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

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

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

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

Thursday, June 30.

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

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

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

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

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

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

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

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

influence and action upon it of the fresh water floods and of the tides in the river, changed its form and position to some extent from time to time, and more particularly of late, and since the year 1838 has been carried further down the stream and more near to the southern bank and to the pursuer's lands on that side of the river; 5th, That the said bank at present lies to some extent to the southern or pursuer's side of the *medium filum* of the river as at low water, and partly on the northern or defenders' side thereof; and 6th, That for forty years, and for time immemorial prior to the date of the present process, the defenders or those in their right have been in use to fish for salmon by net and coble from the said bank, when not covered by the tide, both to the northward and southward thereof, and now maintain their right in this process so to do.—Finds, *secundo*, as matter of law, in respect that the said bank known as 'Eppie's Taes' bank is not altogether stationary, or truly in the sense of the law of the character of an island situated within the bed of the river, but is truly a portion of the bed of the river, liable to be affected and moved from time to time by the action of fresh water floods or of the sea tide, that the same cannot be regarded or dealt with as an island capable of permanent appropriation by the proprietor or proprietors of the shore on either side of the river, but must be dealt with as being truly within the bed of the river, the fishing of or from which is to be divided so as to afford to the respective proprietors on either side thereof the possession of the fishing to the *medium filum* of the river as the same exists at low water; and, with reference to the foregoing findings, Finds and declares that the pursuer has good and undoubted right to fish for salmon and other fish in the river Tay *ex adverso* of those portions of the lands and barony of Ballinbreich or Balmbreich belonging to him and known as the estate of Balmbreich, and that as far as the centre of the stream of the said river; and including the right to fish as aforesaid from and upon the bank called the Balmbreich bank or 'Eppie's Taes' bank, lying opposite the pursuer's said estate, in so far as the same is situated to the southward of the centre of the said river: Finds and declares that the defenders and their successors in the lands and estate of Seaside have no right or title to fish to the south of the centre of the stream of the said river, and, in particular, from or upon any part of the said bank, in so far as the same is situated to the southward of the centre of the said river; and interdicts and prohibits the defenders from molesting or interfering with the pursuer in the exercise of his said rights, and particularly from fishing by themselves, their tenants or others, from or upon any part of the said bank, in so far as the same is situated to the southward of the centre of said river, and decerns: Finds the defenders liable to the pursuer in the expenses of process, but subject to modification," &c.

"*Note.*—The present case, like others of the same class, involves considerations of some nicety as respects the application of the known principles which regulate the rights of proprietors of salmon-fishings in a tidal river such as the Tay, to the particular characteristics affecting the bed of the river, at the point in relation to which this dispute between the pursuer and defenders has arisen.

"The state of the facts which have led to the present litigation is remarkable and peculiar in so far as it has relation to the right of fishing from a bank in the river Tay, which, although in some respects identified and spoken of in evidence as a known subject, is more truly of the character of a moveable portion of the bed of the stream, and which has in fact gradually changed its position and form, and now exists further down the stream, and is more near to the pursuer's side of the stream, than at any former period.

"Each party now maintains an exclusive right to the salmon-fishing from this bank,—the pursuer founding his claim on the allegation that the bank is now situated entirely to the south of the true *medium filum* of the river, and the defenders, on the other hand, relying mainly on the possession hitherto had by them of the subject.

"The Lord Ordinary has been unable to follow either of these extreme views. It has appeared to him, on consideration of the whole evidence, that the river must, at the locality in dispute, be taken as having but one bed, and that the bank in dispute is merely a portion of the *solum* of that bed which is left uncovered, as it at present exists, by the tide at low water, and which is liable to be moved, and which has in fact been moved, and increased or lessened, by the action of the stream and tides from time to time.

"In this state of the facts, the Lord Ordinary does not think that the bank can be dealt with as if it were an island in the bed of the stream, capable of permanent occupation by either party, or as now truly a part of the southern bank or shore, as maintained for the pursuer, but that it must be regarded truly as a temporary obstruction in that bed, and that in consequence the rights of the pursuer and defenders must be regulated in respect to the mode of fishing from it, so as most nearly to preserve to them their common law right to fish respectively to the *medium filum* of the stream.

