law to be as it has been laid down by this Court and by the House of Lords. The question is, When did the *bona fides* cease? This is settled, by the Roman law, from the time of *lis contestata*: and it is a rational rule; for every man is presumed to understand the law. And when a case is once fairly stated, the defender, if he fails in the end, is presumed to be sensible that his cause is bad. Our practice, it is true, goes not so far; but I think that *bona fides* must cease from the date of the interlocutor of the Ordinary. In the case of *Pitrichie*, *bona fides* was found interrupted by the first interlocutor of the Lords: but that does not impinge upon my principle; for that interlocutor, from the form of proceeding, happened to be the first interlocutor in the cause.

PITFOUR. I cannot adopt the maxim of civil law, that every man is presumed to know the law. We see the opinions of Ordinaries to be often doubtful, or corrected by the Court; and even the opinion of the Court to be corrected on a rehearing. Were the rule of the civil law to be adopted, a citation, or even a demand, would interrupt *bona fides*.

PRESIDENT. The question as to the ceasing of *bona fides* has ever been, and will be, arbitrary. So far seems clear, that, when a question occurs as to a point of law, the party is entitled to take the opinion of the whole Court. The question as to *bona fides* is in itself arbitrary;—it may cease from citation. In *Pitcaples'* case, it was found not to cease until the judgment of the House of Peers.

On the 21st June, "the Lords found the defender accountable from the first term after the first interlocutor of the whole Lords," adhering to the interlocutor of Lord Justice-Clerk.

Act. G. Ferguson, R. M'Queen. *Alt.* A. Wight.

1769. *June 27.* THOMAS CARNEGIE of Craigo, and OTHERS, *against* JAMES SCOTT of Brotherton.

SALMON FISHING.

Construction of Cruives and Cruive Dyke.

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

BARJARG. If the channel is so rough with loose stones, as represented, it would be hard to require the cruives to be sunk lower down: we ought to take the medium as to loose stones. As to taking out the inscales, it is of no consequence: they may be put in from above, even in speats. So there is nothing impracticable in what the pursuers propose: but, if they are fairly fixed back, the consequence will be the same. Number of cruives is of great moment: it should be kept up as from time immemorial, *for a solid dyke* was never meant

to be given to the defender. As to shoeing and causewaying, this seems irregular: the causewaying within the keystones may be necessary.

Monboddo. As to the dyke, if necessary to form a judgment, I should find it difficult: but there is law and fact sufficient for a determination, without the aid of the surveyor. I do not think that one having right to fish, may, at common law, destroy the fish as he pleases. If so, he might build a bulwark so as to prevent fish from ascending at all, and thus every right granted to a superior heritor would be elusory. A grant of fishing, by the particular mode of cruives, will not alter the matter. This is illustrated from the statutes respecting cruives: cruives are no favourites of the law. The breadth of the dyke seems greater than formerly, but the height less. There is no law empowering the Court to regulate the breadth of the cruive dyke. That depends upon the nature of the river. *Cruive in the channel.*—This was considered fully in 1746, and so determined without division of the Court. I cannot strike a medium between the settling above the channel, and settling above the dyke: the one is as illegal as the other. If there are any stones in the way, they may be removed, or a causeway may be made within the cruive. *Shoeing and causewaying.*—This is a material point. The stream which was contracted at issuing from the cruive is thereby expanded over the whole breadth of the river. If the causeway be removed, the stream from the causeway will continue running. *Inscales.*—It is said that it is impracticable to remove them in a flood: this would be a good excuse when a flood happens, but they may be removed whenever the water is moderately high. As to the number of the cruives—no law obliges the defender to occupy seven instead of three.

Auchinleck. Every man, having a right to fish, may fish in every legal method. The defender has a clear right both to cruive and coble. When the law did not regulate the cruives, the defender used them. When the law did, he deserted them, and resorted to his coble-fishing. If, in cruives legally constructed, fish of 16 lb. weight got up the river, it proves that the legislature meant to allow such fish to escape. I consider the cruive-fishing as now kept up solely for the benefit of the coble-fishing. He has in effect made a brae cross the river. Braes are unlawful, as was found in the case of *Sir Robert Gordon's* fishings upon the Spey, being against the spirit of the law and the public good. The pursuer has diminished the number of his cruives. I also think the hecks of the inscales should be perpendicular. [It appeared that horizontal hecks are generally used in inscales, and there was no conclusion to the contrary.] Every thing is contrived to prevent fish from getting into the cruives. The law requires that the cruives and the dykes be of one thickness; but the defender has carried out a dyke beyond them, which he calls shoeing and causewaying. Hence, when there were sixteen inches of water in the cruives, one could walk almost dryshod below: it follows that no salmon can get up. It is said this is necessary for preserving the dam-dyke. I do not see that, providing the dam-dyke be low enough founded. Besides, if there were any danger from pooling, the causeway might be laid below the channel of the water. As to the number of cruives, I think it ought to be the same as formerly.

