got, the others must necessarily have missed, as salmons in the fishing time swim always upwards, and the Town had no damage.

Pleaded for the Town; Kinfawns has no right to fish here; the rights of Craigton are to certain particular fishings therein expressed; and a right to a barony *cum piscationibus*, as is the case of Kinfawns, carries only right to fishings possessed as pertinent of that tenement, before the grant; but not of fishing any where adjacent to that barony; especially not to fish in any place where the King has antecedently granted the fishing, and is thereby denuded.

Pleaded for Lady Gray: A barony granted *cum piscationibus*, gives a right to fish any where adjacent to that barony; and to draw the nets upon the shores thereof; and the King, by granting the right to one heritor, cannot be considered as denuded, so as not to have it in his power to make the like grant to the heritor on the opposite shore; as there are great numbers of such fishings in the Kingdom, where it cannot be supposed the one grant was not prior to the other; and in this same river there are several such belonging to the parties in this process, and to the Town, and other heritors.

For the Town; They are not obliged to account how these rights have been constituted to the heritors on opposite shores, in other cases; perhaps in some by prescription; whereas the family of Kinfawns never fished here before; but whatever may be the law where fishing is granted as pertinent of a barony, and where it may be alleged the heritor can only draw his nets on his own land, yet a fishing, which is *inter regalia*, may be granted by itself; and then the proprietor could draw his nets on either shore, the *litus* being of the same right with the river, the fishing whereof is conveyed; and in this case the King,

No 19. being denuded, can make no after grant; such grant may be whether the person who obtains it be an adjacent heritor or not; and such evidently is the grant to the Town of Perth, who are not proprietors of the Island of Sleepless. THE LORDS, 15th June 1748, "Found that the Town of Perth had an exclusive right of fishing within the controverted bounds."

On bill and answers a proof was taken, from which it did not appear that the Kinfawns fishing could be exercised, without prejudice to that of the Town.

THE LORDS adhered.

Alt. *R. Craigie.* Agent, *W. Grant.* Reporter, *Elchies.*

D. Falconer, v. 2. *No* 118. *p.* 134.

*** Kilkerran reports this case:

June 15. 1748. & *Jan.* 9. 1750.—THE Town of Perth had a grant from King Robert II. of the islands of Steples, &c. in the river Tay, with the fishings thereto pertaining, circumquaque ex omni parte et utrobique ac qualitercunque adjacentibus et adjacere quomodolibet valentibus in futurum; pursuant to which right, the Town possessed all the salmon-fishing around the said island past memory, and therefore presumptively back from the date of the grant.

About the year 1741, the Lord Gray, in the right of his Lady, heiress of Kinfawns, to whom the bank on the north side of the river opposite to the island of Steples belongs, set about clearing the shallows on said north bank; and having removed the stones, which rendered the drawing nets on that bank impracticable before, set up a fishing, called the Pyeroad Fishing, on that opposite bank, where never any fishing had been, nor could be before this operation; and for doing thereof, he *alleged* a right upon a charter produced, granted to Kinfawns in 1672, of the barony of Kinfauns, (within which the bank is on the north side the river, opposite to the island of Steples) *cum piscariis salmonum aliorumquæ piscium in aqua de Tay*, which gave rise to a declarator at the Town's instance in 1746.

While little advance was made in the declarator, the Town, in 1747, in respect of their alleged uniform and sole possession, applied for an interdict, till the point of right should be determined. But parties not agreeing upon the fact, it being averred for the Lady Gray, that the Pyeroad fishing had for some years been by her possessed, and that it did not interfere with the Steples fishing, the interdict was refused, though some of the Lords were of opinion, that at least caution should be found to repair the Town's damage in case they prevailed.

When the declarator came to be insisted in, the debate in point of law turned upon these two points, Whether the charter to Kinfawns could be so understood, as to grant a right of fishing and drawing nets upon the bank opposite to the island of Steples, of which fishing the Town had *ex concessis* before the

1741 been in the total possession, in so far as was practicable, by sweeping the whole breadth of the river with their nets, as far as the *alveus*, before that time encumbered on the opposite bank with large stones, would permit? *2do*, Supposing the words of the charter to import such grant, How far it was in the power of the Crown to grant such right in prejudice of the Town of Perth's anterior grant?

