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.

Interlocutors complained of in original appeal affirmed, and appeal dismissed without costs; interlocutors complained of in cross appeal affirmed, and cross appeal dismissed without costs.

Appellant's Agents, J. Knox Crawford, S.S.C.; Crosley and Burn, London.—*Respondent's Agents*, H. and A. Inglis, W.S.; Martin and Leslie, Westminster.

JUNE 28, 1870.

THE CALEDONIAN RAILWAY COMPANY, *Appellants*, *v.* SIR WILLIAM H. G. CARMICHAEL of Skirling, Bart., and Others, *Respondents*.

Lands Clauses Act, 8 and 9 Vict. c. 19—Compensation for Minerals—Verdict of Jury—Successive Claims—Interest—Action—*In a Special Railway Act it was provided, that whereas the railway passed over lands of C., under which minerals were found beyond the value of the surface land, the company should pay the value of the stone, of which the company should prevent the working, and the extent and quality of the stone so to be purchased should be ascertained in the usual way when and so often as a certain length of rock had been worked up to the railway boundary.*

HELD (reversing judgment), *That C. was entitled from time to time, when the requisite amount of stone was worked, to make his claim, and that he had no right, in the first instance, after the Act was passed to claim for the whole stone.*

HELD FURTHER, *That where delay occurred in assessing the sum due from time to time, the jury or the Sheriff could not give interest on the sum fixed as the value at an antecedent time.*

HELD FURTHER, *That the Court of Session had no jurisdiction to entertain an action for the value of the stone from time to time to be paid for, or for interest alleged to be due on such value when ascertained.*—(LORD COLONSAY *dissentiente.*)

This was an appeal from the judgment of the First Division of the Court of Session. The appellants were incorporated by Act of Parliament in 1845, and their Act of Parliament provided, that whereas the railway passed over the quarry field of Hailes, belonging to the respondent, the company would, besides paying for the surface of the land, pay also the value of the whole stone under the surface of the land to be taken, which the company should prevent the respondent from working; provided, that the value of the stone should be payable by the company from time to time, when and as often as a face of rock at least 130 feet in length should be 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. When the railway was constructed, the company paid the price of the surface of the land, but not the value of the stone. Soon afterwards, the quarry being worked up close to the railway, a correspondence took place, and the company intimated, that they did not wish the quarry to be worked beyond a red line, drawn on a map shewing the site, and that as soon as 130 feet of rock was worked up to the red line, they would be ready to arrange for payment of compensation. In 1852 a face of rock 250 feet in length had been worked, and Sir Thomas Carmichael, the respondent's father, commenced proceedings to get the value of the stone ascertained. Some of those proceedings proved abortive, but ultimately a claim of £33,013 being made, the company made a tender of £7005 in full of all claims. This offer was not

[1] See previous reports 6 Macph. 671; 40 Sc. Jur. 347. S. C. L. R. 2 Sc. Ap. 56; 8 Macph. H. L. 119: 42 Sc. Jur. 494.

accepted, and the necessary steps being taken, an inquiry took place before the Sheriff and a jury, and their verdict found the value of the stone to be £5272 as at 31st December 1852. The Sheriff made an interlocutor declaring in terms of the verdict; and in respect of the verdict being for a less sum than had been previously offered by the company, the Sheriff found the claimant, Sir W. Carmichael, liable in one half of the expenses incurred by the company. The respondent advocated the case to the Court of Session, and ultimately the Sheriff recalled that part of his interlocutor finding the respondent liable in one half of the expenses. The company having still declined to pay the amount of the verdict and interest, the respondent raised an action concluding, first, for payment of £5272, the sum awarded by the jury, with interest from 1852; and, second, to have it declared, that the company was bound to make payment of expenses. The pursuer alleged, that the amount found by the Sheriff and jury was greater than the sum offered by the company, as in full of all the pursuer's claims, at March 1864. Under the verdict the pursuer was entitled to payment of the sum of £5272, and claimed interest thereon at 5 per cent. from 1852. The company, in answer, contended, that they were not liable to pay interest, at all events previous to 1864, and that the pursuer was liable in half the expenses. The First Division decided in favour of the pursuer, Sir W. Carmichael, holding that the action was competent, and that he was entitled to interest from 1852, and that the verdict being greater than the tender, he was entitled to his costs. The company thereupon appealed.

Mellish, Q.C., and *Cotton*, Q.C., for the appellants.—The interlocutor of the Court below was wrong. The Court of Session had no jurisdiction to entertain such an action as this, because the Lands Clauses Act provides the only remedy, and the only machinery by which the compensation can be recovered. The fact that there was an express provision in the Special Act as to the mode and time of payment did not the less make the issue one for treatment under the Lands Clauses Act alone. Successive proceedings from time to time under that Act were contemplated as soon as a face of rock had been exposed, of the extent agreed upon, but not before. It was not in the power of the Court to give interest, for neither the contract of the parties nor the special Act of Parliament contained any such stipulation. It was inconsistent with the ascertainment of the amount of compensation being to be made from time to time, and, at all events, no interest was due until the value of the rock was ascertained—*Edinburgh and Glasgow Canal Co.* v. *Carmichael*, 1 Bell, Ap. 316. There was no purchase of the stone; the appellants merely required it for the support of their railway. The claim for the value of the unworked stone being illiquid until July 1864, no interest accrued before that date—*Wallace* v. *Geddes*, 1 Sh. Ap. 42. Even if the respondents could claim interest, the claim should have been made to the jury, and the Court cannot alter the verdict of the jury—*Lenaghan* v. *Monkland Iron Co.*, 20 D. 848; *Webster* v. *Alexander*, 21 D. 1214; *Denholm* v. *London and Edinburgh Shipping* Co., 3 Macph. 815. Whether interest be due or not, the respondents were not entitled to the expenses of the jury trial, for that is regulated by the Lands Clauses Act exclusively.

The *Lord Advocate* (Young), *Sir R. Palmer*, Q.C., and *A. Rutherfurd*, for the respondents.—The appeal here is not directed to that part of the interlocutor which relates to the sum fixed of £5272, and interest thereon from July 1864. Therefore this implies, that the Court had jurisdiction to entertain this action. But irrespectively of that, the original jurisdiction of the Court in these cases has not been expressly abrogated, and cannot be taken away by implication—Ersk. i, 2. 7. In the special circumstances of the case, and having regard to the nature of the contract, the machinery of the Lands Clauses Act could not have provided the means of settling all the claims, more especially those relating to interest. Interest is matter of law, and is due *ex lege*. If the Court had power to deal with interest, it had power to deal with expenses of the trial, and the decision was right.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case an action has been instituted on the part of the respondent against the Caledonian Railway Company, in order to obtain interest on a certain sum of money, which has been awarded to him by a jury in respect of property taken by the company by virtue of their special Act, and also to obtain payment of the costs incurred by him in certain proceedings with reference to the property having been so taken by the company.

