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.

This was an action at the instance of the Duke of Sutherland against Sir Charles Ross, the circumstances of which are reported *ante*, May 26, 1877, vol. xiv. 552; 4 Rettie. 765.

The Duke of Sutherland appealed to the House of Lords that part of the interlocutor in the Court below which was adverse to him.

At delivering judgment—

Lord Chancellor—My Lords, the respondent in this case is the proprietor of the lands of Bonar, and of the foreshore and salmon-fishings in the Kyle of Oykell *ex adverso* his lands of Bonar. The appellant is the proprietor of salmon-fishings higher up, in the river Shinn, which runs into the Kyle; and the action has been brought by him to compel the respondent to remove two erections which he has placed upon his foreshore, on the alleged ground that these erections are in contravention of the Acts for the regulation of salmon-fishing in Scotland. One of these erections the Court has ordered to be removed, and as to it there is no appeal. The other erection the Lord Ordinary and the Second Division of the Court of Session have unanimously refused to order to be removed, and their interlocutors in this respect are now submitted to your Lordships upon appeal.

I do not think it necessary to describe minutely the second of these erections, the details of which have been so lately under your Lordships' notice. It is a bank running lengthways by the side of and parallel to the channel of the Kyle, uncovered at low-water, but covered by the tide, and marked on the plan with the letters F, G, H, I. I think it clearly made out by the evidence that previously to 1862 there was a firm bank of shingle running along in this line, F, G, H, I, forming a foreshore to the low-water channel of the Kyle, and confining the Kyle in its natural course, and preventing it from breaking into Kincardine Bay. It is clear that whatever may have been its former dimensions, it was immediately before 1862 at least nine inches above the level of low-water mark, and at this height it was sufficient to prevent the water from the low-water channel of the Kyle breaking across into Kincardine Bay, the level of low-water in which appears to have been lower than the level of low-water in the main channel of the Kyle.

In 1857 an embankment was made by the proprietor of Skibo, at the opposite side of the Kyle, the effect of which was to throw the water to a considerable extent against the Bonar side of the main channel, and gradually to wear away the bank confining the channel on the Bonar side. In 1862 and 1864 this bank was therefore repaired, but having burst again in the autumn of 1866 or the spring of 1867, by the pressure of the main channel of the river, it was strengthened and made firmer, and a course of stones placed along the top of it, raising it 15 to 18 inches in height. Even when strengthened in this way the bank has not proved adequate to resist the pressure of the stream, for the river having taken a set in the direction of Kincardine Bay, a breach has been made in the bank since 1868 at H, I.

Putting aside the question of the salmon-fishings, beyond all doubt this bank as raised in 1868 was an erection which the respondent had a perfect right to place on his foreshore, and the conclusion at which I have arrived upon the evidence is, that the erection was placed upon the foreshore in perfect good faith, and for the legitimate purpose of confining the water of the river in its proper channel. I do not believe upon the evidence that it was intended to obstruct the passage of salmon or to facilitate the catching of salmon. It is stated that the work done to the bank was intended to improve the fishings of the respondent, and expressions of some of the witnesses to this effect were used to show that this erection was really devised as a mode of fishing; but the manner in which it was to improve the fishings is clearly described by Pitcaithly, the tenant. He says—"These operations were for the purpose of keeping the water from bursting through. The object was to improve the fishing. The ground was quite high enough for fishing purposes with Mr Lipscomb's weir there"—(that is, the bank as repaired in 1862). "If the water had burst through and formed a new channel to Kincardine Bay, that would have injured our fishings."

The result is, that the respondent on his own foreshore strengthened and raised the height of the old bank, which confined the river in its proper channel, the bank even when thus raised being entirely covered at high-water. In what way then is it said that this is a matter of which the appellant as the owner of salmon-fishings higher up can complain?

It is contended that salmon which at certain times of the tide might desire to pass from the side channel in Kincardine Bay to the main channel of the Kyle would be met by this bank, and prevented crossing over, and that the bank is therefore an obstruction to the passage of salmon. It is not said that the obstruction would prevent them going up the river, but that it might delay them in passing up, or oblige them to go up by the side channel rather than the main channel, or force them to go round, and that whilst thus delayed or forced to go round they might be caught in the shoot of a net.

If this result is illegal, it must have been made so by some positive law. Your Lordships are well aware that a very wide construction has been given, especially by the Courts in Scotland, to the old Scotch Salmon-Fishing Acts; but I am not aware of any case in which those Acts have received a construction which would strike at a work like that of the respondent. The Acts are directed against devices fixed in rivers or tidal waters for the capture of fish, especially "cruives and yairs." A lawful work done in a river for a lawful or necessary purpose, and not as a device to obstruct and catch fish, would not be brought within the Acts although the effect of it may be to deflect or to some extent to alter the course which salmon might otherwise take.

A clear example of this is to be found in the case of *Trotter* v. *Hume*, decided in 1757 in the Court of Session (Morrison's Dictionary of Decisions, 12,798). Trotter there brought an action against Hume to remove a gallows and ladder erected at the east end of the island of Annabat, in the Tweed, for the purpose of viewing the fish in the river, and to demolish a bridge between the north bank of the river and the east or lower part of the island. It was stated that the bridge was 226 feet long, supported by three stone pillars and thirteen pillars of wood, by which of course the water was greatly interrupted and the

salmon frightened from coming up the stream, and by the means of spates or land-floods this channel of the river might by the obstruction of the bridge be much filled up, which would lead salmon into the other branch, belonging to a different proprietor. With respect to the gallows and ladder, it was a machine 18½ feet high. The water near it was shallow, and it was impossible it should fail to frighten the fish when coming up. The Lords at first found that the defenders had no right to erect a bridge between the banks of the river and the island, and ordained them to demolish the bridge already erected, and discharged them from erecting any bridge in time coming, but assoilzied them from the conclusion of the declarator as to the gallows; but upon a reclaiming petition the Lords assoilzied the defenders from the conclusion of the declarator as to the bridge, and adhered as to the gallows.

