branch in the destination. That is an important point to bear in view, because if there had been any appearance on behalf of other branches—*e.g.*, for the daughter Ann's issue—that might have affected the question of vesting. I understand, however, that counsel on both sides are satisfied that these branches of the destination have ceased to exist.

Well, when a destination begins and ends by directing trustees to hold for one person in liferent and his issue in fee, such liferent and fee must necessarily vest concurrently. It is a very old rule that the mere interposition of a liferent does not suspend the vesting of a fee. I therefore agree that the first question should be answered by affirming the first alternative.

But even if we decided otherwise that there was no vesting till the death of the liferenter, the result would be the same as regards the interest of the parties, because the destination is to "issue," and in my opinion that includes grandchildren as well as children. It has been more than once observed judicially that the word "issue" is not a word of fixed and inflexible meaning, and that we must look to the terms of the deed to see whether it has any special signification therein. But if there is nothing to suggest a special meaning, it is merely equivalent to descendants or progeny, and includes all claiming by natural descent from the progenitor. Accordingly, if it were necessary, I think we should answer the second question in the affirmative.

LORD KINNEAR—I entirely agree with the judgment proposed, and for the reasons given by your Lordships. I desire to add—because I do not think the point has been adverted to—that I see no ground whatever for holding that "issue" must be construed to mean heirs in heritage. It must have its ordinary and natural meaning, and therefore for the reasons given I am prepared to concur.

It is clear enough that nothing we can decide in this special case can affect any interest of persons called on the failure of Elizabeth in liferent and her lawful issue. No judgment given here can be *res judicata* against them, for they are not parties to this case. But that is no reason for our declining to answer the question put to us by the actual parties, on the assumption, which is probably well founded, that the right must either be in the second party or in the second and third parties.

The LORD PRESIDENT was absent.

The Court answered the second alternative of the first question in the affirmative, the second and fourth questions in the affirmative, and the third question in the negative.

Counsel for the Second Party—W. Campbell, Q.C—Glegg. Agent—James Purves, S.S.C.

Counsel for the Third Parties—Craigie—Younger. Agent—Henry Bower, S.S.C.

Friday, March 3.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

DUKE OF ATHOLL AND OTHERS *v.* WEDDERBURN AND OTHERS.

Salmon-Fishing—Fixed Engine—Nets.

A certain net known as a "toot-and-haul" net was used for salmon-fishing in the river Tay. The mode of using it was that instead of being paid out from a rowing boat and hauled in as soon as the boat had completed its circuit, one end of the net was fixed to a boat anchored in the river (as in the case of net-and-coble fishing), a rope being carried thence to the shore, while the other was attached to a post on the shore. It was thus fixed in the water for several hours at a time. About fifteen yards of the net was turned in towards the shore so as to form a hook, but there was nothing of the nature of a bag or chamber to prevent the escape of the fish, or to catch the fish automatically. A man was stationed in the boat, who when he saw or felt a fish strike the net, cast loose the net and signalled to men on shore who thereupon drew in the net to shore as in the case of a sweep-net.

Held (*following* the rule laid down by Lord Westbury in *Hay* v. *Magistrates of Perth*, 4 Macq. 535) that this mode of fishing was illegal.

This was an action at the instance of the Duke of Atholl and others, proprietors of salmon-fishings on the Tay or its tributaries situated above Mugdrum Island, against Captain Wedderburn of Birkhill, Fife, and other proprietors and tacksmen of fishings below the fishings of the pursuer. The summons concluded for declarator that "the defenders are not entitled to fish in any part of the river and estuary of the Tay for salmon or fish of the salmon kind with nets of the description known as the toot-and-haul nets or with stell-nets, or with nets of a similar kind;" and for interdict against the defenders using such nets.