The case turns entirely upon the construction to be put upon the special Act of the company, which was an Act for making a railway from Carlisle to Edinburgh and Glasgow. The respondent was possessed of a certain quarry of very considerable value, and that quarry was dealt with in a particular and special manner by the Act. The Act itself was in the usual form of Acts for the purpose of enabling parties to execute railways and works of that description, and it embodied by one of its earliest clauses the Scottish Railway Clauses Consolidation Act and the Scottish Lands Clauses Consolidation Act. Both those Acts are embodied in the Special Act, and, therefore, as regards any ordinary property taken in the execution of the works, the ordinary course in such cases would have to be followed.

By the Railway Clauses Consolidation Act it is especially declared, that all lands taken in the execution of works shall be valued, and the money due in respect of the taking of them shall be ascertained, and paid in the manner directed by the Lands Clauses Act; and then in the Lands

Clauses Act there is a regular course indicated, which was referred to by the Lord President in his judgment upon the present case, (I need not enter into any details upon the subject,) namely, notice by the company stating their intention to take the land. Thereupon a proposal or a claim is sent in on the part of the owner of the land as to what he demands in respect of compensation. Thereupon, when things proceed in their usual course, a tender is made by the company of what they are disposed to give him in respect of his claim, and if the parties cannot agree, there follows the assembling of a jury by the Sheriff, and the jury meet and ascertain the amount payable to the claimant, and if that amount which is awarded to the claimant falls short of what the company tendered, then the claimant is found liable to pay one half of the expenses.

But in this particular Act there is a special provision with regard to the subject matter now in dispute, namely, a quarry. That special provision is found in the 24th section of the Act, which recites, that, "The railway passes over the quarry field of Hailes in the parish of Colinton and county of Edinburgh, belonging to Sir Thomas Gibson Carmichael;" and it is enacted, "that beyond, and in addition to, the value of the surface land to be taken from the said Sir Thomas 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 Thomas Carmichael to work by turning or 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: Provided always, that the value of the said stone shall be payable by the said company from time to time, when and as often as a face of rock at least 130 feet in length is 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 such face." Then arrangements are made by which the company are to have power, by turning or removing the turf, to shew, that they intend to prohibit Sir Thomas Carmichael from working the stone; and then the stone, as to which the turf is so removed, is to cease to be workable by Sir Thomas Carmichael, and the company are to purchase it.

Now, if I had simply to read this by the light of the Act of Parliament, and without the comments of the learned Judges who have decided this case, I should have said, that the clear construction of this Act of Parliament would be, that there was a something to be bought beyond the surface land of Sir Thomas Carmichael. The surface land clearly had to be valued and dealt with by the conjoint operation of the Special Act and the Railways Clauses Act, which refers all these valuations to the provisions of the Lands Clauses Act; and the usual course that I have pointed out would be pursued. That would apply clearly to the surface, and there is no doubt about that part of the case, nor is any question raised on it.

Then what does the Special Act further go on to say? It appears to me to say simply, that, in addition to the value of the surface, the value of the stone shall be given. That is the short construction of the clause. But the value of the stone is to be ascertained in a particular way. In the first place, the indication of the quantity wanted by the company is to be the turning or the removing of the turf; and the company having done that, there at once arises, on the part of the proprietor of the stone, a right to make his claim; and if the parties cannot agree as to the amount to be paid, there arises the necessity of determining it by a jury.

The wording of the clause is certainly not altogether felicitous, because it says, "There shall be paid by the company the value of the whole stone situate under the surface of the land so to be taken;" 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. That of course must mean, as the Judges in the Court below held, that it is not merely a dry abstract question that is to be determined by the jury as to what quantity of stone is taken, and what the quality of the stone taken is, but of course it means by "quality" the price and the value; and therefore, the jury being called together to ascertain the extent and quality of the stone taken, it is therefore valued exactly in the same manner as is done to ascertain the extent and quality of the surface taken. But there are two provisions: one is, that the owner of the quarry is to cease to have any right to deal with the stone the moment the surface is removed; and there is a further provision, that the value of the stone to be ascertained in the manner prescribed is to be only payable from time to time when a certain event has taken place, namely, when a certain face of rock has been worked "up to the north or south boundary of the railway;" and then the payment is to be "only to the extent of the value of the stone opposite to such face." In other words, the Legislature seems to have considered, that the complainant is entitled to be paid for all stone that he is prevented working; but inasmuch as the stone would not be valuable to him, supposing he were entitled to work it, until he had opened a face in the quarry from which the stone could be worked, the date of purchase is to be taken to be from the time when the stone might have been rendered available by the process here described. And therefore he is to have valued to him from time to time, when this face of rock is exposed, the quantity and value of the stone opposite to that face; and I apprehend, that the true course of proceeding in working out this clause would be not to value the whole amount of stone, the surface of which shall have been removed, but from time to time, when the proprietor shall have put himself in a condition to

demand payment, and that he is to demand payment only to the extent of the value of the stone opposite the face of stone which is opened. When he has opened the face, it is time for him then to make his claim, and to send in his demand on account of that which is to be valued, and that will be valued by the jury.

What is there, then, to prevent the whole operation of the Railways Clauses Consolidation Act, and the Lands Clauses Consolidation Act, to which the Railways Clauses Act refers, taking place, namely, that this is to be valued like any other piece of land which is purchased? The Railways Clauses Consolidation Act says expressly, that all land purchased for such undertaking shall be valued according as the Lands Clauses Consolidation Act prescribes. There are two things to be considered,—the surface of the land, which is to be valued without any special direction, and the quarry, which is to be valued according to a special direction, which makes a special proceeding necessary in order not to pay the person who has the quarry before the property is made available which he is desirous of being paid for; and then, from time to time, when he is entitled to be paid for it, he may proceed to summon a jury and so to obtain payment.

That being so, what took place in this case originally was this: All the parties in fact seem to have supposed in the first instance, that matters were going to be dealt with in that way. The respondent, or rather those whom the respondent represents, sent in their claim, this right having accrued, in December 1852. They claimed a very large sum of money, I believe £20,000 or £30,000 or something of that kind, the claim embracing some other particulars. Then the company sent in a response to that claim, by which they offered £7000 I think, or somewhere about that amount, in respect of that claim. Then they went to a jury, and with regard to the other particulars of the claim which do not seem to have been the more important features of the case, (the value of this stone being the principal feature,) either they were withdrawn from the consideration of the jury on account of there not being any case to be established in respect of them, or in some other way, we know not for why, they were passed by. All we can look to, as it appears to me, is, what was the claim which came before the consideration of the jury. This offer had been made anterior to that claim by the other side in respect of that which was brought before the consideration of the jury. And what did the jury award? They awarded £5000 or something less than the amount which had been offered by the appellants, considerably less than the amount claimed by the respondent. Accordingly the Sheriff came to the conclusion, that he must order execution to issue for the sum found by the jury. He also found the respondent to be liable to half the expenses in consequence of his not having accepted an offer which exceeded the amount that had been awarded by the jury.