"How this is to be done it is scarcely for the Lord Ordinary at present to anticipate. In forming his present opinion the Lord Ordinary has been guided by the principles which, as it appears to him, were given effect to by the House of Lords in the leading case, relating to nearly the same locality, of *Lord Gray* v. *Magistrates of Perth*, 30th March 1757, House of Lords, 1 Craigie & Stewart, p. 645; and very recently by the Lord Ordinary and by the First Division of the Court in the case of *Wedderburn* v. *Paterson*, 22d March 1864, 2 Macph., p. 902."

The defenders reclaimed.

The pursuer also reclaimed, and asked the Court to recal the Lord Ordinary's interlocutor, "(1) in so far as it finds that the defenders and their authors have for forty years and upwards, under and in virtue of the titles founded on by them, exercised a right of fishing for salmon *ex adverso* of the lands of Seaside and others belonging to them and situated on the north side of the river Tay; (2) in so far as it finds that the bank called 'Eppie's Taes' bank lies partly on the northern or defenders' side of the *medium filum* of the said river as at low water; (3) in so far as it finds that for forty years and for time immemorial prior to the date of the present process, the defenders, or those in their right, have been in use to fish for salmon by net and coble from the said bank; (4) in so far as it only finds the defenders liable in expenses subject to modification."

The Court substantially adhered to the Lord Ordinary's findings.

The pursuer appealed.

LORD ADVOCATE and SIR ROUNDELL PALMER, Q.C., for him.

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

At advising—

LORD CHANCELLOR—My Lords, the question which arises in this case is one which concerns a fishery in the River Tay. The present appellant, the Earl of Zetland, was the pursuer in the proceeding against the Glover Incorporation of Perth, with reference to an interference with his right of fishery, in which action he seems to have been upon the whole successful; but there are certain declarations made and findings which he objects to which have been made in the course of the proceedings in that action, and in respect of those declarations and findings, and those only, he appeals.

Now, in this action, which was generally with reference to the interference with the right of fishing, and in which the summons concluded with asking for certain declarators, and also asking for an interdict in respect of what had been done by the defenders, the Lord Ordinary, on 8th of January 1867, pronounced this interlocutor. He found first, as a matter of fact, "That the pursuer and his predecessor and authors have, under and in virtue of the titles founded on in the record, for forty years and upwards exercised a right of fishing for salmon in the River of Tay *ex adverso* of the lands and estate of Balmbreich and others belonging to them in property on the south side of the said river, and within a portion of the same where the sea-side ebbs and flows, by net and coble and otherwise, to the *medium filum* thereof, as the same exists at low water." That, secondly, he found (and this is the first finding complained of) "That the defenders and their authors have in like manner, for forty years and upwards, under and in virtue of the titles founded on by them, exercised a right of fishing for salmon *ex adverso* of the lands of Seaside and others belonging to them in property, and which are situated on the north side of the said River Tay, and within the influence of the tides, lying opposite to the aforesaid lands and estate, the property of the pursuer, and that by net and coble and otherwise, to the *medium filum* thereof as at low water." Then, thirdly, he found "that within the channel of the said river there has existed for a lengthened period of time, and exceeding forty years, a bank generally known or distinguished by the name of "Eppie's Taes" bank, formed chiefly of sand and mud, which is covered by the flow of the tide at high water, and which at low water shews itself as situated within the bed of the fresh water stream." Fourthly, "that the said bank is not and has not been altogether stationary, but has, under the influence and action upon it of the fresh water floods and of the tides in the river, changed its form and position to some extent from time to time; and, more particularly of late since the year 1838, has been carried further down the stream and more near to the southern bank and to the pursuer's lands on that side of the river." Fifthly, he found "that the said bank"—(and this again is a finding complained of)—"that the said bank at present lies to some extent to the southern or pursuer's side of the *medium filum* of the river as at low water, and partly on the northern or defenders' side thereof;" and sixthly, "that for forty years and for time immemorial prior to the date of the present process the defenders, or those in their right, have been in use to fish for salmon by net and coble from the said bank, when not covered by the tide both to the northward and southward thereof, and now maintain their right in this process so to do."

