PRESIDENT. The privilege must not be extended. If there is in practice any anomalous right, a holding without a reddendo, which may be the case here, I would not extend the privilege to such anomalous right.

On the 15th November 1769, "the Lords found the claim of terce relevant;" and adhered to Lord Gardenston's interlocutor.

Act. R. Sinclair. *Alt.* Ilay Campbell.

1769. *November* 16. WILLIAM LORD HALKERTON, and OTHERS, *against* JAMES SCOT of Brotherton.

SALMON FISHING.

Construction of Cruive and Cruive-dyke.

[*Faculty Collection, IV.* 185; *Dict.* 14,293.]

MONBODDO. I am clear as to adhering as to the placing of the cruives. (All the judges agreed in this.) As to the causeway, it must not remain as at present; but there is a method proposed which may tend to secure the dyke, without hurting the superior fishings; and to this I would listen. We may admit an equivalent for what is not ordered expressly by law, but is only ordered by the interlocutor of the Court. As to the number of cruives, the original grant refers to use and wont; and, therefore, the number of seven must continue according to use and wont. We cannot fix any other rule than that. If Brotherton may insist to keep but three cruives, he may, upon the same principle, insist to keep but one; which would be rendering his cruive-fishing elusory, in order to benefit his coble-fishing.

HAILES. I have a suspicion of the equivalent proposed. I doubt whether it is consistent with the pretended cause of it—the security of the dyke. If there are to be so many grooves or channels, the causeway will be much impaired. I doubt whether the plan is practicable. The question as to the number of cruives is difficult; but I think that we can find no rule but possession. Brotherton and his authors, while they seriously occupied the cruive-fishing, did immemorially use seven cruives. We must therefore presume that seven cruives are necessary for occupying the cruive-fishing in the most beneficial way that he is entitled to exercise it in. If Brotherton uses fewer cruives, it is with the view of benefiting his coble-fishing at the expense of his cruive-fishing, and to the hurt of the superior heritors.

PITFOUR. The ancient immemorial usage must be the rule, unless in things unlawful or indifferent.

GARDENSTON. As to the number of cruives, immemorial possession is nothing; because immemorial possession has been disregarded in the other parts of this cause.

AUCHINLECK. The difficulty in this cause is, that he who has the cruives does not incline to use them. If Brotherton could convince me that seven cruives were of no use to the cruive-fishing, he would have a great deal to say. Brotherton would not surely agree to let the superior heritors fish those supernumerary cruives, which he asserts to be useless. We ought to keep to use and wont while the cruive-fishing was *bona fide* used. As to the proposal of rectifying the causeway, the expediency of that will depend upon the fact, whether the foundation be channel or gravel?

COALSTON. Cruives must be regulated by immemorial possession. Nothing more prejudicial can be done to the neighbouring heritors than what was done formerly. When Brotherton had seven cruives, he also filled them up in the winter: it is hard to oblige him to keep them up and yet not allow him to fill them in the winter.

JUSTICE-CLERK. The court will not be deaf to any argument which may be for Brotherton's advantage, without hurting the justice of the cause. I would therefore allow the alternative proposed. The superior heritors do not show that three cruives will not serve their purpose, as well as seven; and, therefore, I incline to allow three to be used.

KAIMES. The proposal of correcting the causeway is *res innoxiæ utilitatis.* It is said, that Brotherton has right to seven cruives; therefore he must keep up seven. This is no just conclusion. The conclusion ought to be that he may continue them. Besides, they were kept up by a sort of connivance with the superior heritors. As to the superior heritors showing that three cruives will be of less benefit to them than seven, that depends on the nature of the river.

PRESIDENT. Difficulty as to the cruives. For how can we oblige a man to keep up as many cruives as he is entitled to? What law can force a man to exercise a right in a manner most beneficial to himself if he does not incline it? I doubt whether seven cruives would be more beneficial than three to the superior heritors. The expression, in the right, *as anciently used*, relates to the mode of fishing, not to the number of cruives. If, by the law, Brotherton could *bona fide* have used but three cruives, why should he be obliged to use more when he comes to have a right to another sort of fishing? What should prevent him from using cruive-fishing in subserviency to his coble-fishing? My argument, I admit, will lead to this,—that Brotherton might use one cruive instead of three. I see this consequence, and I see the inconveniency which might thence arise.

PITFOUR. In the case of coble-fishings, a man may use what nets he pleases; for a grant of that sort of fishing is a grant to catch as many fish as can be caught: but a grant of cruives is an unnatural right, and must be used with moderation. If Brotherton may use so few as three cruives, he may use but one. This would be a cruive *dicis causa.*

ELLIOCK. Brotherton's whole management has been for the purpose of destroying the cruive-fishing. In regulating cruive-fishings we must consider not only the interest of the superior heritor, but also the preservation of the species.

On the 16th November 1769, "The Lords found that the causeway, as at present used, is improper; but remitted to the Ordinary, who pronounced the Act, to receive proposals for rectifying the causeway; and adhered *quoad ultra.*

Act. H. Dundas. *Alt.* A. Wight. *Diss.* as to number of cruives,—Gardenston, Kennet, Justice-Clerk, Coalston, Barjarg, President; [who could not vote, as numbers unequal.]

Non liquet, Kaimes.

1769. *November* 17. ROBERT FULTON *against* ROBERT POLLOCK.

ACT OF GRACE.

A Debtor, liberated upon the Act of Grace, may be again incarcerated at the instance of the same creditor, a process of *cessio bonorum* being the proper remedy.

[*Fac. Col. V.* p. 6; *Dictionary,* 11,815.]

PITFOUR. By constant practice, whenever a debtor is liberated on the Act of Grace, he dispones his effects to his creditors; so that the creditor comes to have a right in them. If a man is once liberated upon disponing every thing, shall the creditor have a power next day to take him up again? No decisions are necessary to prove this, nor any decision capable of proving the contrary. The decision, *Law,* 1709, is in point, for support of this opinion. The decision, *Abercrombie,* points the other way; but that was a singular case: the debtor was a contentious, profligate person, who would rather be alimented in prison than earn three shillings a-day by his work. He had the audacity to bring a process of wrongous imprisonment against the creditor who re-committed him. The court assoilyied from the wrongous imprisonment. The interlocutor mentions also the finding the letters orderly proceeded: but the debate was as to wrongous imprisonment. [This decision seems not well accounted for.] But, at any rate, this single decision will not alter the law. Can Fulton say that Pollock is possessed of more effects at this moment than he was when set at liberty? If he cannot, what pretence has he for renewing his diligence?

AUCHINLECK. According to Fulton's doctrine, if a man is let out to-day, he may be taken up next day; let out the third; and so on, *ad infinitum.* This would be oppressive, and could serve no lawful purpose.

KENNET. The Act of Parliament was made for the relief of the magistrates of royal burghs. The judgment of the court, in the case of Abercrombie, was my rule.

KAIMES. A man's coming out on the Act of Grace, is for the relief of magistrates in royal burghs. There is nothing to hinder the creditor from committing him the next day. As long as a debtor got out without executing a disposition, there was some reason for allowing such second commitment; but now, as a disposition is always required, the creditor ought not to commit again unless he can show new funds.

GARDENSTON. The fraud of debtors is at present a more universal evil than the cruelty of creditors. When a creditor is willing to aliment, the Act of