The question, however, which remained behind after this matter had been so settled was this, that the jury found a somewhat special verdict. They found this verdict (I should have mentioned, that it was in 1864 that the matter came to be tried). This matter came to be tried in 1864, but the Court of Session, from which this appeal is now presented, came to the conclusion with the Lord Ordinary, that neither side was in fault, with reference to this delay, which had arisen from a variety of accidental circumstances which are not necessary to be entered into now, because there appears certainly to be no blame attaching to the company in this respect. The trial having terminated in July 1864 the jury find this: "They find, that the rock under the railway is 260 feet long by 90 feet wide, which exceeds the amount specified in the Act of Parliament, and that the value thereof is £5272 sterling, as at the 31st December 1852."

That having been so found, what was first done by the respondents or those whom the respondents represent was this: The matter was brought by advocation before the consideration of the Lord Ordinary, and a complaint was made with reference to a part of the expenses which the Sheriff had fixed the respondent with, and the result of that advocation before the Lord Ordinary was, that he remitted it to the Sheriff with a direction to vary that which he had done with reference to the expenses. There was a claim made also in the advocation with reference to the interest on the money, on the ground, that a verdict having been found for £5272 sterling, as at the 31st December 1852, namely, 12 years before the verdict itself was found, the Lord Ordinary was of opinion, that he could not deal with the matter in the advocation, and that if it was to be dealt with at all it must be dealt with by a substantive action in respect of it. The consequence of that was the bringing of this action.

The action now brought raises two questions, the question of expenses and the question of interest alleged to be payable on £5272 sterling, and upon that action the Lord Ordinary first, and the Court of Session afterwards, who adhered to his interlocutor, have allowed interest upon the sum of £5272 sterling as from the 31st December 1852. And the Court came to the conclusion, that, inasmuch as the interest on that sum will make the aggregate sum, including the principal, considerably to exceed the tender or offer made by the company, the company is liable for all the expenses which attended the investigation.

The question we have now to consider is this, whether or not this action was competent to the pursuer (the respondent), regard being had to the jurisdiction which is conferred upon the Sheriff by the Acts to which I have referred; because if the true construction of these Acts be such as it occurred to me is their true construction, independently of the observations made by the learned

Judges of the Court of Session, then the Act itself provides for this case, as it does for every other case of compensation. In any ordinary case of land being taken from a landholder, although the landholder might, without any fault of his own on the one hand, and without any fault of the company on the other, have been rather dilatory in making his claim, in respect of the money found to be due to him, it could not be doubted, that the whole matter would be a matter to be decided by a jury. With reference to the value of the ground, the jury would not be able to award interest in respect of that delay. They would simply find the value of the land, and the Sheriff thereupon would issue his process, and the sum would be recovered, and the costs would be governed by the principles enunciated in the Act with respect to the tender.

The whole case is therefore resolved into this question, whether or not the case was a case to be dealt with according to the ordinary procedure under the Act. I confess, that it appears to me, for the reasons I have already given, that it is so. I will simply notice what the grounds were which were taken by the Court below, which led them to the contrary conclusion. It is only just and right that I should do so, on account of the great respect I entertain for the learned Judges who took that view. It can be stated very briefly in what respect it is, that the view which I have been led to take differs from their judgment.

The Lord President puts it thus: He seems to be of opinion, in the first place, that under the very peculiar form of the provisions, making arrangements for compensation under this Act, there are several things to be done which cannot be done under the ordinary course of procedure. He states the ordinary course of procedure in the manner in which I have stated it, and then, with regard to this particular case, he says—"This is the embodying in the Special Act an arrangement or parliamentary agreement between the parties. The stone which must be left, and which the railway company require to be left for the purpose of sustaining their railway in its passage over the quarry, is to be valued. Its extent and quality are to be ascertained in the same manner as in ordinary cases of disputed compensation—that is to say, the parties are authorized by this Special Act to avail themselves of that part of the machinery of the Lands Clauses Act appropriate to compulsory sale, which provides for the ascertainment of the price. But that is not the same thing as saying, that the case between the Caledonian Railway Company and Sir Thomas Gibson Carmichael shall be dealt with in all respects as if it were a case of compulsory purchase by them. Not at all. All that is necessary in order to carry out the provision of the Statute, so far as I have read it, is, that the valuation tribunal shall decide upon the value of this stone—that is to say, either that a set of arbiters nominated under the clauses applicable to arbitration, or the Sheriff and his jury, shall fix for the parties the value of that portion of stone which the railway company are to require the proprietor to leave unwrought. There is another point in the clauses of the Statute that is also extremely important. In the ordinary case of a verdict returned by a valuation jury, judgment follows instantly upon the verdict, and that decree or judgment is instantly enforceable. But it is not so in this case. The contrary is provided by this very clause. This valuation, which is to take place in the same manner as in ordinary cases of disputed compensation, might obviously take place within a few weeks or a few months after the Act passed. There is nothing to prevent it. But it is provided, that the value of the said stone shall be payable by the company from time to time, when and "as often as a piece of rock at least 130 feet in length is 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 such face."

I confess it does not appear to me, that that would be the proper way of carrying into effect the valuation under this Act of Parliament. The Act says, that there shall be no money payable until a certain time, and that the value only of that which is ascertainable in that particular event which is to make the money become payable by the company, is to be valued, and to be paid, and therefore it would be an unreasonable course for the proprietor of the quarry to ask for a valuation of his whole quarry before that event had happened, and before any money could possibly be payable to him. The proper course would be, when the time had come at which the money was payable to him, then to ask to have the value ascertained which then would be payable, and not to have the value of the property all ascertained in a lump immediately after the passing of the Act before anything had been done, which could possibly indicate to the jury what the property was which was then to be paid for. Upon that ground the learned Judge says —"What is the remedy of Sir Thomas Carmichael? Most unquestionably, to bring an action in a Court of Law for the purpose of enforcing the contract contained in the Special Act of Parliament, so far carried out by the verdict of the jury, as to have ascertained the total amount of the rock which is to be left unwrought in all time coming. Then this inquiry and this dispute may be repeated, because there may, after the lapse of some more years, be another face of rock of 130 feet wrought up to the boundary of the railway, and then another demand in like manner takes place, and so on."

I see no difficulty at all, in practice or in justice, in saying, that what he is to be paid for is a thing to be ascertained on each occasion, and that there is no necessity, upon any ground whatever, for ascertaining what is to be paid before the time comes when the payment is to be made, and when the property is to be valued for which the payment is to be made.

