wards to a court of law, and attempt to take objections to the decision of the arbiter, on the ground of some irregularity in the proceedings. Courts will always, in such cases, give credit to the propriety of the proceedings before the arbiter. This litigation, after hanging on for some eight or nine years, had culminated in a point of very small value; and it would have only excited indignation in their Lordships' minds, if it were not that such frivolous litigation occurs in these appeals from Scotland day after day. If the people of Scotland only knew the miserable slavery to which they were subjected by the carrying on of this class of cases, and by the state of the law which permitted of it, they would probably think of some remedy.

LORD COLONSAY also concurred.

Judgment affirmed, with costs.

Agents for Appellant—J. & R. D. Ross, W.S.
Agents for Respondents—D. Crawford and J. Y. Guthrie, S.S.C.

Monday, June 20.

LESLIE *v.* M'LEOD.

(*Ante*, vol. v, p. 275.)

Marriage-Contract—Provision to Younger Children—Heir-male of the Marriage—Creditor under Marriage-Contract—Liability of Heir for Debts of Ancestor. A bound himself, in antenuptial articles of marriage, to convey a certain estate to himself and the heir-male of the marriage, and also to secure a sum of money to the younger children. A postnuptial contract of marriage was executed giving effect to these stipulations. A died, and his son took the estate. A's executry being insufficient to satisfy the provision to the younger children, *held* (affirming judgment of the Court of Session) that the son, as heir of his father and so liable for his father's debts, was bound to implement his father's obligation to the younger children, *intra valorem* of the estate to which he succeeded.

Agreement—Bond—Conditional Right—Obligation to Relieve. An heir taking the heritable estate of his father executed a bond for £5000 in favour of his sister, she granting in return a discharge of all claims against her father's estate. It was subsequently discovered that the sister was entitled, under the father's marriage-contract, to a provision of £16,000. *Held* (affirming judgment of the Court of Session) that the sister was not entitled to decree for the £16,000 until she should relieve the heir and his estate of the obligation for the £5000.

This was an appeal from a decision of the First Division, along with three Judges of the Second Division, of the Court of Session as to the construction of a marriage-contract. The late Mr Leslie of Dunlugas in 1820 married Mrs Mary Ramsay or Brebner. There was an antenuptial contract, which was afterwards carried out by a postnuptial contract. By this contract Mr Leslie bound himself to convey the estate of Dunlugas to himself and the heir-male of the marriage in fee, and also to secure to the younger children of the marriage £16,000. Mr Leslie died in 1856, leaving one son, the appellant, and one daughter, who had married the respondent. The estate of Dunlugas was valued at £28,000, and there was only about £1500 of personal estate. At the time of the death it was not known that the marriage-contract had been entered into, and the deceased Mr Leslie had left a trust-disposition whereby, among other things, he left £5000 to Mrs M'Leod and her children. That sum was paid accordingly, but afterwards it was discovered that there had been a marriage-contract, and the heir-at-law reduced the trust-disposition on the ground of deathbed. Thereupon the question came to be, what was the construction of the marriage-contract? Mr M'Leod, as representing his deceased wife, claimed from the appellant payment of the sum of £16,000 in full, on the ground that she was a creditor of the father to that extent, and that the appellant was bound, as representing his father, to pay it. The appellant, on the other hand, contended that he was not liable, or, at all events, if he was liable, he was a creditor of his father's estate in the same sense that his sister was, and therefore the proceeds of the estate must be divided in the proportion of £16,000 to £28,000. The respondent having raised an action against the appellant, the Lord Ordinary held that the true construction was, that Mrs M'Leod, the sister of the appellant, did not take a preferable right to the appellant, but both were entitled to prove against the father's estate for their respective provisions. On a reclaiming note, the First Division reversed this finding, and held that the appellant was bound to pay the whole of the £16,000 to the respondent. Thereafter the further point was raised, whether in payment of the £16,000 the appellant was entitled to deduct the £5000 which had already been paid to the respondents under the trust-disposition. The First Division held that the £5000 must be deducted from the £16,000. There was an appeal and cross-appeal upon these judgments.

The case was argued in March.

SIR ROUNDEL PALMER, Q.C., and LANCASTER for the Appellants.

ANDERSON, Q.C., and NEVAY in answer.

Their Lordships took time to consider their judgment.