The pursuers described the net and method of working it as follows:—"(Cond. 3) . . . This net is from 5 to 10 yards in depth, and generally from 70 to 100 yards in length, the mesh thereof being from 8 to 10 inches all round. The net is fitted with a heavy rope at the bottom, while a cord runs along the top with cork floats, placed at distances of from eight to nine feet apart, which keep the net perpendicular while in the water. When the net is in working order one end of it is fixed by a rope with a block for tightening, called the tow-line, to a post sunk in the shore. From this point the net runs outwards from the shore and against stream or current, forming an arc, and at a point from fifty to seventy yards out from the shore the top of the net is attached to a boat anchored outside the net. The 'anchor' is very often a fixed

post driven into the bed of the stream. From this point the net is turned inwards towards the shore for about eighteen or twenty yards, forming what is called the 'hook' or 'cleek' and a rope fixed to the bottom of the net at the corner where the hook or cleek begins is attached to the anchor rope in order to keep the net at that corner in position. At the turned-in end of the hook or cleek is the 'hook-staff' which is kept in an upright position by a rope called the 'hook line,' attached to the base of the hook-staff and carried to the shore where it is attached to a post with a block for tightening. The hook-staff is also maintained in an upright position by ropes called 'bridles,' which lead from the top and bottom of the staff and are joined to one rope called the 'head' or 'haul' rope, which is carried to the shore and there attached to a windlass. Besides these ropes to keep the net in position and to haul the net inshore, there is another rope called the 'off-haul,' which is attached to the anchor in the stream, and is used to haul the boat from the shore to its position in the river. The mode of working the net after being placed in the position above described is as follows:—One man stands in the boat and two men generally on the shore in attendance at the windlass. When the man in the boat sees or feels a fish strike the net he makes a signal to the men at the windlass, at the same time freeing the net from the boat and anchor rope in the stream, whereupon those on shore immediately haul the net in by means of the windlass. The man in the boat pulls ashore and assists in hauling in the net. After the fish are taken out the net is laid on to the boat and the boat is again taken out by means of the off-haul rope to its former position, where the top and bottom of the net, at corner where the cleek or hook begins, are fixed to the boat and anchor rope respectively as before, and the two men on shore tighten up the net by means of the rope attached to the windlass and the other two ropes attached with blocks to the posts. The net remains fixed for periods as long as six hours at a stretch when a fish does not strike the net during that time. It will thus be seen that the net when fishing is a fixed engine, being firmly attached to three ropes made fast to the shore, and both under and above water to the anchor rope in the stream. The stell-net, in its construction and use, resembles the toot-and-haul net, from which it differs only in detail, and is a fixed engine, the use of which obstructs the passage of salmon, and would be injurious to the fishings of the pursuers. The prohibition of toot-and-haul nets would be ineffectual to protect the rights of the pursuers unless the stell nets were also at the same time prohibited. The statements in answer are denied."

The pursuers averred that the nets were used by the defenders in parts of the river above the limits fixed by decisions of the Court as dividing the river Tay and estuary from the sea, and that their presence in the river seriously obstructed the free passage of salmon. They averred further the injury had been greatly increased by the conjunct use of these nets with hang-nets. They maintained that the use of the nets was illegal at common law and contrary to the provisions of various statutes.

The pursuers pleaded—"(1) The said toot-and-haul-nets used or permitted to be used by the defenders as aforesaid, being fixed engines adapted for the capture and obstruction of salmon and fish of the salmon kind, are illegal both at common law and under the statutes above libelled.

The defenders while admitting the accuracy of the pursuers' description of the nature and mode of working of the nets, denied that toot-and-haul or stell-nets were fixed engines. They averred—"(Ans. 3) . . . The average time during which the net remains set, if no fish strikes it, is not above three hours. The toot-and-haul-net is used only during daylight, and not at night. Explained that when the man in the boat sees or feels a fish strike the net he frees the net by simply letting go the small line from the net to the boat, known as the 'slip line,' off its pin. As soon as the net is thus freed it is put in exactly the same position, and is worked in the same way as the ordinary sweep-net, which is the mode of fishing employed by the pursuers themselves in their own waters. *Quoad ultra* denied. The modes of fishing carried on by the defenders are legal and proper, and neither unduly obstruct the passage of salmon nor injure the pursuers' fishings. The said modes have been pursued in the waters in question by the defenders and their predecessors, as proprietors and tenants respectively of the said fishings, from time immemorial."