Then the Lord President says subsequently—"The parties themselves seem to have been perfectly aware, that the verdict, which was returned upon the 25th of July 1864, could never be considered or dealt with as a verdict in an ordinary case of disputed compensation, or as a verdict which could be carried out and made the foundation of a judgment by the Sheriff under the terms of the Lands Clauses Act, without any further inquiry, or without settling anything more between the parties. The verdict itself finds, that the rock under the railway is 260 feet long by 90 feet wide, and that the value thereof is £5272 sterling, as at 31st December 1852. Now these last words are very material in the present question, because they shew, that the railway company were of opinion, (and that is the construction that both parties adopt,) that the sum of £5272 sterling was payable at the 31st of December 1852, and that the reason was, that at that date the whole face of 260 feet had been wrought up."

He proceeds again to say, that he thinks that on that account it was necessary, that there should be some proceeding by which the parties could be put in a proper position in regard to payment not having been made at the time it was claimed, and that that could not be done, as it certainly could not be by a jury, and therefore it must be ascertained by the Court.

Now I do not think that is a correct conclusion, that in consequence of the valuation not having been made, the company being in no way parties to the keeping back of that valuation, but that in consequence of that valuation not having been made until a long time after it might have been made, therefore the case should be exempted from the operation of the Act. It does not appear to me, that this case should be exempted from the operation of the Act any more than if it were a case of an estate taken possession of by a company ten years before, which had never been valued till ten years afterwards, in which case it would not have been competent to a jury to have awarded interest. The parties who desire to be paid must suffer if they did not take the proper and usual mode for having been in any way impeded in getting that payment by anything done on the part of the company.

With regard to the special finding, there is no finding as to interest, but there is a special finding as to the time at which the property should be valued. Both parties seem to have agreed that that should be put in the verdict. Of course it might be thought that either party might succeed in raising an argument upon it. The success of that argument is not guaranteed to either side.

Each party wishes to have the fact recorded, and the fact was recorded by their common consent, and the fact was admitted in this action, that it was a correct finding, that in the year 1852 the value might have been ascertained if the parties had taken steps to get it ascertained. But it was not ascertained, and I apprehend, therefore, that there is no jurisdiction raised for the purpose of giving interest upon a sum, upon which interest had not been receivable on account of the party whose business it was to procure the making of the payment which he wished to receive, so as to place him in a position to recover that interest, not having done so.

Therefore, as regards the interlocutors decreeing payment of interest, and decreeing also a payment in respect of costs, it appears to me, that in both respects they are erroneous, and that we ought now to reverse those interlocutors which are the subject of this appeal.

LORD CHELMSFORD.—My Lords, the questions raised upon this appeal are, whether the Court of Session had any jurisdiction to entertain an action for the compensation assessed by the Sheriff's jury for the value of the stone under the surface land of the respondent which the company declined to allow him to work under the 24th section of their Act, and whether, assuming the action to be well brought, it was competent to the Court to decree interest on the amount of the compensation assessed by the jury, or to determine anything respecting the payment of the expenses incident to the trial before the Sheriff.

The appellants assert, that the only proper mode of proceeding to obtain the amount of the compensation awarded to the respondent was by judgment in the Sheriff Court, and execution thereon, as in an ordinary case of compensation under the Lands Clauses (Scotland) Act. The appellants did not object to the competency of the action in the Court of Session; but after stating their readiness and willingness to pay the ascertained value of the stone, pleaded, that interest not having been awarded by the jury, they were not liable for the same prior to the 25th July 1864, the day on which the jury returned their verdict, and that the amount tendered by them being larger than the amount awarded by the jury, they were entitled to one half of their expenses of the trial.

The Judges of the First Division themselves took up the question of jurisdiction, and decided, that the action before them was a competent proceeding, "because," as the Lord President said, "it was not the case of the compulsory sale under the Lands Clauses Act, but if a sale at all it was one which was provided for by a clause in the special Act of Parliament embodying an arrangement or parliamentary agreement between the parties;" and Lord Ardmillan said, "it was not a claim of compensation for land, but only a claim for ascertainment of the amount and quality or value of the stone purchased, and it was for that limited purpose that the Lands Clauses Act came into operation, and when that matter had been once ascertained the jurisdiction of the Court was not thereby excluded."

I am quite unable to enter into the distinction here proposed between the present case and that of an ordinary proceeding for compensation under the Lands Clauses Act; nor do I see any good reasons why the functions of the Sheriff Court are to cease with the verdict of the jury, and the Sheriff to be deprived of his ordinary power of enforcing the verdict. The 24th section of the Special Act, upon which the question turns, is very imperfectly worded, but I find nothing in it to induce me to think, that a jury was to be summoned merely to ascertain the amount to be paid for the stone, and that the respondent was then to be compelled to commence an original proceeding in another court in order to obtain not only what the jury awarded, but also what was supposed to follow as a consequence from their verdict.

The compulsory taking of land under the Lands Clauses Act is called a purchase, and the stone prohibited to be worked under the surface of the land taken from the respondent by the company is treated by the Special Act as having been purchased. It is difficult to see why those should be regarded in such a different light as to give the Court of Session a jurisdiction in the one case, which it admittedly would not have in the other.

The words of the 24th section, "the extent and quality of the stone shall be ascertained in the same manner as in ordinary cases of compensation," do not of themselves import, that the proceedings in the Sheriff's court are to be confined to the finding the amount of compensation by the jury. In the very next section, which provides for making tunnels under the railway, the company are to pay the value of the stone that may be wrought out in forming these works, "to be ascertained as before mentioned." It could not be contended, that the value of the stone thus ascertained would be recoverable only by action.

A question was raised upon the 24th section, whether the whole stone not allowed to be taken was to be determined upon, and the value of it ascertained at once, and afterwards portions of the amount to be paid as often as a face of rock of 130 feet in length was worked up to the boundaries of the railway, or, whether the valuations were to be made from time to time as often as the workings had proceeded to this extent. The Lord Advocate admitted, that it was not necessary, that there should be a valuation at once of the whole of the stone, and a division of the sum from time to time when, and as often as, a face of rock to a certain extent was opened up. It is therefore perhaps unnecessary to say, that I read the section in this way, that in addition to the value of the surface land the company shall be bound to pay the value of the whole of the stone under the surface which they decline to allow to be worked, the value to be ascertained, and paid from time to time for the stone worked to a defined extent: but whether the valuation is to be made once for all, or from time to time as the workings proceed, is immaterial to the main question, for in either case the extent and quality of the stone is to be ascertained in the same manner as in ordinary cases of disputed compensation.

The company, by the 6th section of the Railway Clauses (Scotland) Act, are subject to the provisions of that Act, and of the Lands Clauses (Scotland) Act by this section: "The amount of compensation for lands taken or used for the purposes of the railway shall be ascertained and determined in the manner provided by the Lands Clauses Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the said last mentioned Act shall be applicable to determine the amount of any such compensation, and to enforcing the payment or other satisfaction thereof."

