

[14th May 1832.]

MURDO MACKENZIE of Ardross, Esq., Appellant.—

No. 2.

Lushington — Knight.

HUGH ROSE of Glastullich, Esq., Respondent.—

Lord Advocate (Jeffrey) — Pemberton.

Salmon-fishing—Property.—A party, alleging his exclusive right of fishing salmon and all other fish in a river, to the banks of which he had no right, but to the waters of which, as well as to the fishings, he claimed an absolute and exclusive right, raised actions of declarator, suspension, and interdict against the proprietor of lands adjacent to and bounded by the river, and infest on titles, conveying the lands ‘cum pertinentibus,’ and supposed also ‘cum piscationibus,’ who claimed a right to fish for trout and other fish ex adverso his lands. The House of Lords affirmed the judgment of the Court of Session, holding that the latter proprietor did not require to prove prescriptive exercise of such right of fishing; but that, independent of such prescriptive possession, he had a right to fish trouts in the river ex adverso his property, with trout rods, but not with net and coble, or in any way prejudicial to the former party’s salmon-fishing.

MACKENZIE of Ardross, alleging that he stood heritably infest and seised in the whole salmon-fishings in the water, river, and linn of Shinn, together with the water and lynn itself, and whole parts, privileges, and pertinents thereof, and that he had accordingly occupied, possessed, and exercised the said whole fishings exclusively and uninterruptedly, raised an action of declarator against Rose of Glastullich, the proprietor of the lands

2d DIVISION.

Ld. M^rKenzie.

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of Achany, adjacent to the river Shinn, stating that Glastullich had, without any title or authority whatever, unwarrantably pretended and asserted a right to fish in that river ex adverso of the lands of Achany and others; and had, by himself, or by others in his employment or by his permission, under the false pretence of fishing for trouts, fished for and killed salmon in that river, to the injury and damage of the pursuer, who had the sole and exclusive right to the said river, and to the whole fishings thereof; and concluding that it ought and should be found, decerned, and declared, that the whole of the water and river and linn of Shinn, and the whole fishings thereof, appertain and belong entirely and exclusively to the pursuer, and that he has the only good and undoubted right of fishing in that river by the various methods permitted by law, and by which the river is capable of being fished; and further, that Glastullich has no right or title whatever to fish for salmon, or otherwise, in any manner of way, in that water and river, or in any part thereof; and that he should be prohibited and interdicted from fishing therein, to the injury and damage of the pursuer, in any way or manner, or under any pretence whatever.

Glastullich, in defence, denied that the pursuer and his authors had enjoyed an exclusive possession of every description in the river and linn of Shinn. On the contrary, the defender was infest on titles carrying “ the
 “ town and lands of Achany, and pertinents thereof,
 “ with the houses, yards, tofts, crofts, outsets, insets,
 “ shealings, grazings, woods, fishings, mosses, muirs,
 “ marshes, pasturages, commonties, liberties, privileges,
 “ annexis, connexis, dependencies, parts, pendicles, and
 “ universal pertinents thereof, use and wont, pertaining,

“ or known to belong and pertain thereto.” The defender and his authors had been for more than forty years in the open, constant, and uninterrupted use of fishing salmon, with nets, in the Shinn, both above and below the linn or fall ; and had constantly enjoyed, by themselves and servants, the right of fishing, with rods, for salmon, trouts, and other fish. The pursuer’s claim was the more extravagant as the Shinn is a river of magnitude, flowing from a lake of fifteen or sixteen miles in length, to claim the ipsum corpus or property of which was a mere absurdity ; besides, the pursuer had no right of property in any of the lands adjacent to the stream ; he was not the proprietor of the bank, and therefore could claim no right in the stream even as a conterminous heritor.

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Glastullich further maintained that the pursuer’s right only extended to a fourth of the fishing on the linn, and a half of the water of Shinn, and the pursuer, therefore, had no title to interfere with or dispute the possession of the defender so long as the defender did not encroach upon that portion of the right belonging to the pursuer.

