

incumbent upon him, and, therefore, were she to succeed in reducing the present investiture so as to obtain possession of the estate, she is bound immediately thereafter to reconvey the estate to the respondent as heir of entail, under the conditions, provisions, and restrictions imposed by that deed, upon the maxim, *quia frustra petis quod mox es restitutus*. The appellant has, therefore, no interest to insist in the present action.

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 CARMICHAEL,  
 &c.  
 v.  
 CARMICHAEL.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *J. H. Mackenzie, Fra. Horner*.

For the Respondent, *Wm. Adam, Sir Saml. Romilly, John Clerk, John Jardine*.

WILLIAM CUNINGHAME BOUNTINE CUN-  
 INGNAME GRAHAM, Esq. of Gartmore,  
 Finlayson, and Ardoch, and ÆNEAS  
 MORRISON, Writer, Greenock, Tacksman  
 of the Fishings, . . . . . } *Appellants ;*

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 GRAHAM, &c.  
 v.  
 DIXON, &c.

JOHN DIXON, Esq., present Provost of the  
 Royal Burgh of Dumbarton, and the other  
 Magistrates and Councillors of Dumbar-  
 ton, for themselves, and as representing  
 the Community thereof, . . . . . } *Respondents.*

(Et è contra).

House of Lords, 19th June 1816.

SALMON FISHINGS—YAIRS—STAKE NETS.—(1.) In a dispute raised by mutual declarators as to the rights of salmon fishings, Held that both parties had established a right to a salmon fishing. (2.) The appellant's title bore reference to the fishings in these words: "cum piscatione de lie yair de Ardoch," and nothing was said about stake nets in the other's right, and stake net fishing being claimed by both parties, the appellants contending that yairs necessarily included and meant a stake net fishing. Held that neither party was entitled to establish any species of stake net fishing within the bounds in question. Affirmed on appeal.

The royal burgh of Dumbarton holds grants from the Crown of the salmon fishings of Clyde, from the mouth of the Kelvin, which is situated about ten miles above Dumbarton to the head of Loch Long, about twenty miles below Dumbarton. The burgh has likewise a royal grant of the

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river Leven, and the salmon fishing in it, which river is the outlet from Lochlomond, and enters the Clyde at a distance of about ten miles. Dumbarton Castle stands in the angle formed by the junction of the Clyde and Leven.

The respondents stated, that while thus possessing a right to the salmon fishings of the Clyde, from the mouth of the Kelvin to the head of Loch Long, yet that, on the other hand, some proprietors of the estates on the banks of the Clyde within the same bounds, held in their charters, grants of the fishings of particular yairs, which are low dykes of stone built within flood mark to detain herrings and other small fish that swim low in the water. Among these was the proprietor of Ardoch, the appellant. They stated, further, that the appellant had, by his ancient titles, a right to the fishings of the yair of Ardoch, which was an old stone fabric then in ruins. They alleged it was a herring yair, constructed in the form of a crescent, with the hornsturned up the river. The respondents and their tenants having erected a yair in the form of a stake net on the shores of Ardoch, below that of the appellant, whereby, as the appellant stated, the fish approaching towards the appellant's yair were intercepted, he brought an action of declarator against the town of Dumbarton, which was met by another action of declarator on the part of the town, against the appellants, who had also proceeded to erect stake nets on the sands opposite to Ardoch.

The appellant Mr Graham's summons set forth his title to be to the lands of Ardoch, "cum piscatione *de lie zair* de Ardoch."

The respondents' titles conveyed "totum et integrum "dictum fluvium de Leven, a Balloch ad castrum dicti "burghi, cum piscationibus salmonum, et aliorum piscium, in "eadem; una cum libertate ejusdem, ex utroque latere ad "metas fluctuum maris; ac etiam libertatem dicti fluvii de "Clyde, *cum piscationibus salmonum aliorumque piscium,* "intra bondas prædict, viz., inter dictam aquam de Kelving "et caput de Lochlong; possidendo per eos, eorumque suc- "cessores, adeo libero sicut ipsi aut eorum predecessores, "easdem alioque tempore præterito possidebant."

