

1763. Lord Hardwicke's observations on the argument—  
 LESLIES, &c. "Two things in the statute of 25 Edw. 3, show it not to be de-  
 v. claratory of the common law."  
 GRANT, &c. "1st, It is in future words—'that shall be born.'  
 "2d, It requires both father and mother to be natural born subjects ;  
 whereas, if it had been the common law, the father's being a natural  
 born subject, would have been sufficient."

After hearing counsel, as well yesterday as to day, upon the other points in the cause ; and due consideration had of what was offered on both sides, it was

Ordered and adjudged, that the interlocutors therein complained of be, and the same are hereby affirmed. And it is further ordered, that the Court of Session in Scotland, do give all proper directions, relating to the continuance or discharge of the factor or receiver of the rents and profits of the estate in question, appointed by order of the said Court ; and for his accounting for, and paying over, the rents and profits of the said estate, as to the said Court shall seem just.

Judges present—

Pratt, Chief Justice, C. P.	
Clive, J.	Adams, B.
Bathurst, J.	Perrot, B.
Wilmot, J.	Lord Mansfield.
Gould, J.	Lord Hardwicke.

For Appellants, *Thomas Miller, Al. Forrester.*

For Respondents, *C. Yorke, Ja. Montgomery, Al. Wedderburn.*

Unreported in Court of Session.

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ALEXANDER DUKE OF GORDON and his Curators, <i>Appellants ;</i>	
JAMES EARL OF MORAY and WILLIAM EARL OF	} <i>Respondents.</i>
FIFE, - - - - -	

House of Lords, 9th March 1763.

RIGHT OF FISHING.—A difference having arisen as to the import of the judgment of the House of Lords, fixing the boundary between two fishings, as being the line which the sea made upon the coast where it cut the river Spey: Circumstances in which the Court

of Session was held entitled to order certain permanent landmarks, indicating this line to be fixed up.

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THE river Spey falls into the upper part of a bay or haven, which the sea enters and fills at high water. The mouth or entrance of the bay, between two heads, is about 500 yards wide, from whence the sea expands in a circular form, containing a depth of water of 16 feet, capable of admitting ships of 100 tons.

D. OF GORDON,  
&c.  
v.  
E. OF MORAY,  
&c.

The appellant's family possessed a right of salmon fishing in the water mouth of the river Spey, by virtue of a charter from the crown in 1676, bearing to give a fishing "introitu fluminis de Spey," which in a subsequent crown charter 1689, was expressed "in littore et ostio fluminis de Spey." While the respondents' claimed, in equal moities, the right of salmon fishing *within* the river Spey, from the said haven and water mouth up the river for about three miles.

The respondents' fishing in the river Spey was divided into stations—the lower was called the Haven shot—the next the Rake, and the highest the Pott. The Potty and Linn Burns were situated *within* the haven mouth, about 350 yards from the sea. The appellant claimed the exclusive right of fishing from these burns downwards to the sea, and the respondents stated that their right of fishing included these burns, their titles conferring upon them a fishing in the "three shots of the said river called the Haven, the Rake, and the Pott, as high up and low down, and on any side of the water, as any of their predecessors had used the same before."

Having thus got into dispute, mutual actions were brought in the Court of Session to ascertain their rights. A proof was adduced by the respondents that they and their predecessors had used to fish the Haven down to where the fresh water enters the sea at lowest ebb. And the judgment of the Court of Session being taken to the House of Lords by the Duke and Duchess of Gordon, that House fixed, by its judgment of this date, "That the (then) respondents have April 16, 1728.  
" the exclusive right of fishing in the channel of the water  
" Spey downward to the place where the line which the sea  
" makes upon the coast cuts the river at high water, and  
" that they had not right to fish below that line; and that  
" the then appellants had the exclusive right of fishing with  
" the tug net from and below the said line to the sea, and  
" that they had not right to fish above that line."

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 &c.

In resorting to the fishing after this judgment, still further disputes arose as to its import. The appellants insisted that it gave the Duke a right to fish *within the bay*, below the line where the sea cuts the river Spey, which the respondents disputed, and raised the present action to have it found that the line described as the boundary of the two fishings, is the line formed by the appulse of the sea to the coast, *without the bay*, at high water, and which in that direction divides and cuts the river from the sea at high water.

June 27, 1761.

The Lords “found that the line described in that judgment, where it crosses the river. being marked upon the plan or map made by authority of the said Court of Session, runs from the west head, letter A, to the east head, letter B, and appoint the two sheriffs to concur in fixing proper marks at the two extremities on the said line on each side of the said river; and prohibit and discharge said defenders from fishing with the tug net, above the foresaid line, or to molest, disturb, or impede the pursuers in their fishings upon the said river, above the foresaid line, and remit to the Lord Ordinary in the cause to proceed accordingly.”

July 29, —

Against this the appellants reclaimed, but the Court adhered.

The present appeal was then brought to the House of Lords.

*Pleaded for the Appellants*:—That it was clear from the appellants’ titles—from the royal award—and from the decree of the House of Lords, that the respective rights of the parties in the salmon fishing was determined by *natural boundaries*, and it was therefore incompetent for the Court of Session, without the consent of the parties, to substitute for this natural boundary an imaginary line, to be determined and ascertained by artificial landmarks, liable to be destroyed and removed by the sea, by accident, or by design. The high water mark is the line fixed on by the House of Lords. At this time the bay is filled with sea, and the river and rivulets, which at low water run through the sands, are totally absorbed and annihilated, so that at that period of time, there is, in fact, no line formed by the sea upon the coast, which can with any propriety be said to cut the river, other than the circulating line formed by the sea *within* the bay or haven; and, as the land which surrounds this bay cannot be said to be the banks of the river, it is of necessity the coast or shore of the sea; and therefore the line

mentioned in the decree of the House of Lords, “ which the sea makes upon the coast *at high water*,” is the line which the sea forms at high water on the land surrounding this bay. The two heads or forelands, which constitute the entrance to the bay or haven, and upon which the marks appointed by the Court of Session to be set, are visibly nothing more than sand-banks, liable to daily variation from the operations of the sea and river. Such a line necessarily extends the respondents’ fishing not only *into*, but to the utmost verge of the bay and haven, so as to exclude the appellant from fishing therein, and thus has deprived him of the most valuable part of his fishing.

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GROSETT  
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*Pleaded for the Respondents*:—The line fixed by the House of Lords in 1728, was a line across the river Spey, which the sea makes upon the coast, as it flows in upon the land. That this line was the boundary of the two fishings; and in so far as the appellant’s right was concerned, it meant the general line of outer coast next the sea, and not that line which goes round *within* the bay. That the Duke of Gordon’s limits were the “ *Littora Maris*.” That the *Ostium fluminis* did not, and could not, comprehend the space from the Potty and Linn burns downwards to the sea, but only *that* without the bay; and, therefore, the Court of Session were warranted in ordering the fixed landmarks to be set up on the two headlands, at each side of the mouth or entrance to the haven.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Thos. Miller, Al. Wedderburn.*

For Respondents, *C. Yorke, Al. Forrester.*

Unreported in Court of Session.

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M. 1592.

JAMES GROSETT, son and executor-dative of  
Walter Grossett of Logie, Esq., deceased,  
formerly Inspector-General of His Majesty’s  
Customs in Scotland, - - - } *Appellant* :

Sir JAMES MURRAY, Receiver-General of the  
Customs in Scotland, - - - } *Respondent.*

House of Lords, 17th March 1763.

BILL—NEGOTIATION.—Held a party (a public officer) to whom a