

hereby further ordered that the Court of Session in Scotland do give all proper and necessary directions for carrying this judgment into execution.

1764.

DOUGLAS, &C.  
v.  
THE DUKE OF  
HAMILTON,  
&C.

For the Appellants, *Fl. Norton, Fra. Garden, Jo. Burnet, David Rae.*

For the Respondents, *Tho. Miller, C. Yorke.*

SIR WILLIAM DUNBAR and SIR ALEX-  
ANDER GRANT, Baronets, DUNCAN UR-  
QUHART, and ALEXANDER TULLOCH,  
Esqs., . . . . .

*Appellants;*

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ALEXANDER BRODIE of Lethen, Esq., *Respondent.*

House of Lords, 15th February 1765.

SALMON FISHERIES IN THE RIVER FINDHORN.—(1) Held, that the appellants had right to the fresh water fishings in the Findhorn, and that the boundaries extended from fixed points; and (2) that the respondent had right to the five stells on the east side of the river Findhorn, and that Sir William Dunbar had right to the stells on the west of the said river, and that Mr Brodie had the only right of fishing on the sand beds, and on the east side of the river, at all times of the tide, and also on the west side during the ebbing of the sea, and that he and Sir William Dunbar had right to exercise their stell fishings without any limitations as to the mode of fishing.

King Robert de Bruys, by charter of date 1st July 1309, granted to the Abbot and Monks of Kinloss, “Totam piscariam Aquæ de Findhorn.” This was afterwards confirmed by charter from King James the First, which also granted and confirmed, “Zaras suas solitas et consuetas prope dictum monasterium situatas.”

The burgh of Forres having lost its original corporation charter, records, and whole title deeds in the troubles of the times, a new charter, proceeding upon the recital of this loss, was obtained from the Crown, re-establishing the corporation, and regranteeing to it such estates as were represented anciently to belong to the burgh.

Among other subjects, the fishings of Findhorn, both in fresh water and in salt, were thrown into this grant.

Claims to the right of fishing having been set up by the corporation, and by two other persons, Alexander Urquhart

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and William Wiseman to a part of the fishings of Findhorn, the abbot and they, by contract, came to the following agreement, by which the limits of the appellants' fresh water fishings, were fixed thus : " All and hail the fishings of the fresh " water of Findhorn, lying within the said sheriffdom, running " down from the Sloy Pool, to the entering of the Burn of " Massett in the sea, under the lands of West Grange of " Kinloss ; together with all and hail the fishings of the " west side of the salt water of Findhorn to the great sea." " That is to say, to the said Alexander Urquhart eight-sixteen " parts of the fishings of the said hail fresh water of Findhorn, " and to the said William Wiseman, a sixteenth part of the " said fresh water fishings, together with his part of the salt " water fishing on the said west side of Findhorn part, like as " the said burgesses have of the same." The same contract fixes the respondent's salt water fishings thus : " And to the " said burgesses and community of Forres and all the rema- " nant of the fishings of Findhorn above expressed, both in " fresh water and in salt ; excepting and reserving to the " said abbot and convent, and their successors, all and hail " the fishings of the east side of the said salt water of " Findhorn, from the entering of the said burn of Massett " running through West Grange of Kinloss in the de- " scending by the yairs and fish houses of Kinloss, to the " bank of Findhorn entering in the great sea, with ebb " and flood, both on the east and west sides, and within all " parts of the said salt water and on the said beds within " the same ; the said burgesses and community of the burgh " of Forres, and their successors, paying yearly to the said " abbot and convent, and their successors or factors for the " said fishings of the fresh and salt waters of Findhorn," &c.

Dec. 22, 1539.

The inhabitants of Forres, however, still continuing to make enroachments on the fishings reserved to the abbot and convent, and law suits having ensued, these terminated with another agreement, by which the abbot and convent, in im-  
plement of all former agreements, granted a feu charter to the town of Forres, thus : " Septem sex decem partes, vulgariter " seven sixteenth parts piscarium nostrarum aquæ nostræ " dulcis de Findhorn, unum rete vulgariter, an Leith net, in " dicta nostra aqua dulci ; nec non piscarias nostras de Aithe- " stell, et tres quartas piscariæ nostræ de Elvinstell, ex parte " occident ali nostræ aquæ salsæ de Findhorn, prout tem- " poribus retroactis dicti Aldermanus Balivi, et communitas " dicti. Burgi ad viginti annos elapsos, occupabant, absque

“ innovatione aliqua, per eos, aut eorum successores, seu nos  
 “ aut successores nostros, in aliqua dictarum piscariarum,  
 “ fien in futurum.”

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The abbey of Kinloss and estates thereto belonging having been annexed to the Crown and afterwards dissolved by Act of Parliament, they were by charter erected into a temporal lordship, and were granted to Lord Edward Bruce of Kinloss, and to his heirs and assignees whatsoever.

May 3, 1618.

The grant as to the fishings was in these terms, “cum salmonum piscariis super aqua de Findhorn.”

The son of this Lord Bruce (Earl of Elgin) sold the abbey and abbey lands to Alexander Brodie of Lethen, the respondent's great-grandfather, whereupon he obtained several charters under the Great Seal granting to him, “Totum et  
 “ integrum monasterium et abbaciæ locum Kinloss, &c. Et  
 “ similiter totas et integras salmonum piscarias de qumque  
 “ stellis super aquam de Findhorn, subscript. quæ ab antiquo  
 “ ad dictam abbaciam de Kinloss pertinerunt, viz., Monki-  
 “ stell, Outwaterstell, Durstell, Caulstell, cum domo piscatoria  
 “ et horto ejusdem, et alliis privilegiis et pertinen. quibuscun-  
 “ que ad dictas salmonum piscarias pertinen. solit et con-  
 “ suet.”

