

1777. February 7. MOWAT of GARTH *against* BRUCE STEWART of SYMBISTER.

By an Act passed 29th G. II. c. 23., it is provided, "That all persons employed in the fishery on the coasts of Scotland, or of Orkney, or Shetland, or the Islands, shall exercise the free use of all ports, harbours, shore and forelands, below the highest high-water mark, and for 100 yards on any waste and uncultivated land, beyond such mark within the land, for landing their nets, &c. and for erecting tents, &c.—for landing, pickling, &c. the fish, without paying duties, or any sum of money, or other consideration for such liberty; and if any person shall presume to demand any such, or shall presume to obstruct the fishers, every person so offending shall forfeit the sum of £100 sterling, actionable by bill or information before the Court of Exchequer in Scotland."

Notwithstanding of this statute, certain fishers in Shetland belonging to Mr Mowat of Garth, having erected huts for the fishing season, on the Skerries, islands to the east of Shetland, particularly the westmost of these islands, under tack to Bruce Stewart of Symbister,—which island is inhabited, and consists partly of corn and pasture,—Bruce Stewart destroyed their huts, alleging that they had no right to erect huts upon the island; that their doing so damaged his grass and his corn; that, in particular, Mr Mowat of Garth had no servitude of that kind upon it; and that it did not fall under the foresaid Act of Parliament, which related only to lands waste and uncultivated, which this was not.

In an action against him of declarator and damages, as well as of perpetual interdict, the Lord Kennet, Ordinary, by interlocutor, (16th November 1775,) "found, That the pursuer, Mr Mowat of Garth, had not produced any title, nor adduced any proof sufficient for instructing that his lands of Garth, and possessions thereof, have a right of servitude of erecting huts on the islands of Skerries for the accommodation of their fishers, or of gathering bait there. But finds, that, by the public law, the pursuer and his fishers have right to fish white fish in the sea, around these islands, and to gather bait on the sea-shore; and, by the Act of Parliament libelled on, he and they have a right to exercise the free use of all ports, harbours, shores, and foreheads in said islands, below the highest high-water mark, and for the space of 100 yards on any waste or uncultivated lands beyond such mark, within the land, for landing their nets, &c. Find, that the defender, in the year 1771, obstructed the pursuer and his fishers in the rights competent to them by the said statute, and caused pull down their huts erected in virtue thereof; therefore continues the interdict, and suspends the letters *simpliciter*.

His Lordship gave no damages nor expenses of process, except the expense of extract. He considered that the pursuer had failed as to any private servitude, and the point upon the public law was new.

On a reclaiming petition by Mr Mowat, and answers by Mr Bruce Stewart, 3d December 1776, "the Lords found the respondent, Mr Bruce Stewart, liable to the petitioner in damages,—of which they ordered him to give in a special condescendence,—and also found him liable in the expenses of process. But before answer, as to the quantum, they ordered an account to be given in." For several of them thought, that as Mr Mowat had failed in proving a

servitude, on which point a proof had been allowed, that he was not entitled to any expense of that part.

It appeared to the Lords, that this Act of Parliament for encouraging the white-fishing deserved a liberal interpretation; and that the ground, or beach, where these fishers were in use to land, and erect huts, &c., was truly the species of ground pointed at in the Act of Parliament. It was a stony beach; and though rocks might, by force of money, be improved, yet this sort of ground could not; neither therefore could it be damaged.

Mr Bruce Stewart reclaimed; and, upon advising his petition, with answers, (7th February 1777,) the Lords adhered, and afterwards modified the damages and expenses of process, to be paid to Mr Mowat, to the sum of £80 sterling.

See, on this subject, Papers in the Election Complaint, *Lord Adam Gordon* against *James Duff, Sheriff-Clerk of Elgin*, decided 2d July and August 1773.

1777. January . SIR JAMES GRANT, &c. against DUKE of GORDON.

IN a process for regulating the Duke of Gordon's cruives upon Spey, in the dispute betwixt his Grace and Sir James Grant, &c.; the Lords found that the rings of the hecks of the Duke's cruives behoved to be formed either in a round or oval shape: and if in an oval, That the longest axis of the oval behoved to be set in the line of the stream, and be placed at three inches from each other, and made only as strong as was sufficient to resist the force of the water. All this was to facilitate the passage of the fish, and in favours of the superior heritors. They found also, that the inscales behoved to be placed at the extremities of the cruive box, and to afford an entry into the cruives equal in wideness to the side of the cruive box next the sea: that they behoved to be taken out during the Saturday's slap, except in time of flood, when that could not be got done; but that, at that time, they should be fixed back to the sides of the cruive box: that the cruives should be placed on the bottom or channel of the river, and that the face of the cruive box should not project beyond the cruive dyke. And the Lords appointed these and certain other regulations to be observed by the Duke in placing and constructing his cruives, and to be completed before beginning of the fishing season, under the penalty of £50 over and above performance; and so to be continued under the like penalty to be paid by the Duke, his heirs, and successors, transgressing or opposing them, *toties quoties*, to such of the respondents, or their heirs or successors, who should sue for the same.

1777. June 25. SIR JAMES COLQUHOUN against CAMPBELL OF STONEFIELD.

SIR James Colquhoun, and his predecessors, stood infest in the salmon-fishing and other fishings of Loch-Lomond, "*et ab illo lacu deorsum in fluxio de Leven ad mare saleum.*" In a question betwixt Sir James and Mr Campbell