At advising—

LORD CHANCELLOR—My Lords, the facts of this case are a little complicated, and the point of law here raised has been argued before us with great ability and in great detail; but I confess it appears to me that the whole determination of the case rests (as regards the original appeal) upon the construction of a single sentence of the settlement which was executed by the settlor in the present instance, and that the construction of that sentence may be arrived at in a very few words.

Now the facts are simply these. Mr Leslie, who appears to have been a wealthy gentleman, on his marriage in March 1820 executed an antenuptial contract, which was implemented soon afterwards by a fuller and more complete instrument following the terms of the contract. That contract is the contract we have to consider. His wife died before him. Under the contract his wife would have taken a liferent, and also a certain sum of money was charged in her behalf. I need not any more deal with her interest in the matter. She died before him. He died on the 4th of March 1856. Then upon his death the present appellant in the original appeal, Mr Leslie, served himself as heir-general. It so happened that, at the time of the

death of Mr Leslie, the settlement was not forthcoming. It is not necessary for us, I think, to enter into any detail as to whether or not it was kept back by Mr Leslie the father, or under what circumstances it was not forthcoming; because although in the proceedings in this case some question was at one time raised as to that matter, and an attempt was made to suggest fraud on the part of the present appellant Mr Leslie, that part of the case seems to have been distinctly waived, and all probation of it renounced. I therefore simply state that the settlement was not forthcoming. The father made a testamentary disposition by which the son would take the estate of Denlugas, —his family only consisting of a son and a daughter; and by a testamentary disposition he provided that a sum of £5000 should be paid to the daughter; and, subject to that, the estate was to go to the son. This disposition, however, was invalid according to the law of Scotland, as being subject to the infirmity of a deathbed disposition. It could not therefore be carried into effect. The son was entitled to reduce it, and he did reduce it; but at this time, the settlement not having come to his knowledge, as he said, and as I think we are bound at the present time to hold, he entered into an engagement with Mr M'Leod, who had married his sister, the only other child of Mr Leslie, in which, expressing his desire to fulfil the intention of his father, as indicated by his deathbed disposition, with reference to the interest of his sister, he executed a bond for securing £5000 to certain trustees, who were to hold it for the benefit of Mrs M'Leod for her life, and afterwards for the benefit of her children, in the same manner as had been provided by the deathbed disposition. After that had happened the settlement itself was discovered. Mrs M'Leod died before the original proceedings were taken by Mr M'Leod. Mr M'Leod took proceedings upon the settlement itself, to have handed over to him, in right of his wife, that which by the original settlement of 1820 was provided for the younger children of the marriage.

Now, my Lords, having shortly stated the facts of the case, I will proceed to state what the settlement of 1820 was. By that settlement of 1820 there is provision made in this manner. It is immaterial, I think, whether I take it from the original articles or from the ultimate disposition itself, because in effect the one conforms sufficiently to the other to make it quite immaterial which instrument one cites. The complete instrument was in this form. It was matrimonially contracted and agreed between the spouses that, first, Mrs Leslie's property being made over to her husband, he gives her the liferent which I spoke of, and he secures to her a sum of money also; and the provision there made is distinctly expressed to be a charge upon the whole property of the testator. The charge there is specifically made; and that point has been relied upon in some respects as being a circumstance that ought to lead us to a construction with reference to the £16,000 which was afterwards provided for the younger children. Then what he proceeds to do afterwards is this:—He binds himself to convey Denlugas to himself and the heir-male of the marriage in fee; then also to secure to the younger children of the marriage the sum of £16,000; and, in the event of there being no heir-male, that sum was to be increased to £20,000; then having recited the marriage articles, which were to that effect, he disposes and conveys, I may say, accordingly. I need not go into more detail as to that settlement. The whole of this case turns upon the part I have read.

Now the circumstances which happened were these:—At the time of this settlement being executed Mr Leslie had considerable property. He had considerable personal estates (as we should call it in this country) besides this estate of Denlugas which he possessed; and he having made this instrument in the form in which it is made, the question that has arisen is, whether or not—it having happened at his death that there was no property out of which the £16,000, which he had engaged should be paid to the younger children of the marriage, could be paid, other than the Denlugas property itself—whether, under the true and proper construction of this settlement, Mr Leslie, the son, the present appellant, was entitled either to retain Denlugas free of all claim in respect of the £16,000, or, if not, whether he was entitled to retain it in such a manner that an apportionment should be made between the value of the estate and the sum of £16,000 to be paid to the younger children, in order that the intention, as it was alleged, of the instrument might be completely effected?—the alleged intention being that the son was to have the estate as much as the younger children were to have the £16,000.

