

doubt has been got over ; but we still try such case in a civil light. Words may be used so as not to infer damages ; but, wherever there is a malevolent intention, and not a view of correction, *veritas convicii non excusat* : We cannot presume Hamilton guilty, when we ourselves would not allow a proof. The law presumes the words to be false, because the party had no right to use them.

**ALEMORE.** It is impossible to overhaul the first interlocutor. Actions of this nature are a new branch of business in this Court, and the law is not yet ripened as to them. I reserve to myself hereafter to determine as to the validity of the maxim, *veritas convicii non excusat*.

**STONEFIELD.** [This ought to have come in before the President's argument.] *Veritas convicii excusat in fervore iracundiæ*, but not where there is premeditated malice. See abridgment of the law by Gilbert, published by Bacon : he distinguishes between scandal by words and scandal by writing. In the last there is premeditated malice, but not in the first ; *King against Roberts*, 8th Geo. II. *Here* is premeditated malice : the defenders went on from step to step. The publication at the cross is altogether unjustifiable.

On the 9th August 1771, the Lords "found that the conduct of the defenders was malevolent and injurious ; repelled the defences : Found expences due ; but, in regard of the pursuer's consent, assoilyied from damages."

*Act. H. Dundas, &c. Alt. Hlay Campbell.*

*Diss. Kaimes, Pitfour.*

Alemore and Coalston voted with the interlocutor, upon the footing of the former proceedings being final.

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1771. *November 14.* DUKE of QUEENSBERRY and OTHERS *against* MARQUIS of ANNANDALE.

#### SALMON FISHING.

Regulation of the Salmon-fishing upon the Annan. Demolition of a mill-dam dyke erected by an inferior heritor, refused. The stenting of nets, either entirely across the river, or placed alternately from side to side, but overlapping one another so as to obstruct the fish from getting up, found to be illegal, and prohibited. The placing of other engines or contrivances, which frightened and deterred the fish from coming up the river, likewise prohibited.

[*Fac. Col. V. 364 ; Dictionary, 14,279.*]

**GARDENSTON.** The defender had right to erect the dam-dyke. As to the slop, the Act of Parliament defines its nature with much accuracy. With respect to the size of the slop, I would assoilyie ; because the pursuers have not proved that a greater slop could have been made without prejudice to the going of the mill. As to the mode of fishing, in so far as nets of a new construction

are used *for taking fish*, such fishing is lawful, although many more fish are thereby intercepted, to the prejudice of the superior heritors; but I distinguish between nets for *catching*, and nets for *interrupting* the course of the fish; the latter are *unlawful engines* even in cruives, when permitted. There must be a *slop a fortiori* in this case, where no grant of cruives.

PITFOUR. Every proprietor may build a mill, providing he does not prejudice the right of others. The Act 1696 applies to mills to be hereafter built as well as to those already built; but a right to make a dam-dyke does not give a right to prevent the fish from passing up. The legislature has required a *slop* as far as can be made, without prejudice to the mill: it is not proved that the *slop* could have been deeper without prejudice to the mill. As to the mode of fishing, every lawful mode of catching fish, without *emulatio vicini*, is permitted. It was so determined in the case of *Findhorn*; but nets are only to be used in the time of fishing: at other times they are nuisances and unlawful engines.

COALSTON. I agree with the general principles laid down; but still the difficulty remains as to the application. A trout-net is equal to a cross-dyke, and plainly unlawful, because it intercepts, but does not catch the fish: here there are also overlapping-nets: If they remain at all times of the tide, they are unlawful. Perhaps they are lawful, if the fishers are in the course of catching fish as long as they remain in the river.

MONBODDO. The Legislature considered the benefit of salmon-fishing, in general. Stent nets are worse than a cruive-dike, for they absolutely stop the course of the fish,—prevent their going up to spawn,—and, I believe, estrange the young fry from the river: for it is said that salmon only frequent that river in which they were spawned.

AUCHINLECK. The inferior heritors might as well put up an iron rail across the river, as use the nets they now use.

KAIMES. Lord Coalston's difficulty is owing to a mistake: Salmon are not caught in such nets as those in question, though such nets might serve to hang herrings.

PRESIDENT. I should even doubt as to hanging nets constantly cross the river, although salmon were thereby occasionally caught; but *here* the fact is, that the salmon were stopped, not hanged in the meshes: This is not *fishing*, but *obstructing* the course of fish. I doubt also as to hanging a net at the arch of a bridge; for that is, in effect, damming and laving, which is prohibited by law.

On the 14th November 1771, "The Lords assoilyied the defenders, as to the caul: Found, that, although the inferior heritor has right to use all legal engines and methods for catching fish, conform to law and possession, yet he has no right, either in time of actual fishing, or at any other time, to erect any engine, or use any method not for the purpose of catching fish, but for preventing or obstructing them from passing up the river; and therefore found that the methods used of stenting nets across the river, either reaching from side to side, or overlapping, or stenting across the arch of Annan bridge, or of putting in leisters, or stretching a rope with bones, are illegal methods, preju-

dicial to the superior heritors, and destructive to the fishing, and ought to be discontinued.”

*Act. A. Crosbie, &c. Alt. W. Baillie, &c.*

1771. November 15. WILLIAM PARK *against* ROBERT CRAIG.

#### ADJUDICATION.

An Adjudication, where both the penalties and termly failyies in an heritable bond were accumulated, found liable to the objection of a *pluris petitio*, and restricted accordingly.

[*Faculty Collection, V. 199; Dictionary, App. No. I., Adjudication, No. 6.*]

PITFOUR. Termly failyies are adjudged for, and yet not due; for there was no pointing of the ground. Would cut off penalties and even expenses. It is true, that, since the Act 1672, there is no apprising; but still an adjudication must be led in the same form as an apprising for *debita fundi*: The only difference is, that the Lords of Session are the Judges, instead of the messengers, as of old. Apprising led upon termly failyies, without a previous pointing of the ground, is improper.

KAIMES. It was an error to adjudge for termly failyies, which are *debita fundi*: this is not a *pluris petitio* from intention, but from ignorance. I would not annul the adjudication, but I would strike off after-profits. Whatever is due in equity, is here due; *i. e.* the capital sum and annualrents accumulated at the date of the adjudication. Doubt as to expenses.

MONBODDO. The only question, How termly failyies are to be made effectual? I think, in the same manner as the principal sum. I see no difference.

COALSTON. The adjudger has not adverted to a distinction in the Act 1672, which provides, that adjudications upon *debita fundi* must proceed as formerly, in apprisings, *i. e.* by a pointing of the ground.

HAILES. There is no reason for cutting off *necessary expenses*, for they will be no greater in this case than they would have been had the adjudication been regularly deduced. It is true that the adjudger has put the other party to expense in this cause: but this seems no reason for making a set-off of the expense of diligence against the expense of litigation, when it is considered that the plea was carried the length of annulling the adjudication altogether.

On the 15th November 1771, “The Lords restricted the adjudication to principal sum, and interest accumulated at the date of the adjudication, and the necessary expenses;” altering Lord Monboddo’s interlocutor.

*Act. G. Ferguson. Alt. R. Blair.*