he takes subject to the legal responsibility of heir; and that legal responsibility, inasmuch as his father having left no other property than his estate of Denlugas, fastens on the heir of Denlugas a liability to pay the portions provided. And although that consequence is one that we may regret when you look at it in a natural and moral point of view, yet it is the result of the conclusions of the law as established, and it must therefore be submitted to without any attempt to evade it or to escape from it.

It is plain, therefore, to my mind, that the appellant in the original appeal must pay the £16,000, so far as the estate will extend. I should have thought that the children would be satisfied with that, without attempting to inforce a claim which is contrary to every principle of moral equity. It is quite clear that when this settlement was undiscovered there was an arrangement made by which the heir of the marriage advanced £5000, which, by the assent, and at the request of the husband of the daughter, who would have been entitled to her portion, was settled upon the children of their marriage. That was in every sense of the words, therefore, a payment to the husband; and now, contrary to every thing that a proper sense of duty would dictate, there is a desire on the part of these parties not only to get hold of the £16,000, but to get the £5000 *plus* the £16,000, without including that in the payment. Fortunately they cannot get that without coming to the Court of Session to have the release given by the father who was entitled to the £16,000 set aside; and then the universal principle of justice and duty intervenes, and says this, you shall not have equity unless you will do equity—you shall not have the release that stands in the way of your recovering the £16,000 set aside unless you are willing to do that which plain justice dictates, and to have the £5000 imputed to the £16,000 as a part payment.

I have no doubt, therefore, that the Judges in the Court below arrived at a correct conclusion, and I must therefore submit to your Lordships that it be affirmed.

It will be for your Lordships to consider how we are to deal with the costs of that cross appeal, which contradicts every proper feeling, and in which the appellant comes here with the hope of claiming £5000 in addition to the £16,000. I therefore think the appeal ought to be dismissed.

LORD COLONSAY—My Lords, I think it quite unnecessary to go again over the points which have been so fully and clearly stated by my two noble and learned friends. They have stated precisely the views which I entertain on this case. Therefore I merely say I concur in the judgment proposed to be pronounced.

LORD WESTBURY—My Lords, of course we affirm the interlocutor so far as it relates to the first appeal. In that respect, therefore, the appellant fails. We also affirm the interlocutor in regard to the cross appeal, and in that respect the respondent in the first appeal will fail. Now the costs are so blended and intermingled that, although your Lordships' general rule is that costs always follow the event, yet in this particular case perhaps it may be best in order to avoid that complication if your Lordships come to the conclusion to dismiss both appeals without costs.

Appeals dismissed, without costs.

Agents for Appellant—H. & A. Inglis, W.S., and

Agents for Respondent—J. Knox Crawford, S.S.C., and Crosley & Brown, London.

Tuesday, June 28.

CALEDONIAN RAILWAY CO. *v.* CARMICHAEL AND OTHERS.

(*Ante*, vol. v, p. 413.)

Jurisdiction—Lands Clauses Act—Interest—Expenses—Special Act—Agreement—Verdict—Tender. A special Railway Act provided that, where the line passed over a quarry, the Company should pay the value of the stone unwrought under the line, the extent and quality to be ascertained as in ordinary cases of disputed compensation, and the value to be payable from time to time as a face of rock of 130 feet was wrought up to the railway boundary. The Act incorporated the Lands Clauses Act. In 1864 a valuation-jury returned a verdict that the rock under the line was 260 feet, and the value £5272 as at 31st December 1852. The Company had previously tendered £7005 in full of all claims. In an action by the proprietor for the price, with interest from 31st December 1852, and expenses of the inquiry, *Held* (diss. Lord Colonsay, and reversing decision of First Division)—(1) that the Court of Session had no jurisdiction to entertain the action, the sale being a compulsory one under the Lands Clauses Act, with additional machinery introduced by a special Act; (2) that no interest was due on the sum fixed by the jury, and that it would have been incompetent for them to have given it; and (3) that the costs had been rightly apportioned by the Sheriff.