The defenders further denied that the toot-and-haul and hang nets could be used together or at the same state of the tide.

The Lord Ordinary (Low) on 5th December 1897 allowed the parties a proof.

The pursuers reclaimed, and the Court on 1st December refused the reclaiming-note.

No evidence was led in the proof as to the stell-nets.

The evidence in regard to the toot-and-haul-nets substantially confirmed the account of them given in the averments on record.

The Lord Ordinary (Stormonth Darling) on 18th May 1898 decerned against the defenders in terms of the conclusions of the summons so far as they related to fishing with toot-and-haul-nets or with nets of a similar kind, and dismissed the action so far as it related to fishing with stell-nets.

Opinion.—"In this case eight proprietors of salmon-fishings on the river Tay and its tributaries above Mugdrum Island sue six proprietors of salmon-fishings below that island, and their respective tenants, for declarator that the latter are not entitled to fish with nets of the description known as 'toot-and-haul-nets,' and for interdict against their doing so. There is also a reference in the summons to 'stell-nets,' but these must be thrown out of view, as no evidence was led regarding them.

"It would serve no good purpose to enter

into a minute description of the toot-and-haul-net, because there is no dispute between the parties either as to its construction or use, and there is a model in process which is admittedly correct. The essential thing about it is that instead of being paid out from a rowing boat and hauled in as soon as the boat has completed its circuit, the toot-and-haul-net is fixed (it may be for hours) in the water. One end is attached to a post on the shore, and the other to the boat, which is attached to an anchor. About 15 yards of the net are returned towards the shore so as to form a hook, but this, although it may detain the fish for a short time, does not effectually enclose or secure them, for there is nothing of the nature of a bag or chamber from which they cannot escape. When the man in the boat sees or feels a fish strike the net, he casts it loose and signals to the men on shore to haul in. The fish are then drawn up on the hauling-ground, just as in the case of the sweep-net.

"It will thus be seen that this net differs from the ordinary sweep-net, inasmuch as it is temporarily fixed in position, and that it differs from the stake-net inasmuch as it does not automatically capture the fish. The defenders strenuously maintain that this last is so vital a distinction as to take the net out of the category of fixed engines, and to make it in truth only a variety of net-and-coble. The question thus comes to be whether it ought to be referred to the one category or the other?

"The whole law as to the mode in which salmon may be caught in rivers and estuaries was originally statutory, but it has been explained and developed by a long series of decisions, many of which have received the approval of the House of Lords. Whether these decisions have taken too great liberties with the statutes may be an interesting subject for discussion, but a judge of first instance at all events must accept the decisions as they stand, and I see no reason to doubt the soundness of Lord Westbury's *dictum* in *Hay* v. *Magistrates of Perth*, 4 Macq. 535, that 'those decisions have gone so far as to make it clear law at the present time that it is illegal to fish for salmon with any net or with any species of engine or machinery devised or constructed for catching fish which is a fixture, which is at all fixed or permanent, even for a time, in the water; and if I were asked to define the conclusion which I should derive from the statutes and the decisions, it would be this, that it was not legal to fish with a net, unless when the net continued in the hand of the fisherman. The net must not quit the hand, and the net must be in motion, during the operation of fishing.' On the other hand, Lord Westbury was equally clear in repudiating the idea that net-and-coble was a stereotyped mode of fishing, incapable of alteration or improvement. The direct effect of the judgment in *Hay's* case was to allow a variation in the ordinary method of working the net adapted to the peculiarities of certain channels in the Tay. But that variation in no way interfered with what I think the House of Lords regarded as the vital feature of net-and-coble fishing, viz., that the net should be kept constantly in motion. If I may again quote Lord Westbury, he calls it the 'distinctive peculiarity' of net-and-coble fishing that it 'takes a grasp of a portion of the river during such time only as is required for the boat to row round the net.' That is plainly inapplicable to a toot-and-haul-net, which sometimes grasps its portion of the river for hours at a time.

