

December 16. 1762.

A N S W E R S

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Thomas Erskine of *Alloa*, commonly called *Lord Erskine*, and Mr *John Erskine* of *Balgonie*, Advocate, pursuers, for themselves, and in name of the other heritors upon the river of *Forth* having right to salmon-fishings,

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The PETITION of the Magistrates and Town-council of *Stirling*, *Michael Potter* of *Easter Livelylands*, *John Galloway* elder, and *Robert Galloway* younger, of *Burrowmeadow*.

THE respondent *Lord Erskine* stands infest, on a charter under the great seal, in the lands, lordship, and earldom of *Mar*, comprehending the barony of *Alloa*, with salmon and other fishings thereto belonging; and connects his title with the charters formerly granted to the family of *Mar*; particularly a charter from the crown in 1620, disposing the said earldom to *John* then Earl of *Mar*, with the salmon-fishings and other fishings whatsoever in the water of *Forth*, from the *Abbey* boat, to the water commonly called *Carron Mouth*.

And the other respondent, Mr *Erskine*, stands infest in the lands of *Pople-trees*, lying in the barony of *Cowie* and shire of *Stirling*, by which he connects his title with the ancient rights

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and infestments of his ancestors in these lands, with a stoup-net, and fishing therewith, in the river *Forth*, as far back as the year 1598.

The respondents and their ancestors have immemorially possessed these fishings, as quietly and freely as any other part of their property, until of late that they have been disturbed by the petitioners, who pretend that they ought not to exercise the fishing with nets of any other form or dimensions than such as they are pleased to point out; which obliged the respondents to bring this action of declarator, That they, their vassals and tenants, have good and undoubted right to the salmon-fishing in the river, in terms of their infestments, and to use and enjoy the same with nets, cobles, stoup-nets, &c.; and that the defenders should be prohibited and discharged from disturbing or molesting them in the peaceable exercise and enjoyment of their said right.

This process having come in course before the Lord *Colston* Ordinary, the petitioners only defence was founded on the act 1698, transcribed in the petition; and his Lordship having reported the case to the court, your Lordships remitted the cause to the Lord Ordinary, to call and hear parties thereon, to inquire into the facts, and to do therein as he shall see cause.

When the cause came back to the Lord Ordinary, a condescendence and additional condescendence of facts were exhibited by the defenders; to which very full and satisfactory answers were made on the part of the pursuers, to be hereafter noticed; with which his Lordship made avifandum, and thereafter pronounced the following interlocutor.

Nov. 13. 1762 *The Lord Ordinary having considered the memorials and informations formerly given in for both parties, with the remit by the Lords, condescendences for the defenders, and answers for the pursuers, finds the facts contained in the condescendences not relevant; and further finds, That the act of parliament 1698 was not meant to regulate the manner in which heritors having a right to fish in the river Forth, were to exercise their right of fishing, but only to*
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restrain interlopers who had no right to fish, from fishing to the prejudice of the heritors; and therefore, and in respect that no law prohibits heritors who have right to fish, from fishing with pock-nets or stoup-nets, finds and declares, That it is lawful for the pursuers to fish with pock-nets and stoup-nets, and with every other engine not prohibited by law; and decerns accordingly.

The defenders reclaim, and contend, "That the act 1698 ought to be so constructed as to discharge the heritors having right to fishings, from using pock-nets or herry-water-nets, as well as every other person whatsoever. *2do*, That the stoup-nets now in use, fall under the prohibition of the act, as being a device to elude the same; and ought also to be discharged."

The chief part of the argument in the petition, is directed against the construction of the statute established by the interlocutor, though a good deal of time is also spent in resuming the facts in the condescence, and referring only to the answers made thereto; which the petitioners contend were not sufficient to elide the relevancy of the facts condescended on; and yet at other times they seem to be satisfied, that no proof is necessary in this case; and that the question depends entirely upon the construction that your Lordships shall think fit to put on the act of parliament.

