

1804.

DUKE OF
QUEENSBERRY
v.
M'MURDO.

prejudicial to the fishings of the respondents, by diminishing the number of fish which would otherwise frequent them, and this not only by exhausting the fish in the river, but by impeding the passage up the river of those fish which the appellants do not catch. 3. And the respondents having a sufficient title and interest to insist in this action, without the concurrence of any public prosecutor, they are entitled to interdict to stop these illegal fishings.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *C. Hope, Samuel Romilly, Math. Ross, M. Nolan, David Monypenny.*
For Respondents, *Wm. Adam, Wm. Alexander, John Clerk.*

NOTE.—For some account of what passed in the House of Lords, in disposing of this case, vide another case of the same kind, between the same parties. *Infra.*

DUKE OF QUEENSBERRY, *Appellant;*
JOHN M'MURDO, Esq., late Chamberlain to }
the said Duke, *Respondent.*

(Et e contra.)

House of Lords, 14th May 1804.

RECOMPENSE—QUANTUM MERUIT—CHAMBERLAIN AND FACTOR.—

This was a question about the remuneration to the respondent, as the Duke's chamberlain and factor. A third party, in name of the Duke, proposed the appointment to the respondent, with a salary of £200, verbally. The reply was, that the estates were so extensive as to raise a fear that it could not be done on so small a salary, as the expense and trouble would be great. But he stated he would make a trial. A factory was drawn out in his favour, without specifying the amount of salary. At the end of the first year, he wrote the Duke's agent, with his account of outlay and expense,—amount £165, leaving the amount of salary blank. He continued to do so for eleven years, always leaving the amount of his salary blank. In mutual actions brought against each other, the Court of Session found him entitled to £550 per annum for salary and other expenses. In the House of Lords this sum was restricted to £450 per annum.

The Duke of Queensberry, previously to the respondent being engaged as factor over his estates in Dumfriesshire,

1804.

DUKE OF
QUEENSBERRY
v.
M'MURDO.

had them superintended by five several factors or managers, to whom he gave in all £900 per annum, the rental derivable from these estates being £8000 per annum.

Wishing to economize the management of these estates, while staying at the family seat of Drumlanrig, he spoke to his then guest, Sir Alexander Crauford, to make a proposal to the respondent, then engaged on the estate at a salary of £80, to undertake the entire management, as factor or chamberlain, at a yearly salary of £200. The estate stretched in length 60 miles, and in breadth, between 20 to 30 miles; and therefore he thought that it was too extensive, and would prove too laborious to be executed by any one person; but he agreed to make the attempt. Accordingly, when Sir Alexander Crauford made the proposal to the respondent verbally, he stated these fears and doubts, in such a manner as to convey the idea that it might be attended with such trouble and expense as that £200 would not adequately cover. By the appellant, however, it was alleged that this proposal was gone into by the respondent, and accepted of absolutely. The respondent, however, insisted that, had it not been for the death of Sir Alexander Crauford, he would have clearly established by his oath the nature of the agreement to be, that while Sir Alexander made the proposal of the office at a salary of £200 per annum, the respondent's answer was expressive of his opinion and fear that one factor was quite unable, looking to the extent of the estate, to manage the estates—that he could, therefore, form no proper idea of the extent either of the trouble or expense attending such an undertaking, and, consequently, could not judge what was the proper and fair and reasonable allowance for remuneration. But added, if upon trial he should be satisfied that he was able to discharge the trust reposed in him to the advantage of his employer, he would be happy to continue at what recompense the Duke might think suitable.

Nov. 15, 1779. A factory was executed in his favour, without specifying the salary he was to receive, and he entered on the duties of his office in spring 1780.

On rendering his accounts for the first year, he found that very near the whole £200 had been exhausted in necessary expense in managing the estate, and accordingly wrote the Duke's agent, sending in his year's accounts, and leaving in these his own salary blank, to be filled up, with the following account of expenses:

My clerk's salary for the year	£30	0	0	1804.
Board and washing for do.	20	0	0	—————
Absolutely necessary to have four saddled horses constantly in my stables for myself and clerk in transacting the business of the estates, £12. 10s. each.	Hay and oats,	50	0	DUKE OF QUEENSBERRY v. M'MURDO.
Travelling expenses self and clerk, for this year,	47	15	0	
Servant attending horses, wages and board,	18	0	0	
	—————			
	£165			15 0

Along with this account he wrote as follows:—"From this state, and in which I have not exceeded in one article, you will observe that the balance remaining from £200 is only £34. 5s.—and, subtracting from that, the expense of *entertaining people who are frequently coming here on his Grace's business*, with the expense of purchasing horses, and loss on them, I do assure you the whole sum is at least exhausted. I am far from asking any unreasonable allowance for my trouble in this business, which, you must be persuaded, is very considerable; but I shall most cheerfully submit the matter to his Grace, and shall esteem it as a particular favour if you will represent it in the manner you may think it most proper."

