

No. 13. and ought to make a sloop in the foresaid part of the dam-dike, where the mid-stream, or current thereof, runs ; and remitted to the Lord Ordinary to proceed in the cause accordingly."

But, upon review, " They found, That, in the special circumstances of this case, the act of Parliament 1696 does not extend to the fishing in question, and remitted to the Lord Ordinary to proceed accordingly."

Act. Solicitor Dundas et Patrick Murray. Alt. Rae et Lockhart.

A. R.

Fol. Dic. v. 4. p. 258. Fac. Coll. No. 77. p. 134.

* * This case having been appealed, the House of Lords, 6th June, 1774, ORDERED and ADJUDGED, that the interlocutors complained of be reversed, and that the cause be remitted to the Court of Session in Scotland, to give the proper directions for carrying this judgment into execution.

1769. December 13.

WILLIAM LORD HALKERTON, and others, Pursuers; *against* JAMES SCOTT of Brotherton, Defender.

No. 14.
Penalties in
the case of
the salmon
fishing of
Northesk
refused.

By the interlocutor pronounced betwixt these parties of the 4th July, 1769*, it was *inter alia* found, " That when, in forbidden times, the cruives are taken away, the defender is not entitled to fill up with loose stones or other materials the hecks or places from whence they are so removed." In a reclaiming petition for Lord Halkerton, he craved that the defender should be found liable in one or more penalties of £50, for having, in forbidden times, filled up these vacancies with stones or other materials ; and likewise that penalties should be annexed to his future transgressions.

In making this demand, the pursuer rested his argument upon the propriety of enforcing the judgment of the Court, which could only be done by imposing, as a merited punishment in one case and restraint in the other, the penalties claimed. The expediency and power of the Court to impose them to the extent claimed had been fully recognised ; *first*, in the case of the fishing of the river Don in 1665*, where £1000 Scots was laid on ; and more recently in the various litigations that had taken place with regard to this very fishing in question. In the judgment March 16, 1684*, reported by Fountainhall, 500 merks, and in that of 15th November, 1701*, 600 were imposed as a penalty. In the after litigation, by the decret of the Court 12th June, 1746, No. 11. p. 14264, £50 was laid on ; and in the fourth action, by decret of the Lord Ordinary the 5th August, 1762, adhered to by the Court on the 11th February, 1763, the same sum of £50 was imposed. These penalties had been thought both expedient and necessary at the time : matters were far from being altered in the defender's favour since ; which in the strongest manner suggested that the same restriction should be continued.

* These cases are in Section 3. of this title.

The defender answered, That the filling up these vacancies in forbidden time was not owing to any bad intention, or with design to improve his fishing at the expense of the superior heritors, but was done from the necessity of the case, both for the purpose of supplying the mills below with water, and to prevent the cruive-dike from being demolished by the winter floods. This operation was not a momentary act or matter of wilful neglect, to guard against which alone, penalties were introduced and imposed by law, but was a measure of such gradual execution, that it could not fail to be observed, and if objected to, prevented. In the different judgments founded on, the penalties imposed were to enforce the regulations as to the Saturday's slop, the taking out the inscales, the wideness of the hecks, the removing of the teeth in forbidden time, and keeping the same void and clear; and had no relation whatever to the present ground of complaint. As no penalty therefore had hitherto been incurred, and no wilful transgression committed, there could be no reason or necessity for annexing penalties to future transgressions, more especially as the regulations to be now observed, could, at the sight of the Judge Ordinary, be immediately carried into effect.

Upon advising the petition and answers on the 22d November, 1769, the Court, moved chiefly by the consideration that such restriction could with propriety be imposed only where transgressions could be committed *de momento* and clandestinely, "adhered to the former interlocutors, assoilzieing the defender from the penalties libelled in time past." And thereafter, upon advising memorials as to the annexing of penalties in time to come, their Lordships were of opinion, that penalties were only to be annexed in certain circumstances, where redress could not be had in common course, which in the present instance was not the case.

They accordingly "Refused to annex any other penalties than those contained in the decret 1762, and adhered to their former interlocutors."

For Lord Halkerton, *T. Fergusson, Advoc. Montgomery, Sol. H. Dundas.*
For Scott, *Wight, Macqueen.* Clerk, *Ross.*

R. H.

Fac. Coll. No. 7. p. 16.

* * This decision affirmed upon appeal.

1770. August 7.

GEORGE SINCLAIR of Ulbster, Pursuer, *against* DAVID MURRAY of Castlehill, Defender.

THE Earl of Breadalbane, in 1694, obtained a charter of the earldom of Caithness, comprehending the lands of Thurso and Ormly, and salmon fishing on the water of Thurso; the lands of Murkles, East and West Stangergill, Pait, and Dunnet, and fishings thereto belonging; which lands lie along, and nearly surround, the bay of Murkle and Dunnet.

These lands and fishings were, at different periods, feued out to vassals. In particular, the Earl of Breadalbane, in 1706, feued to Sir George Sinclair, Ulbster's

No. 15.

Limited interpretation given to a grant of salmon fishing.