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JOHNSTONE, &c. v. STOTTS, &c.

PETER JOHNSTONE, Esq., and Others, Trustees of JAMES MURRAY, Esq., of Broughton, deceased, and JOHN THOMSON, Writer in Kirkcudbright, and THOMAS BUSHBY, Collector of Customs there, Tacksmen of the Fishings of Tongland, in the River Dee, — *Appellants*;

WATSON and EBENEZER STOTT, Esquires of Kelton, and their Commissioners, — *Respondents*.

House of Lords, 18th Feb. 1802.

SALMON FISHING—CRUIVES—PRESCRIPTIVE POSSESSION.—(1.) Circumstances in which a new mode of fishing, by means of doachs, was construed to fall within the description of a cruive fishing, and subject to the rules and regulations of the statutes regulating that mode of fishing, and therefore, that certain blind eyes, and other artificial obstructions used, must be removed as illegal. (2.) That this right of cruive fishing was established, although the respondents had produced no title to the salmon fishing, but only a charter from the crown, conveying the lands *cum piscationibus*, followed by immemorial usage of such fishing. Affirmed in the House of Lords, excepting as to part of the interlocutor which was remitted.

This was a question regarding the mode of fishing salmon claimed by the appellants, as proprietor and lessees respectively of the lands of Tongland, on the river Dee.

The barony of Tongland, with the salmon fishings in the river Dee, had belonged anciently to the abbots of Tongland, and had, at the time of the Reformation, come into the possession of the Viscounts Kenmore.

It was alleged to be in evidence that, in the middle of the seventeenth century, these salmon fishings were carried on by what, in the language of the country, are called Doachs, which are certain engines contrived to suit the peculiar nature of the bed of the river. This was proved by an old valuation of the fishings in 1642; and a lease granted of them by Viscount Kenmore in 1688, whereby the Viscount became bound to make the doachs and carrachs sufficient against the tenant's entry, and to keep the doachs sufficient during the period of the lease.

Viscount Kenmore, in 1726, was attainted of high treason, after he had divested himself of his whole estate, by an absolute conveyance to Henry Bothwell of Glencorse. Upon this conveyance, Mr. Bothwell obtained a charter from the

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crown, comprehending the barony of Tongland, "with the "salmon fishings in the river Dee, and other rivers, *as used "and* WONT, and was infeft."

1731. 1735.

Henry Bothwell, in 1731, conveyed these estates to Mary, Viscountess Kenmore, who obtained charter from the crown, in which the fishings were thus described, "Cum piscatione "salmonum aliorumque piscium in aqua de Dee et alius flu-"viis solit et assuet." Upon this charter she was infeft, and the infeftment recorded, of these dates.

Oct. 8, and Dec. 1, 1735.

1744.

The subsequent conveyances were all in the same terms. By a minute of sale, dated 1744, Alexander Murray of Broughton acquired right to the Mains of Tongland, and to certain other lands, and to "all and whole the fishings of "Tongland and other fishings on the river Dee, *as used and "wont*;" and upon his death a regular disposition, in implement of the minute of sale, was granted to his son, the late James Murray, in whose right the appellants now stand, conveying this subject in the same form of words, upon which disposition Mr. Murray was infeft.

May 27, 1754.

The respondents were the proprietors of the lands of Kelton, with the salmon fishings belonging to these lands, also in the river Dee, about two miles further up the river; and they now objected to the mode of fishing practised by the appellants as being illegal. They alleged that, in place of cruive boxes constructed according to the regulations pointed out by the acts of parliament, the proprietors of the Tongland fishings employed a kind of machinery called doachs, somewhat resembling cruives, but differing in various respects from them, particularly in the distance and formation of the spars, and calculated for no other purpose than to prevent the salmon from getting up the river. Besides these, it was alleged they employed other devices to enhance the value of their fishings. They fished in forbidden time; and they disregarded the law which requires that all cruives should be kept open from Saturday to Wednesday (Saturday's slap); and they thought proper to obstruct the whole passages between the rocks, partly with barricades or machinery called *blind eyes*, and partly with stones and other materials, bound together with planks of wood, which they called foot-gangs. By these means the upper or higher heritors found their fishings, year after year, become less and less; which compelled the respondents to present a petition to the Sheriff, complaining of the illegality of the mode of fishing, and praying that the machinery be re-

