On the 23d November, 1768, they adhered.
Act. J. Swinton, D. Rae. *Alt.* A. Lockhart, D. Armstrong.
Reporter, Auchinleck. No votes at last hearing.

1767. *July* 21; and *25th November* 1768. DUKE of ROXBURGH *against* EARL of HOME.

SALMON-FISHING.

A Fishing in the Tweed possessed jointly by a Scots and English Heritor, how far subject to the regulations of the Act 1696, cap. 33, and to the cognisance of the Court of Session.

[*Dictionary,* 14,272.]

HAILES. Of the opinion of the Lord Ordinary's interlocutor: the slop on the south side of the river can never be the slop intended by the Act 1696, for that it is without the jurisdiction of the Court of Scotland; and, consequently, Lord Tankerville may shut it up whenever he inclines. The argument, from custom, does not affect me: a public law is not abrogated by particular consuetude. So was found, not only in the case of *The Fishings of Ness,* but also in the case of *The Fishings of Craigforth.* The case of *The Water of Ericht* was a singular one. The bulwark, there, was ratified by Parliament, and the immemorial possession followed upon that Act.

MONBODDO. The Act 1696 was never in use in this river. I cannot divide the river, nor the dam-dike. If one part is not in Scotland, the other cannot be regulated by the law of Scotland. Possession and custom go far towards the interpretation of the statute. The case of the water of Ericht is rather stronger than the present case, where there was a bulwark quite cross the river from time immemorial. The interest of the mill is to be considered.

AUCHINLECK. As to the interest of the mill, undoubtedly that is the primary use of the river, and the mill must be served. The Acts concerning salmon-fishings have been considered by the court as relative to public police; the Act 1696 is a general law; and I do not see that the Tweed is exempted from it. It is true, that part of the river is not under our jurisdiction; but, so far as our jurisdiction reaches, we must support this salutary regulation of the mid-stream. If Scots people were convicted of killing smelts in this river during forbidden time, they would be punished: the mill-dam has no mid-stream; but, what is equivalent, it has holes, which will answer as well whenever the nets are taken out. This was ordered by the sheriff, and approved of by the Lord Ordinary, and is a good expedient: it makes no difference that the law has not been put in execution as to the fishers of this river. The Ness fishers also pleaded that they were *legibus soluti;* but their plea was disregarded. The case of Ericht is a *strong* case, and I doubt of its justice. Besides, in that case,

Mr M'Kenzie was specially infeft in the bulwark. The pursuer seeks to have the dam new-modelled; but this will not be allowed: there should be openings, provided that those openings do not hurt the defender's mill.

PITFOUR. I cannot think that the legislature, by the statute 1696, meant to comprehend the Tweed. 1. There is immemorial possession to the contrary. 2. It is probable, from the rapidity of the river, the fishing could not be carried on in another way. 3. A river between the two countries cannot be subject to the Scottish regulations. During a truce, at the beginning of last century, it was provided, that the proprietors of fishings on the Tweed should exercise their rights of fishing as formerly: so stood the law before 1696. And the Act, 1696, did not alter any thing. The Scottish legislature could never mean to inhibit its own subjects from the exercise of this right merely with the view of forcing the fish into the hands of the English. The Act, 1696, means no such thing. It relates to rivers wholly within the jurisdiction of this kingdom; for how make a *mid-stream* when they had no jurisdiction over any more than one half of the river? The regulations of the statute, 1696, are very proper where they can be executed: but they cannot be executed in the Tweed. I am not affected with any of the precedents: as constant consuetude established the right, so constant consuetude explains the law.

GARDENSTON. The Act, 1696, does not extend to the Tweed. The river is not within the kingdom. Had the legislature meant to comprehend the Tweed, it must have made other regulations for that river than those of the Act 1696. It would not have provided for a mid-stream there: how can half of a river be regulated by the law of Scotland, and the other half by the law of England?

COALSTON. The regulations concerning fishings are matters of public police; and, therefore, if this river were in the common case, I should think possession not sufficient. The old laws do not relate to Tweed. The commission for executing the laws as to fishings, granted in the reign of James VI. does not mention Tweed. The Act 1606, does, as to fishings in forbidden time; and I suppose there was some such law in England at that period; but the Act says nothing of the mid-stream, &c. The only question is, whether the Act, 1696, extends to Tweed? I cannot think that it does.

KAIMES. If the words of the Act are taken strictly, Tweed is comprehended. On the other hand, the reason of the thing is urged. I do not think that the consequences will be such as represented by the defender; for, if the holes are kept open, salmon will run up by them. The principle on which I would give judgment for the Duke of Roxburgh, has not been hitherto mentioned: it is this,—no man can, by his own authority, draw a bulwark across a river, and thereby deprive the superior heritors of all fishing: he may make mill-dams, it is true, but then he must make them with as little hurt to the superior heritors as possible. The Act, 1696, is not a new regulation: it is for ascertaining the common law; and it does it in a rational manner, that the mill-dams may subsist,—but that they may subsist so as not to deprive the superior heritors of all salmon-fishing. Where the river Tweed runs through Scottish ground, the Act, 1696, will apply to both sides: where it runs half in England and half in Scotland, it will apply to the Scottish half.

