

shall be advised, but in respect the objection of incompetency was never pleaded for the suspender till he applied for a suspension, Find him liable to the charges in the expenses incurred by them before the inferior court, and remit to the Lord Ordinary to proceed accordingly." And to this judgment they (14th June 1776) unanimously adhered.

Lord Reporter, *Covington.*

Act. *G. Wallace.*

Alt. *W. Craig.*

J. W.

1776. August 10.

DUKE OF GORDON against SIR JAMES GRANT.

The Duke of Gordon brought an action against Sir James Grant, heritor of a superior part of the river Spey, for contravention of the regulations enacted in the statutes regarding salmon fishing, and craving that the court should ordain observance of them under penalties.

The defender contended, that as the law has imposed no penalty for contravening these regulations, the Court can impose none, and that it is only competent to sue for damages: That although the Court had interfered to enact penalties in former instances, yet in the case of *Carnegie against Scott*, 30th June 1768, No. 84. p. 735, the decision of the Court of Session had been reversed.

The Court held, that the reversal of their judgment in the case of *Scott* had proceeded in consequence of a compromise, and that it was proper and necessary to enforce the regulations by penalties, which they accordingly did.

W. M. M.

1777. February 5.

WILLIAM MOWAT of Garth, against JOHN BRUCE STEWART of Sembister.

The lands of Garth in Shetland are about 20 miles distant from some islands or rocks on the east side of Shetland, called the Skerries. Near these islands is a considerable fishery, on account of which their shores and beaches are frequented by the fishermen. The fishers land their boats, erect huts within sea-mark, and cure and dry their fish. This they consider to be in conformity with the privileges of general fishery conferred by statute 29th Geo. 2d, Cap. 23.

The tenants and fishermen belonging to the estate of Garth had been in use, past the memory of man, of exercising this privilege.

The greatest part of these isles or rocks belonged to the sequestrated estate of *Girlista*, held in tack by Mr. Bruce Stewart.

No. 2.

No. 3.

The Court enacted penalties to enforce the statutable regulations respecting salmon fishing.

See No. 98. p. 7384.

No. 4.

Competent to sue in the Court of Session, declarator of the right of fishery conferred by the statute 29. Geo. 2. Cap. 23. and action of damages for infringing that right.

No. 4.

In June 1771, these fishermen, to the number of 28, in five boats, who had built huts, and were fishing as usual, were forcibly obstructed by the factor for Mr. Bruce Stewart, who pulled down the huts, and obliged the men to desist.

The reason given for the obstruction was, that roads and foot paths had been unwarrantably made by the fishermen through ground which was fit for corn and pasture.

On the other hand, it was contended, that no proprietor of ground in similar situations, is entitled to prevent or interrupt the general liberty, which is competent to all, of fishing on those coasts in terms of the statute.

Mowat of Garth filed informations in Exchequer against Bruce Stewart and his factor, founding upon the following clause of the statute: ‘ And if any person or persons shall presume to demand or receive any dues, sums of money, or other consideration whatsoever, for the use of any such ports, harbours, or forelands, within the limits aforesaid, so made use of for the purposes aforesaid; or shall presume to obstruct the fishermen or other persons employed in the taking, buying, or curing of fish, in the use of the same, every person so offending shall, for every such offence, forfeit the sum of £100, to be recovered and levied in manner herein after directed,’ and which is declared to be actionable by bill or information *before the Court of Exchequer in Scotland.*

Subpœnas were obtained against the defendants; but it having been found troublesome and expensive to execute these in that country, because no proof could be led in a cause in Exchequer without bringing the witnesses to Edinburgh, the term was allowed to elapse.

In the succeeding year, at the approach of the fishing season, application was made to the Court of Session by bill of suspension, and an interdict was obtained against Mr. Bruce Stewart from interrupting the fishers.

The suspension came, (2d. March 1773,) to be discussed before Lord Kennet, who pronounced this interlocutor, ‘ Renews the interdict in terms of the said act of Parliament, without prejudice to the charger stopping the suspender in case he exceed the bounds prescribed by the act, and lands his nets on any *cultivated* grounds belonging to the charger, and ordains the suspender to give in a condescence of the facts he alleges and offers to prove.’

Mowat likewise raised a summons of declarator in the Court of Session, against Bruce Stewart and his factor, of his right to fish upon the coasts of the Skerries, and for damages for the oppression committed by interrupting his tenants in the exercise of his privilege.

The summons and suspension were conjoined,—and a proof was taken.

The Lord Ordinary pronounced an interlocutor, continuing the interdict, but finding that the *quantum* of damages had not been proved, therefore *as-soilzieing* the defender from the claim for damages.

Mowat, in a petition to the Court, after pointing out the particulars of the proof, by which he considered it to be ascertained that actual and specific damage had been suffered, endeavoured to obviate an argument which had been used on

the other side in the previous proceedings, and which has occasioned this case to be reported. It had been maintained, that it was entirely incompetent to pursue an action of this kind before the Court of Session, as whatever right was now claimed by the pursuer of the declarator must be founded solely on the statutes establishing the general privileges in question; but as actions upon these statutes are declared to be competent by bill, plaint, or information in any of his Majesty's Courts of Record at Westminster, or of the Court of Exchequer in Scotland, it must be incompetent to sue upon them in any other Court.

The answer to this was, that the clause directing the competent courts regards only actions for recovery of the penalties—whereas the action at issue was of a nature entirely different. It was a declarator of right, and a claim of damages, which must be competent to the Court of Session. If the action had been for the penalties, of which one half falls to the share of the Crown, it would have been competent only before the Court of Exchequer.

The Court sustained the competency, and found damages and expenses due.

Lord Ordinary, *Kennet*.

For Mowat, *A. Tytler*.

For Bruce Stewart, *R. M^cQueen*.

W. M. M.

1777. *March 11.*

WILLIAM HALL of Whitehall, *against* ROBERTSON of Ladykirk.

THE act of Parliament 1661. Cap. 41. contains this clause: "For the further encouragement of the said heritors, wadsetters, and liferenters, to go about the ready observance of the said act, liberty and power is granted to them, at the sight of the Sheriffs, Stewarts, Lords of Royalty, Barons, and Justices of Peace, in their respective bounds, to cast about the high ways to their conveniency, providing they do not remove them above 200 ells upon their whole ground."

Mr. Robertson made applications to the Justices of the district of Berwickshire in which his estate is situate, proposing to alter a part of the high road.

A Committee, who were appointed to visit the place, reported, that by the proposed alteration, the road would be turned 298 ells, into a tract unfavourable to the public, on account of being overshadowed with trees on one side. Consequently at a general meeting of the Justices, (30th April 1774), Mr. Robertson's petition was refused.

The Justices of Berwickshire had sometime before issued certain regulations, one of which was, that, 'notice of all private applications for turning 'high-ways on account of inclosing, shall be given at the parish church 'on Sunday between sermons, and at one or other of the said two general 'meetings previous to such application being made.'

No. 4.

No. 5.

A Committee of Justices had reported that a proposed alteration on a road was within the statutable limits of 200 ells. Offered in a suspension that the distance was 215 ells. Refused as irrelevant.