Mr. Tait, the Duke's agent, in his answer to this letter, wrote:—"I notice that the article for your salary stands blank in the account, and your reason for it; and I observe also the extra expense your office of chamberlain costs you; I believe the calculation you make is a very just one, and am fully satisfied that the salary formerly proposed is no way adequate to the trouble and expenses of the office; this I shall mention to his Grace, with what further occurs to me on that subject; and, at same time, I can with truth tell him, and I shall do it, that your attention to, and ability in executing the duties of your office, is above all exception, insomuch that I consider the estate to be as well managed, and his Grace's interests as closely attended to now, as when there were five factors on the estate;—I am particularly called on to mention this to his Grace, because I advised him against employing only one chamberlain, and repeatedly told, which was then my honest opinion, that no one man was capable of executing the office of sole chamberlain; but I now see that I have been mistaken; and, so long as your health continues, I have no doubt the management, under one chamberlain, will be more regular than under many."

1804.

DUKE OF
QUEENSBERRY
v.
M'MURDO.

He continued to render the accounts yearly, with his salary left blank, in same manner. Mr. Tait wrote the Duke on the subject, and transmitted to him the above letter of the respondent. His Grace was therefore made aware of the above letter, and of this rendering of accounts with the salary left blank; but having free rent of a house, and taxes and coal, as well as other privileges enjoyed through a farm, which he held in. set from the Duke, he took no notice further than to retain in his hands each year a sum that might be deemed adequate to his salary. Eleven years thereafter the Duke desired his agent, Mr. Tait, to have these blanks closed and settled. In the interval, other duties had been devolved upon him at the desire of the Duke. This was the political agency of the burghs of Dumfries, Kirkcudbright, Annan, &c. which jointly sent a member to Parliament, and which, consequently, devolved upon him additional trouble and expense. This request having been made to Mr. Tait, and communicated to him that the Duke had fixed to allow him £350 per annum of salary, although £200 was the sum agreed on by Sir Alexander Crauford. In answer, 6th June 1794, the respondent wrote, declining this as an adequate allowance, and offering, 1st, To take £400 per annum; or, 2d, If his Grace shall renew "his lease of my farm, with a salary of £350." In a subsequent letter to Mr. Tait, 30th September 1794, the respondent intimates his willingness to take £350 per annum, as salary, in future, "provided I have no further connection "with politics."

Thus the correspondence dropped, whereupon the Duke raised action against him for the money which he had retained to meet his salary. And the respondent, on his part, raised action for £243, as annual charges incidental to doing duty of factor, £300 as an annual allowance for trouble, £100 for annual charge of extra expense in political business, in all £643 per annum, as well as £3000 for the respondent's trouble in managing the political business for the last fifteen years.

The appellant contended that there was a concluded bargain, at the rate of £200 per annum, in full of trouble and expense.

Nov. 21, 1801. Upon report of the Lord Justice Clerk, the Lords pronounced this interlocutor: "Find no evidence of there having been any finished bargain between the parties; find "Mr. M'Murdo, the defender in the original action, entitled "to an allowance of £550 Sterling yearly, during the con-

“tinuance of his factory, in full of his claims, and remit to the Lord Ordinary to proceed accordingly; find the pursuer liable to the defender in the expense of process, and appoint an account thereof to be given into Court.”

1804.

DUKE OF
QUEENSBERRY
v.
M'MURDO.

Against this interlocutor the Duke appealed to the House of Lords, and the respondent, on his part, brought a cross appeal, contending that the sum allowed him by the Court was inadequate.

Pleaded for the Appellant.—There is sufficient evidence that the office was granted by the appellant, and undertaken by the respondent, upon an agreement or understanding that £200 per annum was to be allowed for trouble and charges attending the execution of the office. Even in his letter to Mr. Tait, he refers to a *salary*, which shows that he was not employed on an allowance left *indefinite* and unfixed. He says the *allowance* of £200 is *exhausted*, which shows not only that a salary of £200 had been mentioned, but that he had not then *rejected* it, as now alleged. If it had really been understood between Sir Alexander Crauford and him, that he undertook the charge as upon trial, and was to have an allowance calculated according to the value of his supposed services, or what the appellant might think so; or if the respondent himself had so understood the footing he was upon, it seems impossible that he could have written on these terms, or mentioned the £200 as the *allowance*. By that letter, he admits that he had no legal demand beyond the £200, though he conceived that sum too little, and hoped the appellant would make an addition to it, “cheerfully submitting the matter to his Grace.” There was therefore a concluded bargain on the subject, which forecloses him from claiming more than the £200 per annum of salary. And it is no answer to this to say, that his annual accounts, from the very commencement, leave the amount of yearly salary blank; and that the commission and factory appointing him factor, does not fix him down to any amount of salary, and does not name the £200 as his salary; because, 1st, as to the accounts, the appellant was not bound to take any notice of them in this form; and, 2d, as to the deed of factory, it is not a common practice to insert the amount of salary in such writings. Taking, therefore, the whole facts and circumstances as they stand, or as the respondent states them, the demand as for a *quantum meruit* cannot be supported. But, 2d. Supposing the respondent entitled to receive as much as his labour deserved, the sum allowed by the Court of £550 a year is exorbitant. There