ALEMORE. As long as I remember any thing, I have heard those works

complained of: I have great doubts why the law should not extend to Tweed, as far as our jurisdiction extends. If the slop is made, salmon will run up, instead of entangling themselves on the English side. If the position laid down for Lord Home is to hold, what is there to hinder all the inferior heritors from building bulwarks across the river? They will be under no jurisdiction either of Scotland or of England. All the laws about fishing are calculated for the benefit of the superior heritors. The former Acts, excepting Tweed from the laws as to killing fish in forbidden times, were barbarous and impolitic. Because the English, by irregular fishing, hurt themselves and us, we would do the same. These laws were altered upon the Union of the Crowns. The Act, 1696, does not mean mathematically the middle, but the mid-stream, which may be on one side, and which may be divided, and run on both sides. Why should not the Act, 1696, be extended to Tweed, as well as the former Acts, at the Union of the Crowns, were extended. You do not thereby throw more fish on the English side, but the contrary.

PRESIDENT. The Act 1696 is general, and must extend to the Tweed. The right before 1696, vested in the parties, was no more than a power of fishing. Had Tweed never been excepted from any of the Acts, the argument would have been stronger for the defender. The Act 1606 took away the exception. Had the Act 1696 meant to make any exception as to Tweed, it would have so provided. Here is a Scots dike and a Scots mill, for the dam does not reach over to the other side, and a Scotsman has a servitude upon the Englishman. I have no concern with English law; but I would give force to a Scots Act as far as the jurisdiction of this Court extends, leaving the English to manage their own laws as they please.

KENNET. Of the same opinion. The permission to kill fish in forbidden time, in the Tweed, is by special statute, which shows that the Tweed, in so far as Scottish was understood, was to be subjected to the laws of Scotland. The argument, from the supposed advantage of Lord Tankerville, would be stronger, were there to be no slop, than on the contrary.

The Lords, (21st July 1767,) found that the regulations 1696 extend to the river Tweed, and remitted to the Lord Ordinary to proceed accordingly.

Act. P. Murray, H. Dundas. *Alt.* D. Rae. *Reporter*, Kennet.

Diss. Coalston, Pitfour, Gardenston, Monboddo.

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered :—]

AUCHINLECK. If this is a Scots fishing, the Court has jurisdiction. What is the boundary between Scotland and England? That must depend upon possession. Had Lord Tankerville possessed the whole river, the boundary would have been the north side. Here the case is different. The two Earls have possessed the fishing as common. The dam-dike was upheld by them mutually. The fish were divided. It is therefore not a Scots fishing, nor an English, but common to both countries. Suppose there were here a dry march, how could a common in both kingdoms be divided? Lord Tankerville is not amenable to the Courts in this country. Our rule of dividing by the valued rent does not take place in England.

GARDENSTON. The regulations of the Act 1696 are only applicable to a river altogether in Scotland.

MONBODDO. Of the same opinion. Immemorial possession is one circumstance; a joint concern of a party not subject to the jurisdiction of this Court is another. I am clear also upon the principles of common law. Every river, *juris publici*, between two nations, is common to both. The old Scottish statutes are nothing to the purpose. The Act 1696 relates to dam-dikes within this kingdom.

PRESIDENT. I do not agree with some of the doctrines laid down in Lord Tankerville's memorial. We will judge over our half of the river, and leave the English courts to judge over the other. But I incline to alter upon immemorial usage. I consider this fishing just as a common between the two nations.

ALEMORE. If the Tweed is a common river, there is an end of the question. It has now changed its nature, and has become extraparochial.

On the 28th June, 1768, the Lords altered the interlocutor of 22d July 1767, and found that, in the circumstances of this case, the Act 1696 does not extend to this fishing; and assoilyied.

On the 25th November 1768, they adhered.

Act. H. Dundas, P. Murray. *Alt.* A. Lockhart, D. Rae, R. Kennet.

Diss. Alemore; Hailes at the second interlocutor. Alemore absent, and Hailes, in the Outer-House, at the third interlocutor.

[Reversed on appeal.]

1768. *November 25.* SIR ALEXANDER MACKENZIE of Gairloch *against* HECTOR MACKENZIE and His TUTOR.

HOMOLOGATION.

When challenge of an Entail, for limiting a fee destined to the pursuer in a contract of marriage, is excluded by homologation.

[*Faculty Collection, IV.* p. 298; *Dictionary,* 5665.]

KENNET. There are two points, power and homologation. The Court has always avoided determining the first point. Homologation seems plain by the entail upon record, which must have been known to the present pursuer.

MONBODDO. The only provision to Sir Alexander, by the contract 1755, was upon a narrative of the entail.

PITFOUR. As to the first point, I do not say but that a father may make an entail notwithstanding a marriage-contract. Yet I do not think that he can make an arbitrary entail. A father, in such circumstances, may make a rational entail; but I never saw any such made. It must be of a large estate which can admit of an entail, and a power to provide a wife and children must be left. *Here* the entail is irrational, because the provisions to children are too small.