and came to the unanimous opinion that the evidence did not establish that the offer of the 14th August constituted the title upon which possession followed, and therefore the title common to the proprietor and to the tenant; but that the evidence led to this—that you could not say whether the possession followed exactly either upon the title of the 14th of August or upon the title of the 12th of September. The result was, that the Court were clearly of opinion that the Duke of Hamilton had not made out his case founded upon the offer of September, and, under the circumstances, that they could not dispose of the case upon the footing of giving the right to the Duke of Hamilton or to the defender. That difficulty—as both my noble and learned friend Lord Blackburn and my noble and learned friend now on the woolsack have explained to your Lordships—has occurred under almost similar circumstances in England, and the same solution was adopted then which is proposed to be adopted in the present case.

The only further point raised was that there was a case of personal bar to be raised against the Duke of Hamilton through his advisers. The Duke of Hamilton personally was not mixed up with the transaction; but it was said that his advisers to some extent laid themselves open to the plea of personal bar. That depends a good deal upon the good faith of the parties. I think it was acquiesced in by all the learned Judges in the Court below that both parties were acting in perfect good faith, but that they were under a mistake, and therefore that there could be no other solution of the difficulty except that adopted in England—namely, to find that there was no bargain, because there was not a *consensus ad idem placitum*. The only Judge, I think, whose judgment was relied on, or prominently relied on, by the appellant was Lord Deas, who very naturally expressed some difficulty in deciding against the tenant, but at the same time quite concurred in the result arrived at in the Court below. His Lordship says—"I come therefore to the conclusion that there was a misunderstanding for which both parties are equally responsible." That, I think, brings the case to its proper solution, that there is a misunderstanding for which both parties are equally responsible. "We cannot therefore adjust a lease without mistaking what was intended." Accordingly, the course your Lordships propose now to take is, to say that there is no agreement out of which you can frame a lease for the parties, who had been acting under a misunderstanding and not agreeing with one another. I quite concur in that.

The four interlocutors of 1877 complained of affirmed, and the appeal dismissed with costs, so far as those costs have not been increased by the cross-appeal. The cross-appeal dismissed without costs.

Counsel for Appellant (Defender)—Pearson, Q.C.—Lorimer. Agents—Martin & Leslie—H. & A. Inglis, W.S.

Counsel for Respondent (Pursuer)—Benjamin, Q.C.—Mackintosh. Agents—Connel, Hope, & Spens—Tods, Murray, & Jamieson, W.S.

Monday, April 15.

SINCLAIR *v.* FLETCHER'S TRUSTEES AND OTHERS.

(*Ante*, vol. xiv. p. 662).

Teinds—Interim Locality—Relief—Prescription.

Held (*rev.* judgment of the Court of Session), in a claim by an overpaying heritor under an interim locality against the representatives of a heritor who had been exempted from all payment under the interim locality, and who had ceased to be a heritor in the parish more than forty years before the claim for repetition was made, that the negative prescription applied and extinguished the ground of the claim.

The circumstances of this case are fully reported of date July 18, 1877, 14 Scot. Law Rep. 662, 4 R.

The second and third parties appealed to the House of Lords.

In moving the judgment of the House—

LORD CHANCELLOR—My Lords, in this case I propose to state very shortly the grounds for the motion which I am about to propose to your Lordships, for I have had the advantage of being made aware of the opinions which some of your Lordships entertain and are about to express upon the case, and with those opinions I entirely concur.

My Lords, the question arises in this case with regard to lands which are called the lands of Wester Monkrigg, in the parish of Haddington. Those lands belonged between the years 1808 and 1825 to one General Fletcher or to his trustees, and the first set of appellants on the record represent him or them. The same lands from 1825 to 1833 belonged to Mr Andrew Fletcher of Saltoun, and he is the third appellant, and the person who is called the third party on the record. In 1833 Mr Fletcher conveyed the lands to a Captain Keith, and since that time—that is to say, for more than forty years—Mr Fletcher has had nothing whatever to say to the lands. Between 1808 and 1833 there was an interim locality for the augmentation of the stipend of the minister of the parish, and the common agent allocated in the course of this interim locality no part of the augmentation upon the lands of Wester Monkrigg. He and everyone else believed that those lands were exempt from the obligation of contributing to the stipend of the minister. That is now known to be wrong, and consequently the respondent Sir John Sinclair or his predecessor paid more in respect of his lands in the parish (the lands of Stevenson) than he ought to have paid, and the case raises the simple question as to the right of Sir John Sinclair to recover against the appellants in respect of the lands of Wester Monkrigg the excess—or a portion of the excess—which Sir John Sinclair has thus been obliged to pay.

Now, my Lords, of course from the short facts which I have stated it follows that the year when the lands of Wester Monkrigg were sold—the year 1833—was the last occasion in respect of which any right to be recouped for the overpayment fell or accrued to Sir John Sinclair in respect of the lands of Stevenson, and *prima facie*,

unless some reason can be shown to the contrary, it is apparent that more than forty years having elapsed, what is called the long period of prescription would bar any right to recoupment which had accrued in that year. But it is said that this period of prescription does not apply in the case of an interim locality for the payment of a minister's stipend—and for this reason. It is contended that so long as the process of augmentation continues, and is not consummated or terminated by what is called a final locality, so long there is a species of *lis* or litigation proceeding, and that there is what has been termed a judicial contract, which I suppose means an implied contract in the course of judicial proceedings among all the heritors of the parish, that when the time arrives that the final locality is made there will be an adjustment among them all as to what really ought to have been the scale of payment between them from the beginning, and that anything which any person may have paid in excess, or which any person may have underpaid during that time, will be set right.

My Lords, for that proposition one authority certainly going to that extent has been referred to, and is the foundation of the decision of the Court below, the case, namely, of *Weatherstone* v. *The Marquis of Tweeddale*, and in the observations which I am about to make I will assume, although it is not necessary now to decide it, that the principle of the decision in that case is correct and well founded. My Lords, it does not appear to me to apply to the case which is now before your Lordships. It may well be that if there are a number of heritors in a parish going on through a long course of years pending a final locality, each of them making payments which may be termed payments *de bene esse* as it were, those persons all understand and are all to be treated upon the footing that at the time of the final locality underpayments and overpayments will be set right. The common agent who conducts the locality may be looked upon as the agent of all those persons, and no final right may be taken as accruing to one as against the other. But what your Lordships have to deal with here is the case of a person who went out of the parish, and left the parish altogether more than forty years ago. You may assume that at the time when he left the parish he was a person who had underpaid—in this case he had paid nothing at all—and that there might have been a right to make him contribute in that respect the payment which he ought to have made; but, as I said, he left the parish—he disappeared—he became from that moment a stranger to the proceedings, and from that time he was no party to the litigation, if there was a litigation; from that time the common agent ceased to represent him. Therefore I am at a loss to see upon what principle it is that the period of forty years having elapsed, the period after which there is a presumption of the abandonment of every claim having run, there is to be an exception grafted upon that prescription that a person who, as I have said, has become a stranger to the litigation, is after the period of forty years to be held liable. My Lords, he had no power over the litigation—he had no means of expediting it. If that argument is right, it might have gone on for the convenience of the heritors of the parish for a hundred years, and his liability at the end of a hundred years would have been the same. Unless some positive law, or unless some long course of decision were to be produced requiring such a result to be arrived at, I think your Lordships could not upon principle arrive at any such result.