Then he finds "as a matter of law, in respect that the said bank known as 'Eppie's Taes' bank is not altogether stationary or truly in the sense of the law of the character of an island situated within the bed of the river, but is truly a portion of the bed of the river liable to be affected and moved from time to time by the action of the fresh water floods or of the sea tide, that the same cannot be regarded or dealt with as an island capable of permanent appropriation by the proprietor or proprietors of the shore on either side of the river, but must be dealt with as being truly within the bed of the river, the fishing of or from which is to be divided so as to afford to their respective proprietors on either side thereof the possession of the fishing to the *medium filum* of the river as the same exists at low water; and, with reference to the foregoing findings, finds and declares that the pursuer has good and undoubted right to fish for salmon and other fish in the river Tay *ex adverso* of those portions of the lands and barony of Ballinbreich or Balmbreich belonging to him and known as the Estate of Balmbreich, and that as far as the centre of the stream of the said river, and including the right to fish as aforesaid from and upon the bank called Balmbreich bank or 'Eppie's Taes' bank, lying opposite the pursuer's said estate, in so far as the same is situated to the southward of the centre of the said river. Finds and declares that the defenders and their successors in the lands and estate of Seaside have no right or title to fish to the south of the centre of the stream of the said river, and in particular from or upon any part of the said bank, in so far as the same is situated to the southward of the centre of the said river." Upon that he grants an interdict.

This finding and the interlocutor of the Lord Ordinary having been in substance, with some verbal alterations not of importance in the present case, affirmed by the Court of Session, the appellant's complaint on the present occasion is this—that, in the first place, it ought not to have been found that any right whatever existed in the defenders with reference to this fishery. And secondly, that regard being had to the special circumstances of this case, the sort of island or bank, whichever it may be called, that is known by the name of Eppies' Taes Bank is so formed that in reality it should not be treated as being a part of the bed of the river, as the finding has declared it to be, but that it should be treated as a part of the southern bank of the river, and so attached to the southern bank of the river as in effect to make a portion of that bank, and that the measurement of the *medium filum* should accordingly be taken, not from the northern edge of the southern bank, but from the northern edge of this new or shifting bank which has been formed in the river; or that, at any rate, if it be not considered as forming a part of the actual southern shore, yet that, according to the decision, or rather *dicta*, which we find in the case of *Wedderburn* v. *Paterson*, the channel between the southern bank and 'Eppie's Taes' (or the shifting bank as I shall call it henceforth)—the channel between the fixed bank and the shifting bank should be treated as a minor channel, and not one of such importance as to be any longer regarded as forming substantially a part of the river, and being a portion of the river itself, but that the appellant should be allowed to disregard

that channel in any question as between him and the persons who might have rights, if any exist, on the opposite shore, and to measure the *medium filum* from the northern edge of that shifting bank, irrespectively of the question whether it was actually solidly joined or not to the southern bank of the river.

Now, the first question of course that arises is the position of the defenders in this case as regards their title, though the appellant of course has no other complaint to make with respect to the defenders' title in this particular matter than so far as it concerns anything interfering with his right to proceed *ad medium filum;* and if it had not been for the finding in the interlocutor which was found necessary before the rights of the parties could be effectually determined, namely, the finding which affirmatively declares the defenders' right, and by which the appellant fears he may be injured in any future or other proceeding.

