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did not consider it so, unless you could say that the Court only ordered those repairs arising from total decay by lapse of time. You cannot consider the proceedings of 1790 to have been conclusive, for, looking at the items of the repair ordered, it is clear that some of them are those which a minister in a free manse would have been bound to execute himself.

" The proceeding in 1798 is an additional judgment in favour of Dr. Scott to the previous interlocutor.

" I do not rely on the case of Botriphnie, but it goes to say, that in this case the manse has not been declared free ; and also to say, that after the lapse of many years, heritors may again become liable to some repairs, even though the manse should have been declared free. But I rely on the words of the act, and on the proceedings in 1796, as explaining the understanding of parties in 1790.

" As to the matter of costs—here there is no general doctrine in question. If the case had involved the interest of all the heritors in Scotland we should have had to lament that all the heritors were on one side, and all the clergy on the other, but with different means of supporting the expense of the suit. But if your Lordships think as I do, that the proceeding in 1796 is an additional judicial proceeding in favour of the respondent, and consider that the judgment of the Court of Session, in this case, is unanimous, though you may not blame the heritors, you will not think it unreasonable that they should pay for their experiment. I therefore move that the judgment of the Court of Session be affirmed, with £150 costs."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed, with £150 to the respondent for his costs.

For the Appellants.—*Henry Brougham, J. H. Mackenzie, John Jardine.*

For the Respondent.—*Sir Samuel Romilly, John Connell.*

LIEUTENANT-COLONEL HERCULES SCOTT of Brotherton, and JAMES SCOTT, Writer to the Signet, Proprietor of the Mills of Morphy, situated on the river Northesk, } *Appellants;*

THOMAS GILLIES of Balmakenan, DAVID LYAL of Galry, DAVID CARNEGIE of Craigo, JOHN TAYLOR of Kirkton Hill, and the Representatives of Patrick Cruikshank of Stracathro, . . . } *Respondents.*

House of Lords, 20th July 1813.

DAM DYKE—INJURY TO FISHINGS.—The proprietors of certain mills had, in process of time, altered their check dyke so as to prove

injurious to the salmon fishing of the superior heritors: Circumstances in which it was held, that this dyke must be rebuilt and restored to its original state, at the expense of the proprietors of these mills. Affirmed in the House of Lords.

This is the sequel of the appeal reported at p. 337, vol. iv., in which the House of Lords pronounced a judgment, containing special findings in regard to the dam dyke complained of, as injurious to the respondents' fishings, and remitted back the cause to the Court of Session.

The respondents having presented a petition to the Court to apply the judgment of the House of Lords, this petition was remitted to the Lord Ordinary (Lord Woodhouselee). The Lord Ordinary pronounced an interlocutor, applying the judgment of the House of Lords. It also found, "And "before answer, ordains the pursuers (respondents) to give "in a condescendence of what they require the defenders "(appellants) to do, in compliance with the above judgments, "and of the grounds on which they insist for the defenders "so doing the same, and that against next calling."

A condescendence having been given in, the Lord Ordinary pronounced the following interlocutor:—"Having con- Nov. 12, 1803.
"sidered the condescendence and answers, and resumed "consideration of the whole process, finds that the judgment "of the House of Lords establishes three different proposi-"tions, 1st. That the pursuers are entitled to have as free "access of salmon to their fisheries as can be had, consis-"tently with the necessary supply of water from the river "to the mills belonging to the defenders. 2d. That the "present structure of the check dyke built by the defen-"ders is such, that while there is no cruive dyke below it, "as formerly, which created a restagnation, the salmon can-"not easily pass beyond the said check dyke; and thus the "pursuers have not as free access of salmon to their fisheries "as they had formerly, while, at the same time, the mills "belonging to the defenders had a sufficient supply of water. "3d. That unless the cruive dyke is replaced in its ancient "form, and the former mode of fishing under the statutory "regulations therewith restored, the structure of the check "dyke must be so altered, and other operations so made, as "that both the above objects, viz. the free access of salmon "to the superior fishings, and the sufficient supply of water "to the defenders' mills, may be obtained. The Lord Ordi-"nary, in conformity with the import and meaning of the "above judgment, finds, that unless the defenders shall re-