Now, really, the whole question turns upon what the effect of the law of Scotland is upon an instrument by which, on the one hand, the person executing it engages to make over to himself and the heir-male of the marriage in fee, and does afterwards effectually make over to himself and the heir-male of the marriage in fee, the real estate; and, on the other hand, by the same instrument simply creates a debt of £16,000 not specifically charged upon any property whatsoever.

My Lords, it appears to me that, looking to the authorities which are cited, and looking to the absence of authority in any way contravening that view, one must necessarily come to the conclusion which was arrived at by the majority of the judges in Scotland, namely, that what was engaged and agreed to be made over to the son is simply the inheritance of the estate, the father remaining fiar of the estate, and having the estate in him, and the son coming into possession of it simply as heir-male of the marriage, and by virtue of his quality of heir. If that be so, then it would appear beyond all doubt that the heir of provision is liable to the burdens that may be incident to the circumstance of his becoming interested in the estate simply *qua* heir—that is to say, he must bear the burdens which have been created by his father. And then, amongst other things, he would have to bear this burden or debt of £16,000.

The whole gist of the argument which has been raised in this case is this, that the son on the one hand and the younger children on the other must be taken as having equally under this instrument —a disposition made as we should say for consideration, an onerous disposition; and that both of them stood in an equal character in that respect, and that therefore it was impossible to predicate of the son, although he took this property as heir, that he was intended by the true intent and effect of the instrument to take it subject to the payment of £16,000, which might exhaust the whole value of the estate and deprive him of any benefit. That, as the eldest son of the marriage, it was at least intended that he should not have an inferior benefit to any of the younger children, and that it could not have been intended that the younger children

should deprive him of the whole benefit of the instrument.

It seems to me that the fallacy of that reasoning is simply this. We were appealed to in argument and in the reasoning of the case upon this ground, —it is said, Is it possible to conceive that Mr Leslie intended his son to have nothing, or next to nothing, in an event which might happen, and that he intended his other child, the daughter, to have the whole benefit of the estate? That is reasoning from the circumstances which have afterwards happened. I do not suppose that either the one thing or the other was present to the father's mind at the time of the instrument being executed. All that he did was this—he said, my son is to take, not as the immediate disponee of the estate, not even by the mode of my reserving to myself simply a life-rent, but he is to take as my heir. And having made that provision, he says, my younger children are to take £16,000. As to what might actually come to one child or another, that of course was a matter entirely incapable of being foreseen. It might have been, if there had been eight younger children, that each would have taken £2,000, but as there was only one younger child the whole £16,000 devolved upon her. As regards the position that this gentleman would be in, taking as heir, it appears very probable that it was in Mr Leslie's contemplation that he himself should remain a man of wealth as he appears to have been at the time when the instrument was executed, not foreseeing then that the estate which he destined for his son would necessarily be subject to the burden of his debts, however they might be occasioned. And of course, if it were subject to the burden of his debts, it would be subject to the burden of the debt which is created by this very instrument, because there is no indication of intention whatever upon the face of the instrument that that debt of £16,000 was to be subject to any other condition than his other debts. Although of course as regarded other creditors upon the estate this instrument might not prevail, yet as between the younger children and the future heir of the marriage there is no indication whatever of any intention that the heir of the marriage is to take the property on any other condition than as heir. And he taking as heir, there is nothing whatever in the instrument saying that he is to be exempted from the ordinary conditions attached to heirship.

The whole position is this. The argument is that there is an equal *jus crediti* between the son and the younger children. Be it so. *Jus crediti* as to what? A *jus crediti* of the son to have the estate as heir, subject to all the conditions of the estate which the heir takes; and a *jus crediti* of the younger children to take the £16,000. Each is to have the property assigned to them. And it is only the circumstances which have since occurred which render it unfortunate that the provision assigned to the son subject to this condition should be diminished in the manner in which it has been diminished by the payments necessary to be made of the debts. There is no apparent commensurability, as it seems to me, in the two provisions.

For that reason I cannot arrive at the conclusion at which Lord Deas arrived, that you are to make an apportionment between the son and the daughter, —looking at the value of the estate on the one hand as £28,000 and the value of the provision for the daughter as £16,000, and then saying that as in consequence of the failure of other means of the testator the son is incapable of taking the whole property free from debts there should be a just apportionment made between them. I am at a loss to find anything upon the face of the instrument leading to that conclusion.

