

substitution, there may be a difficulty, unless circumstances point out what was meant ; but there is no substitution here, expressed or implied.

COALSTON. The provision of 1500 merks is a legacy to the wife : it fell by her predecease. Supposing that there had been a *fideicommiss* it would have fallen by the predecease of the wife.

KAIMES. There is no claim for the 1500 merks. Isobel Swanston was only bound to pay a like sum of 1500 merks to her children ; no obligation on her to pay the sum, for she never had it.

GARDENSTON. According to a liberal interpretation of the clause, this is the same thing as if the father had settled the fee upon the children.

PRESIDENT. I cannot put a construction upon words which they cannot bear. I know of no intention but what parties express. *Charles, Earl of Selkirk*, meant to give his whole estate to *Lord Daer*,—and yet the Court gave *Lord Daer* no part of it. The supposed *fideicommiss* to the wife would not have prevented the subject from being attached and carried off by her creditors.

On the 13th December 1769, “ the Lords found that the provision of 1500 merks fell by the predecease of Isobel Swanston, and did not transmit to the daughters.”

*Act.* G. Hepburn. *Alt.* R. Sinclair, Ilay Campbell. *Rep.* Hailes.  
*Diss.* Pitfour, Gardenston, Monboddo.

1769. December 13. WILLIAM, LORD HALKERTON, and OTHERS, against JAMES SCOTT of Brotherton.

#### SALMON FISHING.

Penalties *quoad futura* in the case of the Salmon Fishing of North Esk refused.

[*Fac. Coll.*, V. 16 ; *Dictionary*, 14, 276.]

COALSTON. I always doubted of the propriety of the judgments imposing penalties. The Court has been carried away by the idea of the enormity of the offence : it has imposed penalties from 600 merks to L.50 sterling. By parity of reason, it might have imposed a penalty of L.500 or of L.5000. Why inflict penalties on the future transgressors of the laws as to fishing and hunting—and not in every case where there is a judgment *ad factum præstandum* ?

HAILES. Of the same opinion. I think the Court is to determine causes when they come before them, instead of perplexing themselves with penalties inflicted before the transgression. If penalties are to be *prepared* in one case, why not in all ? And then, by parity of reason, he who is found guilty of a bloodwit may be ordered not to break another man's head under the penalty of

L.50. As far as the Court has gone we must go; but there seems no reason for going farther. It is said, "The penalty ought to be ascertained before-hand, because it is impossible to liquidate the damages." This seems to imply that, because you cannot liquidate the damage after, you ought before the offence.

KAIMES. I am only for penalties where, unless they are imposed, damages must arise. That does not seem to be the present case.

KENNET. The vacancies in the cruive-dyke cannot be constantly filled up; so that there is an easy remedy by an application to the Sheriff.

PITFOUR. I am very clear that this practice of inflicting penalties has been the constant practice ever since the year 1665. Those penalties have not been desultory, but regular, increased according to the gradual rise in the value of money. Here there are two different interests—that of the superior heritors and of the public. If the Saturday's stop is not observed, the superior heritors only suffer—and the extent of their damage may be known from the number of fish taken during that forbidden interval. But as to the damage to the public—if the cruives are shut altogether during the whole closetime, it is inestimable. The right of the public ought to be more strictly fenced than the right of individuals. Here is an attempt *funditus* to defeat the purpose of the law. Will you prevent peccadillos, and let capital crimes escape? The refusing to enact penalties will be like granting an indulgence for crimes to be committed, which has not been known in Scotland since the Reformation.

AUCHINLECK. Brotherton has shown his indocility in obeying the law. The filling up cruive-holes must be universally hurtful—making a brae-fishing instead of a cruive-fishing. The only question is as to the Court's power of inflicting penalties. If it has power, it is not rigorous to inflict them. I should doubt of the Court's power, were it not for practice. If the defender does not transgress voluntarily—he will suffer nothing by the imposing of penalties.

MONBODDO. Penalties are unnecessary; for the pursuers have three several remedies:—*First*, They may apply to the Sheriff to stop any unlawful work. *Second*, They may apply to the Sheriff to demolish any unlawful work, if completed. *Third*, They may apply to this Court, on the head of contempt of authority.

JUSTICE-CLERK. Upon the common principles of jurisdiction, a penalty cannot be imposed *quoad futura*, where there is a remedy in course of law.

On the 13th December 1769, the Lords refused to inflict any penalties as to future transgressions, and refused the petition.

*Act.* H. Dundas. *Alt.* A. Lockhart.

*Diss.* Auchinleck, Pitfour, Stonefield.

Affirmed on appeal.