My Lords, it appears to me that if in the case now under appeal your Lordships were to differ from the unanimous opinion of the learned Judges of the Court of Session you would be straining the statutes for the protection of salmon very much further than they have ever yet been extended, and this I certainly am not prepared to advise your Lordships to do. I have therefore to move your Lordships that this appeal should be dismissed with costs.

Lord Hatherley—My Lords, I have come to the same conclusion. Upon the evidence which has been placed before us, it appears to me that this case exemplifies extremely well what the actual law is with reference to impediments placed in rivers as contrasted with works executed by a proprietor of the soil merely for the protection of his shore.

The Court below have directed the destruction of a certain impediment—the bank or embankment marked A B upon the plans—which would have had the effect decidedly of impeding the salmon in their passage up the river, combined with what now remains to be disposed of—that is to say, the embankment or work marked F, G, H, I. The one embankment, namely, that marked A B, had the effect of preventing or impeding seriously the fish in their passage up the stream. The present embankment is parallel to the stream, and it in no way impedes the passage of the fish. There is a passage for them on the right or left side of an island which is referred to in the proceedings before us, and it is distinctly in evidence that that which is now complained of—the embankment marked F, G, H, I, or a similar structure—was erected in consequence of works which had been erected at Skibo on the opposite side of the stream having directed the force of the current in a direction in which it had not before been active—directing it to cross this island which divided the two portions of the channel, and having thereby occasioned very considerable injury and damage to the respondent in the present case with respect to his property. In repairing that damage it may be that facilities have been afforded for catching salmon, but the mere fact that facilities are afforded for catching salmon when there is no obstacle to the passage of salmon up the river is, I apprehend, not struck at by any Act of Parliament with which we have been made acquainted in the course of the argument, or any which can be found.

I think, therefore, my Lords, upon the facts of the case, even if it should be that the salmon might be caught somewhat more readily from the circumstance of this erection being made—it having been erected with the *bona fide* view of repairing damage which had already been done, and it not having been brought to its present height until it had been shown by repeated accidents which had occurred by the breaking down of the wall that that height was necessary—there is nothing whatever to impede the free course of the fish up and down the river. It may make the time when the fish can traverse from one channel to the other channel a little earlier or a little later possibly, but it does not impede their passage. I take it that this case sufficiently exemplifies what it is that is unlawful with reference to an impediment in the lower part of a stream as regards the passage of the fish, and that the former impediment having been removed, there is now no reason whatever for complaint on the part of the appellant in respect of that erection, which has been unanimously allowed by the Court below to remain.

Lord Blackburn—My Lords, I also am of opinion that this appeal should be dismissed with costs. I do not think it necessary to enter on the case at all minutely. The law of Scotland as to salmon-fishing, as far as it comes in question in the present case, is clearly laid down in the case of *Hay* v. *Magistrates of Perth*, 4 Macq. 535.

The facts raising the question on which your Lordships are now called on to decide are not, I think, in dispute. It appears that there is a navigable channel on the eastern side of the island, so often alluded to, in which there is at all times water enough for salmon to go up. There is a channel on the western side of the island on the foreshore, not passable at low-water.

The original state of the foreshore here, before the Skibo embankment was made, seems to have been that between the island and the western shore at A B there was a natural bar about one foot above low-water, so that fish could not go up that western channel between the island and the shore until, either from the rise of the tide or from land-floods, the water was deep enough to let them pass over this natural bar; but they could pass as soon as the water was high enough, and in certain states of the weather, at least, fish went up that western channel. There was also at the end of the island—at F H—a bank forming a tail to the island, which appears to have been about 9 inches above low-water, and consequently about 3 inches lower than A B. And whilst this state of things remained unaltered it follows that the water would be deep enough to allow fish that came up the western channel to cross the bank into the eastern channel, whilst it was too shallow to allow them to go up over A B. The period whilst this existed would be measured by the time which it took the water in flood-tide to rise, or in ebb-tide to fall, about three inches, and would certainly not be very long, and the number of fish which would come up during that short time and cross the tail of the bank would not probably be numerous; but still fish could do this, and some fish no doubt did do so.

The respondents have not appealed against that part of the judgment of the Court below which

directed them to remove what was erected by them at A B, and that is not now before your Lordships. The case is to be considered as if the artificial erection at A B (which is to be removed) had never existed. And on the argument at your Lordships' bar the counsel for the appellant admitted that the evidence showed that the artificial work on F H as made in 1862 did no more than restore the tail of the bank to what had been its normal condition before the embankment at Skibo drove the current against it and cut it away, and it is clear that the respondents were justified in doing that much.

But it is agreed by the parties, and is proved on the evidence of Mr Pitcaithly, the tacksman of the fishings, and one of the defendants below that in repairing it in 1868 the tail of the bank was raised about 18 inches higher than it was before, and to some extent lengthened; and this alteration must have deprived the fish that came up the western channel at flood-tide, before the bank at A B was passable, or at ebb-tide after it ceased to be so, of the power of crossing the tail of the bank into the eastern channel, and must have caused less water to flow into Kincardine Bay during ebb-tide than did before. So far as these facts go, there is an interference with the passage of the fish. But I do not think it amounts to an illegal obstruction.