The whole case seems to me to be fairly and reasonably concluded by a single remark made by Lord Neaves (and the other learned judges make remarks of a similar character), in which he says, at page 133, "I think this is a great point in the case to be considered, for in reference to all the views that may be taken of it, the question seems to be whether these parties are *in pari casu*, having the same claims, and the same character in this supposed competition, or whether their characters are essentially different; and whether the result of that difference is to lead to the conclusion that we are now come to. The defender, the heir-male of the marriage, had a *jus crediti* under this antenuptial deed; but what was that right? He had a right to be substituted to his father in the succession to the landed estate. He had not a right as disponee; he had not a right to an *inter vivos* conveyance of it, so as at once to enter into possession, but he had this right, that his father should take the titles to that estate to himself in the first instance, and to the heir-male of the marriage as his heir *substituted* to him. That was the right of the eldest son. He had a right to be his father's heir, and a right to be liable for his father's debts" —(we should call that rather a duty or a burden than a right)—"that was the nature of his right; for every man that has a right to be another's heir has a right or a burden to be liable for his debts. He must take the passive elements and characteristics of the character just as he takes the active ones. The right of the other party was not a right of that kind. It was a *jus crediti* in so far like the eldest son's; I do not say they had equally a *jus crediti;* they had both a *jus crediti,* each of its own character, but the children's *jus crediti* was that of pecuniary creditors—pecuniary creditors for a sum of money to be paid to them at a postponed date, viz., the death of the father. They were pecuniary creditors, and nothing else than creditors. These two obligations were essentially different in this way, that the obligations or *jus crediti* of the eldest son was an obligation *ad factum præstandum.* It was an obligation affecting the titles of this estate, so that the succession should go down to him as heir, that the estate should be so left that he would take it up by service by that solemnity in law which we know as the *aditio hæreditatis,* and by so doing became liable in all his father's onerous obligations *ad valorem* of the estate."

My Lords, those observations seem to me to conclude the whole case, and if one were to put the analogy, as one is perhaps too much tempted to do to English cases, in order to bring it home to the minds of such of us as are more conversant with English than with Scotch law, it is really simply a case of a marriage settlement by a man who is very wealthy, and had a large personal estate at the time of the settlement, and who engaged that he will at the time of his death, having then I will suppose, two or three hundred thousand pounds at his disposal, leave to each of the younger children of the marriage a legacy of £10,000, or as the case may be; and that he will leave to the eldest son the residue of his estate at the time of his death. The eldest son would have that which at the time when the settlement was made appeared likely to be a far greater share than was secured

to the younger children, but he might, in consequence of events which happened afterwards, find it reduced to something very considerably below what was provided for the younger children, or perhaps absolutely to nothing.

As regards the authorities, I do not enter upon them, because there is no authority which justifies the appellant's conclusion when he says that he, coming in as heir, is entitled to be liberated from the consequences of being heir. On the other hand, there are text-writers supporting authorities so far as they go upon the points to which I have adverted; though this very precise point does not appear to have occurred according to the authorities. Yet they say—Erskine, I think, says—If a person wished to secure the children against his own acts, or if those who advised a lady wished to secure the children against the acts of the father, I think a possible way of doing that is to make the father a life-renter, or to engage to infeft the eldest son of the marriage in such a way as to make over to him the benefit of the estate, which he shall not take as leaving the father fiar, but shall take himself by way of succession. If that is done, then of course the eldest son becomes absolutely entitled to the interest not subject to any of those conditions of succession which affect him here. Here the whole question before us is, whether or not one who is, for example, declared to be entitled by an instrument for onerous causes to be entitled to come into succession to his father, and to say I will come into that succession in a different character from that in which the others come in, because the charges which are sought to be made payable out of my property are charges created by the same instrument, and therefore are not of a higher character or position than my own, which made over to me the succession. I think it would all depend upon what it is that is made over to him; and whenever you arrive at a conclusion as to what it is that is made over to him, I think the case is fairly concluded, and that the result is absolutely necessary, namely, that this debt falls to be paid necessarily out of the provision thus made for the son by way of succession.

My Lords, I have carefully looked at the authorities referred to, both in the case and in the judgment, but I do not find anything to justify the view which Lord Deas seems to have taken of the case, namely, that this engagement to place the son as heir was nothing more than an indication of the person who was to take, and that it in no degree indicated the liability. It appears to me that the describing him as the heir of the marriage sufficiently described him in a different manner from the younger children.