The stone under the surface is equally land with the surface land. It is clearly land taken or used for the purpose of the railway, as it is retained for its support. The value of it is "to be ascertained in the same manner as in ordinary cases of disputed compensation"—that is, in the manner provided by the Lands Clauses Act. Why is it not to be carried out as a case of compensation to the end? And what is there in the 24th section of the Special Act to prevent the application of the latter part of the 6th section of the Railway Clauses Act, as to the manner in which payment of the compensation is to be enforced?

The case being in my opinion similar to a case of compulsory taking of land under the Railway Clauses Act and the Lands Clauses Act, the interlocutor of the Sheriff ought to have been treated as final, as by the 139th section of the Lands Clauses Act "such judgment shall in no case be subject to review by suspension or advocation, or by reduction on any ground whatever."

The Sheriff by his interlocutor found the respondent liable to one half of the expenses incurred, in respect of the verdict being for a less sum than had been previously offered by the company. This interlocutor was brought under review of the Court of Session, and the Lord Ordinary, overruling a plea of incompetency of the advocation, pronounced an interlocutor remitting the cause to the Sheriff with instructions to recall that part of his interlocutor which related to the expenses.

No steps were taken by the company to question the interlocutor of the Lord Ordinary by appeal or otherwise. But it is to be observed, that the Lord Ordinary made no decree as to the manner in which the expenses were to be settled, because, according to his view, the jury having found the value of the stone as of the date of the 31st December 1852, the question of

the right of the respondents to interest from that date could be raised only by an action for the interest founded upon the verdict and the judgment of the Sheriff.

This introduces a new subject of embarrassment into the case. It was asked in the course of the argument by what right the jury valued the stone as of a date prior to the time of the inquiry, and it was answered, that it was by the admission or consent of the parties. But this appears to be incorrect. I find no evidence of any such consent before the Sheriff. In the 9th condescendence it is said—"In the course of the proceedings it was admitted on all hands, that at the 31st December 1852, the workings of the pursuer's quarry came up to the red line at which the defenders regarded that the workings should stop, and that a face of rock not less than 260 feet in length was then worked out along that line; and the question left to the consideration of the jury on the evidence was the extent, quality, and value of the stone as at the 31st December 1852, upon the footing that the defenders were the purchasers of the stone as at that date."

It seems, therefore, not to have been by consent, but by the direction of the Sheriff, that the jury found the value at the particular date. The admission merely amounted to this, that at the time mentioned the workings of the respondents had proceeded so far as to entitle them to compensation, and I doubt whether this was sufficient to authorize the special finding of the jury. The admission which was referred to was probably that which was entered into after the award of the compensation, and after the present action was brought. Even this is not an admission that the jury were authorized by consent or otherwise to find the value of the stone on the 31st December 1852, but merely that on that day a face of rock 260 feet in length was worked up to the northern boundary of the railway, and that the rock or stone referred to in the verdict of the jury is the rock or stone opposite to that face. The Court of Session was called upon by the action to give effect to the verdict of this jury as to the principal sum of £5272, and also to decree interest upon this sum, and, in virtue of the provisions of the Lands Clauses Acts, to decree the defenders to pay the charges and expenses incurred by them in connection with the proceedings before the Sheriff. The action, if maintainable, must be founded entirely upon the proceedings before the Sheriff. The interlocutor of the Lord Ordinary, which is adhered to by the First Division, decerns the defenders to pay £5272, (the amount of compensation found by the jury,) and also interest thereon from the 31st December 1852. This is not enforcing satisfaction of the verdict, but adding to it, that which either the jury had no power to give, or, having the power, did not give it.

The course which the Court adopted with respect to the costs and expenses in the Sheriff Court is in my opinion more objectionable. By the 50th section of the Lands Clauses Act, in every inquiry before a compensation jury, if the verdict is for the same or for a less sum than that previously offered by the promoters of the undertaking, one half of the expenses of the promoters shall be defrayed by the owner or party interested in the lands. Before the jury was summoned the company tendered to the respondent a sum of £7005, and the verdict was for £5272. The Sheriff, in accordance with the express words of the Act, found the respondent liable in one half of the expenses incurred by the company. The Court of the First Division, adding interest to the verdict of the jury, (which it was not competent to them to do,) increased the verdict to an amount beyond the sum tendered, and dealing with the expenses before the Sheriff, (which are regulated by the Lands Clauses Act by a comparison of the verdict with the sum tendered,) found the company liable to the whole of the expenses. It was argued, that the respondents preferred three heads of claim to be submitted to the jury, and that the tender was to satisfy them all, and that, as the jury gave the £5272 for one head of claim only, there was no tender specifically for this claim. It appears to me, that, looking to the statement in the summons, and the verdict of the jury, it must be taken, that the other claims were either withdrawn from the jury, and must therefore be considered to have been unfounded, or that the jury found, that the respondent was not entitled to anything in respect of them. But however this may be, the words of the Statute are too clear and precise to be capable of any other interpretation than that, as the verdict is higher or lower than the sum tendered, so are the costs and expenses to be adjusted between the parties.

If the action could have been maintained, the interlocutor would, in my opinion, have been objectionable, so far as it relates to the interest on the sum assessed for compensation and the expenses of the inquiry before the Sheriff. Even if it had been agreed, that the jury might value the stone as of the date of the 31st December 1852, I should have doubted, whether it would have been within their province to give interest, their duty under the summons being merely to value the subject matter of compensation. But suppose the jury might have valued at the earlier date, and were bound to have given interest, their verdict was imperfect and defective, and the Court of Session could not add to or supplement it, but all that they could properly do would have been to have pronounced a decree of reduction, which, according to the case of the *Caledonian Company* v. *Ogilvy*, (2 Macq. 239,) *ante*, p. 474, would have been competent under the supposed circumstances, notwithstanding the 139th section of the Lands Clauses Act, and a new inquiry would have taken place before the proper tribunal. I think the interlocutors appealed from ought to be reversed.

LORD WESTBURY.—My Lords, the great respect which I entertain for the Courts below, and especially for my noble and learned friend opposite, induces me, perhaps without necessity, to add a few observations. Nothing could be more clearly and excellently well explained than the proceedings under the Lands Clauses Act as stated in the Lord President's judgment. He states most distinctly, that, "as regards the amount of compensation and the cost of the inquiry, there is a machinery provided, which works the whole thing out without the necessity of any judicial intervention at all." He goes on to state, that the Sheriff, in giving a decree for the amount of the verdict, is not required to consider any question of law or fact between the parties; but it is "a mere decree conform to the verdict, and the way in which the costs are made recoverable is entirely a matter of diligence. There is no interposition of any judicial act at all." It is most distinctly stated, therefore, by my noble and learned friend in his judgment, that had this been a compulsory sale under the Lands Clauses Act, as incorporated in this Special Act, there would have been no room whatever for the jurisdiction of the Court of Session.