My Lords, I think that Lord Gifford in the Court below very truly says that the first question is, Whether, supposing that Sir Charles Ross had not the salmon-fishings, or that there were no salmon-fishings at all there, the owner of the fishings above could have said that the mere lengthening of the island or raising the height of the bank at the tail of the island was an obstruction illegal within the statutes as expounded by judicial decisions?

My Lords, I think it must in every case be a question of fact—a question on the evidence more or less—whether an artificial work preventing the fish from swimming as they were used to do is or is not such as to be illegal, as being in contravention of what Lord Westbury, in *Hay* v. *The Magistrates of Perth*, stated to be one of the objects of the old Scotch Fishery Statutes—"to ensure to the salmon a free and unimpeded access to the upper fresh waters, which are the natural spawning ground of the fish." I do not think it is necessary to prove that what is said to be an obstruction totally deprives the fish of such access; I think it is illegal if it really and substantially impedes that access. On the other hand, I do not think it is enough to make it illegal to show that it renders the mode of access different from what it was, unless that change in the mode of access really and substantially impedes it.

Now, if I have correctly apprehended the facts to be as above stated, it seems to me that the mere statement of the case shows that if there were no nets here the prolonging of the island could not be a substantial impediment to the access of the fish to the upper spawning grounds. And I do not think the witnesses for the pursuer say that it would. The Court asks Mr Young—"(Q) It obstructs the passage of the fish just by giving facilities for netting?—(A) Exactly." And it seems to me that this question and answer really give the effect of the evidence of all the witnesses who say that in their opinion it was an obstruction. But there are salmon-fishings a the spot, and it is necessary to consider whether that makes any and what difference.

I think it appears, without going out of the evidence of Mr Pitcaithly, that he has fished the water harder than it has been fished before—used more boats and more nets and more men—and that the men can catch fish longer in consequence of the bank being raised, and that they catch more fish, and in consequence the upper fishings have been falling off in value. This is a loss to the upper heritor, and no doubt very annoying to him, but it is *damnum absque injuria*.

I think it probable, though it is not proved, that the effect of this hard fishing may be to diminish the number of breeding fish which get up to such an extent as to cause the number of fish bred in the river to diminish, and so to produce the public mischief which the numerous Scotch Acts are directed to prevent. But no one of those Acts is framed so as to prevent the owner of the lower fishings or his tacksman making an excessive use of the legal modes of fishing. It may be improvident in the lower heritor to do so. He may, as Lord Deas said in *Hay* v. *The Magistrates of Perth*, not improbably "fare like the owner of the goose, in the fable, that layed the golden eggs." And the Legislature may by some future legislation regulate the use of the legal means of fishing so as to prevent hard fishing. But no restrictions have yet been laid on the owner of fishings further than those of the statutes, which, compendiously stated, are that he may not use any fixtures as part of the machinery by which he catches the fish.

My Lords, I do not say that an artificial work might not be so connected with the mode in which the fish are caught, even though the fish were taken out of the water by the net and coble, as to come within the extensive terms of being "siclike" with the enumerated modes of fishing which are prohibited. The decision of the Lord Ordinary in *Copland* v. *Maxwell*, June 13, 1810, F.C., may have been quite right on this principle.

But though I do not say that it is impossible in law, I think it clear that in this case it was not so in fact. The new Bay shot appears on the evidence not to be used or capable of being used except when the water is so high as to allow fish to cross freely at A B, and indeed the counsel for the appellant were driven to contend that any delay of the fish became a material obstruction, because the tacksman fishing very hard it was important that the fish should pass rapidly beyond the sweep of his nets. It would, I think, be an unwarrantable construction of the existing Acts to extend them to such a case as this, and it would be going much further than any decided case of which I am aware.

Lord Gordon—My Lords, I am in the unfortunate position of not being able to concur in the judgment which your Lordships are about to pronounce; and as I also differ from the judgment pronounced in the Court below, there is a strong presumption that the views which I take of the case are erroneous. But I have very carefully considered the case, and have anxiously reconsidered it since I became aware of your Lordships' views in regard to it, and I regret that I remain of the opinion which I at first formed in regard to it. But in the view which your Lord-

ships take of the case the judgment appealed from will be of course affirmed. In the circumstances it is, however, incumbent on me to state my opinion more fully than I would otherwise have done, in order to show the grounds on which it is founded.

I think there is little or no diversity of opinion in regard to the law applicable to the case. It is not contended that there is any law with reference to the capturing of salmon except that which has been recognised, after careful and ample discussion in this House, in the case of *Hay* v. *The Magistrates of Perth*, 4 Macq. 535. In that case the Lord Chancellor (Lord Westbury), Lord Chelmsford concurring, thus stated the principle upon which the old Scotch Salmon Fishery Acts had been framed—"It is most important to observe the principle which these Acts embody, and the objects which the Legislature sought to attain. My Lords, they are directed to three objects—one to ensure to the salmon a free and unimpeded access to the upper fresh waters, which are the natural spawning ground of the fish. The second to secure the unimpeded return to the sea of the smolt or young fry of the salmon. The third was to prohibit the killing of unclean fish during the fenced months, as we call them in England—that is, when the fish are out of season. For the purpose of accomplishing these objects, which are clearly declared in various statutes from the very earliest times down to the latest, the statutes rendered it unlawful to erect any cruives or weirs in water where the sea ebbs and flows. Cruives and weirs were allowed in fresh water with certain limitations. One was that there should be a midstream, the width of which is carefully defined. The other that the hecks (as they are called)—that is, the interstices between the wicker-work of the cruives—should be at least three inches wide. Fishing is also prohibited at mill-dams by any description of fixed net or engine. And then there is an enactment rendering it absolutely necessary that a free passage should be given both at the cruives and at the mill-dams in fresh waters from Saturday evening to the rising of the sun on Monday morning. My Lords, these are the objects which the statutes sought to accomplish, and your Lordships will recognise in them provisions for preserving the breed of the fish, but they nowhere descend to any directions touching the mode or the manner of fishing."