My Lords, I am bound to say that I think this view of the case does not appear to have been considered sufficiently or at all in the Court below. It appears to me to be quite fatal to the claim which is made by the respondents; and therefore I submit to your Lordships that the interlocutor of the Court below should be reversed, and that the two questions put in the Special Case should be replied to by the Court in a manner which would be the reverse of that in which the Court of Session has now replied to them. And, my Lords, I am bound to say that I think this is one of the cases in which the appellants should have not only their expenses in the Court below, but also their expenses of this appeal.

Lord Hatherley—My Lords, after the full discussion which took place of this case at your Lordships' bar, and having also had the advantage, which has been referred to by my noble and learned friend who has preceded me, of seeing the opinions which some of your Lordships are prepared to offer to the House, I shall occupy but a very short time indeed with the observations which I have to make.

My Lords, the case is certainly one of a very singular character, and of very considerable importance to those who may have held lands subject to teind in respect of which, long after they ceased to hold those lands, a claim of serious amount might be made. It appears that in some cases rather old demands, including interest as well as principal, have been made, and consequently claims of very considerable amount may be made upon such persons after they have been disconnected with the property in question for a period of more than forty years.

My Lords, as far as I can understand the exact course of procedure in Scotland with regard to this question of augmentation and locality of teinds, it seems that the Court of Teinds (the jurisdiction of which is now transferred to the Court of Session sitting as the Court of Teinds) had a jurisdiction—and I believe the exclusive jurisdiction—for settling the augmentation and the locality—that is to say, settling what was the proper increase to be made to a minister's stipend, and settling by what is called a locality a scheme for the apportionment of the augmentation of the stipend so made upon all the heritors of the different lands in the parish unless those lands were exempt from contributing to teinds. It has been stated in the course of the argument that although the Court of Teinds settled the locality and settled the accounts between the parties they had no power to order the payment. The payment as between the proprietors took place in this way. The minister was not to be delayed by any questions as between the several proprietors, that is to say, the parishioners. The minister had a power of requiring payment to be made, if he thought fit, wholly by one parishioner, or by two or three parishioners as the case might be, and they had to pay the money which would be adequate to the raising of the stipend, but upon such payment being made by them they had a right to

repetition of any sum they might be found to have paid in excess of their proper share when the final locality came to be made. The consequence of this was that as soon as a stipend had been augmented localities were arranged for the time being, which had an interim character until all the rights were determined by what is called the final decreet of locality. This appears to have taken place on several occasions in the case we have now before us under appeal. The course of procedure with reference to the arranging of that locality seems to have been this—An agent was appointed for all the different proprietors who took an active part in settling the locality according to the decreet.

My Lords, I just mention these facts to show how very important it is that we should consider what is the position of the parties in respect of two out of the three localities which are founded upon in the present case. At the beginning of the last century—in the year 1710—there was an interlocutor of a Lord Ordinary of that day, Lord Fountainhall. I see that the Lord President is not quite willing that it should be called an interlocutor; he says he considers it as being more in the nature of a report to the Teind Court at that time than an actual interlocutor; but whatever it may be, there was a conclusion come to by Lord Fountainhall at that time—now more than 160 years ago—in which he found that the lands as to which the teinds are in question in the present suit—the lands of Wester Monkrigg, in the parish of Haddington—were exempt from the payment of teind. That does not appear to have been disputed or quarrelled with until a time far advanced in the present century—so late as the year 1840—when the House of Lords finally determined that that was an erroneous conclusion. In the long period which had elapsed in the meantime between these two dates these circumstances took place. In 1797 there was a process of augmentation, and an interim decreet of locality was prepared in respect of that augmentation in the year 1800. In the year 1807 there was another augmentation, and also a limited locality made up for that in—I think it is stated in the proceedings—the year 1846. At those two periods the two parties who are now the appellants, and who are called the second and third parties in the Special Case presented to the Court in Scotland under an Act for that purpose, namely, General Fletcher's trustees and Mr Andrew Fletcher, were, one or other of them, undoubtedly in possession of the property. The former of them, General Fletcher's trustees, acquired possession in the year 1808, but before any final locality had been made in respect either of the 1797 augmentation or of the 1807 augmentation. General Fletcher's trustees were in possession from 1808 till 1825, when they made over to Mr Andrew Fletcher, pursuant to their trust, the property in question, and in 1833 Mr Fletcher sold that property.

Now, my Lords, the present appellants were beyond all question not represented in any way, nor were they parties in any way whatever to the two first localities which took place upon the augmentations of 1797 and 1807. There is no evidence whatever of their having been served or dealt with in those proceedings, and one very readily understands how that happened, because the interlocutor or report of Lord Fountainhall had been so long acquiesced in that probably it was considered by everybody that they had no part, share, or interest in the localities and no liability to teinds, and accordingly nothing was done in their presence in regard to the first two augmentations. But with regard to the augmentation which took place in 1825, Mr Fletcher, the gentleman who is called the third party in the Special Case which was laid before the Judges for their consideration, seems to have been summoned by a process consequent upon an Act of Sederunt of 1809, by which service, made in a certain fashion at church-doors, was to be deemed good service. That service was made upon Mr Fletcher, and he joined in the election of the common agent.

In that state of matters I cannot conceive how it could possibly have been held in the Court below that as regards the first two proceedings, to which those who were in possession of the estate were no parties whatsoever, any claim could be maintained. Those who were interested as General Fletcher's trustees were no parties whatever to the locality, and I cannot conceive how it can be said that they were to be fixed with the consequences of that locality. Mr Andrew Fletcher is in a different position. I will see presently what his position is.

Mr Andrew Fletcher having had the property made over to him in 1825, sold it in 1833, and from that time to the present he has had nothing whatever to do with the property—that is to say, up to the time of the filing of the Special Case, in which unfortunately he found himself involved. This Special Case seems to have been presented within the last year or two. I say "seems," because I cannot find anywhere the date of the presentation of the Special Case; it is not affixed to the Special Case itself, but the decision of the Court below was given in October 1877, and I think we were told in the course of the argument that the Special Case certainly was not presented earlier than 1875, a period of more than forty years from 1833, when Mr Andrew Fletcher ceased to have anything to do with the property.