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"build the cruive dyke in the same situation as formerly, "and according to its ancient construction, and exercise the "cruive fishing under all legal limitations, it is incumbent on "them to rebuild the check dyke, making its construction so "close as to prevent percolation, and likewise to leave an open- "ing in terms of and under the qualifications contained in the "act 1696, of its allowing sufficient water to the defenders' "mills; and having considered the plans and report of the sur- "veyors in process, and particularly the plan exhibited by Cap- "tain George Taylor, and delineated on the engraved survey in "process, signed by Colin Innes, before answer remits to "to examine the present state of the check "dyke and mill leads of Morphie and Kinnaber, and to re- "port his opinion, whether the plan proposed by the said "George Taylor is fitted to fulfil the purposes which he "has stated in the conclusion of his signed additional report, "and which appears to answer the ends pointed out in the "judgment of the House of Lords, which the said Mr. "is hereby directed to have under his view; or if Mr. "shall be of opinion that the said plan proposed "by Captain Taylor is not sufficient to answer the requsite "ends, he is hereby authorized and required to make out a "plan and report relative hereto, which shall, to the best of "his judgment, fulfil the foresaid purposes, at the least pos- "sible expense, and this *quam primum.*"

The respondents represented against this interlocutor, praying for an alteration or explanation in so far as regards the rebuilding of the check dyke, in the event of the cruive dyke being replaced. The Lord Ordinary pronounced this

Dec. 6, 1803.

interlocutor:—"Being satisfied that the alteration suggest- "ed by the respondents is necessary towards the more ef- "fectual carrying into execution the object of the interlocutor "of the 12th November 1803; and to the complete fulfilment "of the judgment of the House of Lords, which it was the pur- "pose of the Lord Ordinary by that interlocutor to give effect "to, in such a manner as to bar evasion or frustration of the "ends thereby meant to be accomplished, therefore, alters "the said interlocutor, in the first part of the said decerni- "ture, in the following manner, viz. "Finds that, unless the "defenders shall rebuild the cruive dyke and check dyke "in the same situation as formerly, according to their an- "cient construction and dimensions, in such a manner as to "occasion the same restagnation as formerly, and exercise "the cruive fishings under all the legal limitations, it is in-

"cumbent, &c., and adheres to the said interlocutor *quoad* "*ultra*."

At this stage Mr. Scott of Brotherton died, and the action was transferred against his heir, Lieut.-Col. Scott, who petitioned against the above interlocutor, but the Lord Ordinary adhered. On reclaiming petition to the Court, the Court pronounced this interlocutor:—"The Lords appoint the petition- Dec. 14, 1804.
"er within ten days to state in a minute, whether or not he
"intends to restore the cruive dyke below the check dam, as
"it stood before the year 1772; appoint this petition to be
"answered, the answers to be in the boxes before the 20th
"current."

The minute ordered by the above interlocutor was given in and answered; whereupon the Court pronounced an interlocutor, which led to further discussion, and after other interlocutors the Court pronounced this interlocutor:—"The Lords Mar. 5, 1807.
"having resumed consideration of this cause, and advised
"the same, with the mutual memorials for the parties, and
"whole proceedings and productions, approve of the report
"made up and given in by Thomas Telford, engineer, of
"date 15th October 1805, and find that the dam dyke in
"question must be of new constructed, in conformity there-
"to, by and at the expense of the defender Lieutenant
"Colonel Hercules Scott, and be thereafter maintained and
"supported by him, and decern, reserving to him any claim
"competent against the other mill owners, but supersede ex-
"tract till the second box day; and, with regard to the claim
"of damages at the pursuers' instance, remit the same to the
"Lord Ordinary to hear parties procurators thereon, and
"to proceed and determine therein as he shall see cause:
"Find that the memorial for the pursuers contains expres-
"sions highly injurious, derogatory to the established cha-
"racter of Mr. Charles Abercromby, engineer, respecting the
"report made and deposition emitted by him; and remit to
"the Lord Ordinary to cause the said injurious expressions
"to be expunged from the record."

Another reclaiming petition was given in, and the Court further pronounced this interlocutor:—"The Lords having Jan. 26, 1808.
"resumed consideration of this petition, with the answers,
"they refuse the prayer thereof, and adhere to the inter-
"locutor reclaimed against, with this explanation, that the
"dam dyke recommended by the report of Mr. Telford
"must be constructed and maintained by Colonel Hercules
"Scott, so long as he does not reconstruct and maintain the
"former cruive dam, in such manner as to prevent percola-