The railway of the defenders passes over part of the quarry-field of Hailes, the property of the pursuer, Sir William Gibson Carmichael of Skirling, Baronet. The Companys' Act provides that, in addition to the value of the surface land to be taken from the proprietor of Hailes, the Company should pay the value of the whole stone under the surface so taken, and the extent and quality of the stone so taken should be ascertained as in ordinary cases of disputed compensation; provided that the value of the said stone should be payable from time to time as often as a face of rock at least 130 feet in length was worked up to the north or south boundary of the railway, such payment to be only to the extent of the value of the stone opposite to such face. With this special Act were incorporated the Lands Clauses Consolidation (Scotland) Act 1845, and the Railway Clauses Consolidation (Scotland) Act 1845. In 1849 the working of the quarry had almost reached the northern boundary of the railway, and the defenders' agents intimated that the Company desired that the workings should not be carried further south than a line 48 feet distant from the railway, and that when a face of rock was worked up thereto to the extent specified in the Companys' Act, they would be ready to arrange a reference as to the amount of compensation. Various communications then took place between the parties, two submissions being entered into for the purpose of determining the sum payable by the Company, both of which fell. In March 1864 the pursuers intimated to the Company their desire that the sum should be settled by a jury, in terms

of the Lands Clauses Act, unless the Company were willing to settle otherwise by payment of the sum claimed. In the following month the Company intimated their refusal to pay the sum claimed, and their intention to petition the Sheriff for a jury, giving notice, at the same time, that they were willing to pay to the pursuers the sum of £7005 in full of all claims. This sum being refused by the pursuers, a jury was summoned in July 1864. The jury returned a verdict finding that the rock under the railway was 260 feet long by 90 feet wide, and that the value thereof was £5272 sterling as at 31st December 1852. The Sheriff then pronounced an interlocutor, in which he "approves of the verdict, and finds and declares in terms thereof accordingly; and farther, in respect the verdict has been for a less sum than had been previously offered by the Company as the value of the subjects in question, finds the claimants liable in one-half of the expenses incurred by the respondents." That interlocutor was advocated in the Court of Session, and in 1866 the Lord Ordinary remitted to the Sheriff, with instructions to recall that part of the interlocutor which found the pursuers liable in one-half of the expenses incurred by the defenders.

The pursuers, Sir William Gibson Carmichael, and the trustees of his predecessor in the estates, then brought an action against the railway company concluding that the railway company should be ordained to make payment "to the pursuers of the sum of £5272 sterling, with interest thereon at the rate of £5 per centum per annum from the 31st day of December 1852 years until payment, or such sum as our said Lords shall modify as the interest to which the pursuers are entitled on the said sum of £5272. And further, it ought and should be found and declared, by decree of our said Lords, that the defenders are bound to make payment to the pursuers of all reasonable charges and expenses incurred by the pursuers incident to an inquiry held in virtue of the provisions of an Act of Parliament, entitled, 'The Lands Clauses Consolidation (Scotland) Act 1845,' before the Sheriff of the county of Edinburgh, and a special jury at Edinburgh, on the 18th day of July 1864, and following days, under a petition, dated the 20th day of April 1864, and presented to the said Sheriff by the defenders; and the defenders ought and should be decerned and ordained, by decree aforesaid, to make payment to the pursuers of the sum of £2000, or such other sum as our said Lords shall modify as the amount of such reasonable charges and expenses incurred by the pursuers incident to the inquiry aforesaid, with interest thereon at the rate of £5 per centum per annum until payment."

The Lord Ordinary (BARCAPLE) gave effect to the contention of the pursuers, and decerned for £5272, with interest from 31st December 1852, and gave expenses. The defenders reclaimed to the First Division, but the Court unanimously adhered.

The defenders appealed.

LORD ADVOCATE, and COTTON, Q.C., for them.

MELLISH, Q.C., and PEARSON, Q.C., in answer.