The right of the defenders stands in reality upon a very few facts, because I think there is no dispute beyond one which I can state in a very few sentences. There is no question whatever that the defenders, claiming through one Hunter, who was the person in respect of whom the question as regarded the particular title to the fishery arose, have this much right, that Hunter centred in himself certain rights of this description—without going through the names of all the parties from whom the right was derived, it may be briefly stated as a right established or claimed to be established by a confirmation of certain grants made in a marriage settlement, I think, originally a long while back, early in fact in the last century, confirmed by the Earl of Errol—claiming the superiority, and by a charter of confirmation which he granted of these rights of fishing which *eo nomine* had been asserted and disposed of, and that that right was followed, as is averred by the defenders, by possession, which possession, I think, seems to be sufficiently established by the evidence anterior to the date of 1784. A sasine was had and the right was feudalised, undoubtedly (that seems to be beyond all dispute) before the year 1784. An apparent title at all events is evidenced by actual user anterior to the year 1784 of the rights vested in Hunter. But the superiority not being at that time consolidated with the fishing right, what took place afterwards was this (and the question is, whether or not what I am about to describe destroyed the right)—The right of fishing having become vested in Hunter, he afterwards acquired the superiority. The two were vested in him under two distinct titles. Then, being minded to consolidate the title to the fishery and the title to the superiority, he took the proper course by a charter for that purpose, by a resignation to a person representing himself—a resignation as it were to himself in terms which were allowed by the Scottish law—a resignation in fact to the hands of another, as passing to himself by way of resignation the right to the fishery with the intent and purpose of what was called *ad remanentiam*, the effect and purpose of which was, that he intended that this right to the fishery and the right to the superiority should become consolidated, that the two rights should be granted to him, and then, that step having been taken, the question arises, what was the effect of that step so taken, and whether or not, the fishery and the superiority having been, as was averred in the argument, united together, the fishery became merged, as our English law would consider it, entirely in the superiority, and the superiority discharged of the *dominium utile* of the fishery which would be vested in Hunter, whether the superiority became discharged of that separate right in the fishery, so that the two were now merged the one in the other—that is to say, the fishery in the superiority—and that consequently you would have no longer to look to the separate title to the fishery, but to look to the title for the superiority, and to see whether or not the superior in that state of things had a title to the fishery. Because it curiously enough stands thus. The original right of the lord to the fishery is disputed, and it does not appear in fact in evidence that any such original right existed. The claim is made solely under a grant made so many years ago, and the possession taken under that grant, which gave to the person taking under that grant a valid right by virtue of the statute and prescription under the statute. Then it is said that that right was vested in you, but you passed that right over and it merged in the lordship, and when you come to examine the titles to the lordship you do not find the title to the fishery, therefore the title to the fishery has gone by that merger and you can have no longer that right, although you had acquired it by virtue of the statute aud prescription under the statute. No doubt the point is a very subtle one, and it would be a very singular result if that could be the correct view of the law, because the result would be this, that a person wishing to hold the fishery, and to hold the two rights he had in a manner vested in him, merging the two, and taking proper steps for that purpose, would find that he had only destroyed the right he had got.

But this point seems to have been very little discussed in the Court below, and therefore of course I may well feel a certain degree of doubt and hesitation as to any conclusion which I might come to with such little assistance as is to be derived from anything that was said in the arguments in the Court below, or anything in the way of authority in the arguments which took place before us. There are certain expressions in certain Scottish text writers, comparing the effect of consolidation with the effect of a merger. But as far as I have been able to inform myself upon the subject (one much better informed upon Scottish law than I am will presently address your Lordships), a consolidation of rights has not the effect of destroying by merger the right of fishery which was surrendered in order to be consolidated with the superiority. The simple effect is that, the two being consolidated, the right to fish might well pass with the grant of superiority alone if the two were consolidated; but there is no reason whatever why the two rights should not continue to co-exist, and why the person who has acquired the right of fishery should be supposed to have lost the right which had been vested in him, and why the resignation should be considered to work only for the effect of passing over and destroying that right which was effectually vested in the vassal, and which, if the lord had no right at all (that is a very singular part of the case), could not well be taken to operate anything by way of resignation to one who had no interest in the two originally. Because in the argument now used by the appellant it is contended that the lord himself had no right by superior title to this fishery at all. Whence it would seem a very singular position to say that by surrendering to one as something which he had a

right that to which he had no right, he destroyed that right which he had acquired by virtue of the operation of the statute, and that being so destroyed the title thus conferred upon him was entirely extinguished, and that the effect of the resignation was not really to pass anything at all to the lord, because the lord had no interest in the matter resigned, but the effect was simply to destroy that which he had not the slightest intention to destroy, but which it was his intention to confirm. I am happy to find that it seems to be conformable to Scottish law that consolidation has not this effect, which according to English law it would have had in the case of the merger of a lease or anything of that kind. The effect simply is, that the two things are consolidated, and that the thing held by one title is not lost and destroyed because this consolidation has taken place. If this argument had been successful, no doubt there would have been considerable reason for saying that subsequently to 1784, in regard to the titles made out, there had not been forty years' user, that is if you suppose a new title to start altogether from 1784. Although there had been continued grants of fishery from that time, those grants had not been feudalized so as to enable you to attach forty years' possession to the rights feudalized.

My Lords, for the reasons I have stated, it appears to me that the restrictions did not affect the rights conveyed to Mr Hunter, and subsequently to the respondent in the present appeal; and that therefore the finding of the Lord Ordinary, which was affirmed by the Court below, is correct.

