at all persuaded that the Lord President and Lord Curriehill were really considering the question which we are called upon to determine now, or that they intended to say anything at all about the admissibility of evidence. In that case there was a very specific, detailed, and somewhat elaborate statement in the condescendence of publication in certain newspapers; and the observations of the learned Judges were all made with reference to that statement only. They knew nothing more of the case than what they saw in the condescendence, and it was as a criticism of the condescendence that they made the observations in question. Now, it is not the function of the condescendence to set out in detail the evidence on which the pursuer means to rely. Its proper purpose is to aver the facts upon which his claim is grounded, or in a case of this kind the facts which constitute the wrong of which he complains. And therefore it appears to me the Court may very well in that case have looked on this averment as an averment of a separate wrong which the pursuer was bringing forward as a ground of claim. I do not think that, if that were so, there is anything to create any surprise or doubt in the opinions expressed, that that was not a relevant ground of action —for it merely came to that—that it might not be a direct or natural consequence of what the defender had done, that this other wrong set forth in the specific averment was committed. But I cannot read these opinions as amounting to a judgment that it is not relevant to prove injuries to the trade or credit of a person making a complaint of this kind by reason of its having come to the knowledge of persons trading with him, not because of their having been in Court and learned the proceedings by their own ears, but because they had read it in the newspapers. That is what the defenders maintain here. I do not think that it is supported by the judgment in *Davies* v. *Brown*. But if it were, then I should agree with your Lordships that we are not bound to follow it, and ought not to do so.

As to the other matter, I entirely agree with all your Lordships that it is a question for the jury to determine what is the proper amount of damage, and as your Lordship has said, it is a question of difficulty and of considerable delicacy. Whatever our own opinion is, we ought not to interfere with the verdict of a jury unless it is quite evident that they have given not what we may think too much, but what is so excessive and exorbitant as to make it unreasonable that their verdict should stand. I do not think that is the case here, and therefore I concur in the judgment proposed by your Lordship.

The Court discharged the rule and applied the verdict.

Counsel for the Pursuers—A. J. Young—Kemp. Agent—Francis S. Cownie, S.S.C.

Counsel for the Defenders—Jameson—Watt. Agent—William Manuel, S.S.C.

Tuesday, February 23.

FIRST DIVISION.

DUKE OF FIFE *v.* GEORGE (CLERK TO DEVERON FISHERY BOARD).

Fishings—Salmon Fishings—Salmon Fisheries Act 1862 (25 *and* 26 *Vict. c.* 97), *sec.* 6, *sub-sec.* 6—*Salmon Fisheries Act* 1868 (31 *and* 32 *Vict. c.* 123), *Schedule F—Regulations—Width of Cruive.*

Sub-section 6 of section 6 of the Salmon Fisheries Act 1862 empowers the Fishery Board Commissioners to make general regulations with respect, *inter alia,* to the construction and use of cruives, . . . "provided that such regulations shall not interfere with any rights held at the time of the passing of this Act under royal grant or charter, or possessed for time immemorial."

By Schedule F of the Salmon Fisheries Act of 1868 the Commissioners made a regulation that no cruive should be less than 4 feet broad.

A proprietor owned a right of salmon-fishing by cruives under royal charters, which contained no specific provisions as to the size of the cruives.

In an action raised against his predecessor in 1774 by upper riparian proprietors for the purpose of regulating the size of the cruives, the Court found that the cruives must be an ell (37 inches) in breadth. Since that date the cruives were uninterruptedly maintained of that breadth.

Held (1) that the above proviso did not exempt these cruives from the application of the new regulation; (2) that the cost of altering them so as to be in conformity with it must be borne by the proprietor.

Kennedy v. *Murray*, July 8, 1869, 7 M. 1001, *followed.*

The Duke of Fife, in virtue of ancient royal grants, was the proprietor of the salmon fishings in the river Deveron from the sea for about four miles upwards; he was also proprietor of the lands on both sides of the river for the same extent. The royal grants and the title of the Duke and his predecessors connecting therewith comprehended the right of fishing both by cruives and by net-and-coble. The cruive-dyke belonging to him was situated on the river about two miles from the sea.