"Now, of course, I admit that the words used by a judge in explaining his judgment are not to be scanned closely, like the language of an Act of Parliament, but are to be taken with reference to the question for decision. Accordingly, in the case of *Allan's Mortification* v. *Thomson*, 7 R. 221, which established the legality of hang-nets in the Forth, the First Division did not profess to hold that the hang-net precisely answered Lord Westbury's requirement of never quitting the fisherman's hand. 'But,' said the late Lord Mure, 'although the mode of fishing here followed may not in that respect come within the very words of the opinion, it appears to me to fall distinctly within the principle of the rule on which the judgment proceeded, viz., that the net must be kept constantly in motion, and under the fisherman's command, and not be fixed for any period during the time of the operation.' That case is therefore a fresh assertion of the principle that the test of legality is the constant motion of the net. Personally I think it convenient that so comparatively simple and intelligible a test should have been established, and at all events it seems to me that it has been established, by the decisions viewed as a whole. If that be so, it is nothing to say that the sweep-net may be so incessantly used from opposite sides of the river as practically to create a constant obstruction to the passage of fish in the whole available channel.

"That being my view, I do not propose to follow Mr Balfour in his minute and most able review of the earlier cases. I certainly think he succeeded in showing that neither the case of *Duke of Atholl* v. *Wedderburn*, 5 Sh. 153 (N.E. 139), nor the case of *Lord Gray* v. *Sime*, 13 Sh. 1089, was directed against toot-and-haul-nets, although the short reports in Shaw might seem to convey the contrary. Nay more, I think he succeeded in showing that the upper proprietors in both these cases contrasted the pock-and-sole-nets, of which they were really complaining, with the toot-and-haul-net, the legality of which they seemed to concede. Further, I think it is established by the evidence that the toot-and-haul-net has been used in the lower parts of the estuary for time immemorial, and that it has never till now been directly challenged. It is capable of being used in some places where, from the shortness of the frontage or the roughness of the bottom, the use of the ordinary sweep-net is impossible, or at least difficult. Probably it has hitherto escaped attack partly because it is not used very exten-

sively, and partly because it does not appear to be very deadly.

"But neither immemorial use of a kind of net, nor the fact that it is specially suited to a particular locality, will make it legal if it is contrary to the statutes and decisions.

"I shall therefore give decree as concluded for as regards toot-and-haul-nets, and dismiss the action as regards stell-nets. The pursuers must have their expenses, but subject to a slight modification in respect of their failure to make any case as regards stell-nets."