Thereafter the pursuer brought a suspension and interdict against the defender, to have him interdicted from fishing in the river in question.

These two processes being conjoined, and the record closed : The Lord Ordinary found, “ The pursuer and suspender has produced a sufficient title to the property of fishings of salmon and other fish in the river of Shinn, including the linn thereof generally, as in a question with the defender and respondent, who does not pretend any right to the said property generally, or any part thereof, but pleads a right of the nature

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“ of a servitude thereon, viz. a special right of fishing
 “ for salmon, as well as trouts and other fish, by rods,
 “ spear, and net, but not by net and cobble, founded
 “ on a grant of lands adjoining, cum piscationibus et
 “ pertinentibus, with forty years’ possession of such
 “ special right; finds this possession wholly denied by
 “ the pursuer and suspender, and therefore remits the
 “ cause to the Jury Court.”

The respondent reclaimed to the Second Division of the Court, in so far as this interlocutor seemed to require him to prove forty years’ possession of fishing trout and other fish, exclusive of salmon, in order to establish a right thereto; and their Lordships, having ordered and considered mutual cases, recalled the interlocutor re-
 29th May 1830. claimed against, and found, “ That the pursuer and
 “ suspender has produced a sufficient title to the pro-
 “ perty of the fishings of salmon in the river Shinn,
 “ including the linn thereof generally, as in a ques-
 “ tion with the defender and respondent; find, that
 “ the defender and respondent has a right to fish
 “ trouts in the river Shinn, so far as his property
 “ extends along the said river, with trout-rods, but not
 “ with net and cobble, or in any way that may be pre-
 “ judicial to the salmon-fishing belonging to the said
 “ pursuer and suspender; recal the interdict to this
 “ extent; and, quoad ultra, remit the case to the Lord
 “ Ordinary, reserving all claims to expences of process
 “ for his Lordship’s determination; and decern.” *

Mr. M’Kenzie appealed against this interlocutory judgment, so far as it found that the respondent had right to fish trouts with trout-rods in the river Shinn, ex adverso of his property.

* F. C. and 8 Shaw and Dunlop, 816.

Appellant.—The property of the water of Shinn, comprehending the loch and linn of that name, and the whole salmon-fishings, which grant, as the superior right, includes all other fishings in this water, were feudalized as separate subjects in the persons of the appellant's predecessors upwards of a century ago; and the absolute right, both to the water or river and loch, and to the salmon fishings, is now vested, by a complete and regular progress of titles, in the appellant; under which titles he and his predecessors have enjoyed an uninterrupted and exclusive possession of the whole water of Shinn, and of the whole fishings of every description in this water, for a period far exceeding the long prescription, without any interference with this possession until the present attempt on the part of the respondent.

On the other hand, the respondent has produced no feudal title, conferring upon him or his predecessors any right of property, either in the water of Shinn or in the fishings in that water, which can compete with the title of the appellant. The respondent's infeftment in the lands of Achany and others, cum piscationibus, gives him a mere right of fishing within his own ground, but cannot confer upon him any title to trespass by fishing trouts, or otherwise, upon the water of Shinn, the absolute property of the appellant. Again, the words cum pertinentibus, while they are plainly ineffectual to confer any right of property in the fish, cannot even give him a servitude of trout-fishing in a stream belonging to the appellant, unless supported by a proof of possession for forty years. That he has had no such prescriptive possession of a right of fishing trouts in the water of Shinn must be assumed in the present state of the case, as his averment upon the

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point has been unequivocally denied, and not attempted to be supported by proof.

There is no principle of Scotch law, either express or implied, from which it can be assumed, that trouts in a river, which is the exclusive property of one person, more especially a salmon river, are a pertinent of lands belonging to another person, or are a pertinent of lands at all, or that the proprietor of the adjacent lands has any right to them, or to fish for them.

