No. 9. nearest land, and slay their fish upon the same, and to infix pails and trees upon the land adjacent to the river, where the sea ebbs and flows, to dry their nets upon them, and mend their nets. And albeit the said land be bounded to the river, yet the heritors thereof must leave so much ley nearest the river side as is necessary for the foresaid uses of the said fishings, and must neither till it nor big dikes upon it, which may hinder the commodity of said fishing, in manner foresaid.

Fol. Dic. v. 2. p. 360. Haddington, MS. No. 2357.

1623. *December* 18. Lord MONIMUSK *against* FORBES.

No. 10.

FOUND, That a party who is infeft by the King in a salmon fishing, having no lands adjacent to the water, may draw his nets and dry them on either side.

Where one has lands on one side of the water, and another on the other side, with both of them a right to the fishing, it was found, that each may draw only on his own side.

Fol. Dic. v. 2. p. 360. Durie. Haddington.

*** This case is No. 106. p. 10840. *voce* PRESCRIPTION.

1746. *July* 16. FISHERS on NORTHESK *against* SCOTT of Brotherton.

No. 11.
Cruives regulated under penalties in case of transgression.

ROBERT RAMSAY, merchant in Edinburgh, tacksman of the fishing of Edzell, Turnbull of Strickathrow, and Fullarton of Galry, having right to fishings, in consequence of their respective properties, all upon the river of Northesk, pursued Hercules Scott of Brotherton, having a right of cruives near the mouth of the river, for several alleged infractions of the law in the form of his cruives.

THE LORD ORDINARY, 9th December, 1743, 'found, That the defender's cruive-dike in question should only be half an ell Scots broad at the top, and only one foot and an half high above the surface of the water, in its common course, as it run from the 15th of April to the 1st of May, and that the said dike ought to be built sloping from the top, till it was two feet under the water. 2*dly*, That the defender had right only to one cruive-dike, and that he ought to remove his side dike. 3*dly*, That he ought to observe the Saturday's slop, viz. one ell wide of a sluice in each cruive, from six o'clock in the evening till Monday at sun-rising. 4*thly*, That the hecks of the cruives ought to be three inches wide, conform to act of Parliament of James I. and former decisions in the debate mentioned. 5*thly*, That the teeth or rungs of the hecks ought to be entirely removed in forbidden times to fish, and the same kept clear and void. 6*thly*, That the defender was not obliged to keep or observe the mid-stream. 7*thly*, That he ought to take down and model his cruive-dike, and to build it according to the above

regulations, without prejudice to him to make the foundation and superstructure, till it came to two feet of the surface of the water, as broad as he pleased, and either sloping or perpendicular, and that under the penalty of £50 Sterling, by and attour performance. 8*thly*, And the like sum, in case of contravention of any of the regulations mentioned above, after the dike should be so built, *toties quoties*, to be paid by the defender to the pursuers, or any of them, or their heirs or successors who should sue for the same." And, 21st June, 1744, further "found, 9*thly*, That during the Saturday's slop the defender ought to lay by the in-scales in all and every one of his cruives. And, 10*thly*, That the cruives to be placed in the new cruive-dike, according to the directions of the former interlocutor, should be built in the channel of the water, and not above the same, under the penalties mentioned therein, *toties quoties* he should be guilty of any contravention." And, 23d July, 1744, adhered. No. 11.

The side-dike mentioned in the interlocutor had formerly been the dam-dike of a mill, and joined near perpendicularly to the lower side of the cross dike wherein the cruives were placed, and which was built lower, and without cruives, beyond the place where it joined; so that the water run over it there, and then in a thin sheet over the side-dike. And this was said to be in effect two dikes, which the defender was not entitled to have. But he, on the contrary, contended, That the law had not prescribed the form of a cruive-dike; but it might be built quite cross the river, or else either slanting or curved, or in any other form that was convenient; and in this form the cruives in question had always been possessed. Besides, he was engaged in an old contract, concerning the keeping up the side dike, with the heritor whose mill it had formerly served, and who might again employ it to that purpose. He also contended, that the law had not fixed any determined *modus* to the heighth or breadth of the dike; nor was it fit that it should, because this behoved to depend on the depth and rapidity of the river, and therefore he might in that respect model his dike according to his own conveniency. He alleged, that no law obliged him to lay by the in-scales during the Saturday's slop; and it would be very inconvenient to do it, as they were a fixed part of the machine. But it was answered, That unless these were laid by, the access was not clear to the fish, and so it was commanded by the same law that ordained the slop; and it was shewn by a model how this might be done without difficulty. The defender further contended, That his cruives were already in the channel of the river, for that this regulation, under which he was laid by the interlocutor, ought not to be understood so strictly, but that he must be allowed to have a foundation of some heighth upon the channel whereon to place his cruives. But the fact was denied, that the cruives were so placed as it could in any sense be said they were in the channel, the bottom of them being at a considerable heighth above it; and it was said, that any foundation necessary ought to be sunk in the channel, as was the manner in building bridges; for in them there was a solid foundation laid, not only under the pillars, but under the arches quite through the water, else the pillars would be undermined, but this was sunk even with the channel.