The defenders reclaimed, and argued—The Lord Ordinary was apparently satisfied that there was no statute or direct decision prohibiting this use of the nets, but he rested his judgment upon a *dictum* of Lord Westbury's in the case of *Hay* v. *Magistrates of Perth*. That *dictum* did not bear the interpretation which the Lord Ordinary put upon it, for what Lord Westbury had in view was an apparatus which was left fishing for itself for a length of time without human agency. His *dictum* was not necessary for the decision of the case, which was a decision in favour of greater latitude in fishing, and it ought not to be held that any *dictum* in such a case should be used to enforce a new restriction upon a method of fishing which had been in use from time immemorial and was peculiarly adapted to the special locality. There had, in fact, been no attempt up till the present case to interfere with it. Lord Westbury's *dictum*, if it were examined in the light of common law and of previous decisions, went beyond any previous authority, and it was unnecessary for deciding the case, and was accordingly *obiter*. The statutes respecting salmon fishing were directed against either obstructions preventing fish from getting up the river to spawn, and the young fry from coming down the river, or against the killing of kelts—Lord Westbury in *Hay*, at p. 543. Clearly, therefore, there was nothing in the statutes prohibitive of the present mode of fishing. The cases were of two classes, the earlier being decided on the ground of the obstruction of fish—*Don Fishers*, 1693, M. 14,287; *Queensberry* v. *Annandale*, 1771, M. 14,279; *Dirom* v. *Littles*, 1797, M. 14,282; *Colquhoun* v. *Montrose*, 1793, M. 12,827, 4 Pat. 221, 1804 M. 14,283. In the second class of cases the Court was dealing with modes of fishing introduced for the purpose of catching fish automatically without the help of a person fishing—*Kinnoul* v. *Hunter*, 1802, M. 14,301, 4 Pat. 561; *Duke of Atholl* v. *Maule*, December 16, 1826, 5 S. 153 (N.E. 139); *Duke of Atholl* v. *Wedderburn*, March 7, 1812, F.C., 5 Dow 282; *Gray* v. *Sime*, July 9, 1835, 13 S. 1089. In the two last-named cases the pock-and-sole-nets which were held objectionable were directly contrasted with the toot-and-haul-nets. The result of the cases therefore was that till this date there had never been any engine prohibited, unless it constituted an obstruction, or was of the nature of a yare catching fish automatically. The pursuers made no attempt to call this a yare, but called it a fixed engine. But the fact was that it was merely a method of fishing by net and coble, the agency by which it killed being precisely that of an ordinary sweep-net. Unless, therefore, the pause which there was in this method was held to convert a legal into an illegal operation, the pursuers must fail. There was no stereotyped method of fishing by net and coble, but it varied according to the nature of the locality. Thus in *Hay* fishing by the Bermoney boat was held an allowable modification.

Argued for respondents—The case fell directly under the rule laid down by Lord Westbury, which was clearly necessary for the decision of the case. It could not be said that these nets "grasped a portion of the river during such time only as was required by the boat to row round the net," which was stated by Lord Westbury to be the distinctive peculiarity of net-and-coble fishing. In *Allan's Mortification* v. *Thomson*, November 14, 1879, 7 R. 221, the principle of the rule laid down by Lord Westbury was further asserted. The Court would not allow any obstruction as auxiliary to net-and-coble fishing—*Copland* v. *Maxwell*, June 13, 1810, F.C. Nor would the Court sanction an illegal method of fishing on the ground of immemorial use—*Colquhoun* v. *Montrose*, *supra*, where this plea was unsuccessfully stated.—*Fife* v. *Gordon*, 1807, M. App. Salmon-fishing, No. 2; *Mackenzie* v. *Renton*, June 12, 1840, 2 D. 1078; *Mackenzie* v. *Houston*, May 25, 1830, 8 S. 796.

At advising—

Lord President—In *Hay* v. *The Magistrates of Perth*, Lord Chancellor Westbury laid it down as "clear law" that it is illegal to fish for salmon with any net "which is a fixture, which is at all fixed or permanent, even for a time in the water," and he asserts that the distinctive peculiarity of the legal mode of fishing by net is that it "takes a grasp of a portion of the river during such time only as is required for the boat to row round the net." An examination of the case in which those words were uttered makes it plain that they express the principle of the decision, and that they are the deliberate statement of a rule of law.

If this be so, the defenders' system of toot-and-haul is a plain contravention of the rule. The Lord Ordinary very clearly explains the method, and there is no dispute about it. According to the defenders' own record, the average time during which the net remains set, if no fish strikes it, is "not above three hours," and, as the Lord Ordinary says, the net sometimes "grasps" its "portion of the river for hours at a time." The mere fact that all this time a coble is also stationary in the river does not affect the question.

On this plain ground, which is that adopted by the Lord Ordinary, I am for adhering to the interlocutor holding this Court to be bound by the rule in *Hay* v. *The Magistrates of Perth*.

LORD M'LAREN — I am of the same opinion. The rule having been authoritatively laid down that the net must be constantly in motion to bring a mode of fishing within the category of legal fishing by net and coble, it is impossible to say that this is true of a system in which the net remains stationary for hours at a time. I think that the case is perfectly clear, and that the Lord Ordinary is right.