The respondents shall first consider the grounds upon which the interlocutor is founded, and the justice of the construction of the statute therein laid down, and suggest the answers that occur to the objections made in the petition; and thereafter shall consider the several articles of the petitioners condescence, and endeavour to show, that none of them are sufficient to avoid the construction of the act, or the consequences thereof, as laid down in the Lord Ordinary's interlocutor.

In order to judge of the import of this act, it will not be improper to consider, in the *first* place, how this matter stands at common law, and by the general regulations of the statutes which affect the whole kingdom, before this act was made respecting the

the river of *Forth* in particular. And the respondents believe, that the only tendency of all the laws that have been made, for the general regulation of fishings in this country, is, *first*, to prevent and restrain the lieges from exercising the rights they have got from the crown, in such manner as may be destructive to the fishing of this country in general, and may hinder their multiplying in our rivers, as they would naturally otherwise do, if not restrained by such unlawful devices. But after the general safety of the fishing is secured against every obstruction that may tend to impair or destroy the same, the law does not interpose to make any regulation, to restrain inferior heritors in the exercise of their right, in favour of the superior, or *vice versa*. It leaves both of them to enjoy the privileges granted them by the crown in the most extensive and beneficial manner they can; as it is the same thing to the public by whom the fishes are caught, providing they are allowed to increase and multiply in the rivers in the natural manner. And no heritor does any hurt to the country, by carrying his industry to the greatest length in catching as many as possible; but rather the contrary; for the trade of the country is thereby increased. And there is no ground to apprehend, that the multiplication will be restrained or prevented by any diligence or activity used in the fishing, to whatever extent it may be carried. Experience shows, that salmon, and fish of all kinds, as well as other animals, will always multiply in proportion to their room and pasture, and that the increase of consumpt or demand will not put a stop to it, providing no hindrance is made to the multiplication in the usual and natural manner.

To prevent such hindrances, is the sole intention of the legislature, in all the regulations that have been made upon this subject. It is for this reason, that fishing has been discharged, under severe penalties, in a certain season of the year, during which the exercising it would tend, in a great degree, to prevent the multiplication, and if continued, might
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in length of time, even destroy the very species of salmon in any river.

It is for the same reason, that the privilege granted by the crown to some of the subjects, of keeping up cruives and yairs, are laid under strict regulations, not only as to taking them away in forbidden time, but also as to the wideness of the hecks, and the *Saturday's* sloop; these being necessary regulations, to give the salmon access to pass up the river, and to return again to the sea, without which they cannot long continue or multiply in any river.

These are the only regulations that have been made by the public laws with respect to the fishing. And it is obvious, that the restraints thereby imposed, are intended for the preservation of the fishing in general, and not to give any particular privileges or advantages to one set of heritor against another, or to restrain the fishings situated in the lower part of the river, in order to increase the benefit that may accrue to the superior heritors. No such partial view ever entered into the mind of the legislature: And accordingly your Lordships have found, that the force of *legal* regulations cannot be taken off by any contracts entered into betwixt the cruive-masters and the superior heritors. If it were intended only for their own private benefit, they could dispense with *them*; but being part of the public law, intended for the general good of the country, it cannot be evacuated by the consent or agreement of private parties.

But laying aside the prohibition as to forbidden time, and the regulation of cruives and yairs, the pursuers cannot discover any limitation imposed by any statute upon heritors who have grants from the crown, as to the manner or extent of their fishing. As it is impossible, in the nature of things, that any fishing, carried on by mens hands in the lawful season, with the assistance of any kind of nets whatever, can have any tendency to destroy or extinguish the salmon-fishing in a river, the law could have no just motive to restrain them

in this particular. Such extinction can only be occasioned by close dikes, which impede the salmon to pass up the river either by night or by day, but not by any activity of fishing with cobbles or nets, which must always leave them more than half of the time, in which they will have free access to pass up and down the river in such manner as they have a-mind.

And therefore, as the public is not concerned whether a greater or smaller benefit of the fishing accrues to one heritor or to another, it would infer a partiality in the law, if it were to restrain those who have the right from exercising it in the most beneficial manner, and improving every new invention that can be devised, by the industry of mens hands, to increase the product of their right, within their own bounds, to the greatest degree possible. The superior heritors have no just title to complain of the increase of the inferior fishings, when carried on by nets of any kind; as such increase is no more than they have right to by their grants and situation on the river, improved by their own industry.

