

discharges regularly annexed to the accounts are in the most general, comprehensive terms, without qualification or reservation, in any instance, to countenance the present demand as for extra services. It is in vain to allege, that the allowance so stated was only in respect of trouble had in the department of steward or factor; for these accounts relate to every transaction in the respondent's affairs, where money came into the appellant's hands, or was expended by him; and it is difficult to conceive any piece of business unattended by some expense, particularly a variety of articles in these accounts, as for the appellant's travelling charges and the like, regarding the very matters for his personal trouble and assistance in which he now asks recompense. The payments made by him to other persons, who were joined with him in the business and transactions alluded to, including what they received as for agency, are stated, and yet it is not alleged that, in all that long course of time, he made a charge for his own trouble, independent of, or besides his salary, or hinted that such a demand was reserved. Why did he refrain for thirty years from making this demand for extra trouble? Simply because he knew that the claim was quite untenable and groundless.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Wm. Adam, John Clerk, George Jos. Bell.*

For Respondent, *T. Erskine, Henry Erskine, J. P. Grant.*

NOTE.—Unreported in the Court of Session.

PETER JOHNSTONE of Carnsalloch, Esq., and } *Appellants;*
Others, Murray of Broughton's Trustees, }
WATSON STOTT and EBENEZER STOTT of } *Respondents.*
Kelton, and their Attorneys, . }

House of Lords, 2d May 1806.

CRUIVE FISHING — ILLEGAL ENGINES — IMPORT OF REMIT FROM HOUSE OF LORDS.—Circumstances in which the Court were held entitled, under the remit of the House of Lords, to regulate the construction of the cruives, dikes, and boxes, and the construction and position of the inscales, as well as the spars and hecks used in

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such fishing. Affirmed in the House of Lords, with the exception as to the cruive boxes, which was remitted for reconsideration.

This is the sequel of the case, reported ante Vol. iv. p. 274, which had reference to the appellant using certain illegal engines in the exercise of his right of cruive fishing on the river Dee, and concluding to have him to regulate the fishing *conformably* to the rules of law established in all cruive fishings.

Feb. 18, 1802. The interlocutor of the Court of Session was appealed to the House of Lords, whereupon their Lordships pronounced this judgment:—"Ordered and adjudged that the said interlocutor of 13th Dec. 1799, complained of in the said appeal, be varied, by leaving out after the words 'are to be,' the words (so formed, constructed, and fixed, as to answer the purpose of a cruive fishing, and agreeable to the practice of those fishings in the north of Scotland, where the cruives have been):" And it was further ordered, "That the cause be remitted back to the Court of Session in Scotland, to review this part of the said interlocutor, for the purpose of giving, and to give precise directions to the parties, for regulating the form and construction of the cruive dikes and boxes, and the construction and position of the inscales, according to law."

When the case came back to the Court of Session on the above remit, the parties differed as to the import of it, and the Court's powers under it.

The appellant contended, that when the words directed to be left out by the judgment are left out, the decree would run thus:—"That the construction of the cruive dikes and boxes, and position of the inscales, are to be *regulated according to law*;" and the remit to the Court being to give "precise directions to the parties for regulating the form and construction of the cruive dikes and boxes; and the construction and position of the inscales *according to law*," the only power left to the Court was, what regulations on those matters had been established by law, or by general usage, and immemorial practice, as constituting the law; and, if there were any, to order them to be observed; but he maintained the Court had no power, under the remit, to make new and arbitrary regulations, as was craved by the respondents. The respondents, on their part, craved the Court to resume the consideration of the cause, and to give precise directions for regulating the form and construction of the cruive dike and boxes, and the con-

struction and position of the inscales, and insisting, in particular, that an open or sparred top to the cruive boxes was inconsistent with the fair exercise of cruive fishing, and contrary to the intendment and spirit of the statutes.