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" tion through the dam dyke, and, without prejudice to in-
" sist and determine in the other points of the cause, allow
" this decreet of declarator to go out, and be extracted by
" the pursuers in the meantime, and that at the expense of
" the defender, and decern."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—1. The change of circumstances which has laid the foundation of the present action, at the instance of the respondents, was not brought about by any act, deed, or accidental event, for the consequences of which the appellants, or their predecessors, were responsible to the respondents. It is indisputable, in point of fact, that the appellant, Mr. Scott, is the proprietor of ancient and valuable mills, which are supplied with water from the river Northesk; and that, for the purpose of securing this supply, a dyke or weir was erected by his predecessors, to which, by original grants, as well as by prescription, *longissimi temporis*, he has acquired an unchallenged right. Within the memory of man, this dyke has undergone no species of alteration; certainly no alteration which any person could have challenged as an innovation on the state of the servitude; and, in the former state of the river, from the earliest tradition down to the year 1773, this dyke was not obnoxious to legal challenge of any sort. At that period, an accidental change took place in the state of the river, in consequence of the cruive dyke being swept away by the floods. It is certain that there was then no addition made to the height, or change on the structure of the check-dyke, as it had been for ages before; but there was a change produced on the level of the river, and in its consequent relation to the height of the dyke. For this alteration, can it be alleged that the appellants were in any way responsible? It was, in effect, brought about *vi majori*, by a power beyond human control. Tracing the matter back to its remoter causes, it may be said to have been occasioned by the superior heritors themselves, who insisted that certain alterations should be made upon the construction of a cruive dyke situated below, which were completely incompatible with its stability. That the appellant's predecessors happened to be the proprietors of this cruive dyke, as well as of the check dyke, situated above, is a circumstance from which no legal inference of obligation or liability can be deduced. The cruive-dyke might have been the separate property of another individual; and it would be a palpable fallacy to

suffer the accidental union of two such properties to enter into the consideration of the case. In the original cause of the evil complained of, there is, therefore, no circumstance or quality out of which can be drawn any plea of responsibility against the appellants. The attempts which the respondents have made to trace the evils of which they now complain, to recent alterations in the dam or check dyke, are totally unfounded and unsupported by proof. It is the height of the dyke of which the respondents complain; and there is no evidence to show that its height is now greater than it has been for time out of mind. On the contrary, if any difference in that respect can be remarked in its present state, it is now rather lower than it formerly was. 2. The alterations on the present state of the appellants' property, alleged to be necessary for the accommodation of the respondents, as proprietors of the superior fishings, although they might be such as the appellants were bound to submit to, are not such as they are bound to execute at their own expense, and to maintain at their own risk. By the judgment of the House of Lords, in the former appeal, it was declared, "That so long as the defenders think " fit to maintain the said check-dam, without a cruive-dam " below, so constructed as to prevent such percolation, the " check-dam ought, as far as circumstances will admit, to be " so constructed that the water must flow over, instead of " percolating the same, and they must leave a slap in the " said dam in terms of the act 1696, if the same can be done " without prejudice to the said mills." This declaratory finding in law, that it is a quality inherent in such easement, that it must be enjoyed and exercised so as not to prejudice other rights on the same river, emulously, negligently, or otherwise, more than is necessary to the fair enjoyment of such easement. By this judgment, therefore, it was hypothetically determined, that, for the accommodation of the superior heritors, the appellants must submit to certain alterations in the present state of their property, provided the circumstances of that property would admit of such alteration, and that the same could be done without prejudice to the appellants. These two hypotheses the Court of Session have been since employed in investigating; and by their interlocutors they have determined, in the *first* place, that the physical circumstances of the property admit of the construction of a dam, which, by preventing percolation, shall force the water to flow over it; and, 2ndly, that, in a dam so constructed, a slap may be made sufficient

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for the access of salmon, which shall be without prejudice to the said mills. According to the reports of the engineers, these objects can only be attained by constructing a dyke according to Mr. Abercrombie's plan, which would cost £5000 or £2000; or, according to the reports of Messrs. Telford and Jessop, £700. According to either plan, the alteration is undoubtedly practicable. But the questions remain, at whose expense are these innovations on the present state of the property to be accomplished? And if the respondents themselves be not preferably liable to the expense and hazard of such operations, are they not of a kind and magnitude which render them legally impracticable, and to which, therefore, the appellants are not bound to submit? These are questions which were not determined by the judgment in the former appeal; and the appellants submit that they are questions which must be determined in their favour. They are not liable in the expense of the proposed alterations, either on the ground that the check dyke has been rendered more prejudicial by any recent operations of theirs upon it, or that the present defect of that dyke was the result of their previous operations upon the cruive dyke.

Pleaded for the Respondents.—It is proved by the reports of the engineers, and the evidence adduced in the Court below, that a check dyke may be so constructed that the water may flow over, instead of percolating the same; that it may be constructed at a moderate expense, and that it will be more permanent and equally serviceable with the present check dyke. 2d. It is proved by the same evidence, that a slap may be left in the dyke to be so constructed, in terms of the act 1696, which will give the salmon free access up the river without prejudice to the mills of Kinnaber or Morphie. 3d. The expense of erecting, and risk of maintaining this dyke, must be upon the appellants, because it is a quality inherent in their right, that it must be exercised so as not to prejudice the rights of the respondents more than is necessary to its fair enjoyment, as appears from the statute 1696, cap. 33, and the judgment of the House of Lords, already pronounced in this cause. By that same judgment it was established that the present dyke has, since the year 1772, been altered greatly to the prejudice of the fishings of the respondents; and also by the terms of the judgment, it is optional to the appellants either to reconstruct the cruive dyke, or to alter the form and structure of the present check dyke, so as not to injure the rights of the respondents.