My Lords, so things went on under interim localities, coming to no final locality in respect of these augmentations until somewhere about 1835, when a new start took place in the matter in consequence of certain gentlemen then for the first time raising the question whether the exemption reported by Lord Fountainhall could properly hold. Litigation took place, into the details of which I will not enter, upon that, and the case came up to your Lordships' House, and ultimately, in 1840, I think, this House decided that that exemption could not hold. That having been decided by your Lordships' House, the locality went on, and it was found in the course of that locality (this is admitted in the case) that the respondents in this case, the representatives of Sir John Sinclair, had overpaid in respect of the land occupied by him, and treating Wester Monkrigg as now being liable to teind, and to contribute to the locality. A sum was fixed as what was proper to be paid upon Wester Monkrigg, and the present case must be taken, as it seems to me to be, in the nature of an action of repetition on the part of Sir John Sinclair's representatives to be paid that sum of the stipend which he overpaid, and which ought to have been paid in the years from 1808 to 1825 by General Fletcher's

representatives, and in the years from 1825 to 1833, when Mr Fletcher parted with Wester Monkrigg, by Mr Andrew Fletcher, one of the appellants in the present case.

My Lords, I said advisedly that it appeared to me that this Special Case was in the nature of an action of repetition. As I stated at the outset, it appears—and this was conceded on all sides during the argument—that the Court of Teinds was not the proper place to award payment, but that the proper way to obtain payment after a final decreet of locality had been made would be by proceeding for that payment in the common law courts in Scotland (if I may be excused for so terming them) to obtain repetition of that money which had been so paid in excess by one of the parties to the locality.

Now, my Lords, comes the real point of the case, upon which I shall leave more to be said by my noble and learned friends who will come after me. I have read their opinions, and I have quite satisfied myself that in those opinions I can safely concur. The point is how far the negative prescription can in any case take place with reference to a locality of teind. It is said that it cannot do so, on the ground that in the case of *Weatherstone* v. *The Marquis of Tweeddale* it was decided that all parties who enter into an arrangement for the appointment of a general agent, and into an arrangement to have a locality settled and adjusted for the apportionment of teinds payable to a minister, are supposed to enter into an agreement by which they agree that whatever may take place in the meanwhile, whatever overpayments may be made by A, in respect of which he is to be reimbursed by B, those overpayments ought to be reimbursed when the final decreet of locality is made—that is, it is said, if steps are taken in reasonable time for that purpose by the parties to the litigation; but however that may be, all parties are supposed to undertake that irrespective of all questions with regard to time, with regard to prescription, and the like, and irrespective of all questions as to the *bona fide* receipt of rents and profits, which are also held to be concluded by this entering into a final locality; the parties are supposed to agree, notwithstanding all those questions, that when the final locality is adjusted and settled they will pay those sums which have been overpaid by other proprietors.

My Lords, whatever may have been said in that case of *Weatherstone* v. *The Marquis of Tweeddale*, in order to apply it to a case like the present I should have expected to find facts similar to those existing in the case upon which such observations were made, and I find nothing at all comparable in the state of circumstances in the case now before your Lordships for decision to the circumstances in the case of *Weatherstone* v. *The Marquis of Tweeddale*. In the first place, there is the fact, upon which I have already commented, that in the present case, with regard to the first two augmentations, the parties upon whom the claim is now made really were not parties to the litigation at all, and to say that a man is to be supposed to have bound himself by an agreement that at the end of a certain litigation he will make such and such payments when he has never been a party to the litigation at all, appears to me to be quite contrary to reason and justice, and, without any authority, contradicting what seems to me to be clear reason and clear justice, I could not come to a conclusion here that, at all events as regards the first two augmentations, these appellants had any part or concern in the matter whatever, or were at all bound by anything that was done therein.

As regards the third, a somewhat different question presents itself, but even as regards the third I am at a loss to understand how a person who in 1833 parted with the property altogether, and at a time when the right to the exemption had not been questioned— when nothing had been done to inform him that such was the case—could be held to have been bound by a litigation or a question which was going on in the meantime with regard to the adjustment of a locality in which he was not and could not be summoned, because he was not an owner at the time when the question began. I think it was in the year 1835 that the question was raised as to this exemption, but it was raised between certain parishioners and the person to whom he had disposed of the property, and with whom he had no concern. I cannot understand how the person to whom he sold the property can be said to have acted as his agent so that he could be held to be bound by any supposed engagement that he at the end of this locality, whenever it might take place, which was not apparently for a very long time afterwards, would hold himself responsible both for all the back payments and for the interest upon them. According to one of the cases that was referred to here, that, it appears, would be the consequence if he was responsible at all; he would have to be responsible for both the principal and the interest which might be found to have been underpaid during those years in consequence of the supposed exemption of the estate from liability.

My Lords, it does not appear to me that the case of *Weatherstone* v. *The Marquis of Tweeddale* can be in any way compared with this. There the question was between parties who were heritors who had all paid teind, and the only question was as to the period of time from which that payment should be made; it was not a question of liability to teind altogether. In this case your Lordships have it first of all decided behind the back of Mr Andrew Fletcher, who was not a party to all the proceedings that were carried on after 1833, that his land, which had been held for more than a hundred years to be exempt from teind, was to be made liable to teind, and in addition to that, that he was to be called upon, after he had ceased for more than forty years to be the owner of the estate, as being liable for back payments. That is an extremely strange proposition, and I cannot readily bring myself to think that it can be the law. I have not examined the law in detail, because it will be more fully expounded by the opinions of others of your Lords who took part in hearing this case; but I have satisfied myself that it would be in every respect contrary to the ordinary principles of justice that a claim of this kind should be sustained, as to the delay of which for the long period in question there is really no reasonable excuse that I can see offered, and as to which, if it were to affect this gentleman, it would be affecting him by a supposed obligation on his part to conform to the final decision in a matter in which he had no part or lot whatever.

Lord Selborne—My Lords, I am also of opinion that in this case the defence of prescription ought to prevail. The Special Case was presented to the Court of Session more than forty years after the last of the payments, repetition of which was sought by it from the appellants, and also more than forty years after the appellant Andrew Fletcher had ceased to be a heritor of the parish of Haddington by the sale and conveyance of the lands of Wester Monkrigg to Captain Keith. The appellants Davidson and Fraser had ceased to be heritors of that parish, and the latest payment of which repetition was claimed against them had been made eight years earlier, the earliest payment included in the claim having been made above sixty years before the commencement of these proceedings.

It is settled by the law of Scotland that if one heritor pays a larger and another a smaller share of a minister's stipend, or of any augmentation thereof, than they were respectively by law liable to pay, the underpaying is liable in repetition to the overpaying heritor. So far the law seems clear, though the ground of that liability is not stated in the same way in all the authorities.

In the recent case of *Haldane* v. *Ogilvy* it was laid down that the claim of an overpaying against an underpaying heritor is "strictly and simply a claim of debt, a claim for money advanced by the creditor for the debtor at a time when their respective pecuniary liabilities were misunderstood." And it was added that "the claim of the minister for his bygone stipends is precisely of the same kind."