1643, 1644, and  
 1647.

The appellants having acquired right to all the fresh water fishings conveyed by the abbot in 1505 and 1539 to the town of Forres, and to Alexander Urquhart and William Wiseman, and also to Aithstell, and three-fourths of Elvinstell, on the west side of the river, as limited by the charter 1539, brought an action of declarator and damages against the respondent, charging him with several encroachments on their fishings; and *inter alia*, “ that the said Alexander Brodie of Lethen and his  
 “ tacksman have only right to that species of fishing which is  
 “ known and distinguished by the name of stell net fishing,  
 “ and which is exercised by a coble and net, wrought by two  
 “ persons, the net so to be used not exceeding twenty-five  
 “ fathoms in length; that he has only right to five stells or  
 “ seats in the said river, and that these stells can only be  
 “ practised at particular times of the flood, that is to say, till  
 “ about half flood, which is called the flood stell, and there-  
 “ after about half ebb, which continues till low water, and is  
 “ called the ebb stell; and that the said defender and his  
 “ tacksman have no right to fish in any other manner, or  
 “ with nets of larger dimensions than what is above described,  
 “ and particularly, that they have no right to fish with  
 “ draught or harry water nets, or with hang nets set across

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“ the said river ; and that these hang nets are unlawful  
 “ engines reprobated by law ; that the said Alexander Brodie  
 “ and his tacksman have no right or title to go beyond the  
 “ seat or place of his uppermost stell ; that is, further up the  
 “ river than the usual and customary bounds of the said  
 “ uppermost stell, which ought to be fixed, marked, and  
 “ determined. And the said Alexander Brodie and his tacks-  
 “ man ought to desist from further encroachment.”

The respondent stated the boundary of the appellants' fishings as described in their own titles as “ Curren a lie Sloy-  
 “ pool usque ad introitum torrentis de Massett in mare sub  
 “ terris de lie West Grange de Kinloss.”

The Lord Ordinary allowed to both parties a proof. A proof was accordingly taken and reported.

The result of that proof was stated thus:—That the respondent and his predecessors, had exclusively and without limitation as to the modes or times of fishing, possessed the whole salt water fishings on the east side of the river at all times of the tide, and the ebbs on the west, with the sand bed fishings on both sides of the river ; that the appellant, Sir William Dunbar, occupied his two stells on the west side only in flood tides ; and that the superior fresh water heritors had possessed the whole course of the river from Sloypool to Stockie Banks. The place between Stockie Banks and Binsness, as well as immediately below Binsness, appeared from the evidence, to be of little value, and scarce worth fishing ; it was, therefore, in a manner, neglected by both parties ; but, as the superior fishers had one of their best pools just at the beginning of this space, they sometimes fished downwards to Binsness. But the respondent's valuable fishings being at a greater distance, it did not appear that his people fished above Binsness.

This being the state of the proof, the present question then resolved itself into three points, 1st, What was the boundary between the *fresh* and *salt* water fishings ? 2d, The alternate right of fishing Aithstell and Elvinstell, and 3d, How far the respondent was limited, in the exercise of his fishings, to the dimensions of the cobbles, length of nets, number of hands and servants' wages, as formerly used and practised in these fishings ; or if he was at liberty to make what improvement he thought proper in the mode of fishing, not contrary to public law ?

Feb. 14, 1760.

Upon argument on these three heads ; the Lords of Session pronounced this interlocutor : “ Find, that the pursuers have

“ right to the whole fresh water fishings on the river Find-  
 “ horn, from the Sloypool to the entry of the burn of Massett in  
 “ the sea at high water, under the lands of the West Grange  
 “ of Kinloss; Find, that the boundary of the fresh water fish-  
 “ ings in the present course of the water of Findhorn, is  
 “ where the river falls into the sea at high water in ordinary  
 “ tides; Find, that the defender, Brodie of Lethen, has right  
 “ to five stells on the east side of the river of Findhorn; that  
 “ Sir William Dunbar has right to the two stells of Elvin  
 “ and Aithstells, on the west side of the river; and that  
 “ Lethen has the only right to fish on the sand beds, and on  
 “ the east side of the river, at all times of the tide, and also  
 “ upon the west side of the river, during the ebbing of the sea;  
 “ and find, that the pursuer, Sir William Dunbar, and the  
 “ defender, Lethen, are entitled to exercise their stell fishings  
 “ without any limitations as to the dimensions of the cobbles,  
 “ length of nets, number of hands, or servants’ wages, to be  
 “ employed in the stell fishings, and decern and declare ac-  
 “ cordingly.”

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Several reclaiming petitions were given in, but the Court adhered. The last of these prayed the Court to find that the respondent had no right to use raking or hang nets or draught nets upon the river Findhorn; and the Lords then pro-  
 nounced this interlocutor: “ Adhere to their former inter-  
 “ locutor, and refuse the desire of the petition, and find the  
 “ petitioners liable in expenses.” Sir William Dunbar gave  
 “ in a fifth reclaiming petition, but the Lords adhered.

Jan. 5, 1762.

Jan. 22, 1762.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

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

For the Appellants, *Alex. Lockhart, Al. Forrester.*

For the Respondent, *Tho. Miller, C. Yorke, Al. Wedderburn.*