Now, my noble and learned friend in his judgment considered, that this was not a compulsory sale under the Lands Clauses Act, and consequently he appears to have regarded the Statute as giving authority for two modes of procedure to ascertain the whole value of the stone under the surface occupied by the railway, which my noble and learned friend in his judgment seems to consider might be done immediately after the portion of the land occupied by the railway was ascertained, and then he regards the section giving power to ascertain the amount of money payable as a distinct and separate section giving rise to a special contract, not the ordinary compulsory contract to purchase. The whole case depends, therefore, on the interpretation of the 24th section. If the whole machinery of the 24th section be given merely with a view to effect a compulsory purchase under the Lands Clauses Act, then, as it is shewn by this judgment, there is no jurisdiction in the Court of Session.

That brings us then to the construction of the Statute, and in conformity with the opinions of my noble and learned friends who have preceded me, it appears to me to be perfectly clear, that there is no power of effecting a compulsory purchase until a certain amount of stone has been excavated. The reason appears to be plain, that it would be very difficult to ascertain the value of unknown quantities and qualities of stone lying beneath the railway. The process therefore pointed out was this, that the railway company should prohibit the working of a definite line when the workings approached so near the railway as to be dangerous, and that then the proprietor of the stone should proceed to unfold the quantity of stone up to that time to the extent of a face of at least 130 feet, and as soon as he had done so, then he would have the right to call upon the company to take by compulsion the whole of the stone opposite to the stone that had been so excavated, and the face of which had been exposed up to the boundary fixed by the company. This portion of the Statute, therefore, instead of giving rise to a special contract, is nothing in the world more than a superadded piece of machinery for the purpose of carrying into effect with greater facility the ordinary provisions for compulsory purchase. It is not a different thing; it is a part of the entire thing. There is no contract except that which arises from the company forbidding the stone quarry owner to approach nearer than a certain line. That is equivalent in effect to a notice to take the stone, and then the quarry owner is placed under the obligation of developing the face of the stone to a certain extent, in order that the value of the stone may by that process be more correctly ascertained. I think, therefore, the radical mistake, if I may venture to say so, committed by the Court below has been in dividing the section into two powers—the ordinary power of compulsory purchase and another which it denominates a special power of purchasing, and in regarding the proceedings taken as attributable to the special power and not to the ordinary power of compulsory purchase. The power which the Court has regarded as a special power is not a special power, but is nothing in the world more than a particular direction, in order to facilitate the carrying out of the general compulsory power of purchase.

Now, if that be so, as my noble and learned friends who preceded me agree that it is, then it follows immediately, that we have nothing to do but to apply to the case the lucid reasoning of the Lord President in his judgment, having removed from that judgment the only distinction by which the Lord President, admitting, as he does most clearly, the general principles, proceeds to distinguish the case by virtue of what he conceived to be a special power of purchase contained in the Statute. I apprehend that that is not so, and therefore, if in reality the section admits of the interpretation which your Lordships who have preceded me have put upon it, we shall acquiesce entirely in the conclusion which the Judges of the Court below all agree ought to be the proper conclusion to be arrived at, if there did not exist any special independent power of purchase.

Now it is plain from the proceedings, that the parties regarded this as nothing more than the ordinary mode of effecting a compulsory purchase under the Lands Clauses Act, with the addition which became convenient and necessary for the purpose of more easily ascertaining the amount and value of the stone. Therefore we find, that a notice is given by the railway company when the quarry owner approaches the railway with his workings in the month of February 1849, by

which they determined a red line which was the line of prohibition, beyond which the quarry owner was not (in the language of the Statute) to disturb the surface of the land. It became, therefore, immediately a notice, that within the red line this company agreed to purchase the stone. But before the company could be called on to do so, the quarry owner was under the obligation of developing the face of the rock over at least 130 feet in length. He did so: That appears to have been done by the 31st December 1852, for in the 9th article of Condescendence it was admitted on all hands, that at the 31st December (1852) "the workings of the pursuer's quarry came up to the red line aforesaid, at which the defenders had required that the workings should stop, and that a face of rock not less than 260 feet in length was then worked out."

All the conditions of the section of the Statute were then fulfilled, and on that day it was perfectly competent to the quarry owner to have required the company to pay for the whole of the stone opposite—*ex adverso* the face of the rock he had so opened out. He did not do so, and the *mora* or delay in not ascertaining the amount and value of the stone is attributable entirely to the quarry owner. Well, then, the jury being empanelled for the purpose, proceeded subsequently to ascertain the value of the stone, and they ascertained it with great propriety as it stood on that day in December 1852. For that was the day when the conditions of the Statute were fulfilled, and when the title of the quarry owner to have the value of the stone became complete. If he did not choose to prosecute his claim at that time, it was his own fault.

That being the state of the case; and the jury having found the value of the stone as on that day, all the functions of the jury, and all the obligations of the Statute, were completely fulfilled; and as the Lord President shewed, there was no room for any interest to be demanded. Interest can be demanded only in virtue of a contract express or implied, or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid. There was nothing of that kind here, and there is no room for any jurisdiction of any Court to consider the question of interest, that being, if it arise at all, a matter for the jury alone in determining the amount of compensation or the amount of purchase money to be paid. And in like manner also, as the Lord President shews, the question of expenses is a mere consequence, and, as he properly expresses it, is a mere matter of diligence. There was no room, therefore, for the addition of the jurisdiction of the Court of Session to the authority and jurisdiction and powers created by the Statute in favour of the Sheriff Court and of the jury.

I have, therefore, no hesitation in agreeing with my noble and learned friends, that there was nothing to be done by the Court of Session; that this action was altogether incompetent, and that the only sum of money payable to the quarry owner was that found and ascertained by the verdict of the jury; and inasmuch as the comparison of that sum with the sum tendered by the railway company shews clearly, that the tender exceeded the first amount of his demand, the consequence, as a mere matter of diligence in respect of costs, follows immediately, as explained by the Lord President in his judgment. I agree with my noble and learned friends that the interlocutors should be reversed.