In a still later case (*Mackenzie* v. *L. Adv.*), 15 Scot. Law Rep. 321, it is thus explained—"The claim of the minister for payment of his stipend is a claim which the law gives him against the heritors of the parish—against the party who holds the land, and who is answerable for the teind. In a case where the heritor has not paid his debt to the minister the claim subsists against him, and that claim is, according to the practice of the Teind Court and of this Court" (the Court of Session) "held to be transferred to the overpaying heritor, so as to prevent an unnecessary circuity of action; and the overpaying heritor thus comes to be the creditor of the underpaying heritor; he comes, as it were, in place of the minister in making that demand, but the demand must be made against the party who is in default, who ought to have paid and did not pay."

I am not sure that I correctly understand what is meant by "the practice of the Teind Court" in this passage, because it is admitted—and it seems to be beyond dispute—that the Teind Court has no jurisdiction either at the end of any process of locality or at any other time to make any decree, declaratory or otherwise, as to the liability of one heritor to another in respect of any past overpayments or underpayments, or to take any back account between them—repetition when it is due can only be songht and obtained by means of a separate action against each underpaying heritor in the Court of Session. This, however, does not affect the statement of the principle of the claim.

In an earlier case (that of *Dawson* v. *Pringle*, June 15, 1808, Faculty Coll. xiv. 145), which seems to be the leading authority for the allowance of interest on overpayments of this kind, a view was taken apparently not consistent with the doctrine laid down in *Haldane* v. *Ogilvy*. The Lord President (with whom the majority of the Judges agreed in allowing interest, the suit being by the minister for arrears of stipend) thought "that this was not properly a question of debt—that there was no giving of credit, no borrowing—it was a case of intromission; that teinds originally belonged to the clergy, and were drawn by them; that afterwards the heritor got a right of drawing his own teinds, but under the condition that he should pay the minister's stipend; that to that extent the heritor is an intromitter with the estate of the clergy; that interest therefore must be due on these intromissions as it is on all intromissions," &c.

It would seem to follow, if this were the correct principle, that the defence of *bona fide* consumption ought in a proper case to be available to an underpaying heritor against a claim of an overpaying heritor or of the minister, which, however, was denied by Lord Benholme in *Haldane* v. *Ogilvy*. Such a defence was allowed (as against a claim for repetition going behind a final locality which had been reduced and wholly set aside) in *Cuthbert* v. *Waldie*, and in the case of *The Magistrates of Montrose* v. *King's College, Aberdeen*.

I do not profess to be able to reconcile all that was said and done in all these cases, but it appears to me to be consistent with them all to hold that the claim of the overpaying against the underpaying heritor is one which arises in contemplation of law, and is constituted as a legal course of action at the time when each overpayment takes place—the law imputing to every heritor an abligation at that time to know and to pay the share of stipend properly appertaining to him, whether the amount of that liability was or was not then open to or the actual subject of controversy either in the Teind Court or elsewhere. On no other view would it be possible that each overpayment should carry interest from the time when it was made, which seems always since 1896 to have been assumed, and which in 1836 was judicially determined in *Buchanan* v. *Buchanan* (a case between heritors) mentioned in the joint supplementary statement made to your Lordships since the close of the argument.

In *Weatherstone* v. *Lord Tweeddale* repetition was claimed by an overpaying against an underpaying heritor for more than forty years before the commencement of the action, going behind a final decree of locality, which had been afterwards reduced and set aside. The defender pleaded prescription and also *bona fide* consumption, and though more was said as to the latter plea than the former, both defences were repelled by the Court. This decision, so far as it carried back the liability beyond the date of the restriction of the final decree of locality (without which the question of prescription would not have arisen, for that final decree was reduced in 1792, and the action was brought within forty years after that date), cannot in my opinion be reconciled with the later cases of *Cuthbert* v. *Waldie* and *The Magistrates of Montrose* v. *King's College*. nor was the attempt to explain it on that point which was offered at the bar satisfactory to my mind.

Even, however, if the authority of *Weatherstone* v. *Lord Tweeddale* in this question of prescription stood higher than under these circumstances it appears to me to stand, it would still not be an

authority applicable to the present case. The grounds of that decision were stated in the interlocutor of the Lord Ordinary, which was, so far, affirmed by the Inner House. After declaring in effect that the final decree of locality of 1789 had been converted into an interim decree by the reduction of 1792, he found "that where payments of stipend are made under interim decreets of locality, there is an implied judicial contract among all the parties that when the legal obligations of the heritors shall be determined by final decreet their several interests shall be adjusted from the commencement of the process or processes according to the true state of their rights and obligations, and that the claims of relief thus arising cannot be affected by the length of time during which the settlement of a final locality may have been delayed," and that it was "admitted on the record that the condescenders or their authors were parties to the proceedings in the several processes of locality referred to"—to which it was added "that no party being a singular successor in lands could claim relief in respect of overpayments made by his authors unless he had a special assignation thereto."

The hypothesis thus laid down of a "judicial contract" was treated by Lord Benholme in *Haldane* v. *Ogilvy* as "somewhat artificial," and as a "narrow if not mistaken view of the subject"—a criticism which certainly detracts somewhat from the authority of *Weatherstone* v. *Lord Tweeddale*. And it does seem difficult to suppose that there can be an implied "contract" to make restitution to heritors who may eventually appear to have paid too much by anyone who has never paid or admitted his liability to pay anything at all, and who until a late stage of the proceedings was treated by everyone as under no liability. Perhaps, however, this question may be one more of words than of substance. What was really meant probably is, that as between the parties or actors who were before the Teind Court in a process or augmentation and locality a right to a future adjustment of such payments as might be made under an interim decree was implied from the very nature of their *concursus* in that proceeding by which they were all bound, and that the dependence of such a process between them would keep that right alive until a final decree.

The doctrine, so explained, seems to be applicable to those only who have been throughout, or at the very least within forty years before action is brought, parties to the locality proceedings, which in the present case none of the appellants were. I do not think it consistent with the principle of any of the authorities on this subject to hold that the cause of action is, in any case of this kind, originally constituted by the final decree of locality; and it would certainly be inconsistent with all principle to hold that it was or could be so constituted as against persons who (like the appellants in the present case) were at the date of the final decree, and had been for many years previously, strangers to the locality proceedings. When the appellant Andrew Fletcher sold his estate in 1833, and ceased to be a heritor, he became a stranger to those proceedings, and had no longer any power (as I apprehend) to intervene in them for any purpose. If the respondents had desired to enforce such liability as he may have been then under to them, and with that view to bring the locality proceedings to a close, it was for them to do so. In point of fact they allowed twenty-eight years to elapse after Andrew Fletcher had ceased to be a heritor before obtaining a final decree of locality. That period was not in itself sufficient for prescription, but they allowed the full time of prescription afterwards to run out by waiting for fourteen years more before presenting this Special Case.