No 11.

A petition was given in, and answered, against the whole of these interlocutors, except the third, fifth, and sixth articles, to understand the determination whereon, the above explanation will be sufficient; but, however, it will be proper to insert the arguments at greater length concerning two points, viz. the wideness of the hecks, and the enforcing the regulations with a penalty.

Pleaded for the petitioner, It was true that, by act 11. Parl. 1. James I. ilk heck ought to be three inches wide, as the old statute requires; and, by act 15. Parl. 2. James IV. ilk heck ought to be five inches wide, according to an act and statute made by King David; but that, in the case of the cruives of Don, in 1665, the Lords had found this last statute to be mistaken, both as to the name of the king who enacted the regulation, and the wideness of the hecks determined thereby; and indeed there was no such statute extant of King David's; that, however, the decision was itself mistaken in attributing this regulation to King Alexander, who introduced the mid stream, a regulation now in desuetude, and the Saturday's slop, 16th stat. Alexander; but the only old law to be found relating to the hecks was the 11th of Robert I. which enacted, that they shall be two inches wide, so that the fry of the fish shall have no impediment in passing up or going down, but that they may freely ascend or descend at all times. See Sect. 3. *h. t.*

As therefore the Legislature itself was mistaken, in referring to this old act, and was justly found so by the Court, so much more might it now be found, that the Court made another mistake in that decision, and in the two others, in the case of this same river, which were copied from it, and the pursuers could not now insist for a conclusion in virtue of an alleged old statute, which they could not point out; and though the Legislature might have, by subsequent statutes, enacted any further regulation, yet when the declared intention thereof was to inforce a prior statute, which happened to be misrecited, it was competent to the judges to correct the mistake. And in the present question, the wideness of the inches, statuted by King Robert, was sufficient to answer the intention of letting the fry freely pass.

Answered, That the act of James I. though referring to an old law, was itself statutory; and the same regulation was again enacted, act 73. Parl. 10. James III. both which acts were revived and ordained to be put in execution, by act 20. Parl. 1685.

That the statute of King Robert bore indeed *duorum pollicum;* but Skene had added a note, *al. trium Ja. I. P.* 11. *C.* 11. *quod confirmatur auctoritate quorundam codicum;* and the leading decision was not laid on any supposed mistake in the writing or printing the acts of Parliament, but on the authority of the later statutes, as appeared by the argument; and it was considered by Stair, Mackenzie, and Stewart, as the rule, and had been followed by two decisions, 1684 and 1701, concerning these very cruives. See Sect. 3. *h. t.*

Concerning the sanction of £50 inflicted for the transgression of the several re-

gulations, the parties were fully heard by their counsel, and the matter reasoned on the Bench, before passing the judgment. No. 11.

Pleaded for the petitioner, That it exceeded the power of a court of law, which was to determine in cases when they came before it, to fix a penalty on future transgressions; and, accordingly, several acts of Parliament had made transgressions in this matter a point of dittay, and had inflicted pecuniary penalties, which belonged, as all other fines, to the King, but not to the private party, act 11. Parl. 1. James I. and act 73. Parl. 10. James III. and that the former precedents were not to be followed, as it appeared, in those cases, this had not been the point disputed.