In an action of declarator in the Court of Session at the instance of Lord Banff and others, proprietors of upper fishings in the river, against James second Earl of Fife, the Duke's predecessor, raised for the purpose of regulating the position, dimensions, and use of the cruives and cruive-dyke belonging to the Earl, the Court, by interlocutors, dated 16th February and 8th December 1773 and 4th August 1774, found that the defender and his tacksmen "were entitled to maintain and uphold the cruive-dyke now belonging to the first party in the

form and shape in which it then was, but that the defenders were bound to place three cruives at least in the said dyke; that each of these cruives must be an ell in height and an ell in breadth." By these interlocutors it was further found "that the said Earl of Fife was entitled to withdraw water from the river at the cruive-dyke by a lade for the purpose of driving the said Rack Mill belonging to his Lordship, the entry to the mill-lade from the river to be 2 feet above the bed of the river."

These interlocutors were, on appeal, affirmed by the House of Lords.

In two subsequent actions raised against the Earl for transgressing the terms of these interlocutors, the Court in 1784 found that it had not been proved that any alteration had been made in the cruive-dykes since the decrees, and accordingly assoilzied the defenders. The present Duke of Fife and his predecessors have uninterruptedly maintained, under and in virtue of the above interlocutors, cruives of the width of an ell (37 inches).

By section 6, sub-section 6, of the Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97) it is provided that "The Commissioners shall have the powers and perform the duties hereinafter specified; that is to say . . . To make general regulations with respect to the following matters, viz., the due observance of the weekly close-time; the construction and use of cruives; the construction and alteration of mill-dams or lades or water-wheels, so as to afford a reasonable means for the passage of salmon; the meshes of nets (so that they shall not intercept smolts or salmon fry); obstructions in rivers or estuaries to the passage of salmon: Provided that such regulations shall not interfere with any rights held at the time of the passing of this Act under royal grant or charter or possessed for time immemorial."

Section 10 of the Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. cap. 123) provides that "the bye-laws contained in the schedules annexed to the Act shall . . . so far as consistent with the Acts 25 and 26 Vict. cap. 97, 26 and 27 Vict. cap. 50, and 27 and 28 Vict. cap. 118 . . . be as valid and binding as if the same had been expressly enacted in this Act."

Schedule F contains, *inter alia*, the following regulations—"We, the Commissioners appointed under the said Acts, and empowered thereby to make general regulations with respect to the construction and use of cruives, do hereby make the following general regulations with respect to the construction and use of cruives:— . . . (2) No cruive shall be less at any part of it than 4 feet broad in the clear, provided that where an upright post is used to support the cruive, thereby dividing the width into two parts, the aggregate width exclusive of such post shall not be less than 4 feet."

In October 1894 the Fishery Board for Scotland drew the attention of the Deveron Fishery Board to the bye-law in Schedule F quoted above, and suggested that the Duke of Fife's cruives were not in conformity with it.

A Special Case was accordingly presented by (1st) the Duke of Fife, and (2nd) the Clerk to the Deveron Fishery Board. The questions submitted to the Court were—"(1) Is the first party entitled, in the circumstances set forth, to maintain and continue to use the said cruives at their present width? or (2) Is the first party bound, when called upon to do so by the Fishery Board represented by the second party, to widen the said cruives to a width of 4 feet each? or (3) Is the said Fishery Board entitled so to widen said cruives?"

The parties agreed that the widening of the cruives would in the summer months prejudice the first party's water supply for Rack Mill.

Argued for first party—The extent of his rights had been defined by a judgment of the Court of Session and the House of Lords, as explaining the ancient grants, and accordingly this was a typical case falling under the proviso of sub-section 6 of section 6 of the 1862 Act. This was distinguishable from the case of *Kennedy* v. *Murray*, July 8, 1867, 7 M. 1001, because there the possession was required to explain the use, while here there was immemorial possession of a defined use. The decision of the Court in 1874 was one as to heritable rights, which it was competent for the Court to fix for all time coming—*Marquis of Huntly* v. *Nicol*, March 5, 1896, 23 R. 610. If the contention of the second party were accepted, the whole effect of the proviso would be taken away. Moreover, if the cruives were widened it was agreed that there would be a most injurious effect on the right of water supply to the mill, and the Court would be slow to hold that this right was to be impliedly injured by the regulations.

Argued for second party—The decision of the Court founded on by the first party was merely a regulation of the mode of exercising the right, and such a regulation was one which might be altered from time to time by the Commissioners under their statutory powers. The plea founded on the proviso in section 6 of the 1862 Act would have the effect of nullifying the enacting part of the clause. It had been considered and repelled in the case of *Kennedy* v. *Murray*. That case further showed that the expense of the alteration must be borne by the first party.

At advising—

LORD PRESIDENT — The main question raised by this special case is, whether the first party is entitled to maintain and continue to use his cruives at their existing size, which is 37 inches, or is bound to conform to the regulations of the Commissioners, which require cruives to be of the width of 4 feet.