By their grants they are intitled to the first option of catching the fish, as they come from the sea, and pass up through their bounds to the superior part of the river: and, on the other hand, the upper heritors have it in their power to catch them while they remain in their bounds, before they return again to the sea. Each of these grants is in effect a burden upon the other; and consequently neither of them can object, that the other exercises his right in the most beneficial manner possible. Let him devise new nets of a more ingenious form, and better adapted to carry on the fishing in a more expeditious and extensive manner than what had been formerly used; all such expedients are lawful and commendable; they tend to the increase of the trade, and the general good of the country; and therefore are equally competent to the crown's grantees in the *lower* as in the *upper* part of the water. The more they are improved, so much the better for the country; and the law, which always acts impartially, has no concern whether
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the improvement is made by one heritor or another, but leaves every one of them quietly to enjoy the profit arising from his own industry.

And accordingly this is the construction your Lordships have put upon the law, when questions of this kind have been stirred; as particularly in the late case of the fishing of *Findhorn*, where it was objected, That some of the heritors had invented *hang-nets*, and other *nets* of *unusual sizes*, to the extent of *fifty fathom* long, &c. by which the fishing of the superior heritors was in a great measure disappointed. But your Lordships disregarded the objection, and found, " That Feb. 14. 1760
 " the pursuer *Sir William Dunbar*, and the defender *Lethen*,
 " are intitled to exercise their stell-fishings without any limitation as to the dimensions of the cobles, length of nets,
 " number of hands, or servants wages to be employed in
 " the stell-fishings; and discern and declare accordingly."

As therefore it must be allowed, that, *de jure communi*, and by all the regulations enacted by the public statutes, proprietors of fishings are at liberty to exercise the same by nets of any form, dimensions, or construction, which they shall find most expedient, without any limitation whatever; the question is, Whether the act 1698, founded on by the defend-Parl. 1698,
cap. 3.
 ers, intended to put the heritors of fishings on this river under a new limitation as to fishing by nets, in which they had before enjoyed an absolute freedom, in common with all the heritors of fishings in other rivers in *Scotland*? The pursuers are advised, that such cannot be found to be the construction or intendment of this statute.

1mo, Because there was no reason to move the legislature to alter the regulations of the public law, which, after taking care to restrain such practices as appeared destructive to the fishing of the country in general, left every proprietor in the kingdom at liberty to exercise his right of fishing by nets in such manner as he should find most expedient. By consulting his own interest, and devising every method that can lessen the
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expence and augment the product, he does at the same time promote the interest of his country, by increasing this branch of its trade, without any danger of prejudging or hurting it in time coming. There can be no apprehension of this from fishing by nets, to whatever degree improv'd; but only from *close cruives* or *dikes*, or fishing in *forbidden time*. If these are duly restrained by the *execution* of the *statutes* already made, the law could do no better than to leave every *proprietor* to pursue his own *interest*, which entirely *coincides* with that of the *public*.

2do, If the legislature had thought, that the regulations already made with respect to fishings, stood in need of any alteration or amendment, they would not have confined this amendment to one particular river, or denied the benefit of it to the proprietors of fishings in other rivers, and indeed to the nation in general. If it was judged necessary, either for the preservation of the salmon, or to give superior heritors a greater share of them, that the inferior heritors should be restricted as to the dimensions or form of their nets; if either of these had been the motive, no reason occurs that should have moved the legislature to refuse the other subjects the benefit of such regulation. If the superior heritors had a title to limit those below them in this river, in the manner of exercising the right given them by the crown, they must certainly be understood to have the same right also in other rivers; and therefore, as the law is not made general, it may be justly concluded, that it is not founded upon any title in the upper heritors of a river, to limit the exercise of inferior fishings, in order to give them the greater opportunity of profit. Had that been the reason of the law, the regulation would have been made as general as the inductive cause of it.