At advising—

LORD CHANCELLOR stated the facts as follows:—The interlocutors appealed against were pronounced in an action before the Court of Session in regard to compensation for Sir W. Carmichael's land, which was taken by the Caledonian Railway Company for making its line, and also for a stone quarry under the land so taken. By the Companys' special Act, it was enacted (section 24) "that beyond and in addition to the value of the surface land to be taken under the Act from the said Sir W. Carmichael, there shall be paid by the said Company the value of the whole stone situate under the surface of the land so to be taken, which the Railway Company shall decline to allow Sir W. Carmichael to work by the removal of the surface therefrom, and the extent and quality of the stone so to be purchased by the Company shall be ascertained in the same manner as in ordinary cases of disputed compensation," said value to be payable from time to time as often as a face of rock at least 130 feet long is worked up to the north or south boundary of the railway. With this Act the Lands Clauses and Railway Consolidation Acts were incorporated. By December 31 1852 a face of stone 260 feet long had been worked up to the north boundary of the railway, and the working of the quarry was stopped. In the spring of 1864 the matter went before a jury in terms of the Lands Clauses Act 1845, the Company having previously tendered £7005, which was rejected. The result was a verdict for "£5272 as at 31st December 1852." Upon this verdict the Sheriff pronounced judgment; and, inasmuch as the verdict was for a sum below that tendered, he found Sir W. Carmichael liable in half the costs. Thereupon Sir W. Carmichael advocated the cause to the Court of Session, and claimed £5272, with interest from 31st December 1852; and further pleaded, that, as this sum, with interest, was larger than the £7005 tendered, he should not be liable in half the costs. On the other hand, the railway pleaded that, under the Lands Clauses Act the Court of Session had no jurisdiction, and that on the merits they were not liable to pay interest, and that the Sheriff was right as to the costs. The Court of Session repelled these defences, and the Company has appealed. The question turned (said the Lord Chancellor) on section 26 of the railways' special Act, and on the peculiarity of the special verdict found by the jury that £5272 was due as at 31st December 1852. The words of this 24th section, and the fact that the Lands Clauses Act was incorporated with the special Act of the Company, showed that the question of compensation was to be decided in the ordinary way, and that there was therefore no jurisdiction in the Court of Session to revise the proceedings of the jury and the Sheriff otherwise than by reduction. That being so, the verdict of the jury stood, and that verdict contained and could not competently contain anything about interest. Therefore the sum given by the jury being below the tender, the Sheriff did right in dividing the costs between the parties. He therefore advised the House to reverse the interlocutors complained against, find that the Court of Session had no jurisdiction, that no interest was due on the £5272, and that the costs were rightly apportioned.

LORD CHELMSFORD concurred.

LORD WESTBURY also concurred. He said that the Company's special Act did not provide a particular mode of valuation, it merely contained an addition to the machinery of the general statutes to suit the specialities of the case. There was no special and distinct power given by it, but it was part of the general machinery for working out an object common to all the Acts. It was evident from the proceedings that the parties themselves had

thought so to; and on the whole case he could see no room for the interference of the Court of Session, or for adding to the terms of the jury's verdict.

LORD COLONSAY dissented. He could not see how the Court of Session had not jurisdiction. If the sum given was a debt due at the 31st December 1852, then, according to the ordinary rules, interest would follow. But neither the Sheriff nor the jury had power to give interest. If this was so, who has? Surely the supreme courts of the country have a right to step in and settle the question, which otherwise would be left unsettled. He also thought the interest was due in virtue of a contract by sale where possession was obtained, and that was just the case here. He therefore thought the judgment of the Court of Session was right.

Interlocutors reversed, except in so far as they find the £5272 due by the Company, and with costs.

Agents for Appellants—Hope & Mackay, W.S.
Agents for Respondent—Gibson-Craig, Dalziel & Brodies, W.S.

Thursday, June 30.

EARL OF ZETLAND *v.* GLOVER INCORPORATION OF PERTH.

(*Ante*, vol. v, p. 204.)