Then, my Lords, the rest of the case is this—There is a cross appeal which I must refer to—Upon the settlement being discovered, or rather upon a copy of it being discovered (for the original to this day is lost or mislaid), Mr M'Leod, the respondent in the first appeal, and the appellant in the cross appeal, instituted a proceeding in which he, in the first place, wished to have a declaration of the existence of this settlement—a declaration proving the tenor of this settlement. That accordingly was regularly done, and the instrument now exists before us by virtue of that decree. It is established as an instrument according to that tenor to which I referred in dealing with the instrument itself. Well, that having been done, he also insisted on having the £16,000 paid. But then that being the case, on the other hand, the appellant in the original appeal asserted that there was nothing payable by him, and that he was entitled to hold Denlugas, which controversy I have already adverted to, and, as far as my opinion is concerned, disposed of. He said further, if you insist upon that payment of £16,000, you cannot retain the £5000 which I made over to you in consequence of my father having, by a disposition which was invalid according to the law of deathbed, indicated a desire that that sum should be secured to my sister, and which sum of £5000 I also made over to you in entire ignorance on my part, as well as on your part, of the existence of the settlement. That £5000 must be deducted as so much money paid from the £16,000. The learned Judges in the Court below were unanimous (as every person who hears the case must be) that that is the true justice to be administered between the parties. I should add that, the £5000 being made over, a release was executed by Mr M'Leod of all other rights whatsoever, which release would discharge the whole £16,000. It is impossible to allow Mr M'Leod to get rid of the effect of that release—which is part of the proceeding which he desires to achieve in his action—without at the same time giving up the £5000, which was the consideration for the execution of the release. The learned Judges below appear to have had some little difficulty as to the best mode of effecting this manifest and clear justice; but I think they have effectually achieved it by holding that, although Mr M'Leod may have an interlocutor decreeing payment of the £16,000, he shall not be paid the whole sum, but that he shall be paid only the difference between the £16,000 and the £5000 which has already been received by the trustees of the settlement of his wife; that he shall not receive the remainder until and unless he procure a release by the trustees of that £5000. He says, that is hard upon me, I have not power or authority over the trustees of that settlement to make them grant a release. But then the answer to him is this—We cannot assist in relieving you from the release which you have given to Mr Leslie, except upon the terms of procuring a release to him on the other hand in respect of the £5000. It appears to me, therefore, my Lords, that in both cases the decisions complained of are just and right, and ought to be affirmed; and that in both cases the appeals ought to be dismissed without costs.

Lord Westbury—My Lords, this is a case of an interesting nature, as illustrating the difference between the jurisprudence of Scotland and of England with reference to real estate. It tends to show, what is otherwise abundantly clear, that property in land is not to be determined or regulated by any abstract rules of justice, but that it depends only on the positive institutions of the country; and that by those institutions the title to property and land, its ownership and enjoyment, must be regulated.

Now, here we have an antenuptial contract expressing in a very few words an engagement by the intending husband that he will settle the estate to himself and the heir-male of the marriage in fee. That antenuptial contract being an agreement, if it had come to be construed by English law it is probable that a court of equity would have expanded the words "the heir-male of the marriage" into "the first and other sons of the marriage." And the sons of the marriage under the proper limitations for the purpose would have taken as pur-