LORD COLONSAY.—My Lords, I confess I do not regard this case as so free from difficulty as my noble and learned friends do. In the first place, I do not concur in the construction which they have put on the clauses in the Special Act. This is a matter dealing with a substance under the surface. No doubt the Lands Clauses Act and the Railways Clauses Act are incorporated in the Special Act. But the dealing with that substance, if it is to be regarded as mineral, is not left to be done under the mineral clauses of the Act. On the contrary, it is taken out of the provisions of the mineral clauses of the Act, and is made the subject of a special agreement under the special clauses. Now what was the meaning of that special agreement? It appears to me to have been, that the railway company were to purchase, if they chose, certain stone from the owner of the quarry, that is, whatever portion of the stone they did not permit him to work, they were to be held to be purchasers of, and to pay the price of it. That price was not to be paid until the owner of the quarry had worked up to the point where the railway company considered that he was bound to stop, and where they required him to stop. But I do not agree with my noble and learned friend who last spoke as to the meaning or purpose of that arrangement. It appears to me, that the owner of the quarry might, at any time after the passing of the Act, have called on the promoters of the railway to mark the line at which they would require him to stop, and I do not see that there could have been any difficulty in ascertaining the amount and value of the stone at any time. It is not stone that is developed which has to be valued; it is stone that has not yet been worked. There is a certain breadth of ground under which stone is supposed to be. There must be some mode of ascertaining what is the amount of stone undeveloped in the ground; and that could be ascertained at any period. But I think, that the object of the provisions as to the payment being delayed until a certain amount of the quarry was worked out, so as to develop a certain portion of rock, was this: that until the owner of the quarry had worked up to that point he had lost nothing whatever by the company requiring him not to work the stone under that land, because he had not arrived at a point at which he could have made that stone available; and therefore it was that he was to receive no payment of the price of the stone till matters had arrived at a position in which he could no longer make that

stone available in consequence of his being stopped by the railway company from doing so. But it does not follow from that, that the right to the stone was to be held as a mere matter to be valued, and to be dealt with by way of compensation, either under the Railway Clauses Act or under the Lands Clauses Act. The manner of ascertaining the value is no doubt by a Sheriff's jury. They are to ascertain the quantity and the quality, and by inference the value of the stone.

It appears that the period at which the owner of the quarry was entitled to payment of the value of the stone was in the year 1852. But the value was not ascertained at that date. It was not ascertained till 1864. In any ordinary case, or, perhaps, even in this case, and looking to the terms of this clause, I doubt very much whether, even if there had been *mora* on the part of the railway company, the jury could have found specially that interest was due on that sum. If they had put a special clause into their verdict, finding, that the quarry holder was entitled to £50,000 odd, and separately so much for interest from 1852, I doubt whether it would have been a competent proceeding on the part of the jury. For all that was remitted to them under this Statute was to ascertain the quantity and quality, and by inference the value of the stone; and if they had found that which they were not competent to find, I agree with my noble and learned friend who spoke last, that a remedy might have been open to the railway company by reduction to get the better of that verdict. But that is not the question here. The question here is, whether this clause in the verdict, in which the jury have found the value of the stone as in 1852, means, that the quarry owner was entitled to his money at that date. And then the question arises, whether, in point of law, anything has occurred to preclude him from getting interest on the price as at that date.

Now, how did this clause come into the verdict? My noble and learned friend who spoke first says, it has been represented that it was done by the consent of the parties, but that he can find nothing of that kind in the evidence. Now I think my noble and learned friend has overlooked a statement in the answer of the railway company, which bears, that it was of consent of both parties that the jury found the value of the stone in question as at 31st December 1852. Neither the pursuer's title to the stone, nor the question, whether the pursuers were entitled to interest of the price or value thereof from 31st December 1852, was left to or determined by the jury. "The parties consented to the jury fixing the value." "The claim of the pursuer and the tender made by the defenders included the principal sum or value of the stone only, and were both made, leaving the question of interest open, and the verdict of the jury was returned upon the same footing." If that was a question to be disposed of at all, it was not a question within the competency of the jury and the Sheriff. Then where was it to be dealt with? The Supreme Court was the only Court that could deal with it. If they found that this was a debt of that date, then on the ordinary principles of law, unless there was something to interfere with them, interest would be due from that date. That interest is a separate thing, one which neither the jury nor the Sheriff could deal with. It follows that it was an open question to be dealt with by a tribunal that was competent to deal with it.

On that footing it appears to me, that the Court had jurisdiction. Whether they dealt with the matter rightly or wrongly is another question. All that I say now is, that I think they had jurisdiction. Now, if they had jurisdiction to deal with it, the question would come to be, whether they dealt with it rightly or wrongly. It is perhaps unnecessary for me to make any remarks upon that question. I consider it a minor question, as the case is practically decided; but it appears to me to stand in that position. Further, as regards the jurisdiction, I may remark, that with that statement in the record by the railway company, no objection was taken to the jurisdiction of the Court of Session, clearly shewing what was the meaning of the parties in that clause of the statement. Their conduct shews clearly, that it was their opinion that the question was to be dealt with by a tribunal competent to deal with it, and the only tribunal competent to deal with it was the Court of Session. But whether they decided it rightly or wrongly is a secondary matter. But I cannot entirely hold with some of the views which have been stated by my noble and learned friends, as to the circumstances under which alone interest would be given. It does not require a special contract for it, in order to make interest due, nor does it require that there be any clear *culpa* or blame on the part of the person who has not paid the price at the proper date; as, for instance, the vendor may not be in a condition to give a clear title, but the purchaser may have been put in possession of the property purchased. And here the question would come to be, whether, if it be regarded as a purchase, and the railway company got into possession of the purchase in 1852, there is any reason, why they should be on a different footing from parties who have purchased, and have got into possession, but some circumstances have occurred which have prevented the purchase being completed. The Court found, that neither party was to blame for the delay that took place. It seems to be implied, I think, in the opinion of my noble and learned friend who spoke last, that the owner of the quarry was alone to blame for not having that value ascertained earlier. But it is a common statement between the parties, that no blame attached to either party; then *mora* cannot be introduced into the question, and if *mora* is not introduced into the question, then we fall back on the ordinary rule, and then the question comes back to what I have stated. It was the case of a

purchaser who got into possession in 1852, and to whom, through no fault of the seller, the price was not fixed till 1864. That being so, I should rather be inclined to concur in the judgment which the Court pronounced upon that point.

Then the question of expenses is said to be a consequence of that. I am not quite so clear about that. I am not sure that it necessarily follows so. If the view of both parties was, that the value of the stone only should be ascertained, and if the value of the stone was ascertained at a less sum than the amount which was tendered, I am not so clear that the Sheriff was wrong with reference to the expenses in the shape in which the statement was presented to him. I think he was right; he had no power to deal with the expenses. But on the two points of jurisdiction and liability for interest, I go along with the view that was taken in the Court below. But I confess it is a difficult question, and I am not surprised that my noble and learned friends have arrived at an opposite conclusion. Perhaps they are rather surprised at the conclusion at which I have arrived. But I cannot give my concurrence to the judgment that is to be pronounced.

LORD CHANCELLOR.—As the majority of your Lordships have come to the conclusion, that the action was incompetent, I apprehend it will be necessary, besides reversing the interlocutors, to substitute for those interlocutors a decree of absolvitor, with expenses.

LORD WESTBURY.—Probably your Lordships would agree to this: Reverse the interlocutors; and this House being of opinion, that this action was incompetent, direct, that a decree of absolvitor, with expenses, be substituted for the order of the Court below.

Sir Roundell Palmer.—Then shall we not receive payment of the principal money, my Lords?