Now, *de facto*, the Duke's cruives, 37 inches wide, have been there for upwards of a hundred years; but then their origin is very clearly shown in the Special Case. The first party does not ascribe the size of the cruives to any specific provision to that effect in the royal charters under which he

is in right of his salmon fishings. On the contrary, the size of 37 inches was laid down by the Court of Session in the decree mentioned on record; and from the terms of the decree it is clear that the Court prescribed cruives of this size by way of equitably harmonising the exercise of the rights of the Earl of Fife with the interests of the upper riparian proprietors. In short, the provision of the 37 inch cruives was a regulation laid down by the Court of Session, which was then the only body competent to do in particular cases what is now done by the Commissioners through general regulations. I do not think, therefore, that the first party can be said to have any right to this particular size of cruive under his charter; and I do not think that the mere fact of the cruives having been there since 1774 discloses the case of a right possessed for time immemorial in the sense of the Act, especially when the origin of the cruives is seen to have been a decree regulative of possession. The Act of 1862 introduces a new system of regulation; and regulations made under it apply not merely to structures to be erected in the future but to existing structures, as was held in the case of *Kennedy* v. *Murray*. This being so, I see nothing in the history of the cruives now under consideration to afford to them any immunity from the regulations of the Commissioners.

A special point was made regarding the effect of widening the cruives on the flow of water into the mill-lade. But I suppose the necessary result of widening cruives is to affect the flow of the water; and this is one of the incidental results of the regulations which must be submitted to. Here, again, the first party has no special right conferred by charter which places his mill-lades in a protected position. The provision in the decree which relates to this matter is again of a regulative character, confers no immunity, and does not denote any right of the character which is safeguarded in the Act of 1862.

I am, therefore, for answering the first question in the negative. It was decided in the case of *Kennedy* that the cost of the operations necessary to produce conformity with the regulations falls on the proprietor; and therefore the second query should be answered in the affirmative. This does not necessarily imply that the Board might not be entitled, in case of failure on the part of the proprietor, themselves to widen the cruives; and therefore, considered in the abstract, the third query is not properly alternative to the second. But it is so put, and no circumstances are stated as giving rise to it except the contention of the first party on the question of expense. Accordingly, I think that we should hold it to be superseded.

LORD ADAM—By sec. 6, sub-sec. 6, of the Fisheries Act of 1862, the Commissioners are directed to make general regulations with respect to, *inter alia*, the construction and use of cruives, provided that such regulations shall not interfere with any rights held under royal grant or charter or possessed from time immemorial.

The right of cruive fishing, and, so far as I know, all other rights of salmon fishing, are exercised under conditions and regulations imposed by Act of Parliament, or otherwise any alteration of such conditions and regulations would, in one sense, be an interference with such rights of salmon fishing. If that be the meaning of the Act, I do not see how the Commissioners could make any regulations altering or affecting the previously existing conditions and regulations, as that would be interfering with the right of fishing.

It appears to me, therefore, that regulations altering or modifying the existing regulations, are not, in the sense of the Act, interference with the right of fishing, but merely with the mode and manner in which such right shall be exercised.

In this case one of the conditions or regulations under which the Duke's right was exercised was that the cruives should be at least one ell in height and one ell in breadth—that is, 37 inches.

One of the general regulations issued by the Commissioners required that no cruive shall be less than 4 feet broad in the clear. It appears to me that this regulation does not interfere with the Duke's right of fishing, but is merely an alteration of the conditions on which it is to be exercised, and that his Grace is bound to conform to it.

It is said, however, that if the cruives are so widened his supply of water to the Rack Mill may or will be prejudicially affected. It appears to me, however, that his right to take water is not interfered with by the regulation.

I think, therefore, that the first question should be answered in the negative.

I think the second and third questions should also be answered in the negative. I think the Duke is not bound to widen the cruives unless he pleases, and that the Fishery Board are not entitled to widen them.

The remedy is that if the Duke proceeds to fish with cruives of a less breadth than 4 feet he may be stopped by interdict.

LORD M'LAREN—I concur with the Lord President. We must assume that the Commissioners have a statutory power of regulation, and therefore it is not an answer or good objection to a regulation of this kind that the mode of enjoyment of the right of fishing is altered in some respects; and nothing more, I think, has been said in this case. It is substantially still a right of cruive fishing. At the same time it is perfectly clear that the Commissioners cannot under the guise of regulations take away or substantially diminish the rights of a proprietor of salmon fishing, and it was for the purpose of safeguarding these rights that the clause in question was inserted.