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moved, and the appellants prohibited from fishing during forbidden time. This was followed by an action of declarator before the Court of Session, in which the respondents concluded, 1st, That it should be found, either that Mr. Murray had no right of cruives in the river, or, 2dly, That he is bound "to have the structure of the place or places "where the salmon are caught conform to the law of cruive "fishing, and observe what else is prescribed by law with "regard to salmon fishing."

In support of this action, the respondents produced this title, 1st, Special retour of William Earl of Nithsdale, as heir to his father: "In tota et integra salmonum piscatione super Aquam de Dee aliasque piscationes quascunque ab antiquo ad Castrum de Threaves spectan. quarum hæreditarii custodes ejusdem quovis tempore præterito in possessione fuerunt." 2d. Infeftment on the said retour. 3d. Deed of conveyance by the Earl to Robert Johnstone, in whose place the respondents now stand, dated 1703, of the salmon fishings on the river Dee, in the above words of the retour; and, 4th. A charter from the crown in favour of Johnstone, in which the salmon fishing is omitted, the grant being generally of the fishing in the river of Dee, and other fishings belonging to the Castle of Threaves.

June 16, 1696.

The appellants contended that this title did not confer a right of salmon fishing, and that this right could not be acquired by prescription, or from general words, such fishings being *inter regalia*, and to be acquired only by a subject under an express grant from the crown.

The Lord Ordinary allowed a proof to both parties, which was chiefly directed to the mode of fishing, and the machinery used therein, so as to establish whether they were of a legal or illegal nature; the appellants endeavouring, on their part, to prove that they had a right of doach fishing in the river, which was entirely different from a cruive fishing.

The Lord Ordinary reported the case, with the proof, to the Court; and the Court, of this date, pronounced this judgment:—"Sustain the title of the pursuers to insist in "this action; find that the defender, James Murray, Esq., "has right to a cruive fishing in the river Dee, at the places "marked in the plan, Meikle Doach, Priory Doach, and "Little Doach; but find that the cruives or doachs must be "regulated in terms of the laws regarding cruive fishings; "and that the blind eyes, and other artificial obstructions "or barricades, to interrupt the run of the fish in the river,

June 28, 1798.

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" within the bounds of the defenders' fishings, must be re-" moved as illegal; and remit to this week's Ordinary on " the Bills, to ascertain the particular regulations that " ought to be observed in the said cruives; and decern " against the defenders to observe the same accordingly; " finds the said James Murray, defender, liable in the full " expense of extract, but in no other expense, and de-" cern."

Against this interlocutor Mr. Murray petitioned, but the Court adhered.

Dec. 6, 1798.

The cause having been remitted to the Lord Ordinary, his Lordship allowed Mr. Murray to proceed in erecting his cruives and cruive dykes, according to the regulations " pro-" posed by the pursuers, in so far as they are agreed in the " minute on his part, which appears to him to admit every " thing that can be legally claimed by the pursuers."

A petition was presented to the Court, complaining of those articles which the Lord Ordinary had rejected as unnecessary and illegal, and praying that they should be adopted; and, in consequence, the Court remitted to Mr. Craigie to report. After visiting the fishings and reporting, the Court pronounced this interlocutor:—" The Lords having resumed con-" sideration of this petition, with the answers for Mr. Mur-" ray of Broughton and his trustees, and report of the She-" riff-depute of Dumfries, in consequence of the remit to " him from the Court, and advised the cause; find the de-" fender is bound to place the cruive boxes to which he has " been found entitled, at the places marked on the plan, " and known by the name of Meikle Doach, Priory Doach, " and Little Doach; and find it at present unnecessary to " determine whether the defender is at liberty to shift all " or any of these doachs, or cruive boxes, in case of any al-" teration on the state of the river; find that the rungs or " spars of the cruive boxes must be placed at a distance not " less than three inches, and must be made of an oval " shape, with the edges rounded off; find that the form " and construction of the cruive dykes and boxes, and the " construction and position of the inscales are to be so form-" ed, constructed, and fixed, as to answer the purposes of " the cruive fishery, and agreeable to the practice of those " fishings in the north of Scotland, where the cruives have " been regulated according to law; find that the spaces be-" tween the rocks, from which the blind eyes are to be re-" moved, are to be filled up with proper materials, formed