After hearing counsel,

LORD CHANCELLOR ELDON said,

" My Lords,

" This appeal arises out of a former judgment of your Lordships, pronounced in 1802.

" The appellant, Colonel Scott, is the proprietor of certain salmon fishings in the river North Esk. He is also the proprietor of a mill situated on one side of this river; on the other side of the river is a mill belonging to a family of the name of Fullerton of Kinnaber; and to these mills there is a mutual dam dyke.

" The appellant's family appear to have had various disputes with the superior heritors, on the subject of their respective rights of salmon fishing. In 1773, in consequence, as is stated, of openings made in the cruive dyke belonging to the appellant's family, in terms of a former judgment of your Lordships, *that* cruive dyke was destroyed. The consequence of this was, that the mill dam, by the water not being pent back as before, stood so high out of the water that the salmon could not pass up the river.

" The upper heritors complained of this, but the Court of Session having decided against them, the matter was brought here by appeal. On the 23d of May 1802, your Lordships pronounced this judgment (Here his Lordship read the same at large). The matter having returned to the Court of Session, there has been a good deal of litigation in that Court; and at length the Lord Ordinary pronounced the first interlocutor appealed from, on 12th Nov. 1803. (Here his Lordship read the same.)

" This interlocutor, as well as the judgment of the House of Lords, applied both to the Scotts and Fullertons as defenders. They were mutual proprietors of the check dyke; and Mr. Scott was the sole proprietor of the cruive dyke. Then another interlocutor of the 6th of December 1803, was pronounced, which also had respect to both.

" On these, various other interlocutors were founded; and the great question between the parties at last came to be, Whether the things to be done would destroy the mill dam or not?

" Mr. Fullerton, the original party, having died, his daughter, Mrs. Fullerton Carnegie, was made a party; but she also died before the action was ended, and it was not revived against her representatives.

" It appeared that the defender, Mr. Scott, had originally undertaken to free Mr. Fullerton from all the costs of the cause, but he had not gone further. It was stated, as matter of objection to the proceedings in the Court below, that Mrs. Fullerton Carnegie's representatives ought to have been made parties, but the Court thought otherwise.

" In a case of this kind, it does not appear that more could be done by the Court than was done in this case. They referred the matter to the consideration of persons of skill, and though there was a difference of opinion among the surveyors, they considered that the greatest weight was due to the opinion of Mr. Telford. In my own view

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the Court did right as to this, and their judgment is correct accordingly.

"I should therefore move an affirmance of the interlocutors, but for this one difficulty, that, when the ultimate judgment was pronounced, Mrs. Carnegie's heirs were not before the Court.

"Mr. Scott is not only subjected by the judgment to all the expenses to be incurred, but he is directed to do certain acts upon the mill dam, which he could not be justified in doing, unless the Kinnaber family had been parties to the judgment. If, by these operations, the mills should be stopped, I conceive that, as matters stand, Mr. Scott might be liable in damages.

"There is, I think, no other objection to the judgment but this. The Court has imposed upon Scott the burden of the expense of making the necessary alterations on the dam-dyke, reserving to him any claim competent against the other mill owners. I think the Court acted properly as to this, because the injury to be redressed arose from his not maintaining his cruive dyke. I therefore move judgment as below."

(The judgment, after remitting to consider whether Mrs. Carnegie Fullerton's representatives ought to be made parties to the cause, proceeded thus): "And, subject to such directions, it is ordered and adjudged that the interlocutors be, and the same are hereby affirmed. And it is further ordered that the cause be generally remitted back to the said Court of Session, to proceed accordingly."

For the Appellants.— *Wm. Adam, Tho. Thomson.*
For the Respondents.—*Sir Samuel Romilly, John Clerk.*

(Mor. App. Tailzie, No. 15; Dow, Vol. ii.)

WILLIAM DUKE OF QUEENSBERRY'S Trustees and Executors, ... } *Appellants;*
The Right Hon. FRANCIS CHARTERIS, EARL OF WEMYSS AND MARCH, . } *Respondent.*

House of Lords, 10th and 17th Dec. 1813.

TAILZIE—LONG LEASE—ALIENATION.—In the Neidpath entail, there were clauses prohibiting the heirs of entail to "sell, alienate, wad-"set, and dispone any of the said lands,"—but allowing tacks to be made of the lands during the lifetime of the heir, "the same "always being set without evident diminution of the rental." The late Duke of Queensberry granted a lease of Wakefield for ninety-seven years, at a rent of £86. 15s. 2d., receiving at same time from the tenant a grassum of £318. The question was,