No. 12. gulating the fishing on the river of Forth: And that the stoop-net, being a species of the pock-net, the pursuers, and all the heritors, as well as others, are debarred by the said act from fishing on the said river, above the Pow of Alloa, with pock-nets, stoop-nets, or herry-water nets; and assoilzie from that branch of the declarator, and decern."

Act. *Erskine, Ferguson.* Alt. *Monro, Lockhart.*

The decree, upon an appeal, was affirmed by the House of Lords.

J. M. *Fol. Dic. v.* 4. *p.* 258. *Fac. Coll. No.* 106. *p.* 248.

1768. *June* 29.

DUKE of ROXBURGH, *against* EARLS of HOME and TANKERVILLE.

No. 13.
A fishing in the river Tweed, possessed jointly by a Scots and English heritor, how far subject to the regulations of the act 1696, c. 33. and the cognizance of the Court of Session?

THE Earl of Home has right to Fairburn's-mill on the north side of the Tweed, with the fishings thereof, in virtue of grants from the Kings of Scotland. The Earl of Tankerville is proprietor of the opposite lands and fishing in the river, by grants from the Kings of England. The river is there so rapid, that it is impossible to fish by net and coble. There had been immemorially a dike running from the north side, considerably beyond the middle of the river towards the south, which, besides serving to convey the water to Fairburn's-mill, had been used by both Earls for the salmon fishing. In this dike were five holes, three towards the north, and two towards the south side of the river. On the upper side of these holes were fixed pock-nets, on the other side square barricades of stones, with openings in the sides, and over these openings frame nets, so placed as to allow the fish to go up the river, but to catch all that returned. This dike had been immemorially kept in repair at the joint expence of both Earls, and the fish caught there equally divided.

The duke of Roxburgh, proprietor of the superior fishings at Kelso and Mackerston, brought an action against Lord Home and his tacksman, concluding, that the defenders should be prohibited to use that mode of fishing in time to come, as contrary to the regulations established by the act 1696, c. 33. and for the penalties in that statute, &c.

The Earl of Tankerville sisted himself in the process. And the questions debated were, What was the boundary of the two kingdoms at the place? Whether any part of the river was subject to the regulations of the act 1696? and, Whether the matter was cognizable by the Court of Session?

The pursuer maintained, that a line drawn along the middle of the river divided the two kingdoms; and all that part of the river which was on the north side of that line belonged to Scotland, and was subject to the laws and jurisdiction of the courts of Scotland. In support of this proposition, it was argued, that this was the

law with respect to rivers which divide private property; and hence, these rules with regard to the division of the channel, and the right of islands that may arise in such rivers. And it does not appear, why the same ought not to be the case, with regard to rivers which divide independent kingdoms. No. 13.

2do, This seems to have been the idea of the Scots legislature. It is true, that, in the act 1597, c. 265, with regard to killing salmon, &c. the rivers Tweed and Annan were excepted; because it was thought, that the observation of the regulations contained in these statutes by the Scots would only have the effect to add to the value of the fishings on the English side. But, after the union of the Crowns, an act passed 1606, 5. expressly extending all the former regulations to these two rivers, which evidently showed, that the Scots parliament understood that part of these rivers belonged to, and was subject to the laws of Scotland. The rights of the defenders too proceed upon the same supposition; for, how came the kings of England and Scotland to grant fishings upon this river to their respective subjects, if part of it had not been understood to belong to each kingdom?

It was maintained on the part of the defenders, that the whole river was the proper boundary between the two kingdoms, and that no part of it belonged exclusively to either. It is true, by the civil law, the channel of a river is divided between the proprietors on either side; but it does not follow from thence, that, while the river exists, it is to be divided in the same manner. On the contrary, rivers were by that law held to be common to all the world, § 2. *Inst. De ur. div.* Indeed, such division as is contended for by the pursuer would be often impracticable, and at all times the source of confusion and animosity, from the various windings and frequent changes in the course of the river.

But, suppose, *in dubiis*, the middle of the river were to be held the boundary, yet there is no doubt that a different rule may take place, either by express covenant, or immemorial use or possession; *Grotius De jure B. et P. l. 2. c. 3.* § 18. The whole river may either belong to one state, or may belong in common to both.

With regard to the Tweed, there is not, in all the records of antiquity, any trace of such division as is contended for by the pursuer, or of courts of either kingdom extending their jurisdiction just to the middle, and no farther. On the contrary, it appears from the border-laws, 1*st*, That the fishings in this part of the river were not considered as subject to the cognizance of the courts of either kingdom, but were regulated in the way of treaty by commissioners vested with the authority of both, or by the warden of the marches, a judge appointed by these commissioners. 2*dly*, That, in all questions regarding these fishings, the thing chiefly attended to was ancient use and possession. Thus, by a treaty between Edward VI. of England and Mary of Scotland, it was covenanted and agreed, "That so many and such fishings in the flood of Tweed, from the bounds and limits of Berwick, ascending upwards to Rydingburne, even as many and such shall apertain to the kingdom of Scotland, as notoriously did appertain thereunto before the beginning of the said wars, and by the Scots were

No. 13. haunted, and by use exercised and holden of the same manner as by right they might." *Nicolson's border-laws*, p. 60. § 5. From another treaty, in 1553, it appears, that certain questions with regard to the right of fishing in this part of the river between Lord Home and Richard Bowes, and between Home of Manderston, and Selby of Tweedzzet, were determined by the commissioners upon a proof of the ancient possession; and, by another section of the same treaty, it is ordered, "That, if any of the subjects of both realms, unlawfully trouble, stop, or make impediment to the subjects of the opposite realms, in his or their fishing in the water of Tweed, so that he may not thereby use and fish his fishing, according to the virtue of these treives, that it shall be lawful to the party grieved to give in his complaint to the warden of the marches where the offender is dwelling, which warden shall cause the said offender to be attached to the day of treives."