The respondents, with respect to their right, stated that the above grant conferred on the town of Dumbarton, 1st, The river of Leven from Balloch to the castle of the said burgh, with the fishery of salmon and other sorts of fish in the same, with the freedom of the river on both banks to the sea. 2d, There was thereby granted 'the liberty of the said river Clyde,' that is, the freedom of navigation therein, along with the

other royal burghs. And 3d, The fishery in the Clyde of salmon and other fishes, between the water of Kelvin and the head of Lochlong, to be possessed as freely as their predecessors had done in past time. They further stated, that the charter founded on, ratified prior charters granted by Alexander II., who began his reign in 1213, David II., and James III. And under these, they contended that they had exclusive right of salmon fishing opposite to the lands of Ardoch, and that, consequently, they had a right to prosecute that fishery by means of stake nets. On the other hand the respondents contended, with respect to the appellant's titles, that these contained no grant of salmon fishing, and that they imported nothing more than the grant of a permanent fixture of known structure. In short, a yair in the form of a crescent, with the horns turned upwards, and consisting of a dike of loose stones of three or four feet in height, and only calculated to take herrings.

After a proof, Lord Meadowbank, Ordinary, pronounced this interlocutor in the mutual declarators:—"Sustains the titles to pursue *hinc inde* in the mutual declarators, and finds that the parties have thereby established a sufficient right to the ancient grants respectively founded on. Finds that the right to the yair of Ardoch, implies a right to every sort of fishes that might be caught in such yair, whether salmon or other fishes, and that a right to a yair confers also a right to improve its form and capacity for taking fishes in every lawful manner used in a fishing by yairs, according to the skill and attainments of the time of fishers by yairs. Finds that a stake net fishing adjusted to the yair of Ardoch, is a fishing of the yair of Ardoch according to the present practice of fishing by yairs. Finds no evidence of the town of Dumbarton having exercised a right of yair fishing, or having obtained any grant for that purpose, or having acquired any right of salmon or other fishing by the positive prescription, incompatible with the right of Mr Bountine Cuninghame Graham, or of his authors, to the yair of Ardoch, and that a possession of the said yair sufficient to have prevented any such prescription, has also been established on the part of the said Mr Bountine Cuninghame Graham. Therefore, finds that the town of Dumbarton has no right to establish a yair or stake net fishing on any part of the shore of Ardoch, or to carry on any species of salmon fishing there, by net and coble, or otherwise, so as to demolish the yair of Ardoch or the

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Dec. 3, 1810;  
in appellant's  
case, Dec. 3,  
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 May 13, 1812.
- “ appurtenances thereof, or injure the said yair fishing, by any  
 “ operations carried on opposite to the shore of Ardoch, so far  
 “ as the Clyde is there rideable; decerns, and dispenses with  
 “ any representation.” On representation, his Lordship ad-  
 “ hered, issuing the note below.\*
- Nov. 27, 1812.
- These interlocutors were brought under the review of the  
 Second Division of the Court who pronounced this interlocutor :  
 —“ The Lords having resumed consideration of this petition,  
 “ and advised the same, with the answers thereto; in terms  
 “ of the Lord Ordinary’s interlocutor submitted to review,  
 “ sustain the titles to pursue *hinc inde* in the mutual  
 “ declarators, and find that the parties have thereby estab-  
 “ lished a sufficient right to the ancient grants respectively  
 “ founded on; *quoad ultra* recall said interlocutor; find that  
 “ neither of the parties are entitled to establish any species  
 “ of stake-net fishing within the bounds in question. Find  
 “ that Mr Graham and his tenant are entitled to repair and  
 “ uphold the yair of Ardoch, according to ancient usage, and  
 “ decern and declare accordingly.” On another reclaiming  
 Jan. 16 and 19, 1813. petition, the Lords found “ that Mr Graham and his tenant  
 “ are entitled to repair and uphold the yair of Ardoch, and  
 “ according to ancient usage, to possess and enjoy the same,  
 “ and decern; and with this variation, adhere to the inter-  
 “ locutor reclaimed against, and refuse the desire of both  
 “ petitions.”

The present appeal against these interlocutors, was brought by the appellants and a cross appeal by the respondents, in so far as the interlocutors were not sufficiently favourable to them.

*Pleaded for the Appellants.*—1st, Because the appellant, Mr Graham, and his ancestors have, from a period prior to 1560, down to the present time, possessed under express grants from the Crown, a right of salmon fishing by yair, on the shores of Ardoch. And though the respondents have adduced what they call right to the salmon fishings in the

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\* Note by the Lord Ordinary :—

“ The points chiefly attended with difficulty, seem to the Ord-  
 “ nary to be the right of converting an old yair into a modern  
 “ yair, by stake nets. This certainly requires the fullest con-  
 “ sideration of the Court; and the Ordinary conceives that his  
 “ interlocutor is little more than a proper step for such discussion,  
 “ as he followed, on pronouncing it, only the analogy of mills and  
 “ mill dams, and the like.”