Now as regards the river: There really seems to be no reason on the facts of the case (for this wholly turns upon the facts) for finding fault with the conclusions which have been come to in the Court below. The facts of the case seem to be simply these—that there is a very considerable mass, as it appears to me, of mud and shingle in this great estuary (for such this portion of the river may be described to be), and that this mass is of a slowly shifting character. It appears during a considerable number of years to have shifted (as far as the evidence has gone) somewhere nearly a mile down from one part of the river to another. In its shifting progress it has now arrived opposite the southern bank of the appellant, and opposite the northern bank of the respondents. And it having so arrived there, the question is whether this shifting bank has so far acquired the form of solid land as to be regarded as being attached to the southern bank, and as in effect forming part of the southern bank, with only an intervening channel, which is not to be considered any longer as forming part of the channel or bed of the river, but only as a streamlet diverging from the river, which is to be disregarded in the determination of any question as to the *medium filum*. so that the *medium filum* will no longer take account of this streamlet at all, but the measurement will take place from the northern side of the shifting bank, and go to the northern side of the river held by the respondents.

What is the evidence upon this? It appears that at low water there is usually water between the shifting bank and the main bank on the southern side. That water is said to be some 10 or 11 inches only in depth, and there may be extreme cases of low tides in which persons may pass nearly dry-shod from one shore to the other. But at high water vessels still navigate this channel, and pass over the shallowest portion of it, that is to say the western portion, and at all times the fishery goes on, so that the appellant has the advantage of fishing in this channel as much as if it was a portion of the river, and in that respect he can and does use it as a portion of the river. It appears to me that, so long as that state of things continues,—one cannot tell of course what changes providential arrangement of storms and a variety of other causes may ultimately operate with reference to this bank—the decree seems to have confined itself to the existing state of circumstances,—but in the present state of circumstances, it appears to me that which is used for navigation in some states of the tide, and which is used or can be used at all times of tide for the purpose of fishing, is sufficiently a portion of the bed of the river to say that the *medium filum* is not reached until you have reached that *medium filum* by measuring from the southern bank, including this particular portion or branch as being a part of the river Tay. That I apprehend is all that is stated. It is a very different case from the case of *Wedderburn* v. *Paterson*, which has been cited, and where all that was intended to be said by the learned Judge was that he should have had no difficulty in dealing with the case if it had been a *cul de sac*, or if it had been a small driblet or streamlet which could not be regarded as any part of the river in question. No such case appears to me to arise here, and it is impossible to predicate, at present at all events, that this portion of the water which runs between the shifting bank and the southern bank is not a portion of the river Tay. How can it be said that it is not a portion of it when it is used for navigation and for fishing? Under these circumstances the question of fact appears to be with the respondents, as well as the question of law, and the only result which I can come to is, that the appeal must be dismissed, with costs.

Lord Chelmsford—My Lords, two questions have been argued by the counsel for the appellant—a question of law and a question of fact. The question of law is, whether the respondents, in virtue of their titles, have any right to salmon-fishings *ex adverso* their lands of Seaside? That of fact, whether, assuming that the parties have each a right of salmon-fishing *ex adverso* their lands *ad medium filum aquæ*, in ascertaining the limits of their respective rights the part of the river south of a bank called 'Eppie's Taes' bank is to be taken from the stream as no longer a part of it but an accretion to the appellant's lands?

With respect to the question of the respondents' title to salmon-fishing, I cannot understand how it was allowed to be raised. The appellant claimed a right of fishing south of the *medium filum*. It was quite immaterial to that right whether or not the respondents have a right of fishing north of that line, except that if it could be shewn that the respondents had no right of fishing at all, they could not have a right of fishing south of the *medium filum;* and, if I rightly understand the general effect of the pleadings, the respondents' right does not appear to be properly brought into question by them.

In the summons of declarator the appellant seeks to have it "found and declared that the defenders and their successors in the lands and estate of Seaside have no right or title to fish for salmon or other fish to the south of the centre of the stream of the said river, and, in particular, from or upon any part of the said bank." And in his pleas-in-

law the appellant says, "The defenders have no right or title to fish for salmon or other fish from or upon any part of the said bank."