3tio, It is not contested, that this act was obtained upon the application of the heritors who had grants of fishing on this river; and particularly of the late Earl of *Mar*, who had by far the most considerable fishing in it, from the mouth of

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Carron upwards, for the space of upwards of 20 miles. This appears very plain from the act itself, which discharges exercising the fishings thereby prohibited, to the prejudice of the heritors, and their rights of salmon-fishing on the said river. Now, though it is very probable, that the Earl of *Mar*, and the other heritors on the lower part of the water, would concur with the rest in an application to restrain any incroachment that was prejudicial to the whole; yet it is not to be imagined, that they would apply for a law to limit themselves in the exercise of their fishing; and thereby reduce their fishings, which were then by far the most valuable in the river, to a half or third of the value, by discharging them to manage it in the most beneficial manner; and thus transfer the profit arising from their property to the upper heritors, who never before enjoyed or had any title to enjoy it.

4to, As this act must have been made with a view to the general interest of the heritors on this river, and not to deprive one class of them of a part of their property, in order to enrich another; so it must have been made for some cause peculiar to this river, which did not occur in any other in *Scotland*; and therefore may have been thought to make a special regulation necessary: and the cause appears to have arisen from the situation of this river, and of the adjacent country. It is well known, that, from the bridge of *Stirling* to the power of *Alloa*, the river of *Forth* flows down through a vast variety of windings, so as to make a course of water about five or six times as long as the extent of ground through which it passes. This long tract of water, stored with fishes passing through a small bounds of land, is a great temptation for interlopers to incroach upon the right of the proprietors of the fishing, by catching them whenever they could have access to do it with impunity. And the neighbourhood of the town of *Stirling*, no inconsiderable borough, to which, beside the more useful part of the inhabitants, there will always resort num-

bers of idle people, made the situation of this fishing still the more liable to such incroachments.

These were also greatly facilitated by an engine which had been devised, *viz.* a *pock-net*, which a man can carry under his coat, with which the fisher goes into the water; and by fixing two staves, holding one in each hand, with the net lying down, when he finds a salmon strike in it, he closes the staves, and goes to the shore, and carries it off. So portable an engine gave an easy opportunity to every idle fellow to come into the water when he had a-mind, and carry out salmon very often undiscovered: nor could the heritors prevent the frequent repetition of these offences, unless they were to set a guard upon the water; which was absolutely impracticable.

It seems to have occurred to the heritors, as a proper expedient to suppress this nuisance, to apply to the legislature for a warrant to the sheriff summarily to demolish these unlawful engines; unlawful when in the hands of those who had no right to fish, because it gave them an opportunity to transgress the law with great ease and facility, and as frequently as they had a mind, and for the most part with impunity: but then as this fishing is only discharged in so far as it is *to the prejudice of the heritors, and their rights of salmon-fishing on the said river*, and the law is only to be executed at their suit, it is plain, that it was not intended to impair the right of the heritors, or to limit them in the exercise of it. It was framed for their advantage, and obtained at their suit; and it would be against all rules to invert it to their prejudice: *Quod favore quorundam constitutum est, quibusdam casibus ad lesionem eorum nolumus inventum videri, l. 6. Cod. De legibus.*

It is humbly submitted to the Lords, whether this is not the plain construction of the statute, as laid down in the Lord Ordinary's interlocutor, *viz.* That it was not meant to regulate or restrict the manner in which heritors having right to fish

fish in this river, were to exerce their right of fishing; but only to restrain interlopers, who had no right to fish in prejudice of the heritors. A full copy of the act is hereto subjoined, which makes it unnecessary here to recite the clauses at more length.

The arguments in the petition, for the contrary construction, are as follows. “*1st*, That pock-nets, herry-water-nets, and such engines, are declared unlawful, and condemned as such. *2dly*, That the species of fishing by means of these instruments, is prohibited, and *simpliciter* discharged. *3dly*, That all and every persons using the same, are declared delinquents, and to be punished as such. *4thly*, That the engines themselves being unlawful, are appointed to be destroyed, without any exception or distinction of persons; which shows that the law was directed *in rem*, and against the persons accused as using these engines, and that species of fishing thereby condemned. And, *lastly*, They insist, that the *stoup-net* now used by the respondents, is truly no other than a larger kind of *pock-net*, contrived after the same form; and therefore falls under the general description of other unlawful engines mentioned in the-act.”