I think this is a very valuable exposition of the principles of the Salmon Fishing Statutes. And while this House in that case reversed the judgment of the majority of the Court of Session, I think it is of consequence to observe that they in substance affirmed the view which had been expressed by the Lord President (the late Lord Colonsay), who dissented from the judgment pronounced by the majority. And the views of the Lord President, as delivered in the Court of Session, appear to have been adopted substantially by the noble and learned Lord who moved the judgment in this House.

The question which has to be decided in the present case is whether the principles so expounded have been contravened, and whether the weir or erection which is complained of impedes salmon in their "free and uninterrupted access to the upper fresh waters, which are the natural spawning ground of the fish." I am quoting Lord Westbury's words.

The weir or erection which is here complained of is situated within the estuary of the river Oykell, "where the sea ebbs and flows," in what is known as the Kyle of Oykell, which is an arm of the sea running inland from Dornoch for about forty miles within the limits specified within the old Scotch Salmon Fishery Acts. The salmon-fishings in the Kyle, and particularly in the neighbourhood in question and further inland, are very valuable. The appellant is proprietor of salmon-fishings a few miles further up the river than the point where the erection is situated which is complained of, and which is on the property of the respondent. There is no doubt that the appellant has an interest in the estuary of the river, and is entitled to complain of any erections or weirs therein which create an obstruction to the free passage of salmon up the river. And if it is shown that the erection is truly an obstruction to the free passage of salmon, I am of opinion, as a matter of law, that it is illegal, and must be removed. In my view, therefore, the matter at issue is reduced to the question whether the erection does in point of fact form an obstruction to the free passage of fish up the river.

In considering this question it is necessary to advert to the circumstances attending the erection of the weir or embankment. It has been erected to some extent along the bank of a low island lying on the west side of the main channel of the river, and the original embankment was afterwards extended beyond the island. On the opposite, or north or east side of the river, called the Skibo side, now the property of Mr Sutherland Walker, it is said that a bulwark of stones was erected about thirty or forty years ago, and that this bulwark was added to about the year 1857, and that the effect of that bulwark on the Skibo bank was to throw the water to a considerable extent to the west side of the main channel, and gradually to wear away the bank of the low island on the respondent's property of Bonar. I think it is proved that this bank was composed of mud and shingle, and was only about 9 inches higher than low-water mark at ordinary tides. In course of time a channel was formed across the lower part of the island, carrying the water into Kincardine Bay on the west side of the island. In 1862 the respondent caused an embankment to be erected along the east bank of the island.

The respondent now contends that this embankment was erected for the sole purpose of repairing the breach which had been formed in his island. This may have been part of his purpose, but I think it is proved that his main purpose was to improve his salmon-fishings. His factor, Mr Lipscomb, and his engineers, Mr Paterson and Mr Gordon, in my opinion prove this conclusively in the passages from their evidence, to which I shall afterwards refer. I think that both purposes were perfectly legitimate, provided they were carried out without injury to the rights of others. And it does appear that in his first operations the respondent was careful to avoid doing anything which might be subject to challenge. Your Lordships have before you the specifications under which the weir of 1862 was erected; and you will find that while it was to be of a very substantial character, yet that it was specially provided that "the top of the piers

should be about 10 or 12 inches above low-water," being not much, if any, higher than the height of the original bank of the island.

In 1864 an addition was made to the then existing weir, and your Lordships have also before you the specifications under which that addition was erected, and by these it was provided that the addition was "to be constructed in exactly the same manner as the existing weir;" and it was further provided—"The height of the weir to be up to the height of the original gravel bank, which has been cut away by the new channel." I think these provisions were very judicious and proper; and it will be seen from the evidence of John Ross, the contractor who erected both weirs, and who was adduced as a witness for the respondent, that the provisions of the specifications in regard to the height of the weir were carefully carried out. He says—"That is the specification given me, under which I worked. I adhered to it. Starting from the original slope at the end of the island, I made my erection across the breach, and made it flush with the natural bank at the other end. I afterwards made an addition to the work in 1864. No. 46 of process is the specification under which I did so. The extension was made because the water had cut through the bank further down than the weir. At the end of the second weir which I made I drove piles into the natural bank to strengthen it. My instructions were to drive these flush with the natural bank, and on no account to raise them higher. I studied to adhere to these orders. The first work was inspected by Mr Paterson before it was taken off my hands." And on cross-examination he states (referring to No. 43)—"The top of the weir was nine inches above low-water. The natural bank, where the weir joined it, was nine inches above low-water, but it might be higher or lower further on."

I am of opinion that if the respondent had confined his embankment to the protection of his island, and had not exceeded the height of the original bank of the island, his operations could not have been successfully challenged by the appellant. But from 1866 to 1868 a great addition was made to the embankment; its length was considerably extended, and its height was increased about eighteen inches. In 1866 the respondent let his salmon-fishing to Messrs Powrie & Pitcaithly, and Mr Pitcaithly in his evidence states that he was bound by his lease to maintain the weir at the lower end of the island. He says—"In the autumn of 1866, or the spring of 1867, the weir was burst a little below the island when the river was in flood. I repaired the damage. I also strengthened the rest of the weir by putting fifteen or eighteen inches of stones on the top, and some behind, to keep it from running away. I could see no other plan to prevent it being carried away. I added a little to the length of the weir, but I do not know how much—perhaps thirty or forty yards. These operations were for the purpose of keeping the water from bursting through. The object of that was to improve the fishing. The ground was quite high enough for fishing purposes with Mr Lipscomb's weir there." And again, further on, he states—"It was Mr Lipscomb's weir that I heightened by stones fifteen or sixteen inches. The extension of the weir which I put up was raised to the same height."