Pitfour. As to height and breadth of the dykes: If new frauds are

devised for eluding the law, the Court may interpose and prevent the frauds; but I do not think that the defender has so transgressed as that the interposition of the Court ought to be interposed. As to the causeways, it is hard to hinder the defender from securing the foundation of his dyke. No one can have right to the holes: the causewaying, however, must not be higher than the channel of the river. The uselessness of the cruives proceeds more from the circumstance of the law being enforced, than from the use of the causeways. As to inscales, the under nob is abandoned. I do not see what harm the upper one can do. To take the inscales out, on occasion of every Saturday's slop, is required by a former interlocutor of the Court; but that regulation has been found difficult, if not impracticable. It may be supplied by an equivalent. As to the channel of the river,—the judgment 1746 is not a decision in the cause, because reversed of consent; but still it is a precedent of this Court, and a good one. As to the number of the cruives,—had it been limited to one or two, there might have been a complaint, for you cannot make the whole dyke a blind dyke, except one ell. But I do not see any thing emulous here.

GARDENSTON. It is not yet clear whether unregulated cruives are hurtful or not to the general fishing. We act under the authority of a statute, and we cannot take cognizance of any thing beyond the statute, though we may explain and enforce it. As long as the defender was permitted to use irregular cruives in consequence of a paction, there was no wrong on his part. Now that the cruives are regulated, he may use the coble-fishing in the most advantageous manner. As to height and breadth, the law has made no regulations, and those things must vary according to the nature of the river. *Causeway*—in so far as it obstructs the fishing, in so far it is an evasion of the statute. For the same reason the cruives must be put in the channel of the river; but I do not see why the owner of the cruives may not fortify his dyke. *Inscales*,—of the opinion already delivered. *Number of cruives*,—I doubt as to our power, for the law is silent. Immemorial usage is out of the question; for, in other particulars, that has been set aside. How can we destroy immemorial usage on the one side, and yet support it on the other.

ALEMORE. We are to consider how far the defender may be restricted. He may run the dam-dyke as he pleases. Natural impediments in the river will prevent an excess as to this. He must manage his cruives according to law, and as a man attentive to his own interest would do. The operations made by causewaying are in defraud of the law. The debate *inscales* is a debate about nothing. If they are set aside, it is the same thing as if they were taken away. I cannot suppose that the defender will not *bona fide* obey the injunctions of the Court. As to number of cruives—if they are honestly placed, there is no matter whether three or seven. In the one there will be the most tempting streams, in the other the most passages.

PRESIDENT. As to the dyke—there is no occasion to examine the point of law, for, in fact, no damage is done by it. The inscales may be regulated without being taken out. As to causeway,—a man having a right cannot use it emulously. If the causewaying is not an improvement of the cruive-fishing, he cannot support it upon his right to cruives. As to the number of cruives,—

if a man, *bona fide*, finds it for his interest to shut up some cruives, much might be said; but, if he does this *mala fide*, I would bring him back to the immemorial number which I will presume to have been in the original grant. The more opens there are in the dyke there will be less danger from floods; so that that argument is but a pretence.

KAIMES. The privilege of a cruive is beyond the common rights of mankind, and therefore must be exercised as it was given. He who has this privilege may give it up if he will; but, if he use it, he must use it according to his right. The defender then must show that the diminishing the number of the cruives is for the advantage of the cruive-fishing.

ELLIOCK. The defender cannot convert his cruive into a dyke or brae. If he thinks that his cruive-fishing is not worth his labour, he must throw down his cruive-dyke. I do not think that he uses the three cruives *bona fide*.

JUSTICE-CLERK. A cruive-dyke cannot be kept up without a cruive-fishing. If I could separate the evidence so as to see that the fishing was not diminished by taking away so many of the cruives, I would make a distinction; but this I cannot do, and therefore I am for removing every alteration which has been made to the detriment of the superior heritors.

KENNET. It is difficult to say whether three cruives or seven would be most for the benefit of the superior heritors.

(*Vide infra*, 16th November 1769.)

1769. *June* 28. GEORGE DUFF of Milntown *against* ALEXANDER BRODIE of Windiehills.

PART AND PERTINENT.

Kirk-seat carried by a Disposition of Lands.

[*Faculty Collection, IV.* p. 853; *Dictionary*, 9644.]

PRESIDENT. It was determined, in the case of *Kinghorn*, that the burgh has a right to a share of the church, and the heritors to another.

AUCHINLECK. Brodie had a right to a seat, as Laird of Milton, not as burgess of Elgin.

On the 28th June 1769, "the Lords found the pursuer entitled to the seat as part and pertinent of his lands."

Act. A. Duff. *Alt.* J. Douglas. *Rep.* Barjarg.