But the whole of these arguments, however diversified, resolve into one single point, Whether the prohibition in the statute, and the injunction given to the sheriff to suppress these engines, was intended to be put in execution at the suit of any person whatsoever, against the heritors who had grants of fishing; or if it was intended only to be executed at the suit of the heritors against such as made use of them to their prejudice? The pursuers appeal to your Lordships, that the last is the true construction, both from the words and meaning of the statute. The words are express, and limit the prohibition to what is done *to the prejudice of the heritors, and their rights of salmon-fishing in this river*. The case is the same as if it had recited the *res gesta*, That an application was made by the heritors, complaining of the prejudice they suffered

ferred by unlawful incroachments made upon their properties, by means of these engines, so well calculated to facilitate the stealth of salmon without discovery; and that they could not guard against them, without an order summarily to suppress them.

This is the plain purport of the act. It is the same as if the proprietors of barley or wheat mills had applied for an order to suppress all *steel mills* in the possession of any person within theucken, as being an engine proper to facilitate the abstraction of multures without discovery. This surely would not hinder the proprietors of the mills to use these engines if they thought fit, or to authorise others to use them, though they had obtained a general order for suppressing them.

The same would be the construction if a law were made prohibiting all persons to hunt in fields with guns and nets, to the prejudice of the proprietor, under a penalty, and appointing the nets to be suppressed and destroyed. It is plain that such law made in favour of the proprietor, could not be inverted to his prejudice, to preclude him from hunting in his own fields, or using any kind of engine he thought proper for that purpose.

And as to what is said, "That the prohibition of the law seems to be directed against the engines, as being destructive to the fishing, whether used by the heritors or any other person:" This is not founded on the act, which only discharges fishing with these engines, to the prejudice of heritors who have right of fishing on the river: and it is plainly disproved, from the nature of the thing; for it has been already proved, that no fishing with a net, of whatever form, is destructive to the fishing in general, as they will still have sufficient liberty to pass and repass up and down the water; and it is not to be imagined this act was applied for by the Earl of *Mar*, and other heritors of the lower fishings, in order to restrain themselves from any method of fishing, for the benefit of superior heritors.

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But next, if this had been in view, which is hardly credible, this pock-net fishing would not have been mentioned; for there is no kind of fishing less beneficial to the user, and which consequently does less hurt to superior heritors, than the pock-net, which never carries off above a salmon at a time.

As to the herry-water-net mentioned in the act, the petitioners said in their condescendence, " That they had been at all imaginable pains to inform themselves in this particular; but as no such engine as a herry-water-net seems to have been practised since the date of the act, they cannot with certainty describe it. But they are authorised to affirm, that this herry-water-net must have been of a very different construction from the long net, which has always been esteemed, and at present is used in all the rivers in Scotland, as a lawful fishing-engine, and indeed the properest for the use of any."

The petitioners have not thought fit to mention what authority they have for this assertion; and the pursuers believe it cannot be a good one: For there is no net known that comes so closely up to the description of a herry-water-net as the long net, when it is extended to that length as to sweep the whole bed of the river; as in the case of *Findhorn*, where they were used to the extent of *forty* or *fifty fathoms* long, and your Lordships found they were lawful. The petitioners are not able to figure a net of any other construction, that is able to sweep so clean, or catch so many fish as the long net does; and yet they are forced to admit it to be a lawful engine, as it is the net that is most generally used in rivers. And it is a plain proof, that the law has laid no restriction upon the proprietors of inferior fishings; but that they have a right to catch as many fish as they can, and to contrive any kind of nets that may make their fishings effectual, in the most beneficial manner possible.