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This interlocutor was pronounced :—“ Having considered
 “ this petition, and remit thereon from the Court, judgment
 “ of the House of Lords, minute for the petitioners, and an-
 “ swers for the trustees of James Murray, Esq., to the peti-
 “ tion and minute, Finds, decerns, and declares, in terms of
 “ the said judgment of the House of Lords. And further,
 “ finds, that the cruive dyke shall be of the same height as
 “ it has formerly been, built of rough stones, in a compact
 “ and substantial manner, without loose or projecting stones :
 “ Finds, that the spars of the hecks shall be perpendicular,
 “ and shall not exceed the same dimensions as at present,
 “ being five inches of depth in the direction of the stream,
 “ and two inches and a half cross the stream ; that the
 “ lower edge shall be one inch thicker than the upper, and
 “ that they shall be rounded to a semicircle both at the
 “ upper edge and the lower : Finds, That the inscale or
 “ combs shall be so constructed as to answer the purposes of
 “ a cruive fishing, as formerly, and shall not be altered to the
 “ prejudice of the petitioners : Finds, That the new cruives
 “ shall be of the same length, breadth, and depth as former-
 “ ly, according to the plan in process, and shall be placed
 “ in the dyke in the same manner as formerly, and decerns.
 “ Appoints the parties to give in minutes, as to the pro-
 “ posed regulation, whether there shall be no openings or
 “ spars laid across on the top of the cruive box as formerly ;
 “ or that the same should be closely covered over with
 “ wood : And also, as to the regulation that there shall be no
 “ fishing from the 26th of August to the 11th of December,
 “ in every year, and that during that time the cruives must
 “ be entirely removed, and the channel of the river kept
 “ clear and open, without any stones or other materials
 “ being allowed to remain in the opening of the said cruives,
 “ and to put printed copies of the said minutes into the Lords’
 “ boxes, in order to report the same to the Court.” When

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the minutes were given in, the Lords found,—“ That the
 “ cruive boxes must be closely covered with wood at the
 “ top, and that the hecks and inscales must be removed
 “ in forbidden times ; and find it unnecessary to deter-
 “ mine upon the demand of the pursuers, for observance of
 “ the act of Parliament, respecting close time, and decern.”

On reclaiming petition, the Lords adhered.

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The decree, in the former stage of the case, as varied by the judgment of your Lordships, is, That the construction of the cruive dyke and boxes must be *regulated according to law*; and the cause was remitted to the Court of Session for the purpose of giving precise directions for regulating the form and construction of the cruive dyke and boxes *according to law*. The proper subject for the consideration of the Court, when the cause came back, therefore, was, What the law on the subject was? It is admitted by the respondents, that the form and construction of cruive dykes and boxes are not regulated by any statute, and no decision has been pointed out which can be considered as establishing the law on the point. While the appellant, on his part, confesses, that if any general uniform usage, respecting the form and construction of cruive dykes and boxes has prevailed for a long tract of time, it must be held as law, but they have not been able to learn that there has been any usage on the subject; and, therefore, maintains that the dyke, as ordered to be erected of rough stones, in a compact and substantial manner, without loose and projecting stones, necessarily implies that a dyke is to be formed of stones cemented with lime and mortar, which in no case has ever been heard of in such fishings. Again, in regard to the boxes, to have them close at the top, was to render his fishings useless in such places as the fishing in question. Besides, it has been the practice, from time immemorial, in the fishings in these parts, to have the boxes open at the top. But the Court, in a matter which could only be ascertained by inquiry and proof, have laid down regulations of their own, entirely injurious to the appellant's fishing.

Pleaded for the Respondents.—The Court, in ordering the dyke to be erected in the manner they did, and the cruive boxes to be open at the top, have complied with the remit from the House of Lords. All that is found is, that the dyke should be of the same height as formerly, built in a compact and substantial manner; that the inscales shall be constructed as formerly, and that the new cruive boxes shall be of the same dimensions as formerly. This is doing nothing more than enforcing the former usage, which the appellants, in other particulars, insist for themselves. The perpendicular position of the spars is essential to the fair exercise of cruive fishing, and is universally observed in all

cases, as well as the regulation of the covered top of the boxes.