LORD KINNEAR — I am of the same opinion. The ground on which we were asked to arrive at a different conclusion was that the exposition of the law given in Lord Westbury's opinion in *Hay* v. *The Magistrates of Perth* was a mere *dictum* by the way which we were at liberty to examine, and that if we did so and compared it with previous cases, we should find that it is not sound.

I agree with your Lordship as to the principle of that judgment, and I do not see that it was possible for this Court or the House of Lords to decide such a case as that of *Hay* without drawing a defining line between the methods of fishing for salmon which are legal and the methods which are illegal; and I think that the House of Lords has done that in such a way as to be binding on this Court. I see no reason to doubt that the mode of fishing now in question falls within Lord Westbury's description of the modes of fishing that are not legal, and it is clear that it was held to be an illegal method by Lord President M'Neill, of whose opinion Lord Westbury approved. I therefore concur.

LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuers — Sol.-Gen. Dickson, Q.C.—C. N. Johnston—MacRobert. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Defenders—Balfour, Q.C. — Dundas, Q.C. — Blackburn. Agents — Dundas & Wilson, C.S.

Friday, March 3.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

DUKE OF ATHOLL AND OTHERS *v.* GLOVER INCORPORATION OF PERTH AND OTHERS.

Res judicata—Identity of Persons—Riparian Owners of Fishings.

Certain proprietors of salmon-fishings on the river Tay, seven in number, raised an action of declarator against another proprietor to have it found that the use of certain nets known as hang or drift-nets on the river Tay was illegal. The Court held that the use of the nets was not illegal, and assoilzied the defenders.

Thereafter an action was raised for the purpose of obtaining declarator that the use on the Tay of nets indistinguishable in use or construction from those dealt with in the first action was illegal. The pursuers were eight proprietors of salmon-fishings on the Tay, five of whom had been pursuers in the first action. The defenders were certain other proprietors of salmon-fishings on the Tay, and did not include the defender in the former action. The defenders pleaded that the previous decision was *res judicata*, on the ground that all the pursuers in the present action were represented by those in the former action, that the subject-matter of the two actions was the same, and that as the various proprietors of salmon-fishings in the Tay had identity of interest in a common subject, the defenders in the present case were represented by the former defender, or alternatively that they were represented by the former pursuers, who represented the interest of all the proprietors on the Tay.

The Court, after a proof, *held* (*rev.* judgment of the Lord Ordinary) that the previous decision was not *res judicata*.

Salmon Fishing—Fixed Engine—Net.

Held (on the authority of the case of *Wemyss* v. *Zetland*, November 18, 1890, 18 R. 126) that the use of "hang-nets" or "drift-nets" for catching salmon on the river Tay was not illegal.

An action was raised at the instance of the Duke of Atholl and seven other proprietors of salmon-fishings on the river Tay, its tributaries, and Loch Tay against the Glover Incorporation of Perth and other proprietors of salmon-fishings on the Tay and their tacksmen, concluding for declarator that the defenders were not entitled "to fish in any part of the river Tay for salmon or fish of the salmon kind with nets of the description known as hang-nets or drift-nets;" and for interdict against the defenders fishing with these nets.

The pursuers averred—"(Cond. 3) The defenders, the said lessees, by themselves and their sub-tenants, have during the past season been in the practice of using in their said fishings a species of net known as the drift or hang-net. The use of the said nets has been expressly sanctioned by the defenders, the foresaid proprietors, as lessors of the fishings occupied by said lessees. These nets are from 200 to 280 yards in length, and from 12 to 15 feet in depth. They are fitted with a small rope along the bottom, sunk with lead, or a heavier rope which keeps the net sunk without lead. There is a cord along the top with cork floats placed at distances from 10 to 12 feet apart. The mesh is generally about 12 inches all round. The said nets are used at the turn of the tide both at high and low water when the current is least, when they are run out of a boat over the stern in a straight line across the river, and they maintain that position as practically fixed or stationary for a considerable time. They are attached by one