

1752. December.

STRAITON of Kirkside *against* FULLARTON of Kinnaber and SCOTT of Commiston.

THE lands on each side of the river Northesk, down till it emptied itself into the sea, are the property of Fullarton of Kinnaber and Scott of Commiston. These gentlemen have special grants of salmon-fishing in the river, and, in fact, had immemorially been in use of beginning at the lowest flood-mark and fishing upwards as the tide flows.

The lands of Kirkside bound the lands now mentioned to the north, and reach also down to the sea. Straiton of Kirkside having a grant of salmon-fishing in the sea opposite to his own lands, had also immemorially possessed that fishing.

These two fishings, which have hitherto been separate and distinct without any interference, were blended and mixed by an alteration of the course of the river; which deserting its old channel, took a direction northward and entered the sea within Kirkside's lands, instead of entering it as formerly within the lands of the two gentlemen first named.

This obliged Kirkside to raise a declarator of his right, and he *insisted* upon his former exclusive privilege to fish in the sea opposite to his own lands, from the lowest ebb to the highest flood-mark. Kinnaber and Commiston, on the other hand, *insisted*, That the privilege of a salmon-fishing in a river is a real right which must follow the river wherever it runs; like other real rights, which cannot be extinguished, except by consent, while the subject remains entire; and therefore, that their exclusive privilege of fishing in the river from the lowest ebb upwards as formerly, remains with them notwithstanding the alteration of the course of the river.

“THE LORDS found, That the defenders, notwithstanding the change of the channel of the river, have right to fish down to the lowest flood-mark; but that the pursuer, in right of his infestment of the sea-fishing, has a joint right of fishing with the defenders above the lowest flood-mark, when the river is covered by the sea opposite to his lands of Kirkside.”

The Court took the only method to extricate this matter; for as both parties, by their several infestments, were entitled to fish from the lowest ebb to the highest flood, the pursuer by virtue of his sea-fishing, and the defenders by virtue of their river-fishing, came to have a joint fishing, when their rights formerly distinct coincided in the same spot.

In this case a judgment of the House of Peers betwixt the Duke of Gordon and Earl of Murray was cited, but was found to be a different case. (See APPENDIX.) The Duke of Gordon had a salmon-fishing *in ostio fluminis de Spey*. The Earl of Murray had the superior fishing of this river; and the question was, to ascertain the proper limits of these respective fishings. It was the opinion of the Court, that

No 21.

The right of salmon-fishing in a river follows the river, when it changes its course.

No 21. the *ostium fluminis* is that precise point where the river runs into the sea, at whatever time of the tide; and, therefore, that the *ostium fluminis* is a variable point, sometimes higher and sometimes lower, according as the sea approaches or recedes from the land. The House of Peers were of a different opinion. They interpreted a grant of a salmon-fishing *in ostio fluminis* more benignly. They judged the *ostium fluminis* not to be confined to a point, but to comprehend the whole space betwixt the lowest ebb and the highest flood-mark; and thereby to be an immoveable space instead of a moveable point. Therefore it was adjudged, "That the Earl of Murray has the exclusive right of fishing in the river Spey, downward to the place where the line which the sea makes upon the coast cuts the river at high water; and that he has no right to fish beyond that line: That the appellant the Duke of Gordon has the exclusive right of fishing from and below the said line to the sea; and that he has no right to fish above that line." Hence it appears, that the point in that case was to determine betwixt two parties, having both right to fish in the same river, but in different places. In the present case, the point was to determine what effect the alteration of the course of the river should have, by which two parties, who had originally distinct rights, came to interfere.

Fol. Dic. v. 4. p. 176. Sel. Dec. No 33. p. 36.

* * * This case having been appealed, the judgment was thus varied; Find that the pursuer Straiton has the exclusive right of salmon-fishing in the sea, within the bounds of the lands of Kirkside, as far west as a certain line, (described in the judgment), but has no right of salmon-fishing in the river Northesk, so far, and at such times as the water or stream of the river can be distinguished from the water of the sea; and find that the defenders Fullarton and Scott have no right to fish eastward of the line.

Journal of House of Lords, April 8. 1756.

1757. July 9.

HENRY TROTTER of Mortonhall *against* JOHN HUME of Ninewells and Others.

No 22.

If the proprietor of a salmon-fishing can erect any thing within his own bounds, by which a superior fishing may be hurt?

HENRY TROTTER brought an action against Mr Hume of Ninewells and others, *1st*, For ascertaining the boundaries of his fishing on the river Tweed; *2dly*, For obliging them to remove a gallows and ladder erected at the east end of the island of Annabat, for the purpose of viewing the fish in the river, and to demolish a bridge between the north-bank of the river, and the east or lower part of that island.

The marches were ascertained in consequence of a proof; but with respect to the gallows and bridge, it was *argued* for the defenders, That as these were erected within the limits of their own property, and were of considerable use