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"and constructed like other cruive dykes; find that the "Saturday's slap must be observed in all the cruives, according to law; and that the inscales during that time "must be taken up and removed; or where that cannot be "done, from the state of the river, that the same shall be "drawn back and properly fixed, so as to leave a free passage up the river for the salmon; find the pursuers and "their successors, having right to the salmon fishings in the "upper part of the river, are to have the liberty, upon previous notice, to view the cruives and cruive dyke, that they "may know if the regulations now established are properly "observed; supersede determining upon the demand of "the pursuers to annex a penalty to the breach of any of "these regulations; reserving to the parties to apply by "summary complaint to the Court, in case of any interruption to the rights and privileges to which they have respectively been found entitled; and decern and declare "accordingly." The appellants reclaimed by petition against part of this interlocutor; but the Court adhered.

Jan. 17, 1800.

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The respondents have not produced a title to a salmon fishing in the river, and, consequently, cannot carry on the present action. It is alleged by the respondents, that the proprietors of Kelton have been in the uniform practice of taking salmon in this river; and this practice, coupled with the clause in their charters *cum piscationibus*, would constitute a right of salmon fishings, but the grant to the respondents' predecessors is essentially defective in not mentioning *salmon* fishings; they allege that the word *salmonum* must have been omitted by accident in the charter to Johnstone, because it was in Lord Nithsdale's retour; but if such an allegation is to be listened to, it is much more reasonable to conclude that it was purposely omitted, the officers of the crown not being satisfied with the title; and if their right is rested on prescription, it must be limited by that belonging to the appellants at the time the course of prescription began to run. At that period the proprietors of Tongland were in the undisputed possession of a doach fishing in the inferior part of the stream, which having continued ever since, is not only secure from challenge, but, on the well known principle of law, *quod tantum prescriptum quantum possessum*, must have the effect of qualifying the right acquired by the respondents in consequence of the lapse of this pe-

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riod. 2. Supposing the respondents entitled to enter on the merits of the cause, the right and property of the appellants is one essentially different from that of a cruive fishing, and to which the provisions contained in the acts of the Scottish legislature relating to this subject do not apply. The jurisprudence of Scotland favours the law of prescription, and extends it to all rights which mankind enjoy; and hence every right which has been exercised without challenge for a certain period, is held to be sacred in all time coming. When a right of property is once established, it may be exercised in the most unlimited manner: and if uniform possession is made out, it must be permitted to continue, because more essential injury would arise from overturning what has been established, than from allowing the exercise of the right complained of. Nor is the plea maintained by the appellants foreclosed by the statutes applicable to salmon fishing. Of these, the principal object appears to have been, to subject those salmon fishings which were carried on by means of cruives and yairs, to certain regulations; with which view they provide, that all cruives set in water, where the sea ebbs and flows, be destroyed entirely, and that cruives in fresh water observe the Saturday's slap, and certain other regulations well known. All these acts most particularly mention the engine meant to be regulated, leaving those sorts of salmon fishing, not specially enumerated, to be governed by those rules, to which, either from their original constitution, or inveterate practice, they may have been made liable. It is not declared in any of the acts, that salmon fishings of a species separate and distinct from cruive fishing, and which some natural circumstance in the bed of the river where they exist may have rendered necessary, shall be put down, or at least shall be managed as the law requires in the case of cruives and yairs. The statutes therefore requiring the observance of the Saturday's slap, and the hecks to be of a particular wideness, apply to a cruive fishing only, and ought not to be extended to a fishing like that of Tongland, which is entirely different in its nature, has been sanctioned by uniform possession, and has yielded a certain revenue to the crown for upwards of a century past. The case of Mackenzie, decided in 1750, is direct in point to the present. On the principles which induced the Court, in that case, to find that the bulwark there in question could not be taken away, in respect of the defender's title, and the immemorial possession had in virtue thereof, the appellants submit that they