Andrew Fletcher, as a heritor (though denying his liability to pay any part of the minister's stipend), was a party from 1826 to 1833 to the locality process under the third decree of augmentation, dated the 26th June 1826. To the two preceding processes under the augmentation decrees of 1797 and 1807 he had not been a party, and the other appellants were never in any way parties to any of the three processes.

The law as to parties to such proceedings is thus stated in Sir John Connell's book on Teinds (2d ed., vol. i. p. 457)—"The defenders called in processes of augmentation are usually the titulars and heritors. It has been always held to be a good objection that any of the parties interested were not called." Even in 1870 it was deemed necessary (as appears from the Fourth Report of the Scottish Law Courts Commissioners, p. 16), "in libelling any summons of augmentation, modification, or locality of stipends, that the titular and tacksmen of the teinds, heritors, liferenters, and all others having interest in the teinds of the parish, should be called nominatim as defenders to the action." Down to the Act of Sederunt of the 5th July 1809 personal citation of or service upon all such parties appears to have been indispensable to make any proceedings in which they did not intervene effective against them. That Act provided that "in future, instead of the old mode of citation," it should be competent for the pursuer to cite all persons interested by a publication of notice in church from the precentor's desk on three successive Sundays, followed by the exhibition of the same notice on the church doors, and by three advertisements in certain newspapers. By this mode of citation Andrew Fletcher was brought into the process of 1826. But with respect to the two earlier summonses of 1797 and 1807 (by which alone the other appellants could be affected), no such mode of citation was available; and it is expressly stated in the Special Case that "the proprietors of the lands of Wester Monkrigg, at the date of the summons upon which the first two decreets followed, was not called as a party under those summonses, and he is not mentioned either in the rentals given in by the ministers or in the rentals approved by the Court."

It appears to me that the peculiar circumstances of this case were not in the Court of Session sufficiently distinguished from those of the earlier authorities, and that the interlocutor under appeal ought to be reversed.

Lord Blackburn—My Lords, the questions in this appeal are raised upon a case stated for the Court of Session. It does not precisely appear at what date that proceeding was begun, though I think it must be taken to be 5th April 1875—at all events it must be taken to be more than forty years after 1833. The respondents designated in the interlocutor appealed against as the first parties are executors and trustees of Sir John Sinclair.

The first set of appellants designated in the interlocutor—the second parties—are the trustees of the late General Fletcher. The other appellant, Mr Fletcher of Saltoun, who is the person really interested, is designated as the third party. The lands of Wester Monkrigg, in the parish of Haddington, were, as the name imports, originally abbey-lands, and in consequence of what was long supposed to be a judicial decision of Lord Fountainhall as long ago as 1710, it was *bona fide* believed that Wester Monkrigg was teind free, and not liable to pay any part of the stipend of the minister of that parish. There were three different augmentations of stipend granted to the ministers of Haddington—the first in 1797, the second in 1807. At these dates Wester Monkrigg was not the property of either of the appellants. In 1808 the trustees of General Fletcher purchased the lands of Wester Monkrigg from a Mr Home, and they continued to hold the lands from 1808 to 1825, when they conveyed the lands to Mr Fletcher.

My Lords, as far as regards these two first augmentations, there are subordinate questions, whether the proprietor of Wester Monkrigg in 1797 and 1808 was ever properly made a party to these two proceedings for augmentation, and whether the purchasers of the lands can be properly said by that purchase to have become parties to these proceedings? I pass them by for the present.

In 1826 a third augmentation was applied for. A general citation to the heritors was given from the pulpit and on the church door. That since the Acts of Sederunt in 1809 was quite regular; and not only was Mr Fletcher as a heritor bound to take notice of this proceeding, but he acted in it, and by his agent voted in the election of a common agent for conducting the conjoined processes. I think therefore that in 1826 Mr Fletcher was a party to the proceedings.

The common agent made out an interim locality, in which he, acting on the belief that Wester Monkrigg was not liable to pay any part of the minister's stipend, allocated no part of it on Wester Monkrigg, and as a necessary consequence he allocated on the other lands in the parish more than would have been allocated if it had been then known, as it now is, that Wester Monkrigg was liable, and Sir John Sinclair, the testator of the respondents, was during the whole period from 1808 to 1833 proprietor of the lands of Stevenson, in the parish on which too much was allocated.

Mr Fletcher in 1833 conveyed the lands of Wester Monkrigg to Captain Keith. In 1835, two years after Mr Fletcher had ceased to be a heritor in Haddington, proceedings were taken to rectify the interim locality, amongst other grounds because it exempted Wester Monkrigg. As far as that regarded the future from 1833, it concerned Captain Keith and not either of the appellants; but as far as regarded bygone matters from 1808 to 1825, it concerned the trustees of General Fletcher; and as to those from 1825 to 1833, it concerned Mr Fletcher alone, and in some shape or other these two parties (if they were to be bound by the decision) ought to have had an opportunity to defend their interest, but it is admitted that no intimation was ever given to either of them, unless in so far as Mr Fletcher may be supposed to have been still represented by the common agent, which I do not think he can be said to have been after he ceased to be a heritor.

Protracted litigation ensued between Lord Blantyre and other heritors on the one part, and the Earl of Wemyss, who owned some other portions of the abbey-lands, and Captain Keith, the new owner of Wester Monkrigg, on the other, which after an appeal to this House ended, though not till 1861, in a final locality, fixing a part of the stipend on Wester Monkrigg. It is better to state the rest in the words of the case—"A portion of stipend was allocated upon the said lands of Wester Monkrigg by interim localities prepared in 1853, and afterwards, as above mentioned, by the said final localities. The second and third parties to this case were not parties to the said litigation, having ceased to be heritors in the parish of Haddington before the same was instituted, and the proceedings above narrated, which took place after the lands of Wester Monkrigg were sold, were not intimated to the second or third parties. It is admitted that during the dependence of the processes of locality above mentioned the said lands of Stevenson were localled on for stipend under the said interim decrees considerably in excess of the amount they were localled on by the said final decrees; and it is also admitted that the lands of Wester Monkrigg—during the period between 1808 and 1833, when they were in the possession of the second and third parties—were not localled on and no stipend was paid in respect thereof. In those circumstances, the first parties claim payment in relief of a proportion of the overpayments made by their author in respect of the non-payment by the second and third parties. For the period between 1808 and 1825 they claim such payment from the second parties so far as they have trust funds in their hands, and from the third party so far as there is a deficiency of funds. For the period between 1825 and 1833 they claim relief from the third party. The second and third parties maintain that they are not liable, in respect (1) that during the period of their possession the said lands were exempt from liability for stipend by a subsisting judgment of the Court; (2) that the whole rents of the said lands, stock, and teind, were received and consumed in *bona fide;* (3) that as they have ceased to be heritors in the parish of Haddington for more than forty years, all claims against them in that capacity are prescribed."