As this seems to have been the way in which all questions with regard to the fishings in this part of the river were determined, so no case could occur where the interposition, either of the legislature or courts of either kingdom could be so improper as the present. The Earls of Home and Tankerville having a joint right to this fishing *pro indiviso*, no regulation could be inforced or decree pronounced against one which would not likewise affect the other. A decree against Lord Home must affect the interest of Lord Tankerville, though he is not a subject of Scotland, and holds his estate from the Crown of England.

It is true, the old regulations with regard to the time of killing salmon, &c. were, by the act 1606, extended to the Tweed, and Annan. But, 1*st*, This might be meant of these rivers, so far only as they were within Scotland, but not where they were the boundary. 2*dly*, Those old regulations were only prohibitions, enforced by corporal punishment, which might be inflicted upon the offender, if subject to Scots jurisdiction; but the regulations in question are not mere personal prohibitions to the subjects of Scotland, but direct the construction of dam-dikes, in such a manner as can only be executed by an act of power in and upon the river.

Replied for the pursuers, The general proposition maintained by the defenders necessarily leads to this consequence, that the Tweed is subject to no law whatever, either as to crimes committed upon it, or the ascertaining rights of property in it. Such proposition ought to be well supported before it be received. It is clearly contrary to the general rule laid down by the writers on the public law in cases of this kind; and there is nothing urged by the defenders to show, that this river is, or ought to be, an exception from the general rule. All that appears from the border laws, is, that controverted rights between the subjects of the two kingdoms were determined by treaty, or by the warden of the marches. Those could not be determined otherways, both because the laws of either kingdom could not reach the subjects of the other, and because the determining those questions was in effect settling the limits of the two states. But the present question is extremely different: Lord Home's fishing is undoubtedly a Scots estate, being deriv-

ed from and held of the King of Scotland. It is of no consequence that Lord Home and Lord Tankerville have possessed their fishings jointly. As they derived their right from the sovereigns of two separate and independent states, there could be no legal community between them. Their joint possession must have been by agreement for their mutual conveniency; but such agreement could not exempt either from subjection to the laws and courts of their respective states. No. 13.

Duplied: By the treaties above mentioned, provision was made for the punishment of crimes committed upon the borders; and, as the criminal law in both countries is nearly the same, and as both have a common interest in the river, the cognizance of such crimes might be competent to the courts of that country where the offender had his domicile, or was apprehended. The courts of each country too might determine civil questions between its own subjects, respecting their claims to established rights in this river. Thus this court might determine between Lord Home and any other person claiming right to the fishing of Fairburn-mill, though it might not be competent for this court to execute regulations of a public nature in and upon the dikes and fishings within the river, in virtue of a Scots act of Parliament.

The case is just the same with that of land-commonties upon the border, possessed jointly by English and Scots heritors. Though this court might determine between Scots heritors claiming the same interest in such commonty, yet none of the public laws of Scotland, for example, those as to hunting, fowling, muirburn, souming, rouming, division according to the valued rent, &c. could be put to execution there. If this be the case of a commonty upon land, the same ought, *a fortiori*, to obtain in the river Tweed, which, by its nature, is public.

The defender's plea too is confirmed by the practice. The regulations of the act 1696 never were observed; nor, till this action, was there any attempt to enforce the observance of them in any part of this river, although they have been always observed and enforced in every river that is entirely within Scotland.

But, though the law stood otherwise with regard to the river in general, yet it would be incompetent for this court to interfere in the present case. By the treaty above quoted, it was agreed, that the fishings in this river should be possessed in the same manner as formerly. The joint possession of the two Earls must presume *retro*. Of course, Lord Tankerville has a right, as a part of his English estate, to fish over the whole river jointly with Lord Home; and of this right he cannot be deprived in whole or in part by this court. An end cannot be put to this joint fishing any other way than by commissioners, as in ancient times, or by an act of the united legislature of both kingdoms.

The LORDS first found, "That the act of Parliament 1696 comprehends the river Tweed, where that river runs within the jurisdiction of the courts at law in Scotland; and that the dam-dike, or dam-head in question, from the north bank of the river to the middle thereof, is subject to the regulation of that act; and, therefore, that the suspenders ought to remove all nets and engines prohibited by that act,

No. 13. and ought to make a slop 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 decreet of the Court 12th June, 1746, No. 11. p. 14264, £50 was laid on; and in the fourth action, by decreet 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.