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have a right to preserve their fishings as they have been immemorially exercised. 3. The Court, assuming that this is a cruive fishing, subject to the statutory regulations, directed, by the interlocutor of 28th June 1798, that the blind eyes and other artificial obstructions and barricades interrupting the run of the fish, within the bounds of the appellants' fishings, must be removed as illegal; and again, by the interlocutor of 13th Dec. 1799, the Court finds that the spaces between the rocks from which blind eyes are to be removed, are to be filled up with proper materials, formed and constructed like other cruive dykes. The result of this is, that the appellants must remove the ancient barricades, and substitute another mode. The inference, one would suppose to be, that there is a known established form of cruive dykes; but the appellants know of none. A cruive dyke, they conceive to be something more than a wall or mound across a stream, which any person having right to a cruive fishing may erect in such form, and with such materials as he thinks proper, and in rebuilding or repairing, no person can find fault, if the new operations are not more injurious to the superior heritors, by preventing the run of the fish, than the old works were. It is undeniable, that the person entitled to make the barricade, can never be obliged to make it less effectual than before. Supposing, then, that the fishing in question is a cruive fishing, where is the law which prescribes the form in which the barricade, dyke, or mound must be constructed? Where is the statute saying that what are called blind eyes shall not form the barricade? It is clear that the blind eyes are more effectual to stop the fish than a dyke or wall, because the blind eyes admit a passage to the water downwards, without suffering the fish to go upwards, whereas a dyke or wall must, in floods, be overflowed, and the fish get over. The appellants have, for time immemorial, possessed this advantage, which is part now of their property as much as the fishing generally, unless there be some law ascertaining the form and materials of a cruive dyke across a river. And the appellants contend there are none such.

Pleaded for the Respondents.—1. The Court, in finding that the appellants must alter their former mode of fishing, and regulate their doachs or cruives agreeably to the laws regarding cruive fishings, have done no more than given effect to an established principle, both of the common and statute law of Scotland, that all obstructions in the channel

of a river (other than what are expressly recognised by the law, as in the case of cruives), are illegal, and must be removed. 2. No length of possession or alleged immemorial usage, can sanction the breach of a public law, or be set up as a title to found prescription. In this view, the appellants cannot be allowed to avail themselves of any antecedent usage, to the effect of claiming the exercise of the same illegal mode of fishing in time coming. 3. The appellants, however, have not shown that the works at Tongland have been all along the same as at commencement of the process. On the contrary, the respondents have shown from the evidence, that considerable alterations have of late years been made upon them. That the works at Tongland, as originally complained of, were illegal obstructions in the channel, cannot admit of dispute. The plans, measurements and description of the works given by the witnesses, demonstrate this in the clearest manner, as well as show the great prejudice and damage thereby occasioned to the respondents' fishing. The appellants have little reason to complain of the judgment of the Court allowing them the exercise of a cruive fishing, when it is considered that they have no express grant of cruives by their charters; and that any possession held by them seems to have been of a different kind from that of cruives; indeed, contrary to the established law. The interlocutor of 28th June 1798, is therefore right, declaring that their fishings must be regulated in terms of the laws respecting cruive fishing; and the subsequent interlocutors, fixing the particular regulations that are to be observed by the appellants, ought therefore to be affirmed.

After hearing counsel,

Lord Chancellor Eldon said,—

"My Lords,

"Your Lordships will recollect that this cause was heard at the bar before the recess. It is an appeal against three interlocutors of the Court of Session, in an action brought by the respondents, the general prayer of which was, to have certain fishings regulated conformably to the rules of law for cruive fishing, and that the appellants should be enjoined to observe, what was otherwise prescribed by law, in regard to salmon fishings.