And, upon report, the LORDS, upon the 15th June 1748, found, "That the Town of Perth has the only exclusive right of fishing upon the channel of the river, intersected between the island of Steples and the opposite north bank of the river, and that the defenders have no right to fish in that part of the river." And, upon advising a proof before answer, which, upon a petition against this interlocutor, was allowed, the LORDS, upon the 9th January 1750, "adhered."

The material things which occurred in the reasoning among the Lords upon this case were to the following purpose.

A right to fish salmon in the small rivers, in which a few fishes are only now and then got, and which may rather be called a right to take salmon, is commonly given along with the lands adjacent to such rivers, which is nevertheless no pertinent of the lands, though in such cases the fishing is never granted but along with the lands. But in great rivers, such as Tay, where there is such fishing as to be the subject of a separate grant, such grants were frequently made, not only to the proprietor of the adjacent bank, but to any body, whether they had the lands or not, there being no connection between lands and fishings other than what may be called a descriptive connection. And all charters or grants of lands are ever understood to imply a reservation to the Crown to grant along with the right of fishing, power to draw upon the banks, without which the right of fishing, not given along with the lands, could not be exercised.

Where a grant is made of such fishings in great rivers, it depends upon the terms of the grant, whether or not the same be exclusive of all future grants in that part of the river. And in general, a grant of the fishings in the river, or such parts of the river, without limiting the grantee as to the drawing his nets, conveys the whole fishings, and implies a power to draw on either side, though not mentioned in the grant, as what passes as a consequence of the right of fishing; but where a fishing is granted with power of drawing on one side (the usual form of limiting the fishings to one side) a power remains with the Crown to confer by posterior grant the fishing on the opposite bank.

In the present case, the grant of the fishings about the island of Steples was without any limitation, *undiquaque adjacentibus*, nay, *et adjacere valentibus in futurum*. From which last clause it was *argued* for the Town, That they had right even to have cleared the channel on the opposite side, and to have drawn their nets thereon; and that the only reason why they did not insist on that point in their declarator was, that it was immaterial for them, as they were able to accomplish their fishing, by drawing their nets upon the island; that

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though it might be pretended, that where there is a general grant without limitation, and where the grantee has been in use to draw only on one side, it was thence to be inferred that the intention of the grant had only been to give a right to draw on that side, yet the presumption would only apply to the case where there was what could be called a fishing on the opposite side at the date of the grant, but not to the present case where there was not so much as a capacity of fishing on the opposite side, till after the 1741, that it was cleared of stones and rubbish; and that being the case, it could neither be supposed intended by the Crown, when the grant was made to the Town, to reserve a fishing, which was not at the time in being, or in other words, to reserve a power to create a fishing; nor at the time the general grant was made to Kinfawns, to convey a fishing which did not then exist, supposing the Crown to have such power, after the grant made in the above terms to the Town, and which, upon the above principles, the Crown was not thought to have; not to mention the Town's immemorial possession of the total right, of itself sufficient to establish a title by prescription.

Nor did it move the Court, that in many instances upon the same river, where the grants were said to be in as general terms as that to the Town of the fishing about the island of Steples, the heritors on the opposite banks had fishings; not only as these were not in the same circumstances with the banks opposite to Steples, but as having been fishings possessed past memory, they may have been acquired by prescription, or in some other manner that now did not appear.

Kilkerran, (SALMON FISHING.) *No* 1. *p.* 499.

1752. *June* 10. KINCAID *against* Sir JAMES STIRLING of Glorat.

No 20.
In what case proprietor of a superior tenement may divert water from his neighbour's mill on the inferior tenement.

A VARIETY of questions were stirred between these parties on occasion of Sir James Stirling's having built a lint-mill, and rested his dam-dyke upon Kincaid's ground without Kincaid's consent; and Sir James's having diverted a burn or rivulet, at least, pretended a right so to do, from running into the water of Glassart, which Kincaid alleged might render the said water not sufficient for the use of a mill which he had thereon, and which produced mutual processes. *Vide supra* January 12. 1750, No 13. p. 8403. *voce* LOCUS POENITENTIÆ.

The last point between the parties was this day determined, viz. That Sir James had right to divert the said burn.

In this there was a little ground of doubt, as the fact was, that the burn had originally run into the water of Glassart below Kincaid's dam, but that Sir James predecessors had diverted the course of it within his own ground, for the use of a corn-mill by them built, whereby it came to run into the water of Glassart above Kincaid's dam.

Kilkerran, (PROPERTY.) *No* 4. *p.* 454.