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And if the long net, even when enlarged to that degree as to sweep the whole water, is a lawful engine, and cannot be restrained upon any pretence of right in the superior heritors, far less can the pock-net be deemed unlawful, which will not catch a fish for fifty that the other does; and therefore it is plain, that the unlawfulness does not lie in the nature of the engines mentioned in the act, but in the abuse of them by those who had no right to use them; that this is what the law intended to suppress, and not to restrain the heritors from using any nets they find most expedient. The petitioners error lies in not attending to the limitation by which every part of the act is qualified, *viz.* That the nets and engines prohibited be *to the prejudice of the heritors and their rights of salmon-fishing on the said river.* This quality is insert in the first part of the act, which prohibits the pock-nets and herry-water-nets; and it is referred to in the after clauses, which empowers the sheriff to suppress the *foresaid* unlawful and prohibited manner of fishing, and to destroy all the *foresaid* unlawful engines: so this requisite goes through the whole of the statute, That the engines be prejudicial to the heritors intitled to fishings. If not prejudicial, they are neither prohibited, nor appointed to be suppressed or destroyed, by any clause in the statute.

Petition, p. 17 The answer made to this in the petition will appear to be no wise sufficient. It is said, "That the fair construction of these words imports no more, but a declaration of the legislature, that the making use of such engines was prejudicial, not to the interest of particular heritors, but to that of the whole heritors having right to salmon-fishings in the river." But it is very extraordinary to say, That a pock-net, or indeed any net whatever used by the heritors, can be prejudicial to the interest of the whole heritors having rights of salmon-fishing. Nothing can be to them prejudicial but what is destructive of the fishing in general, which cannot be said of any net-fishing, as has been already proved; and far less

less the pock-net in question, which draws less than any other net; and therefore if the act meant, as the petitioners suppose, that the pock-net was prejudicial to the interest of the whole heritors, this description cannot apply to pock-nets used by the heritors themselves, but only to those which are used by interlopers, agreeably to the construction laid down in the Lord Ordinary's interlocutor.

And as to what is said, "That there was no need of a law to restrain interlopers from fishing with any kind of engine whatever, as they were sufficiently restrained by the public laws already made, and liable to be punished for such incroachments;" it is *answered*, That the public laws made antecedent the fishing, were not directed to the punishment of those who incroached on the bounds of other peoples property, but to the punishment of fishers in forbidden time, and keepers up of cruives, yairs, or dikes, contrary to law, and other offences which are hurtful to the fishing in general. The prosecution of incroachments on private property was left to the proprietor to follow out according to law.

At the same time, there is no doubt, that remedies would be competent at common law for such incroachments. But then they were slow and tedious, and could not be followed out in a summary manner. And it occurred to the heritors, that as pock-nets were the engine with which these thefts were generally committed, if they could obtain an order summarily to suppress and destroy them, and to punish the users by fine and imprisonment, this would be the most effectual method to secure their properties, and procure redress of such incroachments, in the quickest manner, and with the smallest expence. This is the only view that can be supposed to have moved the heritors to apply for this act: nor do the petitioners pretend to assign any other. Their argument lies entirely in a criticism upon the words, without entering at all into the intention of the statute.

So far the argument has gone upon the question as to *pock-nets,*

nets, that if these were the nets used by the heritors in the fishing, this law does not restrain them. But then the Lords will know, that these nets, though brought in by the petitioners into the debate, yet are not truly the subject of the question. They are not used by the respondents or other heritors, as they are really of no significancy for carrying on any fishing by those who have an undoubted right, and can exercise it in an open manner. They were devised chiefly for the use of interlopers, who might by means thereof slip into the water, and carry off a fish now and then without being discovered; and were discharged by the act, as being the instruments ordinarily used in such clandestine fishing. The net used by the heritors in such parts of the water where the *long net* cannot be wrought, is not the *pock-net*, but the *stoup-net*. And the petitioners objection is, "That the stoup-net is truly
 " of the same kind or species with the pock-net, though of a
 " larger size; and if the act 1698 has discharged heritors to
 " make use of pock-nets, the stoup-nets must be discharged
 " of consequence, as being another unlawful engine of the
 " same kind."