Answered, That the pronouncing the decision under the sanction of a penalty was absolutely necessary, to secure the observation thereof; else, upon every transgression, it would be necessary for the pursuer to liquidate his damages; which would be difficult, and make the laws be neglected: That jurisdiction being given, every thing was granted which was necessary to explicate that jurisdiction; and examples might be given of penalties being fixed for future transgressions, as in the case of a man ordered to be transported, under a further certification, if he should return, and in the known diligence of a lawburrows, introduced by commmon law: That the Lords had a power similar to that of the Roman Prætors, who prohibited facts under penalties by their edicts, as the edict *de dejectis et effusis*, and others of the like nature; and it was alleged, that the Chancellors of England were in use, in cases similar to this, to grant injunctions under a penalty; and for this a book was cited, entitled, The Complete Chancery Practiser.

Replied, That there was no necessity of this method to secure obedience, since, in case of any transgression, damages would be given; and though the real damage could not be determined, this happened in many other instances, where yet there was no other method but to modify a sum on that account; and the expenses of plea would be given, which might be pretty severe, and a sufficient guard to the law, besides the fines fixed by statute, or arbitrary, that might be inflicted, on prosecuting the transgression criminally: That there was no arguing from the power of the Roman Prætor, which was higher and of a different kind from that of any ordinary judge; but, however, his edicts were general regulations made in a legislative, not a judicial way; while here every other person in the like case with the defender behoved to be sued for damages, and he alone was liable for every accidental trifling transgression in a liquidated £50: That the Chancellor was, by Lord Bacon, compared to the Roman Prætor, and yet his injunctions were only interdicts, prohibiting a fact, whereof complaint had been made, till the right should be tried: That the diligence of lawburrows was regulated by statute; and that the Lords might enforce their judgment with a penalty, they might order something to be done, or a wrong set right, under a sanction, but could not declare the punishment of a future transgression.

Duplied, That in the practice of the Chancery there were two injunctions, one an interdict upon the complaint, and another final, when the cause was determined;

No. 11. and an instance was given, in the case of a bookseller who had sold the play called *The Second Part of the Beggar's Opera*, to the prejudice of the proprietor of the copy.

THE LORDS, 12th June, 1746, "found, That the defender might keep up his cruive-dike, as to the heighth and breadth, in the same manner as now possessed by him; and adhered to that part of the Lord Ordinary's interlocutor, finding that the Saturday's slop, viz. an ell wide of a sluice in each cruive from six o'clock Saturday evening till Monday at sun-rising, was and ought to be observed, and that, during that time, the in-scales in all and every one of the cruives ought to be taken out and laid aside, and that the cruives behoved to be placed in the very channel or bottom of the water, and not above the same: As also adhered to that part of the Lord Ordinary's interlocutor, finding that each of the hecks of the cruives ought to be three inches wide or distant from one another, and that the teeth or rungs of the hecks ought to be entirely removed in forbidden time to fish, and the same kept clear and void; and found, that the defender was obliged to place his cruives, and regulate the hecks thereof, in manner before prescribed, under the penalty of £50 Sterling; but that they could annex no penalties to future transgressions, leaving the pursuers, in such cases, to complain as should accord."

On mutual bills and answers, the Lords having determined, that penalties ought to be annexed, and it being questioned among them whether the heritor ought to be liable in any, solely for the fault of a servant, which might be the case in the infraction of some of the regulations; and it being also observed, that by the Lord Ordinary's interlocutor it was not made sufficiently distinct to whom they were due, since they ought not to belong simply to the representatives of the pursuers, but to their successors, though singular, in their fishings:

They found, That penalties ought to be annexed, and remitted to the Lord Ordinary to call and hear parties procurators as to the extent, and whom they should affect, and by whom they might be pursued for; but adhered to their former interlocutor as to the other points.

Act. *Ferguson & Burnet.* Alt. *Lockhart, W. Grant & Maitland.* Clerk, *Gibson.*

D. Falconer, v. 1. *No* 132. *p.* 160.

1763. *February* 24.

Thomas Lord ERSKINE, Mr. JOHN ERSKINE of Balgownie, and others, Heritors upon the River of Forth, *against* The MAGISTRATES and TOWN-COUNCIL of STIRLING, MICHAEL POTTER of Easter Liveland, and others, Proprietors of Salmon Fishings upon the River of Forth.

No. 12.
Stoop-nets prohibited to be used upon certain parts of the river Forth, by act 1698.

IN the year 1757, the pursuers raised a process of declarator, whereby, *inter alia*, they insisted to have it found and declared, that they, as having right to certain salmon fishings on the river Forth, were entitled to fish within their respective bounds with pock-nets, stoop-nets, cobles, and other nets or engines not ex-