"The first interlocutor, 28th June 1798, is in these words, 'Sustain the title of the pursuers to insist in the action,' &c. Against this interlocutor, a petition was presented, and afterwards, by the indulgence of the Court, a full additional petition; and, in the course of further proceedings, it became necessary to settle before the Lord

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Ordinary the regulations of the cruive fishing, to which the appellants had been found entitled. I shall not take up your time by a description of this mode of fishing, as it was fully explained at the bar, which must be in your Lordships' recollection.

"After some further proceedings, the Court at last, on the 13th December 1799, pronounced an interlocutor to the following effect: 'The Court having resumed consideration of this petition,' &c. (The interlocutor was here read at length.) Your Lordships see, that by this interlocutor, it is stated that no alteration having taken place in the state of the river, the Court had found it unnecessary to determine, whether it would be prejudicial to the appellants, in the event of the *locus in quo* the fishings were situated changing, by the shifting of the course of the river, if they were not entitled to shift the cruive boxes from the three places mentioned; and, that they had superseded determining as to the penalty, on the breach of any of the regulations which they had, by this interlocutor, directed to be observed; because, as I suppose, this related to what is termed the *nobile officium* of the Court, a species of its function little known or understood in this country.

"One branch of this interlocutor was submitted by the appellants to review, namely, in so far as it found that the inscales must be removed during the Saturday's slap, or, if that could not be done, that they should be drawn back and properly fixed:—And their petition against this interlocutor being refused without answers, they brought the cause here by appeal.

"The pleadings were opened on their part, by Mr. Solicitor-General, who, in a very distinct and luminous manner, stated both the facts and the law of the case. It did not escape me, that he felt a difficulty in reconciling his ideas, as an English lawyer, to the mode in which this case had been treated by the Court; a difficulty that has often occurred to myself on similar occasions. I allude to the large discretion used by the Court of Session in regulating salmon fishings. I do not rest upon this observation, as one upon which it would be fit to ask your Lordships to do anything when deciding a question on appeal from Scotland; it appears to form part of the law of that country, and is sanctioned by the mode of administering it, which has been of long standing, and by length of time adopted. I need not remind your Lordships that, in considering such matters, we sit here as a Scotch Court—a Court of Session.

"The first objection offered by the appellants was, that the pursuers had not a sufficient title on which to maintain the action; but they hardly attempted to argue this, and distinctly abondoned it.

"Secondly, They contended, that this was not a cruive fishing, and therefore not subject to the laws for regulating cruives;—but, upon this, they did not lay much stress. Indeed, I am not sure if this can strictly be said to be a cruive fishing; and I think it may be deemed, upon an examination of the facts in the case, that the Court has given a more liberal interpretation to the right of fishing than what

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was originally enjoyed. It originally appears to have been a species of cruive fishing between rock and rock; and I see great reason to doubt if the rest of the space was at first quite filled up. The Court seems to have considered this to be a cruive fishing, where the cruive dyke was partly formed by nature, and where not so formed, that the parties had a right to complete it in a legal manner. But I am not at present to submit to your Lordships any proposition for bringing into doubt, whether this be a cruive fishing or not.

" The next question is, Whether the Court has, in this particular case, applied such regulations as are to be given to cruives in general? On the consideration I have given to the subject, I have felt my mind much enlightened by communication with a noble and learned Lord, long and deeply skilled in questions of this sort.—And, on the best consideration which I have been able to give it, it appears to me that the regulations, in all the cases where they are complained of by the appellants, are either such as are justified by the precedents of former adjudged cases, or lenient in themselves towards the complainants.

Lord Thurlow.