Then, my Lords—"The opinion and judgment of the Court is, in the above state of the facts, craved in the following questions of law:—1. Are the second or third parties, or either and which of them, bound to recoup to the first parties the sum of stipend overpaid by the predecessor of the first parties, and unpaid by the second and third parties during the period between 1808 and 1825? 2. Is the third party bound to recoup to the first parties the sums of stipend overpaid and unpaid as aforesaid during the period between 1825 and 1833? The case having been put to the roll, parties were heard thereon, and the following judgment or interlocutor was pronounced by the First Division:—Edinburgh, 18th July 1877.—The Lords having heard counsel for the parties on the Special Case, Find and declare, in answer to the first question, that the second parties are bound to reimburse

the first parties the sum of stipend overpaid by the predecessor of the first parties during the period between 1808 and 1825; and in answer to the second question, that the third party is bound to reimburse the first parties the sum of stipend overpaid by the predecessor of the first parties, and unpaid by the third party during the period between 1825 and 1833, and decern: Find the first parties entitled to expenses, and remit to the Auditor to tax the amount thereof, and to report."

This is the interlocutor appealed against.

My Lords, in the elaborate and able judgment delivered by the Lord President he deals with the first and second grounds on which the appellants rested their case. But singularly enough he does not, nor do any of the other Judges, even mention the third ground taken by them. And yet it would seem that this objection lies on the surface. The silence of the Judges on this point is accounted for from their thinking that the point had been concluded by authority since the decision of *Weatherstone* v. *Tweeddale*, now forty-five years ago; and assuming (perhaps from the point not being pressed before them) that this was so generally agreed by the practitioners in Scotland that it was unnecessary to say anything about it. My Lords, I need hardly say that the opinion of the profession on any matter of every-day occurrence on which they are continually asked to advise is a very weighty authority. A Court of Appeal should be cautious before determining that a decision frequently considered and always acquiesced in was wrong. And if from the time which has elapsed and the nature of the point (as, for instance, a point in conveyancing law) there is reason to believe that rights have been regulated, and arrangements as to property made on the basis of the decision, it may be right to uphold it, even though convinced that it was originally erroneous. In such cases the maxim *communis error facit jus* applies.

But the occasions on which practitioners have had to consider at what time the negative prescription bars a claim for repetition for overpayment of stipend against a person who has ceased to be a heritor must be rare. In the present case the advisers of Lord Blantyre in 1835 seem not to have thought that the first and second parties had any further concern with the locality after ceasing to be heritors, and I doubt very much if there has been even one other case in which the question could have arisen during the forty-five years that have elapsed since *Weatherstone* v. *Tweeddale*. I think therefore that your Lordships should examine that case and say what it decides, and whether it is a good decision, much as if it had been decided last year.

My Lords, I now return to the general question of negative prescription. "The principle," says Mr Bell in his Commentaries, "of the long negative prescription of forty years is different from that of the short prescriptions. It is not a presumption of payment, but a presumption of abandonment not to be overcome, but available to the debtor as equivalent to a discharge. But the term of prescription may be interrupted either by minorities or by the methods appointed for that purpose."

In the ordinary case of several persons being liable to pay money, and one of them being compelled to pay more than his share, the co-obligants are bound, according to their interests, to reimburse him; but I do not think it doubtful that when forty years have elapsed from the time when the overpayment was made the negative prescription is a good defence, unless there has been something to interrupt it. Now, the different teind-owners are all jointly, to the extent of their teinds, liable to the payment of the augmentation of stipend. One of them may be forced to pay the whole, and then he has a right to be reimbursed by the others according to their interests. This was decided as long ago as 1664, in *Hutchinson* v. *Cassilis*, Mor. 14,788. At that time interim localities had not come into practice. *Prima facie* the forty years would begin from the date of overpayment.

It may be that the pendency of an interim locality alters all this, and that the person who has overpaid is obliged to wait till the final locality is settled, and that *per contra* the person who has not paid is not discharged till forty years after that final locality is settled. The settling of the final locality may be long delayed. In the present case we see that it was sixty-three years from the granting of the first augmentation. So long as the same persons who were heritors when the proceedings commenced continue to be heritors, it may very well be said that they ought not to complain of the delay, which is their own; they could press on the making of the final locality. This is forcibly stated by Lord Shand. But when the parties are changed either by death or by selling their property this is no longer the case.

To explain what I mean, I will suppose the facts to be slightly different from what they are. Let us suppose that instead of Mr Fletcher obtaining power to sell Wester Monkrigg he had died in 1833, and the lands had fallen to the heir of entail, his personal representatives could not after his death be said to be represented by the common agent; and let us suppose that the death of Sir John Sinclair (the date of which I do not know) had taken place in the same year 1833, the lands of Stevenson then passed to his heir, the right to be reimbursed would not have passed to his heirs, but to his personal representatives, and that right to be reimbursed would have been, not against the heir of entail of Wester Monkrigg, but against the personal representatives of Mr Fletcher. The personal representatives of Sir John Sinclair could not as such, in any way that I can see, hasten the settling of the final locality, and it would be very hard both on them and on the beneficiaries if the personal representatives of Sir John were obliged to delay the final winding up of the estate for an uncertain period, which as it turns out was twenty-eight years, and might have been much longer. Yet, unless they were under an obligation so to wait, they were *valentes agere* against the representatives of Mr Fletcher from the time of Sir John Sinclair's death, and from that date at latest the forty years would begin to run.

Again, in the supposed case, the personal representatives of Mr Fletcher were in no ways parties to the subsequent litigation. Perhaps they could have been made so by some citation; I do not say how that may be. If they could be so, their liability could probably be kept alive by a citation received from time to time, but unless

that was done, the personal representatives would *prima facie* be entitled to rely on the negative prescription as equivalent to a discharge at the end of forty years from the death of Mr Fletcher. It would be hard on them if this liability was to be prolonged till forty years after the final locality was settled by a litigation to which they were not parties, and which might be very protracted. Indeed, it is easy to suppose a case in which the final locality would never be settled at all—after the death of one of the underpaying proprietors the chief heritor might bring up all the rest of the parish. This is not at all likely to happen in such a parish as Haddington, but in a small rural parish it would be far from improbable, and I daresay has happened. In such a case the interim locality would remain undisturbed, for the only person who could disturb it, the now sole heritor, would not have any interest to do so.

I do not say that those considerations are enough to show that the existence of an interim locality does not interrupt the negative prescription, but I do say that those who say it does ought to prove their doctrine either on principle or by authority. It seems, as I have already said, to have been tacitly assumed by the Judges below that the point was concluded by authority. To that I will come afterwards.

On principle I do not see how such a doctrine can be supported. I am sorry to be obliged to enter upon the question of principle without any assistance from the Judges below, but I am bound to do so.

