

1778. July 22.

SIR JAMES GRANT and Others, *against* The DUKE of GORDON.

No. 29.  
Powers of the  
Crown in  
granting a  
right of  
cruive fish-  
ing.

AT an early period, general rights of salmon fishing in every part of the river Spey, had been granted by the Crown to the different proprietors of the adjacent grounds.

In 1684, long subsequent to these grants, the Marquis of Huntly, in a charter of resignation from the Crown, obtained a clause of *novodamus*, proceeding on a sign-manual, which gives him a right to the use of cruives on the river, within certain bounds, where he formerly had a general right of fishing, and where the Earl of Fife's authors had a right of curroch fishing.

The attempts of the Duke of Gordon to erect dikes across the river, in this part of it, produced one process in 1727 against him, and another in 1733. Afterwards the Duke erected a cruive-dike in the same place, which gave rise to a new process at the instance of the Earl of Fife, and likewise of many of the upper heritors, concluding, in substance, to have it found, that the Duke had no title to erect cruives to the prejudice of their fishings. A final interlocutor was pronounced in this process, 10th August, 1775, finding, "that the Duke was not entitled to have cruives, dikes, or braes, upon that part of the river of Spey, within which the Crown had granted rights of fishing to other heritors before the date of the Duke's charter; and therefore ordain these cruives, &c. to be demolished."

Upon an appeal taken by the Duke, the House of Lords reversed this judgment, and remitted the cause to the Court, to proceed on the foundation of the respective rights of the parties, established by an interlocutor in the former process, 14th July, 1727.

Parties having differed as to the application of this judgment, the Court found, "that Earl Fife's right of fishing with currochs only, was no bar to the Crown's granting to the Duke of Gordon a right of cruive fishing within the bounds, reserving to all parties any other grounds of challenge against the Duke of Gordon's right to cruives."

After this judgment, the upper heritors resumed the challenge of the cruives at their instance.

Pleaded for the upper heritors: The Crown having previously conveyed the total and complete right of the fishings in every part of this river by grants to the predecessors of the pursuers, and others, *salmonum piscariæ*, nothing remained with the Crown to be the subject of an after grant. It is true, that, under a general right of fishing, the grantee is not entitled to the use of cruives in the place where the fishing is given. The law considered that species of fishing as a pernicious device, which ought to be discouraged. But the right to cruives, though it is denied or not given by the grant of general fishing, is not reserved to the Crown as a separate subject, which the Crown could bestow on another. The Crown is totally divested of the fishings of the river by these grants over every part of it; and the

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law understands no implied reservation, by which a new grant may be made to the prejudice of fishings already established in others. The defender's grant to cruives, therefore, in the 1684, was *ultra vires* of the Crown. A right of cruiue fishing in the lower part of a river, annihilates the fishings on the higher part of it, and is not less prejudicial to the general right of fishing belonging to the superior heritor, than if the right to cruives were given within the bounds of his own grant.

A contrary doctrine was represented as alarming to the rights of an extensive subject of property. The salmon fishings in Scotland are universally considered to be as secure to the proprietor as a land estate, and are daily sold at a price adequate to their present produce. But this property must at once be reduced to a precarious possession at the pleasure of the Crown, if a right to cruives may be granted to an inferior heritor.

The pursuers likewise laid some stress on the act 1581, c. 111. as pointing at a prohibition against granting a right to cruives thereafter, and at least proving that the law considered such grants as unfavourable.

Pleaded *separatim* for Lord Fife: Though the defender should be found entitled to fish by cruives, it must be in a manner consistent with Lord Fife's curroch fishing within the same bounds, which being previously granted, could not be taken away by the grant of cruives. The defender, therefore, must leave an opening in his cruiue-dike for the passage of the pursuer's currochs.

Answered for the defenders: The question whether the Crown can give a right of cruives to one person, in the same place where a general right of fishing had been previously granted to another, is not before the Court. But it has been already found, in the case of Lord Fife, that a partial right of fishing does not bar a grant of cruives to another in the same place. The upper heritors have still less title to challenge this grant than Lord Fife. They have no right of fishing whatever in the place where it is given.

It is not enough to say, that, in consequence of the cruiue-dike, the produce of their fishings is diminished. That must be the consequence where the Crown grants any kind of salmon fishing on the inferior part of the river, after a grant of fishing on the superior part. Every original grantee, or purchaser of a fishing, is presumed to know the quality which necessarily attends it: That, notwithstanding of this grant, the Crown is entitled, in all the other parts of the river, to give a right to every kind of salmon-fishing, and to that of cruiue-fishing as much as any other.

It is of no consequence that these general rights of fishing were given over the whole river before a right to cruives was given. The Crown may extend the right of any of these heritors to a cruiue fishing by a special grant, for the same reason, that an inferior heritor having only a right of curroch fishing may have this right extended by the Crown to a coble or general fishing. On all rivers where cruives are now established, there were undoubtedly grants of fishings in the superior part of the river before the grant of cruives in the inferior part.

*2do*, To Lord Fife's plea: The defender being found entitled to a cruives, cannot be obliged to make an opening in his dike for the passage of currochs. ¶

would no longer answer for the purpose of a cruive dike, as all the salmon would escape by this passage.

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Besides these general points of law argued in this case, the pursuers founded on the words of a contract in 1724, as barring the Duke from erecting cruives. But the Court were of opinion, that the contract could not bear this construction, and was likewise derelinqished. The defenders founded on certain interlocutors in the process 1733, as decisive of the question against the upper heritors. But, as there were some of the upper heritors parties to the present process, who were not parties to either of the former actions, the Court thought the question still open to be tried at their instance.

The Court “repelled the objections to the Duke of Gordon’s right to cruive fishing *sub saxo de Ardiquish*, established by the charter 1684, as well the objections founded on the act 1581, as those founded on the interest of the superior heritors, or on the interest of the Earl of Fife, and in these terms repel the reasons of reduction.”

Act. Lord Advocate, *Ilay Campbell, Elphinston, James Grant.* Alt. Sol. General, *Rae, M’Laurin, Alex. Gordon, jun.*

*Fol. Dic. v. 4. p. 254. Fac. Coll. No. 33. p. 54.*

1783. January 21. LORD BANFF and Others, *against* EARL OF FIFE.

IN an action, at the instance of Lord Banff, and the other proprietors of fishings in the upper part of the river Doverton, against Earl Fife, owner of those below,

The Lords found, “That it was not necessary to remove the sole-trees or side-posts of the cruive boxes in forbidden time; the removing of the hecks and in-scales being sufficient” to answer the purposes of the law.

Act. *G. Buchan Hejburn, R. Dundas.* Alt. *Ch. Hay.* Clerk, *Home.*

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*Fol. Dic. v. 4. p. 261. Fac. Coll. No. 79. p. 123.*

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Not necessary, in forbidden time, to remove the sole-trees or side-posts of cruive boxes, but only the hecks and in-scales.

1793. November 20.

The PROCURATOR-FISCAL of the TOWN of STIRLING, *against* JOHN GILLIES and Others.

By the act 1581, c. 111. which proceeds upon the narrative, that the former statutes relating to offences against the salmon fishing had not been carried into execution, the persons therein mentioned are appointed his “Hienes justices,” for the purpose of “taking up dittay,” and trying by jury offenders against these acts.

The statute then enumerates various rivers. With regard to some of them, this jurisdiction is given to private individuals; and with regard to others, to persons in public office, such as sheriffs and stewarts, or the magistrates of royal boroughs.

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The act 1581, c. 111. is not now in force.