The embankment, as it existed at the time the present action was raised, is described by the witness William Paterson, civil engineer, Inverness, who was the engineer employed by the respondent in the construction of the embankment in 1862. Mr Paterson says—"At the lower end of the islet I find that a weir has been erected, stretching into the stream from F to H. That structure appears at one time to have extended down to I. The length of the weir from F to H is 280 yards, and there is a breach between H and I of about forty yards. The weir stretches across a channel of the river. There is a channel running to the west of it. Where the breach exists between H and I the stream runs past in considerable volume. The tide runs very rapidly in and out, and it is difficult to take a boat against it. This weir has been raised from three to four feet above the level of the adjacent beach. I could not gather, from anything I saw, how high it had been raised above the level of the original breach at the spot. There seems to be some silting up behind. If anything, the original level of beach would be rather lower than the present level of beach, or perhaps generally the same. So far as I could judge, the level of the original beach, where the weir is, had not been higher than the level of the adjacent beach. That applies to the whole distance between F and H. The width of the weir from east to west is about four feet. There is a pathway on the top of it. There is a landing-place for nets upon it at G on the plan, and a smaller one between G and H, with a g for a windlass. The weir is constructed of two rows of piles about four feet apart, tied across, the inside being filled with turf and stones to make it water-tight. It is supported outside by a row of piles for a great part of the way, with bark stays filled with stones and causeway. A great part of it is very substantial. From F to H the level of it is very uniform. It stands about two feet four inches above low-water of ordinary spring tides, and averages about three feet six inches above the beach. The top of the structure is three feet six inches below high-water of ordinary spring tides, and about one foot below high-water of neap tides. In ordinary spring tides the structure will be flush with the top of the water within two or three hours of high-water, and at neap tides within one and a-half or two hours of high-water."

There are other witnesses who give evidence to the same effect with reference to the position of the top of the embankment in regard to the tides.

Matters seem to have remained in this position till the year 1874 or 1875, when the respondent erected another weir or embankment at the upper part of the island, and connecting the upper part of the island with the mainland on the west side thereof. This embankment blocked up the west channel, and prevented salmon from ascending the river by that channel. This embankment is described as extending from A to B on the plans produced.

The appellant, shortly after the erection of this latter embankment, raised the present action, in which he asks to have it found and declared that the embankment A B at the top of the island, and also that which I have specially before referred to at the lower end of the island, "are

fixed obstructions to the passage of salmon and other fish of the salmon kind, and are situated within the limits of the river Oykell and its tributary streams, including the estuary thereof," and that the obstructions were illegal and should be ordered to be removed, and the channel of the river or estuary restored to its former state before the erections were made. Both erections are complained of, and it is sought to have each of them removed.

The Lord Ordinary and the Second Division of the Court below were of opinion that the erection A B at the top of the island was an illegal obstruction, and ought to be removed. The interlocutor of the Lord Ordinary, which was adhered to by the Inner House, found that the said erection A B "is a fixed obstruction to the passage of salmon and other fish of the salmon kind, and is situated within the limits of the river Oykell and its tributary streams, including the estuary thereof, and is illegal, and ought to be removed; and decerns and ordains the defenders to remove the same accordingly within the space of six months from the date hereof." And the Inner House remitted to a man of skill to see that erection removed in terms of the Lord Ordinary's interlocutor, and it accordingly has been now removed by a man of skill.

Your Lordships have therefore only now to consider whether the weir or embankment at the lower end of the island comes within the same category of an illegal obstruction to the passage of salmon up the river.

The Lord Ordinary and the Second Division were of opinion that the appellant had not established his contention that the weir or embankment in question formed an obstruction to the free passage of fish, and their Lordships, *quoad* that weir or embankment, assoilzied the respondent from the conclusions of the summons. Their Lordships seem to have proceeded partly on the ground that it had been erected with the view of preserving the banks of the island, and was not more than was necessary for that purpose.

Now, my Lords, I am of opinion that the respondent was entitled to repair any damage caused to the banks of his island, and also to maintain his fishings there in the state that they existed before the erection of the bulwark or embankment on the Skibo side of the river, which is said to have been what caused the injury to the respondent's island and fishings, provided his operations did not cause injury to the rights of third parties. The decisions relied on by the respondent, and afterwards referred to, show that where a channel has been injured by a flood, and the rights of fishing proprietors have been thereby injured, it is lawful to cause the damage to be repaired, and to restore the channel to the state in which it was before the damage was done. But I do not think that there is any decision to the effect that where injury to fishings is caused by a *novum opus* on the opposite bank, the proprietor whose fishings are injured is entitled to set up an erection on his side of the stream to rectify the damage done, if the erection so set up has the effect of causing injury to other fishing proprietors. It rather appears to me that the remedy of the proprietor whose fishings are alleged to have been injured would be to cause the *novum opus*, which was the cause of the damage, to be removed, and to have the stream restored to the position it was in before the weir was erected.

I think that the weir or embankment in question is much more than a mere repair of a broken bank. Several of the witnesses connected with the erection of the embankment by the respondent state that it was made for the improvement of the fishings. Mr Paterson, the respondent's engineer, states, with reference to the weir of 1862, that it was explained to him that "it was desired to erect the weir in order to improve the fishings. No other object was mentioned to me than the improvement of the fishings." And again—"When I was counselled in 1862 nothing was said about the protection of the banks: it was the improvement of the fishings." Mr Gordon, the engineer who prepared the specification for the weir of 1862, states, in answer to a question by the Court, that the object of erecting the weir "was to improve the salmon-fishing." Mr Lipscomb, the respondent's factor, states that the embankment was erected in consequence of complaints by the fisherman. Mr Pitcaithly says—"The object of that (the extending and heightening of the embankment) was to improve the fishing." And Mr Stevenson, civil engineer, who was examined for the respondent, says—"I have no doubt the fishings would be the chief interest to be conserved there. I do not suppose the weir could have been put down for any other purpose than to help the salmon-fishings; but I do not know."