" The first objection to the regulations was, that the rungs or spars of the cruives, which had been properly directed to be three inches asunder, and in a perpendicular direction, had been also ordered to be of an *oval shape*, with the edges rounded off;—and it was contended that the Court had no authority to add this part of the regulation, which was not contained in the Scotch statute. It will be recollected that the reason originally given by the Scotch Parliament for directing the spars to be of a certain distance asunder, was, that fish of a certain size might pass through,—that the fry of all fishes might escape. It will not be denied, that if the Court are authorized to do what they have done, their regulation will tend greatly to facilitate the passage and escape of the fry. It is no doubt true, that if the spars were of a cubical shape, the fish would have more difficulty in passing than if they were an oval one;—if the spars were jagging, they would soon tire of their attempt to pass through them.

" An English lawyer would think himself entitled to contend with pertinacity, that if the spars were of the due statutory distance, it was not competent to regulate their form. But the Court has thought itself at liberty to follow up the spirit of the law, by the regulation in this case. This is indeed a proceeding which is unknown to the lawyers in this country; and it is no small comfort to me, that I am tied down in cases, where I have to decide elsewhere, to the strict letter of the law. That a greater latitude is allowed to the Courts in Scotland, cannot be denied. A precedent in point for this, was produced by Mr. Adams at the bar, where it had been directed by the Court, and affirmed by this House, that the cruive boxes should be placed in a certain position, and without *knobs* on the inscales. In that case, the object of the regulation was the same as in the present; and it therefore appears to me, (in which opinion the noble and learned Lord already alluded to, concurs with me,) that this part of the interlocutor is well founded.

Halkerston v. Scott of Brotherton, July 4, 1768. Mor. 14293.

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"The next branch of the interlocutor complained of is, where it finds that the cruive dykes and boxes are to be so formed, constructed, and fixed, as to answer the purposes of a cruive fishery, and agreeable to the practice of these fishings in the north of Scotland, where the cruives have been regulated according to law. It is here that my only difficulty with regard to the interlocutors in the present case lies; and I doubt much if it does not contain a dangerous degree of looseness. Your Lordships will see, that it does not give the suitor the rule with sufficient distinctness, according to which he is to form his cruive boxes or dykes, but refers him to the practice in other cases. The question left undecided is, What regulations does the law attach to this particular point? I have great doubt, if this reference to the practice in the north of Scotland can be held to define this. It may be asked, what particular fishings in the north of Scotland are here alluded to; and, can regulations similar to those ordered in any former decided case, be adopted here?

"The fishing here differs considerably from any ordinary case of cruive fishing. In general, the dyke is an artificial bulwark, stretching quite across the river from side to side, in which the cruive boxes are placed; but here there is no such continued building, but a chain of obstructions, partly connected by rocks and by artificial erections, *sparsim*, and at intervals. It may be impossible, therefore, to make this like any dyke in the north of Scotland, if there be no fishing there of a species distinctly similar.

"It still remains a difficulty in my mind, in what form to state an alteration in this part of the interlocutor. It occurred at first, in a communication with the noble person I have alluded to, that it might be done by leaving out part of it, and merely directing that the cruive dykes and boxes should be regulated *according to law*. But doubts were entertained, whether cruive fishings have been so regulated, as would apply to this particular case? Another course occurred, that this matter should be sent back to Court, with a direction to state what particular regulations were here alluded to. A third mode has occurred, since I had communication with the noble Lord on this subject, which is the reason that I shall request that the consideration of this point be put off for a short space; and it occurs to me, that this may be the way of getting rid of the difficulty most respectful to the Court of Session;—to send the parties back upon this point, with a direction to the Court to enquire what are the most wholesome regulations to be applied in the present case.

"The interlocutor then proceeds, with a direction that the blind eyes are to be removed, and filled up with proper materials, formed and constructed like other cruive dykes. It appears to me that this part of the judgment is in favour of the appellants. It is impossible not to see, from the evidence in this cause, that, in the recollection of witnesses, great alterations had been made on the state of the obstructions from time to time. If the appellants do not choose to submit to what is here ordered, they must do away those alterations stated

by the witnesses to have taken place, leaving in some parts an unobstructed passage, at least only obstructed by the rocks. The Court, in this branch of the interlocutor, has proceeded upon the idea that the appellants were entitled to a cruive fishing in those places where they had used cruives immemorially, (I use this word in the sense it is taken in Scotland, not as we apply it in this country,) and that, of consequence, where there is a doach, there ought to be a cruive dyke.