LORD KINNEAR—I agree with the Lord President, and I have nothing to add, except that with reference to what Lord Adam has pointed out as to the remedy of the Fishery Board it does not appear to me that by answering the second question

in the affirmative we are deciding anything contrary to Lord Adam's view as to the proper mode of enforcing the Board's right. That question is not specifically raised in this Special Case. The question put to us is, what are the rights and obligations of the parties, and, agreeing with your Lordships as to the obligations of the Duke of Fife, I do not see that we are called on to consider how that obligation is to be enforced since the parties have not thought fit to raise that question.

The Court answered the first question in the negative, the second in the affirmative, and superseded consideration of the third.

Counsel for the First Party—Dundas—Clyde. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Second Party—H. Johnston—Campbell. Agent—Alexander Morison, S.S.C.

Wednesday, February 24.

SECOND DIVISION.

[Lord Low, Ordinary.

PARISH COUNCIL OF BRECHIN *v.* PARISH COUNCIL OF BARONY PARISH, GLASGOW, AND PARISH COUNCIL OF PERTH.

Poor — Settlement — Forisfamiliation — Weakness of Mind.

The father of a girl of sixteen years of age, who travelled about the country during the winter months as a hawker, and lived in lodging-houses in the towns he visited, left his daughter in charge of the keeper of one of the lodging-houses. The girl was congenitally of weak mind, but not insane, and the arrangement upon which she was left was that she should receive her food and clothing in return for such services as she was able to render in taking charge of children and in simple household work. Her stay at the lodging-house was terminated after about a year by her running away, and she was afterwards found wandering about the roads, and was taken in charge by an inspector of poor. *Held* (*aff.* judgment of Lord Low) that she had not been forisfamiliated, and that her father's settlement was liable for the sums expended on her maintenance.

This was an action at the instance of the Parish Council of Brechin against the Parish Council of the Barony Parish of Glasgow and the Parish Council of Perth, concluding for decree ordaining one or other of the defenders to make payment to the pursuers of the amount disbursed by them in relieving a pauper, Jessie Marshall, in the Brechin Almshouse, between certain dates specified, and further, to free and relieve the pursuers of all further disbursements made or to be made for her aliment.

The pauper was born in the Barony Parish of Glasgow. Her father was born in the parish of Perth, and had never acquired a residential settlement.

It was ultimately admitted that the disbursements had been properly made by the pursuers.

The defenders, the Parish Council of the Barony Parish of Glasgow, maintained that the pauper was an imbecile, and owing to mental incapacity had never been capable of earning her livelihood or of supporting herself, that she had never been forisfamiliated, and accordingly that she took her father's settlement, and was chargeable against the parish of Perth.

The defenders, the Parish Council of Perth, on the other hand, maintained that the pauper had been forisfamiliated, that she had not acquired a residential settlement in the parish of Perth, and that the parish of her birth, being the Barony Parish of Glasgow, was consequently liable for her relief.

A proof was allowed, by which the following facts were established:—The pauper was born on 12th July 1876. She was not insane, but had been weak-minded from her birth or soon thereafter. Her father worked as a painter in summer, when he sometimes had a house, and as a hawker during the winter months, when he resided in lodging-houses in the different towns he passed through. In April 1893 the pauper was left by her father in a lodging-house at Laurencekirk, kept by a man named Laing. She remained there, receiving her board and lodging, but no wages, in return for assisting his wife in her housework and in looking after her children, till the spring of 1894, when she ran away to Montrose. Laing went after her and took her to Brechin, where he tried to get the Inspector of Poor to admit her to the Almshouse, but the Inspector of Poor refused to do this, and Laing took the girl back to Laurencekirk. She ran away again in a few days, and again went to Montrose, where she was admitted to the Almshouse, and received relief. On 31st May 1894 she went to join her father in Brechin, where he was staying in the Model Lodging-House. He left her there on 15th July, making no provision for her maintenance. The keeper of the lodging-house kept her till the 20th, when he took her to the Inspector of Poor, who, on a report from a medical man, that though not insane she was mentally and physically weak, and could not earn her own living, admitted her to the Almshouse, where she remained till 7th August, when she was taken out by her sister and her stepmother. She went with them to Montrose. In September she went to stay with a lodging-house keeper in Montrose called Kemlo, from whom she received her board and lodging, but no wages, in return for doing housework. She stayed with him for about two months. In the end of 1894 and beginning of 1895 she was living with her father. Early in 1895 it was arranged that she should go to live with a Mrs Sturrock, who lived near where her father stayed in