After hearing counsel,

LORD CHANCELLOR ERSKINE said,

“ My Lords,

“ This action was originally brought before the Courts of Scotland against Mr. Murray of Broughton, the proprietor of Tongland, on the ground of exercising his right of fishing with unlawful engines, and in an illegal manner. (The conclusions of the summons read). The Court then pronounced the interlocutors. (Read.)

“ When first presented to this House by appeal, it appeared to a noble and learned Lord, who paid attention to the cause, that there was a defect in the interlocutor, because, instead of rules of law being the *ratio decidendi*, it had reference to the practice in the north of Scotland in regard to cruive fishing, and therefore that was corrected by this House. (Reads the judgment).

“ From that time, it was necessary for the Court to see that the fishing was regulated agreeably to law, and not to practice.

“ After the cause was remitted, the Court of Session pronounced another interlocutor. (Read.)

“ And upon appeal of that interlocutor, this difficulty was occasioned, Whether, by the alteration of the former interlocutor, the Court was to see the fishing regulated according to law, as we do not see from the words how regulations made could be a regulation according to law.

“ From the many statutes passed in Scotland, the great object was, notwithstanding the rights of individuals—the preservation of the fish,—and the cruives were to be regulated by certain specified rules, so as to prevent the breed of fish from being destroyed. Therefore, these statutes promoted this object, and laid down the mode of regulating the cruive fishing and cruives. It appeared, in looking at these statutes, that none of them comprehended cruive boxes covered at the top. Neither does there appear any judgment of Court as to this. No doubt, they have power of judging what was meant by the statutes, on a sound construction of them, and to consider whether all cruives, so covered, are legal or not.

“ It is said, that the Court of Session, in consequence, exercise a very extended jurisdiction. But when Courts are to pronounce judgments that regulate matters according to law, this must be either by statute, or by rules established by practice.

“ Nor am I clear that this is to be altered. It may appear to the Court that all such fishings ought to be regulated as a general rule of law ; or it may appear, that in this particular river a different practice was necessary, by the nature of the river itself, so that these

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cruive boxes ought to be constructed as the Court has here ordered.

“ But the difficulty here is, that the Court has not gone into any evidence to show that the particular fishing here was different from other fishings in Scotland; and, therefore, I affirm that this would amount to a declaration, that the direction of the House of Lords had said, that *all* cruive boxes so constructed, are to be closely covered at the top. This may be attended with consequences which we can form no opinion of.

“ It may be, when the case is remitted, that the Court may say, that all cruive boxes should be so constructed, and it afterwards turn out, that if this is pronounced as a general rule of law, other parties ought to be heard on that point. They did not give, on the former occasion, this specific direction.

“ But if the Court, on remit, say, that it need not be generally so held, but here in this river, unless the cruive boxes are so covered, they must be a nuisance to the superior heritors.

“ The Court, entering into that by evidence, not general but particular, may come to some conclusion, and then it may stand on law and evidence.

“ In all other respects, except closely covered boxes at the top, I think the judgment correct.

“ Your Lordships meant them to review the whole matter, to hear parties, and to state in their judgment what they find.

“ If founded on any general rule of law, then they might refuse to hear evidence; but, if meant not to found on any such general rule, then this will give room for parties to hear evidence.”

It was therefore

Ordered and adjudged that the cause be remitted to the Court of Session, to review the interlocutors complained of, as far as respects the direction that the cruive boxes be closely covered with wood at the top, and to hear the parties, and their evidence thereon, and to state in their judgment, whether they find, that the cruive boxes should be so covered as a general rule of law, applicable to all cruive fishings, or whether only as it respects the cruive fishing in question. And it is further ordered and adjudged that the said interlocutor, in all other respects, be affirmed.

For Appellants, *S. Percival, Wm. Alexander.*

For Respondents, *Wm. Adam, John Burnett, J. P. Grant.*

NOTE.—Unreported in the Court of Session.