It is perhaps not of much consequence to consider the object the respondent had in view in erecting the embankment, because if it is not illegal he was entitled to erect it, but when it is found that the object of erecting it was the improving the respondent's fishings, and when it is complained by the proprietor of another fishing that his rights have been injured by the operations complained of, there is certainly fair room for the inference that something more has been done than was actually necessary for repairing damages done to the respondent's island. And accordingly, on examining the evidence which has been adduced, I think it is found that the operations complained of exceeded what was necessary for mere repairs. It is seen that the original bank of the island was only nine or ten inches above low-water mark. The embankment is now, according to Mr Paterson's evidence, "about two feet four inches above low-water of ordinary spring tides, and averages about three feet six inches above the beach." That is a very material difference, and I think there can be little doubt that such an addition to the height of the embankment at the place where it exists forms an obstruction to the free upward passage of salmon.

Your Lordships have before you the evidence which has been adduced in the cause. There is no question of credibility involved in the proof. There is no doubt—as there is in almost every such case—difference of opinion among the witnesses. But your Lordships are in the same position for considering and judging of the evidence as the Court below were, and can consider and judge of the effect of the evidence for yourselves. It is with considerable diffidence that I venture to differ from the judgment of the Court below; but I have considered the evidence with

very great care, and I have come to be of opinion that the appellant has proved that the embankment, in consequence of its greater height than the original bank of the island, is an obstruction to the passage of fish up the river, and is therefore illegal. I shall shortly advert to a few passages in the proof, which I think bear out the view I take of it.

Mr Archibald Young, an advocate of the Scottish Bar, who is one of the Royal Commissioners on Salmon Fisheries, and who has had great experience in regard to all salmon-fishing questions, inspected the embankment before the question was raised between the parties, and he says—"I examined the weir at the foot of the island both in 1870 and 1875. It appeared to me to be an obstruction to the passage of salmon upwards, and to be a large fishing encroachment upon the channel of the Kyle, barring a place where fish would naturally have passed if it had not been there, and injuring the upper proprietors of fishing by facilitating netting on the part of the lower proprietors."

John Urquhart, who was manager of the respondent's fishings at Bonar Bridge from 1860 to 1865, states—"The weir is now higher to the extent of less than two feet than it was when it was first made. In my judgment that weir would obstruct the passage of salmon to the upper waters at certain states of the tide. The weir was made with a view to improve the fishing." Donald Urquhart, a fisherman in the estuary, and who has lived in the Bonar district all his life, says—"Ever since I remember the islet there has been no bank as high, or nearly as high, as the present weir running out where the weir F H is."

Adam Robertson, who had about thirty years' experience in connection with salmon-fishing, and who was acquainted with the locality in question, states—"I have no doubt that both the obstructions now complained of are serious obstructions to the passage of salmon up the river."

George Davidson, who is a tacksman of salmon-fishings, and pays a rental of £1500 a-year, and who is a member of the Don District Fishery Board, and has been actively engaged in the management of salmon fisheries for forty years, says—"The weir at the foot of the island in my judgment obstructs one of the main channels of the river. It is built across a channel by which salmon would naturally find their way into the main stream." And on cross-examination by the respondent he says—"When I speak of injury to the upper proprietors, I mean that that arises from fish being caught that would otherwise get up the river. I also believe that the obstructions in question would turn fish back altogether."

Mr George Cunningham, civil engineer, Edinburgh, says—"The top of this weir is level with the surface of the water about half-tide of ordinary spring tides, so that for about half of every tide it would form a complete barrier to the passage of fish. It would be still longer a barrier to them at neap tides. It did not occur to me that there was any object for which the weir could have been designed except to facilitate the fishing, and I thought it had been designed for that when I saw the men fishing from it. I saw no bank requiring to be protected by it. There is nothing behind it worth preserving."

Mr James Leslie, civil engineer, who was one of the Salmon Commissioners under the Act of 1862, says—"The weir F H stops the current of the tide away from the channel of the river down towards Kincardine Bay, and bars the passage of salmon till the tide is high enough to cover the weir. Salmon taking a particular line from Kincardine Bay into the main channel would be stopped by that erection. I see no reason why that should not be a likely line for them to take."

William Dunbar, who is a tenant of salmon-fishings, for which he pays rents to the amount of nearly £5000, and who has taken a great deal of interest in the habits of salmon, and has watched them closely, and who has known the Kyle of Sutherland since 1844, says, with reference to the point in dispute—"There was a strong current there, both when the tide was ebbing and when it was flowing. In certain winds most of the salmon entering the Kyle would go that way, and in other winds not so many. I am satisfied that considerable numbers of salmon would enter the Kyle by that place at that time. There is now a weir at that spot which completely bars their progress so far as it goes. Nothing of the kind was there in the years from 1844 to 1848."

I think these passages show that the embankment in its present state does form a real obstruction to the upward passage of fish, and is therefore illegal.