1804.

DUKE OF
QUEENSBERRY
v.
M' MURDO.

are three facts established, and admitted in the cause, which satisfactorily show this, 1st. That the salaries of all the five factors employed by the Duke, before the respondent was employed, amounted to no more than £370. 2d. The respondent was willing to accept of £400 a year in full of all demands. 3d. That since the year 1795, when the respondent was dismissed, the duties have been performed by two factors, whose salaries together amount only to £230. The respondent, besides, has produced no evidence of the amount of the expense he had been put to in discharging the duties of his office, which he said amounted to £243, or of the necessity he was under of incurring such expense. Nor of the sum of £100 charged for entertaining people. Nor was any evidence called for on the part of the Court, or opinions of persons conversant with such matters taken, in order to ascertain a proper allowance for the respondent's trouble.

Pleaded for the Respondent.—There was never at any period a binding mutual agreement between the appellant and the respondent, whereby the latter should do the whole duties of the office of factor for £200 per annum, in full of every demand. The whole circumstances show the reverse. His letter to Mr. Tait, the Duke's agent, of 5th June, sent him at the end of the first year. His annual accounts demonstrate that there was no such agreement. And his letter of 30th September 1794, on which the appellant founds, was made under conditions of being continued in the Duke's employment, and that his leases should be renewed to him, which offers not being accepted of, cannot now prevent the respondent from claiming an allowance for his reasonable expenses, and a just recompense for his labour and trouble in the appellant's affairs. These claims he now prefers are, looking to the extent of the estates and the magnitude of the duties, both just and reasonable. He derived no other emolument whatever from his employment; and therefore these claims ought to have been allowed by the Court to their full extent; and he therefore trusts that, on considering the case, your Lordships shall declare that the sum to which the Court below has restricted his claims is not adequate indemnification for the expenses he necessarily incurred, the services he performed, and the duties he discharged.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be varied,

by leaving out the word (five) and instead thereof inserting the word (four). And it is further ordered and adjudged, that *that* part of the said interlocutor by which the pursuer is found liable to the defender in the expense of process be, and the same is hereby reversed. And it is farther ordered that the cause be remitted back to the Court of Session in Scotland to proceed accordingly.

1804.

 GRIEVE
 v.
 CUNYNGHAME,
 &c.

For the Appellant, *C. Hope, T. Erskine, V. Gibbs, J. Montgomery.*

For the Respondent, *S. Percival, Wm. Adam, Charles Hay.*

Unreported in the Court of Session.

(Mor. p. 15298.)

WILLIAM GRIEVE,	- . -	<i>Appellant ;</i>
LIEUTENANT COLONEL FRANCIS CUNYNGHAME	}	<i>Respondents.</i>
of Dunduff, and JAMES GRAY, Writer, Edinburgh, his Commissioner,		

House of Lords, 19th June 1804.

LEASE—CONSTRUCTION OF WORD “HEIRS.”—A lease was granted for thirty-eight years to the tenant *and his heirs*, secluding *assignees* and sub-tenants; and if the tenant was alive at the expiry thereof, for his lifetime, or for the lifetime “of the *heir* or *heirs* “of the said William Grieve.” In consequence of the tenant’s eldest son having chosen a different mode of life, the tenant, before his death, left a nomination of heirs in favour of his second son, disposing the lease to him. The landlord, after the tenant’s death, objected to this, stating that the word “heirs” in the lease, meant only the heir at law, and not heirs by destination. In the Court of Session, the tenant was decerned to remove. In the House of Lords the case was remitted, with considerable doubt expressed as to the judgment below.

The respondent’s predecessor in the estate of Dunduff set to the father of the appellant, “William Grieve, *and his heirs*, secluding assignees and subtenants without the heritors consent, and that for the whole time and space of thirty-eight years, and the lifetime of the said William Grieve, if then alive, or of the *heir* or *heirs* of the said William Grieve who shall, at the end of the said thirty-