The Commissioners of the Teind Court were originally a different body altogether from the Court of Session. They had jurisdiction to decree augmentations and to local them on the several teind-owners, but they had no jurisdiction in any way to interfere as to the repayment of money.

Had the Earl of Cassilis in 1664—whose case is mentioned in Morison, 14,788—sought reimbursement, he must have gone to the Court of Session. He would there have had to prove as part of his case the proportions in which the different teind-owners were liable, the very question which was pending in the locality before the Teind Commissioners.

There would have been nothing that I am aware of to prevent the Court of Session from trying this question for themselves, but it would be proper—in order to avoid the expense of two litigations, and the possible scandal of contradictory decisions—to suspend the suit before them till the determination of the other suit, if that could be done on equitable terms. And when and so long as the parties to the proceeding in the Teind Court remained the same as those in the Court of Session, the equitable terms would seem to be that payments should be made of what was admittedly due (which is much the same as acting on an interim locality, though interim localities seem not to have come into use till many years after 1664, the date of *Hutchinson* v. *Cassilis*), and that the residue should abide the event of the proceeding in the Teind Court. I do not know whether this was in fact ever done in such cases, but it seems so reasonable that I think it probable that practitioners would at least expect that the Court of Session would so act. Since the Union the jurisdiction of the Teind Court has been exercised by the Court of Session, but it is still a separate jurisdiction.

Now, in cases where such would be the course which the Court of Session would pursue if they were appealed to, the parties had no object in appealing to them. It would not, I think, be unreasonable to imply at least an understanding between the parties that they were to go on on the terms which they all knew the Court of Session would impose upon them; and this, even if no more than an understanding, would be an important element in considering the question of *bona fide* perception and consumption. I doubt whether there would be a sufficient ground for implying a contract such as would interrupt prescription even whilst the parties were the same. Perhaps in such cases the maxim *communis error facit jus* might apply, but that it is unnecessary in the present case to determine.

It would, I think, be not reasonable to imply a contract to wait after they had ceased to be the same parties.

But if instead of the Earl of Cassilis, who was a party to the proceeding for the locality, bringing the suit, we suppose that he was dead, and that the suit was brought by his personal representatives for the benefit of the widow and daughters, whilst the new Earl, who might be a distant cousin, was the person who inherited the land, and so was a party to the locality, I do not see how it could be equitable to the Countess and the ladies Kennedy to stay their action till the determination of a suit over which they had no control, and still less to oblige them to be bound by the result of a litigation which was entirely *inter alios*; and the remark would have more force if the defenders, or some of them, had by death or otherwise ceased to be parties.

It would be no easy task to say in such a case what, if any, would be equitable terms on which to stay the suit; and it is not likely that such cases were sufficiently numerous to establish a practice. I do not therefore see what grounds there can be for implying any contract in such cases.

The Judges below, as I have already observed, do not enter on the question of principle at all. They tacitly assume that it is decided by authority, and principally by the decision of *Weatherstone* v. *Lord Tweeddale*.

I had at the end of the argument been strongly impressed with the belief that neither that nor any other case in Scotch law decided the point now before your Lordships. I had meant to consider further before finally making up my mind on that subject; but having had an opportunity of perusing the opinion of my noble and learned friend on my left (Lord Selborne), I am quite satisfied I am relieved from examining the authorities, or saying more than that I completely concur in the view which he takes.

All that is necessary to decide in this case is that when an underpaying heritor has ceased to be one, either by death or by selling his land, he and his representatives are discharged by the negative prescription after the lapse of forty years from the time when he so ceased, unless the overpaying heritor or his representatives take some step within the forty years to interrupt the prescription. I am satisfied of this on principle for the reasons I have above given. I am satisfied that there is no sufficient authority on decided cases to justify a decision contrary to principle.

If the demand for principal is discharged, no question arises as to the interest.

I therefore entirely concur in the proposed judgment.

Lord Gordon—My Lords, I also concur in the judgment which has been proposed for the disposal of this case. I have had the benefit of reading the opinion of my noble and learned friend opposite (Lord Selborne), and concurring as I do in the opinions he has expressed, I shall not detain your Lordships long, especially at this part of the day. I shall merely read briefly the notes I have made, and I do so out of respect for the Court below, for the opinions of the learned Judges for which I entertain a sincere respect, and also for the purpose of showing that I have directed my attention to many of the facts and cases which were referred to by your Lordships.

The circumstances of this case are somewhat peculiar. It appears that so far back as the beginning of last century a question was raised as to the liability of the lands of Wester Monkrigg for stipend to the minister of the parish of Haddington. It was then contended for the proprietor that the lands were kirk-lands feued out *cum decimis inclusis* before the Act of Annexation, and that they were never in use of paying any part of the stipend. On 8th February 1708 an interlocutor was pronounced by the Lord Ordinary, whereby he found that "the said lands, in respect of the writs produced, and that were never in use of payments, could not be liable in any part of the stipend." Effect was given to that judgment in the decree of locality finally pronounced, by which no part of the stipend was allocated upon the lands.

In 1797 a process of augmentation and locality was raised by the ministers of Haddington under which they obtained augmentations of their stipends. It is admitted that the then proprietor of the lands of Wester Monkrigg was not called as a party to those proceedings, and that no part of the stipend was allocated on the lands in the interim decree of locality which was prepared in 1800. In 1807 the ministers of Haddington obtained further augmentations, and it is also admitted that the then proprietor of Wester Monkrigg was not called as a party in those proceedings, and that no part of the stipend was allocated on the lands in the interim scheme of locality which was made up in 1816.

In 1808 the predecessors of the appellants, the trustees of the late General Fletcher Campbell, purchased Wester Monkrigg, and retained it in their hands till 1825, when they made it over under a deed of entail to the appellant Mr Andrew Fletcher. Mr Fletcher was in the occupation of the lands under the entail till 1833, when they were sold in virtue of the powers contained in an Act of Parliament, and since 1833 the appellants have had no connection with Wester Monkrigg.

In the meantime, in 1826, the ministers of Haddington obtained further augmentations of their stipends, and it is also admitted that the then proprietor of Wester Monkrigg, the appellant Mr Fletcher, was not called in the summonses in the actions of augmentation. But it is said that his name appears in the rentals of the parish which were lodged by the ministers, on which the heritors were held as confessed, though the lands were not included in a subsequent rental which formed the basis of an interim locality of the stipends which was made up and approved of in 1830. It is also said that the appellant Mr Fletcher took part in the election of a common agent for conducting the conjoined processes of locality in 1826. It is admitted that no part of the stipend was allocated on the lands of Wester Monkrigg in the interim locality of 1830, which was the last interim locality which was made up prior to the time when the lands were sold as before mentioned.