It was contended on behalf of the respondent that the embankment was on the foreshore of the island, and not in the *alveus* of the river, and that therefore the appellant was not entitled to object to it. There is no doubt that there is part of the embankment on the foreshore, but the embankment has been executed beyond the island; and so far as it is so extended, it is erected in the *alveus*. The appellant, in the 8th article of his condescendence, says that it extends "from the lower end of the island in a southerly or south-easterly direction for 280 yards or thereby into the said river or estuary thereof." And the respondent, in the 5th article of his statement, says substantially the same thing. His statement is—"He also, between 1862 and 1866, caused the outer bank of the said strip of ground to be faced with piles and boarding, and the detached pieces into which it had been broken to be joined with a narrow embankment. He also caused the said embankment to be extended from the lower end of the said strip of ground in a direction parallel to the main channel of the Kyle." It thus appears that a very considerable portion of the embankment is not on the foreshore of the island, but in the *alveus* of the river.

With reference to the argument as to the erection being on the foreshore, the Lord Justice-Clerk says—"It is a mistake to suppose that everything which is erected on the foreshore which may have the effect of altering the course of salmon is an obstruction of which an upper heritor is entitled to complain. That is not the meaning of the statute. An obstruction must be something which prevents the fish from getting up. If all that can be said is that while the fish have the choice of the two channels going up by the right or west bank, or the left or east bank, there is an intermediate place where a fish might have gone across, which has now been shut up by the operations of the defender, I do not think

that is an obstruction. That the fish has to go two or three yards round in order to get up a stream is certainly not an obstruction to the passage of salmon in the sense of the statute; and it is wholly immaterial whether the result is to improve the fishing of Sir Charles Ross, seeing that if it be not an obstruction in the sense of the statute the Duke of Sutherland has no title and no interest to object to what has been done, and, subject to the provisions of the statute, Sir Charles Ross is perfectly entitled in a question with him to improve his own chance of catching salmon. I am therefore of opinion—first, that there was a good and reasonable ground for at all events a portion of the erection complained of; but, in the second place, that, as it stands, no part of it seems to me to come up to what is necessary in order to constitute an obstruction to the passage of salmon in the sense of the Salmon Statutes, and that consequently the Duke of Sutherland has no title to complain of what has been done upon the ground belonging to the defender. I should not have thought it of any consequence here that this was on the foreshore if it had been an obstruction, because, as I have already said, it is to obstructions to the passage of salmon by means of artificial erections within the flux and reflux of the tide, or in estuaries, that the statutes refer."

Now, my Lords, I agree with his Lordship that if the erection here complained of is an obstruction, it is of no consequence that the erection is on the respondent's foreshore, because it is admittedly within the flux and reflux of the tide. But the question whether the erection does or does not form an obstruction is one of fact, and that fact can only be ascertained by considering the evidence before the Court. In my view, his Lordship seems to have overlooked that, and to have decided the case on a theory of his own, viz., that it is no obstruction to the passage of salmon in the sense of the statute if the fish has merely "to go two or three yards round in order to get up a stream." I am not sure that I would concur with his Lordship in holding that if an erection caused the fish to go only "two or three yards round" it was not an obstruction in the sense of the statutes. But your Lordships are not here dealing with such a case. You have it in evidence that the obstruction in question is 280 yards in length, and the fish would have to go all that distance before they could get round the end of the obstruction. I think that is very different from the theory with which his Lordship dealt, and that a barrier of the length of the one in question does form a very material obstruction indeed.

The only decision referred to by the Lord Justice-Clerk—that of *Jackson* v. *Marshall*, July 4, 1872, 10 Macph. 913—had no reference to fishings, but to operations by a riparian proprietor on the *alveus* of a private river, and which were challenged by a conterminous proprietor. It is of the same class of cases as that of *Bicket* v. *Morris*, which your Lordships had recently under consideration in the case of *Orr Ewing* v. *Colquhoun*, (2 Law Rep., App. Cases, 839), but which cases have no application to the question before the House.

Lord Ormidale refers to the cases of the *Town of Nairn*, *Forbes* v. *Smith*, and *Mather* v. *Macbraire*, as showing that the respondent here had not exceeded his legitimate rights in repairing the injury done to his island and his fishings. But I do not think that these cases support his Lordship's opinion.

The case of the *Town of Nairn* (Mor. 12,779) decided that in order to preserve their fishings the town was entitled to close up a channel which had been formed by a flood. But that was merely a case of repair necessary to restore the river to the condition in which it was before the injury was done.

I think the case of *Forbes* v. *Smith*, as decided in this House (1 Wilson and Shaw, 583), is not an authority in point at all. It had reference to the erection of an embankment by Smith, a riparian proprietor (but who had no right of salmon-fishing), *in alveo* of the river Findhorn. This embankment was complained of by Forbes, the proprietor of the salmon-fishings at the point in question, as being an interference with his rights; and he raised an action of declarator to have it found and declared that Smith had no right to make or construct any bulwark or embankment along the course of the river to his hurt and prejudice in the exercise of his rights of fishing. The Court of Session, without allowing Forbes to lead evidence of the injury caused to his rights by the embankment, assoilzied Smith from the conclusions of the summons. And what this House did was to remit the case back to the Court of Session to inquire whether the bulwark or embankment was so constructed as to be injurious to the right which the fishing proprietors had of fishing in the river, and in a manner not necessary to its utility as a bulwark or embankment—to that effect differing from the Court of Session, and holding that the fishing proprietors might establish by evidence that their rights were injured.

The case of *Mather* v. *Macbraire* (March 14, 1873, 11 Macph. 522) was also a case of repair of injury cause by a flood. The Court in that case held that the operations complained of "were performed for the purpose of repairing the damage caused to the bed of the river by winter floods and floating masses of ice or otherwise, and of restoring the channel to its former state, and so maintaining the said salmon-fishing in a suitable condition for the due and proper use of the nets therein, and otherwise for the due exercise of the rights of the defender in relation to the said fishing, and that said operations did not go beyond reasonable repair to the bed of the river."