LORD WESTBURY.—Yes. Did you not go to the Court of Session for that? You have a Parliamentary remedy for that, you know. It would be very inconsistent with the principle of our judgment, if we allowed the interlocutor to stand as an interlocutor directing the payment of the principal.

Sir Roundell Palmer.—I do not know whether your Lordships remember, that both in the Court of Session and here the appeal was expressly limited to the payment of the interest and expenses. There is no reclaiming note against that part of the interlocutor which directs payment of the principal, and no appeal.

LORD WESTBURY.—If it was agreed between the parties to limit the appeal to the interest and expenses, of course the appellant would be bound by that agreement to pay the principal sum of money. So far as the judicial matter we have to deal with is concerned, having found the action to be incompetent, we should stultify ourselves if we allowed the interlocutor to stand.

Sir Roundell Palmer.—The petition of appeal to your Lordships' House does not include the part of the interlocutor relating to the principal.

LORD CHANCELLOR.—Unless there be some arrangement entered into between the parties, I cannot see how we can proceed otherwise than, having declared the action incompetent, to reverse the interlocutor. How can we leave the decree standing?

LORD WESTBURY.—There need be no difficulty about the matter.

LORD CHANCELLOR.—The money may be recovered under the Sheriff's judgment.

Sir Roundell Palmer.—I should imagine, that it will be the first time that your Lordships have ever gone beyond the petition of appeal. If an incompetent judgment is pronounced, and it is not appealed from, it remains.

LORD COLONSAY.—We had better limit the decree to the petition of appeal.

LORD CHELMSFORD.—Surely we cannot allow the interlocutors to stand, if the action is incompetent.

LORD WESTBURY.—Certainly we cannot do that. That would be to exercise jurisdiction. If the parties have agreed, that the appeal shall extend only to the interest and the costs, then, by their agreeing now, that the principal shall be paid by the railway company to the respondent, the consistency of the House will be preserved.

Sir Roundell Palmer.—I do not know what your Lordships would consider an agreement; but the petition of appeal prays your Lordships to reverse, vary, or alter the interlocutors, except in so far as the sum of £5272, with interest thereon from the 25th of July 1864, (which is the date of the verdict of the jury), is held to be found due to the respondent.

LORD CHELMSFORD.—We are in this difficulty, that we have declared our opinion to be, that the action was incompetent, and therefore, whatever agreement may have been entered into between the parties with regard to limiting the extent of their appeal, I am afraid it would be inconsistent with the opinions expressed by the House if we held, that, so far as the interlocutor relates to the principal sum, it should stand. I think probably an agreement between the counsel, if the counsel for the railway company are present, would obviate all difficulty.

Mr. Mellish.—The railway company have never disputed their liability to pay the principal; but I cannot give up my right to costs in the Court of Session, as we substantially succeed.

Sir Roundell Palmer.—I am not saying a word about that.

LORD WESTBURY.—I expected, Sir Roundell, that the railway company would have frankly stated, that they were ready and willing to pay the principal.

Mr. Mellish.—We never disputed it; that is what I said at the beginning.

LORD CHELMSFORD.—Not disputing and agreeing are two different things.

Mr. Mellish.—Provided it makes no difference as regards the costs of this action, I have not the least difficulty in giving an undertaking, so far as I can do it; though it is difficult, where counsel undertakes anything, to know how it may operate; but certainly I can say, that my instructions from the beginning have been, that the railway company had not the smallest objection to pay the principal, and always intended to pay it, and offered to pay it, and would have paid it, if these proceedings had not been taken in the Court of Session.

LORD WESTBURY.—My Lords, I take it, and my noble and learned friend here (LORD COLONSAY) agrees with me, that it would be desirable for the judgment of this House to proceed upon this declaration:—"That this House is of opinion, that the action was incompetent; but, inasmuch as the petition of appeal does not challenge the interlocutors beyond the questions of interest and of costs, this House doth reverse the interlocutors complained of so far as they relate to the questions of interest and of costs, and doth decree, that *quoad hæc* there be absolvitor with expenses, leaving the interlocutors in force as a means of enforcing the payment of the principal sum of money," or something to that effect. Will that satisfy Sir Roundell Palmer?

Sir Roundell Palmer.—Perfectly, my Lord; that is what I thought your Lordships would probably do when you fully understood the position of the case.

LORD WESTBURY.—I felt perfectly sure there would be no hesitation on the part of the railway company to undertake to pay the principal immediately.

LORD CHANCELLOR.—The declaration must be carefully framed. In substance it will be:—That the House being of opinion, that this action is not competent, reverse the interlocutors complained of, and decree absolvitor with costs, except so far as to leave the interlocutors standing as the means of enforcing payment of the principal.

Judgment of reversal, with declaration.

Appellants' Agents, Hope and Mackay, W.S.; Grahames and Wardlaw, Westminster.—*Respondents' Agents*, Gibson-Craig, Dalziel, and Brodies, W.S.; Loch and Maclaurin, Westminster.

JUNE 30, 1870.

THE EARL OF ZETLAND, *Appellant*, *v.* THE GLOVER INCORPORATION OF PERTH, and Others, *Respondents*.

Salmon Fishing—*Medium filum* of River—Shifting of Sands—Boundary—*A sand bank which was of a shifting character had settled near the south shore of a tidal river, the salmon fishings in which river belonged to the opposite riparian owners respectively* ad medium filum. *Z., to whose shore it was nearest, claimed to treat the sand bank as the new line of shore, and to advance the* medium filum *further towards the opposite shore.*

HELD (affirming judgment), *That the Court properly treated the sand bank as part of the* alveus, *and not as an island or accretion, and that the* medium filum *remained unaltered.*

Superiority—*Dominium utile*—Consolidation—Merger—*Where the owner of the* dominium utile *acquires the superiority, and by a resignation of the former in his own favour* ad remanentiam *consolidates the two estates, the effect is not to extinguish the* dominium utile *by merger.*[1]

This was an appeal from a decision of the First Division as to the proper boundary between the salmon fishery of the parties who held rights of salmon fishings from opposite banks in the estuary of the river Tay. A sand bank, which had shifted its position considerably, had formed near the bank or shore belonging to the Earl of Zetland, and now stood there. It was distant about a quarter of a mile from the Earl's shore, and a mile and a half from the Glover Incorporation's shore opposite. The Earl claimed to have the exclusive right of fishing from the said sand bank called Balinbreich or Eppie's Taes, as being within his half of the river, and to treat it as the south shore of the river; while the Glover Incorporation claimed the exclusive right to fish on this sand bank, by virtue of immemorial possession founded on their similar use of the bank when it was formed higher up the river. The Earl raised an action of declarator, and the Lord Ordinary by his interlocutor found, that the sand bank being of a shifting character, and

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[1] See previous reports 6 Macph. 292: 40 Sc. Jur. 162. S. C. L. R. 2 Sc. Ap. 70: 8 Macph. H.L. 144: 42 Sc. Jur. 501.