This argument has been already fully removed from the foundation, by showing, that the prohibition of the act is not directed against the heritors, but in their favour, against interlopers, who inroached upon their right; and, consequently, that if pock-nets were the subject of the question, no objection could lie against the heritors upon this act.

But, in the *second* place, it is a separate good answer, That if the heritors were supposed to be restrained in the use of their property by this act, as to pock-nets; yet the prohibition could not be extended to stoup-nets, which are a machine of a quite different form and construction. A pock-net has been already described: it is a net to which two staves may be fastened, and which a single man may take into the water to catch a fish, and immediately carry it off. But a stoup-net is a machine of a quite different construction: it is wrought by the assistance of
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boats, as well as the long net, which is commonly used in fishing; there is a rope stretched betwixt two stakes fastened in that part of the river intended to be fished; to this rope boats are fastened, in which the fishers sit; the stoup-net is made of three poles joined together in the form of an equilateral triangle, round which the net is fastened; the bottom of the net, which makes the base of the triangle, rests upon the ground; and to the angle at the top there is a pole fixed, which the fisher holds in his hand till he feel a salmon strike in the net; and then, by bending down the long pole over the edge of the boat, he forces up the net with the fish. This is a very slow and inconvenient manner of fishing, and is only used in such parts of the river as do not admit any use of the long net, by reason of stones, stocks of trees, or other obstructions. In such places of the water it is the only method whereby salmon can be caught; and it is never used but in the *ebb tide*, when the salmon are *returning* from the *upper part* of the river down to the sea: so that this fishing has hardly any, or a very insignificant influence in lessening the profit of the superior fishings on the river.

It must therefore appear a very extraordinary attempt that is here made, to deprive the respondents of the benefit of the stoup-net fishing in those parts of the river which are so obstructed that the long nets cannot be used. For where-ever the water is clear of obstructions, no man will make use of a stoup-net, as it costs more expence, and yields much less profit than the long net, which is by far the most beneficial of any kind of fishing that has been hitherto invented. But where the long net cannot act, the only *succedaneum* that can be taken is the stoup-net, though less beneficial; and this attempt in the petitioners to suppress it, tends to strip the respondents altogether of the right of fishing in those parts of the river where the channel is so incumbered with obstructions that the long net cannot be drawn.

This is, however, what the petitioners are pleased to insist
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upon ; and for this purpose a condescence of facts was given in, which is stated in the petition, without repeating the answers that were made, to the Lord Ordinary's satisfaction, upon which the condescence was found irrelevant. The facts condescended on were, " *1mo*, The stoup-nets are of " modern invention, introduced within these twenty or thirty " years last past. — *2do*, If the pursuers were not formerly in " use of fishing with cobbles and long nets in the same places " where they now fish with the stoup-nets ; and if the bottom " of the river is not such, that it may be advantageous to fish " with the coble and long net ?"

To this it was answered, That Mr *Erskine* of *Balgony*, one of the pursuers, has produced indentments granted to his ancestors of the lands of *Pople-trees*, with an *stoup-net*, and fishing therewith in the river of *Forth*, as far back as the 1598: And therefore the defenders must be in a mistake, in dating the origin of this kind of net so late as twenty or thirty years past. At the same time, the pursuers admit they were in use to fish, above twenty years ago, in certain parts of the river mentioned in the condescence, with long nets and cobbles ; and they would have continued that manner of fishing to this day, if it had been practicable, as it is by far the most beneficial manner of fishing : But for some years past, the bed of the river in these parts has been so incumbered with obstructions, that their nets were torn, and the fishers disabled to work them to any purpose, which obliged them to alter their long nets for this other form of stoup-nets, as the only one that could be wrought, though much less beneficial than the long net, when the channel of the water is such as makes it practicable to use it ; and if these parts of the river shall ever be cleared of the present obstructions, the pursuers will return again to use the long net, by which they will catch twenty times the number of salmon they now do by the stoup-net.

