

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

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Limited interpretation given to a grant of salmon fishing.

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predecessor, certain lands, "together with the salmon fishing and trout fishing upon the water of Thurso, from the tops and fountains of all streams, &c. on the said water, to the utmost extent of the same, where it runs into the sea at the town of Thurso, on both sides thereof, to the mouth of the same; and from thence alongst the coast of Thurso-east, as far as the said Lord Glenorchie or his foresaids their property extends on the said coast; and from the mouth of the said water, on the north side thereof, to the sea, as said is; and from thence and up to the lands and in the town of Thurso, conform to use and wont, with full power," &c.

In the year 1717, the Earl of Breadalbane conveyed, by a feu-contract, the lands of West Stangergill to Sinclair of Durren, "together with the fishings, &c. as the same is and has been possessed by the present and former possessors thereof, and conform to use and wont." These lands, &c. were vested by progress in Murray of Castlehill; who having fished for salmon in the bay of Murkle or Dunnet, opposite to his said lands, was challenged by Ulbster, who brought an action against him of molestation and damages.

Such being the state of the titles of both parties,

Ulbster the pursuer pleaded,

1mo, That, in the right of the Earl of Breadalbane, he could exclude the defender from using any right not specially disposed to him; and, in particular, could confine him to the right of fishing, in terms of his feu-grant in 1717, which was clearly so worded as to guard against the right he now exercised. *2do*, That, by the feu-right of the salmon fishing of Thurso, and alongst the coast as far as the Earl of Breadalbane's property extended, granted to Sir George Sinclair in 1706, prior to the disposition to Sinclair of Durren in 1717, he had a preferable right to the fishing in any part of this bay opposite to the lands which then belonged to the Earl, of which West Stangergill formed a part; more especially as he had been in possession of this fishing ever since the grant; which was of itself sufficient to constitute a prescriptive right. *3tio*, That this new fishing set up by the defender was detrimental to his salmon fishing in the river of Thurso. It could not be denied but that most of the salmon that came into this bay were running for the river of Thurso; and no person without a special grant could set up a new fishing, to injure or diminish one already established.

The defender pleaded, That as Ulbster had produced no proper title to a salmon fishing in the bay of Dunnet, to the extent he claimed, he had no right to challenge or interfere with the fishing he exercised opposite his own lands of Stangergill. The only title the pursuer could found on was the feu-charter in 1706; which, being a grant from a subject superior, could convey no right to a salmon fishing which was *inter regalia*; and however effectual it might have been as a title of prescription, the fact was, that neither the pursuer nor his predecessors had ever possessed a salmon fishing in any other place than strictly in the river of Thurso.

Though that deed had been an effectual title, the just construction of the grant would not permit the right to be extended to that part of the bay which was opposite the defender's lands. At the time of the grant, the Earl of Breadalbane was in possession of the lands of Thurso-east; and though he was also in possession of the defender's lands of Stangergill, he had then no right to the estates of Murkle and Clairdon, which lay along the coast of the bay, interjected betwixt the lands of Thurso-east and Stangergill. According, therefore, to the true interpretation of the grant, a right of fishing was conveyed, so far only as the lands of Thurso-west extended from the mouth of the water eastward, which did not comprehend the defender's lands.

So conscious was the pursuer of his defective title, that he had presented a petition to the Lords of the Treasury, praying for a grant in his favour "of the salmon fishing in Dunnet bay, from Holbourn-head along the bay to Dunnet-head;" and though the intention of this application was to obtain a grant of the fishing the defender exercised opposite to his own lands, the encroachment was so obvious, that the Barons of Exchequer had reported, that the new grant should be limited to that part of the bay which was contiguous to or fronted the petitioner's own lands.

THE LORD ORDINARY found, "That the pursuer has not instructed any right to the salmon fishings opposite to the defender's lands;" and upon advising a petition and answers, the Court adhered.

Lord Ordinary, *Gardenstone*.
Clerk,

For Sinclair, *Crosbie*.
For Murray, *Lockhart*.

R. H.

Fac. Col. No. 41. p. 113.

* * A similar decision was pronounced in the case, 9th January 1750, *Towrie of Perth* against Lord Gray, No. 19. p. 12792. *voce* PROPERTY.

1771, *Nov. 19. and 1772, Feb. 21.*

The DUKE of QUEENSBERRY and others, Heritors of Fishings upon the River of Annan, Pursuers, *against* the MARQUIS of ANNANDALE and others, his Tenants, Defenders.

THE pursuers, who are the superior heritors upon the river of Annan, brought an action against the defenders, the inferior heritors, complaining of injuries done to their salmon fishings, both by the erection of a dam-dike across the river, and by an improper and illegal mode of fishing.

The facts alleged, and either admitted or established by the proof, were the following:

1^{mo}, About twenty-five years ago, the Marquis of Annandale's mill for the barony of Newby, formerly supplied with water from Newby Loch, was removed, and erected upon the Annan. A mill-head was taken off, and a caul or mill-dam

No. 16.

Regulation of the salmon fishing upon the Annan.—Demolition of a mill-dam dike erected by an inferior heritor refused.—The stenting of nets, either entirely across