It thus appears that no stipend was ever allocated on the lands of Wester Monkrigg down to the time when the appellant ceased to have any interest in them in 1833. And it is admitted that no objection was ever stated by or on behalf of any of the heritors of the parish to the exemption of the lands so long as they remained in the hands of the appellants.

But in the year 1835 an objection was stated by two of the heritors to the exemption of Wester Monkrigg from stipend, and a litigation thereupon ensued, to which it is unnecessary particularly to advert, the result being that the then proprietor of Wester Monkrigg admitted that the lands were subject to stipend, and a proportion of the stipend was thereupon allocated upon the lands by interim schemes of locality prepared in 1853, twenty years after the appellants had ceased to have any connection with the lands. Neither General Fletcher Campbell's trustees nor Mr Fletcher were parties to the litigation, and the proceedings were not in any way intimated to them.

It was not until 22d November 1871 that a final scheme of localities of the stipends which had been awarded in 1797, 1807, and 1826 was approved of. It was then seen that the respondents had for many years been paying more stipend than they were bound to pay, but no demand was made on the appellants for any relief until 1877, more than forty years after their connection with Monkrigg had ceased, when the respondents demanded payment from the appellants in relief of a proportion of the overpayments made by their author in respect of the non-payment by the appellants of stipend during the time they had possessed the lands of Wester Monkrigg, from the year 1808 to 1833. And the question which your Lordships have to decide is, whether this demand is well founded?

It was contended by the appellants in the Court below, and also at your Lordships' bar, that they were not liable for the sums claimed, in respect (1) that during the period of their possession the lands were exempt from liability for stipend by a subsisting judgment of the Court; (2) that the whole rents of the lands, stock, and teind were received and consumed in *bona fide*; and (3) that as the appellants had ceased to be heritors in the parish of Haddington for more than forty years, all claims against them in that capacity were prescribed.

The Court of Session did not give effect to these pleas, but, on the contrary, they gave judgment in favour of the respondents finding, the appellants liable for the sums claimed.

I am of opinion with your Lordships that the judgment so pronounced is not well founded, and that it must be reversed.

Their Lordships in the Court below founded

their judgment on the case of *Weatherstone* v. *The Marquis of Tweeddale* (1 Shaw 1), which has been already referred to by your Lordships, in which it was found "that where payments of stipend are made under interim decreets of locality there is an implied judicial contract among all the parties that when the legal obligations of the heritors shall be determined by final decreet their several interests shall be adjusted from the commencement of the process or processes according to the true state of their rights and obligations, and that the claims of relief thus arising cannot be affected by the length of time during which the settlement of a final locality may have been delayed."

I think the principles involved in the judgment in that case were right, but I think these principles do not apply to the present case.

In that case all the parties concerned had been parties to the process of locality, and it was in that process of locality that by consent of parties (as specially set forth in an interlocutor of the Court) the question arose and was decided. In that case the question arose as to underpayments by certain of the heritors who were parties to the proceedings, and in these circumstances I think the Court rightly held that there was an implied contract that the underpaying heritors should, when the true state of the accounting was ascertained, make good to the overpaying heritor the sum which he had overpaid. In every case where payments are made under an interim scheme of locality all parties paying know that the interim scheme is liable to rectification, and that when the rectification is made by the final scheme they are liable to be called upon to pay up any deficiency which they may have been paying prior to the rectification. And I think that the questions of *bona fide* perception or prescription could not fairly be raised by any such underpaying heritors.

But I think the circumstances of the present case are different from those of the case of *Weatherstone*. In the first place, it is admitted here that at all events prior to 1826 the proprietor of Wester Monkrigg was not a party to the proceedings, and although he seems in that year to have voted in the election of common agent, yet his name was not on the record in the process, and it was assumed by all concerned that he was not liable for any of the stipend, and no objection was made to his exemption from stipend during all the time that he was proprietor of the lands. And, in the second place, there is this wide difference between the case of *Weatherstone* and the present, that whereas in that case the Court was dealing with parties who had all along paid stipend, but paying less than they were bound to pay in the present case, the heritors against whom the claim is now made never paid stipend at all. They had not only never paid stipend, but it was not pretended by any of the other heritors that they were liable in payment.

I think therefore that there was not and could not be in this case any implied contract between the appellants and the other heritors such as there was found to be in the case of *Weatherstone*, and that the principles applied in that case are inapplicable to the present.

I concur with your Lordships in thinking that the claim maintained by the respondents has been cut off by the negative prescription, and I do not think it necessary to consider the other pleas maintained by the appellants. I have had the advantage of seeing and considering the judgment which has been delivered by my noble and learned friend Lord Selborne, and I concur in his views in regard to the plea of prescription. I shall not therefore detain the House by again going through the authorities on this subject.

I concur in the judgment proposed to be pronounced by your Lordships.

Interlocutor of 18th July 1877 reversed; cause remitted to the Court of Session, with a declaration that the Special Case should be answered by finding that the second parties are not bound to reimburse the first parties the sum of stipend overpaid by the predecessor of the first parties from 1808 to 1825; and that the third party is not bound to reimburse the first parties the sum of stipend overpaid by the predecessor of the first parties, and unpaid by the third party from 1825 to 1833: Ordered that there be paid to the appellants their expenses in the Court of Session, and that the respondents do pay to the appellants costs of this appeal.

Counsel for Davidson and Others (Appellants)—Kay, Q.C.—C. J. Pearson. Agents—Simson, Wakeford, & Simson, Solicitors.

Counsel for Sinclair and Others (Respondents)—Pearson, Q.C.—Mackintosh. Agent—W. A. Loch, Solicitor.

Monday, April 15.

DUKE OF SUTHERLAND *v.* ROSS.

(Before Lord Chancellor Cairns, Lord Hatherley, Lord Blackburn, and Lord Gordon.)

(*Ante*, May 26, 1877, vol. xiv. p. 552.)

Fishing—Salmon-Fishing—Obstruction to Passage of Salmon.

By the action of stream and tide in the estuary of a river, part of a salmon fishery district, a long narrow strip of land, had gradually been separated from the mainland by a channel which was dry at low tide except when the river was in flood. From the seaward end of this island there extended a long low bank dry at low water, which confined the river in its main channel at low tide as in a canal, and prevented it spreading into an adjacent bay. By operations on the opposite side of the estuary, performed thirty years before the date of action, a larger body of water was thrown on to this bank, which was thus broken through, so that a new channel was made for the river into the bay. The proprietor of the adjacent land, and of the fishings *ex adverso* thereof, embanked the outside of the island so as to preserve it, and restored the bank by an artificial erection, which he ultimately raised to 16 inches above the natural level of the bank, to enable it to resist the force of the stream. He held on a barony title, and this erection was on his foreshore. It had the effect of preserving the bank, but at the same time considerably improving his fishings. *Held* (*aff.* judgment of the Court of Session—*diss.* Lord Gordon) that the proprietor was entitled to preserve the island in the way described, although the effect of so doing might be to improve the fishing.