The defenders were pleased further to inquire, " *3tio*, If " the number of stoup-nets presently used by the pursuers " and

“ and their tenants, is not much greater than the number of
 “ long nets formerly used? 4^{to}, If the method of fishing by
 “ stoup-nets is not more profitable, and if more fishes are
 “ not caught that way than by cobles and long nets? 5^{to}, If
 “ the method of fishing by stoup-nets does not employ a grea-
 “ ter number of hands? and if the fishers do not make high-
 “ er wages, than when they fished by the long net?

In answer to these, it was admitted, That the number of stoup-nets now used, are much greater than the number of long nets formerly used, as the fishes caught by the one bears no proportion to the draught of the other: That they catch more fish now by the stoup-nets, than they did formerly by the long nets for a considerable time before they disused them; because the bed of the river in these parts was so incumbered, that the long net could not be wrought to any advantage. The pursuers have increased the number of hands of late years, which has occasioned an increase of the produce of their fishing; but still it bears no proportion to the increase of the produce of the upper part of the river, which belongs to the defenders, where they have a clear stream, and so are at full liberty to take the advantage of the use of the long net.

The irrelevancy of these articles is obvious at first view, and needs not be enlarged on; and the only other thing which the defenders alledged was, That actions had been sustained by the sheriff for destroying pock-nets and stoup-nets upon the above act. But as this could only be proved by production of decreets, or judicial steps of procedure, it would have been improper to allow any other proof; and the defenders produced no documents of their alledgeance, but one process raised before the sheriff in the year 1756, about the time of the commencement of this action, which was thereafter advocated to your Lordships, and is conjoined with this declarator.

Upon the whole, it is hoped that the Lords will be of opinion, That the construction put upon the act by the Lord Or-

[28]

dinary's interlocutor, is the only just construction it can bear, That there is no prohibition in the act directed against heritors having rights of fishing; but the whole regulations in it are devised in their favour: That it would have been against reason to debar the heritors from the use of pock-nets, which is the net that catches the *least*, when they were intitled to use the long net, which takes the *greatest* quantity of any that is known: That the pock-net and stoup-net are entirely different, and agree in no particular but this one, That fish may be caught by both. Nor can it be thought that stoup-nets would have been omitted, if intended to be prohibited, as they appear to have been used in this river long before the act; and therefore could not be unknown to the legislature.

And as it is evident that superior heritors have no title in any case to challenge the proprietors of lower fishings for making the best use of their right, by using all methods that can increase the product of their fishings with the smallest expence, by which they do service to their country as well as themselves; far less ought any complaint to have been made of this stoup-net fishing in this case, which is a method far less beneficial to the pursuers than the long net formerly used, and much less hurtful to the defenders, as it can only be used in the ebb tide, when the fish are returning from their bounds; and therefore it must appear a strong abuse of the statute, which was applied for by the pursuers predecessors in order to protect them in their fishings, to make it a handle to deprive them of the only fishing that is now practicable. This is adversary to every rule of law, and will never be approved of by your Lordships: *Nulla juris ratio, aut equitatis benignitas, patitur, ut quæ salubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione contra ipsorum commodum producamus ad severitatem.*

L. 25. ff. De legibus.

In respect whereof, &c.

JAMES FERGUSON.

Copy

Copy act of parliament 1698, referred to in the foregoing answers.

HIS Majesty, with advice and consent of the estates of parliament, prohibits and discharges all salmon-fishing, or other fishing whatsoever, in the river of *Forth*, above the power of *Alloa*, on both sides of the said river, with pock-nets, herry-water-nets, or other engines or devices whatsoever not expressly allowed by law, and to the prejudice of the heritors and their rights of salmon-fishing in the said river; and impowers, warrants, and commands, the sheriff-principal of the shire of *Stirling*, bailie of the water of *Forth*, and his deputy, to suppress the foresaid unlawful and prohibited manner of fishing, and punish the users of the foresaid pock-nets, herry-water-nets, and other unlawful engines, by fining, not exceeding the sum of *L. 20 Scots, toties quoties*, or imprisonment, as they shall see cause; and to destroy all the foresaid unlawful engines: And that this they do as they shall be answerable.