The case of *Trotter* v. *Hume*, July 9, 1757, Mor. 12,798, which was referred to at the bar, had reference to a gallows and ladder erected on an island for the purpose of viewing the fish in the river, and to a bridge between the north bank of the river and the island. The case is very shortly reported, and I sent for the printed pleadings in the Court of Session to ascertain further particulars. I find that the conclusions of the action were to have it "found and declared that the lower or eastmost boundary of the pursuer's fishing, and which divides it from the defender's fishing, was a ford at the east or lower end of the island called Annabat, and therefore that the defender had no right to erect a gallows or ladder upon the east end of said island, nor a bridge betwixt the bank of the river and the island, and therefore that these should be demolished." The

question therefore was as to the boundaries of the respective fishings, and whether the portion of the island on which the gallows and bridge had been erected by the defender was or was not within his boundaries. The Court at first decided that the portion of the island in question was not within the defender's boundaries, and ordered the bridge to be removed, but on advising a reclaiming petition, the Court seems to have found that the island was within the defender's boundaries, and that he was entitled to maintain the erections he had set up. It was alleged by the pursuer that the erections were injurious to his rights of fishing, but neither the report of the case nor the pleadings show what view the Court took on this part of the case. The Salmon-Fishing Statutes were not at all referred to. And it therefore appears to me that the case cannot be regarded as an authority in the present case.

I may refer your Lordships to the case of *Viscount Arbuthnott, &c.* v. *Scott and Others*, decided in this House on May 25, 1802 (4 Paton's Appeals, 337). In that case the appellants were proprietors of salmon-fishings in the North Esk. Further down the river, and about two miles from its mouth, the respondents were proprietors of mills on either side of the river. And at this place the respondent Mr Scott had also a right to a salmon-fishing, which he was entitled to exercise either by means of cruives or by net and coble. There had been much litigation in regard to a dam-dyke for supplying the mills with water, and a cruive-dyke immediately adjoining; and in consequence of a judgment of this House in 1772 Mr Scott could no longer use the cruive-dyke as a means of preventing the passage of the salmon up the river, and therefore he resolved to abandon that dyke in order to furnish a pretence for erecting another dyke. Accordingly, some years afterwards he resorted to the plan of erecting a new dam-dyke. This erection proved much more objectionable to the fishing than the former from its peculiar construction, it being made of a heap of loose stones, so placed together as to allow the flow of water to filtrate through them, at the same time preventing the possibility of the river from flowing over the top. An action of declarator was therefore raised by Lord Arbuthnott, concluding to have it found and declared that the respondents "had no right to erect said bulwark of the extraordinary dimensions above described, and therefore that these new erections ought to be demolished and the said bulwark altogether altered in its dimensions, and of new constructed in such a manner and with such openings or gaps as to admit the free passage of salmon at all times up the river." The Court of Session assoilzied the defenders from the conclusion of the action. But this House, on appeal, reversed the judgment of the Court of Session, and found "that the pursuers, as proprietors respectively of salmon-fisheries in the river of North Esk, are entitled to have as free access of salmon to their several fisheries as can be had consistently with the rights which others have in the lower parts of the river." And the House remitted the same back to the Court of Session to have the dyke altered.

Considerable further litigation followed on this remit in the Court of Session, but ultimately the Court found that the dam-dyke in question must be of new constructed in conformity to a report by an engineer, by and at the expense of Mr Scott, and be thereafter maintained and supported by him. This judgment was appealed against to this House at the instance of Mr Scott, but was affirmed (5 Paton, 750).

I think this case shows that wherever there is in fact what amounts to an obstruction to the passage of salmon, in the sense of Lord Westbury's judgment in the case of *Hay*, it will be ordered to be removed.

On the whole, therefore, I am of opinion that the operations complained of in the present case exceeded what were necessary for repairing the damage done to the island, and restoring the respondent's fishings to the condition in which they were before the erection of the Skibo embankment. I am of opinion that it is proved that the embankment in its present condition is an obstruction to the "free and uninterrupted" passage of salmon up the river, and that it ought to be lowered to the height of the original bank of the island; and that so far as it extends beyond the end of the island as it existed before the Skibo embankment was formed, it should be entirely removed.

Interlocutors appealed from affirmed, and appealed dismissed, with costs.

Counsel for Appellant—Balfour—Mackintosh. Agent—W. A. Loch, Solicitor.

Counsel for Respondent — Lord Advocate (Watson)—Benjamin, Q.C.—Johnston. Agents —Markby, Wilde, & Burra, Solicitors.

Monday, April 15.

SMITHS *v.* CHAMBERS' TRUSTEES.

(Before Lord Hatherley, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

(*Ante*, Nov. 9, 1877, p. 58.)

Trust — Succession — Vesting — Arrestment — Power of Trustees to Postpone Term of Payment and Restrict Right of Beneficiaries.

A truster directed his trustees to hold the residue of his estate for behoof of his children "under the exceptions and modifications to be afterwards stated," declaring that the shares should vest at his death and be payable six months thereafter. He gave his trustees power to postpone payment so long as they should see fit, and to restrict the right of any child to a liferent, creating a new trust if necessary to effect that end. The trustees paid certain portions of the capital and the whole of the income of his share to one of the children. Thereafter certain of his creditors arrested his share of the residue in the hands of the trustees, and raised an action of forthcoming. After this action was raised, the trustees executed a deed whereby they restricted the right of the beneficiary to a liferent, and declared his share of the residue to be vested in themselves as an alimentary fund for behoof of the child in liferent and his children in fee. *Held* (*rev.* the judgment of the majority of the First Division) that the right to his share had vested in the beneficiary subject to the exercise of the powers conferred on the