Clyde, under a charter from James VI., which ratifies charters of older dates, and the respondents have possessed such fishing on these titles up to the time when the new erections were made, yet none of the prior charters ratified by that of James VI. contained any title to salmon fishing in the Clyde, and, therefore, the respondents' right to salmon fishing in the Clyde, must entirely depend on the terms of that charter of James VI., which is of a date long posterior to the title produced by the appellants. By the charter of James VI., the freedom of the river Clyde, or the right of exacting toll or custom between the Kelvin and the head of Loch Long (which had previously belonged to the burgh), was confirmed and granted of new; but the grant of salmon fishing contained in that charter, is in express terms limited to the previous possession of the community. Nothing can be more preposterous than to maintain that the community, by that charter, obtained right to all the salmon fishings between the Kelvin and Loch Long, as nineteen-twentieths of the salmon fishings within these extensive bounds, were then, and have continued ever since, to be possessed by other proprietors, under grants from the Crown of a much more ancient date than those of the respondents. These titles are not solely confined to a fishing of the yair of Ardoch, but embrace a salmon fishing within the designation of yair fishing, unless otherwise restricted, and a grant of yair fishing from the Crown must necessarily convey a salmon fishing.

2d. By the law of Scotland, there is no regulation known by which the proprietors of yair fishings are restricted, as to the materials to be employed in the construction of a yair, or as to the shape in which the same may be formed. The Court have held stake nets to be a species of yair, and, therefore, not legal, where yairs are prohibited, but while here they have found the appellant entitled to a yair, they have, inconsistently with that finding, found him not entitled to a stake net fishing. A yair fishing includes a stake net fishing.

*Pleaded for the Respondents.*—1st, The respondents, by a charter from the Crown, followed by possession, have an exclusive right to the salmon fishings in the river Clyde, opposite to the lands of Ardoch. No party has a right to intrude upon that estate, which is lawfully vested in the respondents. 2d, The appellant, Mr Graham of Gartmore, has no right to a salmon-fishery in the river Clyde. He holds only a grant of the yair of Ardoch. This is merely a

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particular fabric. It never was a salmon-fishery, and cannot lawfully be converted into one, to the prejudice of the estate vested in the respondents. 3d, The appellant, Mr Graham, has no right, by his charter, to a particular *mode* or fashion of fishing. He has merely a right to a particular known fabric called Ardoch yair, or the yair of Ardoch. 4th, As Ardoch yair is an ancient and well known fabric, constructed for taking herrings and white fish, the stake net, which is a newly invented instrument for taking salmon, is not an *improvement* of this fabric, but a totally different instrument. 5th, The stake net constructed by the appellants for taking salmon, blockades the river Leven, and unduly injures the salmon fishery of that river. 6th, The stake net erected by the appellants, is an instrument which cannot lawfully be used for taking salmon in Scottish rivers.

On the cross appeal:—

1. The law of Scotland rejects popular actions. Mr Graham of Gartmore has no legal title, and no interest to complain of the mode in which the Magistrates of Dumbarton exercise their salmon fishery. He can lose nothing by their using a stake net, and it was not competent for the Court of Session to sustain any action or judicial process instituted by him or his tenant, for the purpose of interrupting or restraining the Incorporation of Dumbarton in establishing a stake net, or any other instrument which they could devise for taking salmon. 2d, Mr Graham of Gartmore has no right to alter the form or position of the yair of Ardoch. This ought to have been *declared* by the Court of Session in Scotland.

After hearing counsel,

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

For the Appellants, *Sir Saml. Romilly, John Clerk, James Moncreiff.*

For the Respondents, *Wm. Adam, Ro. Forsyth.*

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[Fac. Coll., Vol. xvi., p. 429.]

MOLLE  
 v.  
 RIDDELL.

WM. MOLLE, W.S., Trustee of the REV.)  
 JOHN EDGAR, Minister of the Gospel at } *Appellant*;  
 Lymington, . . . . .

WM. RIDDELL of Camiestoun, Esq., W.S., *Respondent.*