" The next part of the interlocutor relates to the Saturday's slap, with regard to which no possible complaint can be made. The law of Scotland admits of more departure from the letter of its statutes than we have any idea of in this country. We have seen, that the courts of that country superadded provisions to their statutes; and they also do not scruple to enforce their statutes at times, as gently as the statutes admit of being interpreted.

" We see here too, that a Scotch statute may be lost by *desuetude*, as it is termed;—that the ancient statutory regulation of a mid stream in all cruive dykes is entirely gone, and no longer remaining part of the law. The English lawyer feels himself much at a loss here; he cannot conceive at what period of time a statute can be held as commencing to grow into desuetude, nor when it can be held to be totally worn out. All he can do is, to submit to what great authorities have declared the law of Scotland to be.

" In cruive fishings, however, nothing is more clear than that the Saturday's slap is to be observed. The appellants, therefore, on this part of the interlocutor, must take their choice, either to observe this regulation, as it is laid down in the statute, or to take this modification of it; either to take out the inscales altogether, or keep them fixed back, as the Court has here directed. This is a modification which the courts of this country could not grant. The appellants allege, that it is difficult and dangerous at times to do this. To which I answer, they must then observe the slap according to law. You will observe that the Court has reserved a liberty to apply to it in case of any interruption to the rights of the parties, as contained in the interlocutors. If there be at any time an impossibility to observe the directions there given, the Court may excuse on that account. Or if, on the other hand, a vexatious use be made of the indulgence here granted to the appellants, it may then become the duty of the Court to consider if the strict letter of the law should not be enforced, and the *bona fide* observance of the Saturday's slap not disappointed, by the use of those easements.

" Upon the whole, though I do not feel myself prepared, or at liberty to submit any distinct proposition to your Lordships on the point, relative to which I have stated my only difficulty lay, I trust your Lordships will excuse me for having gone thus at large into the points of the cause, which I have done to set the minds of parties at ease, as much as lies in me, upon the great points in the cause.

I do not feel it to be my duty to offer any proposition, for an alteration of any other part of the decree, than that which I have already stated to be in my opinion too loosely framed for the ends of effectual justice between the parties."

On his Lordship's motion, the further consideration of the cause was adjourned till Wednesday next.

On that day his Lordship came, prepared with, and moved the following judgment:

Ordered and adjudged that the interlocutor of the 13th Dec. 1799, complained of in the appeal, be varied, by leaving out after the words (are to be), the words (so formed, constructed, and fixed, as to answer the purposes of cruive fishery, and agreeable to the practice of these fishings in the north of Scotland, where the cruives have been.) And it is 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 dykes and boxes, and the construction and position of the inscales according to law. And it is further ordered and adjudged, that with the above variation to the said interlocutor, the several interlocutors be, and the same are hereby affirmed.

For the Appellants, *J. B. Maitland*, *Wm. Erskine.*

For the Respondents, *Wm. Grant*, *Wm. Adam*, *J. Burnett.*

NOTE.—This case is not reported in the Court of Session.

CHARLES STEWART, Writer to the Signet, *Appellant;*
ANDREW MILLER, Depute Clerk to the Bills, *Respondent.*

House of Lords, 25th Feb. 1802.

SALE OF AN OFFICE—PACTUM ILLICITUM.—Circumstances in which a party was appointed a Depute Clerk of the Bills, by an agreement which amounted to a sale of an office. The party was to pay £2700, one half in cash, the other by a right to two-fifths of the fees. Thereafter new fees were appointed to be exacted, increasing materially the returns of the office. Held by the Court of Session, that the agreement was good as to the old fees, but not as to the additional or new fees. The party acquiesced in this judgment, but his opponent took the case, as to the new fees, to the