Salmon-Fishing—Alveus—Bank—Medium filum—*River.* A bank formed in the bed of a navigable river by accumulation of sand and mud was gradually, within forty years, carried down the channel by the action of the river, until it lay between the properties of B. and S. At high water it was covered, but at low water it was visible, part lying on each side of the *medium filum* of the stream. The channel between this occasional island and the main bank was navigable at high water, but only 10 or 11 inches deep at low water. *Held* (with First Division) that the bank, not being a permanent formation of the nature of an island, but being truly a portion of the bed of the river, its existence did not affect the rights of the owners of the properties on either side of the channel to fish for salmon from their respective banks *ad medium filum.*

Observed, per Lord Westbury, resignation for consolidation does not, like the principle of merger in English law, destroy the lower right.

The Earl of Zetland, proprietor of the lands of Balmbreich, in the county of Fife, and lying on the south side of the estuary of the Tay, brought this action against the Glover Incorporation of Perth, proprietors of the estate of Seaside, in the county of Perth, and lying on the north side of the estuary, opposite to Balmbreich, concluding to have it found "that the pursuer has good and undoubted right to fish for salmon and other fish in the river Tay *ex adverso* of those portions of the lands and barony of Ballinbreich or Balmbreich belonging to him, and known as the estate of Balmbreich, and that as far as the centre of the stream of the said river, and including the right to fish as aforesaid from and upon the bank called the Balmbreich Bank, or 'Eppie's Taes' bank, lying opposite to the pursuer's said estate: And it ought and should be found and declared that the defenders and their successors in the lands and estate of Seaside have no right or title to fish for salmon or other fish to the south of the centre of the stream of the said river, and in particular from or upon any part of the said bank: And farther, the defenders ought and should be prohibited and interdicted from molesting or interfering with the pursuer in the exercise of his said rights, and particularly from fishing by themselves, their tenants or others, from or upon any part of the said bank."

The estuary between the properties of Balmbreich and Seaside is about a mile and a half or a mile and three quarters broad at high water. The pursuer alleged that the stream of the river on reaching the said bank divided into two channels, one flowing on the north, and the other on the south side of the bank; the bank was about a mile and a half from the defenders' lands, and within a quarter of a mile from the pursuer's; nearly the whole body of the water ran in the channel north of the bank; the bank was situated entirely to the south of the centre of the river, and the pursuer had the exclusive right to fish for salmon thereupon.

The defenders, on the other hand, alleged that the bank had gradually within the last sixty years, by the action of the river, been moved downwards, until it had come to be in part *ex adverso* of the lands of Balmbreich; that the pursuer and his predecessors had never fished for salmon from the said bank; that the bank had always been fished by the proprietors of fishings on the north side of the river, and that for forty years and upwards it had been fished partly by the proprietors of Errol, the property adjoining Seaside on the west, and *ex adverso* of which the bank had been situated to a great extent for these years, and partly by the defenders and their predecessors.

A proof was taken, and thereafter the Lord Ordinary (JERVISWOODE) pronounced an interlocutor, in which he found, "*primo*, as matter of fact, 1st, That the pursuer and his predecessors and authors have, under and in virtue of the titles founded on in the record, for forty years and upwards exercised a right of fishing for salmon in the river of Tay *ex adverso* of the lands and estate of Balmbreich and others belonging to them in property on the south side of the said river, and within a portion of the same where the sea tide ebbs and flows, by net and coble and otherwise, to the *medium filum* thereof as the same exists at low water; 2d, That the defenders and their authors have in like manner for forty years and upwards, under and in virtue of the titles founded on by them, exercised a right of fishing for salmon *ex adverso* of the lands of Seaside and others belonging to them in property, and which are situated on the north side of the said river of Tay, and within the influence of the tides, and lying opposite to the foresaid lands and estate, the property of the pursuer, and that by net and coble and otherwise, to the *medium filum* thereof as at low water; 3d, In particular, that within the channel of the said river there has existed for a lengthened period of time, and exceeding forty years, a bank generally known or distinguished by the name of 'Eppie's Taes' bank, formed chiefly of sand and mud, which is covered by the flow of the tide at high water, and which at low water shows itself as situated within the bed of the fresh water stream; 4th, That the said bank is not and has not been altogether stationary, but has, under the