chasers absolutely in remainder expectant on the death of the father, and expectant on the decease of the elder sons in succession, without having barred the entail. They would have taken, therefore, purely as singular successors, and each son would have been wholly exempt from the obligations of the father, the settlor. The reason of that is plain; because marriage is the highest consideration known to the law, both in Scotland and in England. The sons, therefore, would have become entitled precisely as if they themselves had been purchasers or singular successors to the fathers, who would have been reduced to the character of tenant for life only. The same form of words is followed in a postnuptial contract; and supposing it had occurred in an English conveyance passing the fee-simple, probably the effect would have been that the words "heir-male of the marriage" would have been held to be equivalent to the words "heir male of the body of the father," begotten of his intended wife, which would have been a limitation in special tail. That probably would have united with the father's life estate, and would have given the father an estate tail corresponding to that limitation. But in Scotland it is entirely different. It is said that the heir-male of the marriage has a *jus crediti;* that is, a right by contract to the thing to be given to him. But when you come to examine the meaning of the words, it seems to be clear that, according to the law of Scotland, his father cannot by any gratuitous gift, much less by any fraudulent gift, deprive him of his right to receive the estate in the capacity of heir-male of the marriage. And it appears to be clear that the words "heir-male of the marriage" are nothing in the world more than the description of the heir who takes *ex provisione.* The heir has a right to have the estate preserved from any gratuitous alienation; but, taking it as heir, he takes it as an inheritance; and there is inveterate in the character of heir this consequence also, that he must take subject to the onerous debts and obligations of the ancestor. He takes, therefore, in a very peculiar manner. His *jus crediti* does not amount to an absolute obligation for value; but it does amount to a title that deprives the father of the right of defeating it otherwise than by onerous obligation. Probably, though it is unnecessary to consider that, it leaves the father at liberty to defeat it by any obligation contracted in pursuance of such natural and moral duty as the obligation of providing for a child, or of granting a jointure to a widow. That being the right of the heir, there could have been no dispute that the heir would have been liable to pay this sum of £16,000 if it had been the result of an ordinary transaction or contract between the father and a stranger for valuable consideration.

That being the state of the law, about which there can be, I think, no doubt whatever, it appears to have occurred to the minds of these parties, and also to the mind of the Lord Ordinary, that possibly the case of the children might be taken out of the character of onerous obligation, seeing that the engagment in favour of the children is contained in the same instrument that contains the engagment in favour of the heir, and therefore it was said that the *jus crediti* of the one must be in every respect equal to the *jus crediti* of the other. If you consider the heir as entitled to the estate by that species of contract, I consider the children as entitled to the estate by the same description of contract—they necessarily compete with one another. There is a co-equal right, and it would therefore lead to the notion that the subject should be parted, rather than that the subject should be liable to be altogether swallowed up by the one, to the entire detriment and loss of the other.

That view of the case appears to have struck the mind of the Lord Ordinary, and to have been received and embodied by him in his interlocutor. But in reality it involves a fallacy, because when you are speaking of the *jus crediti* of the heir you substitute for his inheritance and right of heirship to which that *jus crediti* leads, the estate itself, and by that fallacious substitution of one subject of right for another subject of right you come then to the conclusion that the heir is entitled under the contract to the estate, and that the other children are entitled under the contract not to a charge upon the estate, but to a provision by the father. Now that is not so. It is a technical distinction; but in reality it is a distinction which is essential to be preserved in order to preserve the distinctive view of the law of Scotland. The *jus crediti* of the heir is in the character of heir, and it is a right to receive the estate *eo nomine et ex titulo.* He takes the estate, it is true, but he takes it as an inheritance. He takes the inheritance it is true by virtue of the engagment, but where he takes the inheritance by virtue of the engagement he takes it *ex provisione patris,* and he becomes, therefore, in the eye of the law what is properly denominated *hæres ex provisione.* That is a more favoured class of heir, but it is still as heir, and what he takes he takes *nomine et titulo hæredis,* and whatever obligation the law casts upon that inheritance must be fulfilled by him, for the obligation contained in the settlement is exhausted, and the settlement is *functus officio,* as soon as the estate is secured to devolve on the heir of the marriage *nomine et titulo hæredis.* Then the law attaches all the other consequences, and it is a mistake to suppose that they came from the contract. They came from the law. The *hæres ex provisione* is liable to onerous obligations, he is liable in the last resort, and all the estates taken by the heir of line of the father are to be discussed and applied in the first place before you have resort to that estate which vests in the heir *ex provisione.* But that is a consequence of law, and you cannot exonerate the person who fulfils the character of *hæres ex provisione* from those liabilities of the inheritance. It was therefore (with great respect I say it) a mistake on the part of the Lord Ordinary to say that the heir of the marriage was entitled to the estate. He was entitled to the estate as an inheritance. He was entitled to be clothed with the estate as heir; but the moment you clothe him with the estate as heir he then becomes a mark for the liabilities of the law, and the law fastens on him those liabilities which, for the want of other assets to answer the onerous obligations of the father, it calls upon the heir to answer.

Then it is said the eldest son of the marriage will be in a less favourable situation than the daughter, because the daughter no doubt may take by virtue of the onerous obligation of the father. But, as I have already said, the daughter takes under the antenuptial contract, and takes therefore under the provision for the children of the marriage, and the provision made for them is in every respect of the term an onerous obligation.

The state of the law of Scotland, therefore, is this, that as the heir takes in the quality of heir,

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