The right to fish trouts with trout-rods in the water of Shinn, ex adverso of his own property, to which the respondent has been found entitled by the interlocutor appealed from, cannot, by possibility, be exercised in any way that is not prejudicial to the salmon-fishings belonging to the appellant.—Scott, 22 July 1825, (Mor. 12,771); Town of Perth, 9 Jan. 1750, (Mor. 12,793); Dick, 16 Nov. 1769, (Mor. 12,831); Stair, II. 3, 76; Bankton, II. 3, 8; Erskine, II. 6, 6; Carmichael, 20 Nov. 1787, (Mor. 9,645, & 2 Hailes, 1,033); Forbes, 31 May 1826, (4 S. & D. 650.)

Respondent.—The appellant has produced no right in his person entitling him to interfere with the exercise of the power claimed by the respondent. The grant is not salmonum aliorumque piscium, but salmonum alone. But although the grant of salmon-fishing were as ample as it is pretended to be, it neither includes, in terminis or otherwise, a grant of fishings of a totally different nature and description, nor gives a title upon which he can either prescribe any right of the nature claimed by him, or which can compete with that founded upon by the respondent, and admitted to exist in his person.

The respondent cannot be required to prove possession of trout fishing for forty years. He has a right to the banks of the river, and therefore, even were his titles altogether silent as to fishings, he has a right to fish trout. Even the non-exercise of the right would be of no consequence, for trout fishing is *res meræ facultatis*.

The averment of the appellant, that he is proprietor, not only of the fishings upon the Shinn, but also of the water itself, is neither borne out by the nature of the titles produced by him, nor is such a right of property recognised by law.

To claim a right of property in the very *ipsum corpus* of a fishing river has more than the merit of novelty, and particularly when he must claim the river as a separate and distinct property in itself from the solum or adjacent land in which he has no right of property. Besides, it is very plain that if the appellant has no access to the stream by possessing the bank, and if the right granted to him is limited and specific, it is *ius tertii* in him to attempt to interfere with the respondent in the exercise of any rights of fishing which do not encroach upon those granted to the pursuer. The appellant must make out a full and exclusive right to every species of fishing in the Shinn before he has a title to disturb the respondent.

The only ground upon which the appellant can pretend that he has any title to interfere with the right of the respondent is, that it may be injurious to his salmon-fishing. This interest is fully protected by the interlocutor under review, which expressly guards against the right of the respondent being exercised in any manner

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hurtful to that interest.—Craig, I. 16, 36, and II. 8, 15 ;
 Stair, II. 3, 69, & 76 ; Erskine, II. 5, 15, & II. 6, 6 ;
 Bankton, II. 3, 8 ; Colquhoun, 20 Nov. 1787, (9,645,
 & 2 Hailes, 1,033.)

LORD CHANCELLOR.—Is it quite plain that the important word “ piscationibus ” in the respondent’s titles has been rightly transcribed ? The impression on my mind is that it should be read “ potestatibus,” and that so it will turn out, if the original title-deeds are carefully examined. For that purpose, let the case stand over for further consideration.

The case having accordingly stood over, the title deeds were minutely examined, and the words were found to be, not “ cum piscationibus,” but “ cum potestatibus.”

On the case being again moved :

LORD CHANCELLOR. — My Lords, this case stood over for further consideration, that during the interval the deeds might be examined. I think I suggested that a word which had been read and understood to be “ piscationibus,” on which a good deal was represented to turn, might, when the deeds were examined, prove to be not “ piscationibus,” but “ potestatibus.” Your Lordships are now informed that the examination confirms that conjecture — that the word is potestatibus. I think, however, that on the merits the case stands very much where it did ; and I shall therefore now humbly move your Lordships that the decision of the Court below in this case be affirmed ; but, in the circumstances, I shall not press on your Lordships the giving costs.

The House of Lords ordered and adjudged, “ That the
“ said appeal be, and is hereby dismissed this House, and
“ that the interlocutor therein complained of be, and the
“ same is hereby affirmed.”

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FRASER—RICHARDSON and CONNELL,—Solicitors.