Now I understand by the terms of the summons, and also by those of the plea-in-law, that the general right of the respondents to the fishing is not denied, but merely their right to fish on the southern side of the *medium filum*. It is true that in the respondents' statement of facts they set out a statement of their title to the fishings, and the appellant "denies that, in virtue of said titles, the defenders have any right to salmon-fishings." But I should have thought this would be insufficient to put the respondents' titles in issue, as by the Scotch Judicature Act, 6 Geo. IV., chap. 120, section 11. "The pleas stated on the record, and authenticated by the signature of the Lord Ordinary, shall be held as the sole grounds of action or of defence in point of law, and to which the future arguments of the parties shall be confined;" nor can I think that the argument of the appellant as to the effect of the consolidation of the *dominium utile* and the *dominium directum* could have been addressed to the Court of Session, or, at all events, have been strongly dwelt upon, or it could not have failed to be noticed particularly by Lord Curriehill. I must therefore conclude this question (if it could be raised at all) in the words of that learned Judge, "that the respondents have produced a title which conveys to them a right of salmon-fishing, which has been followed by possession."

With respect to the question, whether Eppie's Taes Bank is a formation of such a character as to take out of the river all that part of it which lies between the southern side of the bank and the appellant's lands of Balmbreich, so as to throw the *medium filum* much more to the north than it would be if the bank were taken to be a portion of the bed of the river. I am satisfied that the evidence warrants the opinion of the Lord Ordinary, who says that the bank cannot "be dealt with as if it were an island in the bed of the stream capable of permanent occupation by either party, or as now truly a part of the southern bank or shore, as maintained for the pursuer, but that it must be regarded truly as a temporary obstruction in that bed, and that in consequence the rights of the pursuer and defenders must be regulated in respect of the mode of fishing from it, so as most clearly to preserve to them their common law right to fish respectively to the *medium filum* of the stream."

But it appears to me that the description given by the appellant himself of the effect of the bank upon the river concludes the question against him. He says in his 6th condescendence, "The stream of the river, on reaching the said bank, divides itself into two channels—one of which flows on the north side, and the other on the south side of the bank, uniting again into one stream at the tail or lowest part of the bank." This appears to me to bring the case within that of *Wedderburn* v. *Paterson*, in which it was held that a sandbank having been found in a tidal river, which at low water divided the river into two streams (in that case into equal streams), a line drawn down the middle of the river at low water, taking the two channels together, was to be regarded as the limits of their respective rights.

Upon these short grounds I think the interlocutors ought to be affirmed.

LORD WESTBURY—My Lords, I might well leave this case with the observations which have been made upon it; but we were told so confidently by one of the learned counsel at the bar that we were utterly mistaken in our opinion with regard to the Scotch law, that it may be well to enter into that matter a little more at length. The argument upon the point of Scotch law was this—it was said, and said rightly, that possession must be applied to the title, and that the only title that here existed was destroyed. Now all that proceeded on this application to Scotch law of an English notion. It was considered that when an instrument of resignation was executed the resignation had the effect of merging and destroying the thing resigned, and that it had no longer any continued existence. And some book was referred to—a work of some learning, Mr Ross' Lectures—in which, probably not thoroughly understanding the English doctrine of merger, he compared a resignation to merger under the English law. Now the difference between the two things is simply this. A thing surrendered by English law, so as to produce a merger, is lost and destroyed. A thing resigned in Scotch law *ad perpetuam remanentiam*, if it be a subject in which the *dominium utile* has been granted, is restored to the superior. It is again conjoined to the thing from which it was taken, as an integral part thereof, to remain conjoined with it for ever. In English law, if a freeholder has granted a lease retaining the reversion, or if he sells and conveys the reversion to another, and then the lessee or the assignee of the term surrenders it, the term is lost, and the reversion becomes the estate in possession. But if the *dominium utile* in a particular subject has been granted by the superior, and then there is a resignation of the thing granted, the resignation, as I have already observed, is restitution, not for the purpose of destruction but for the purpose of enjoyment.

Now all this is abundantly well known to those who are familiar with Scotch law, and it is evidenced by the very language of the instrument of resignation *ad remanentiam* as set out by the appellant, and your Lordships will find it in page 88 of the appellant's case. There the resignation is made in these words, "In the hands of the said James Hunter, immediate lawful superior thereof, in favour of himself, his heirs, successors, and assignees *ad perpetuam remanentiam*, to the effect the right of property thereof may return, and be conjoined, consolidated, annexed, and incorporated with the right of superiority of the same, standing and established in his person in all time coming, and be peaceably brooked, enjoyed, and possessed by him and his foresaids."

The grant of this right of salmon-fishing was originally made to a person of the name of Duncan by Lord Errol in 1703, and transmitted by Duncan probably to his son, of the same name, who, in the year 1783, sold and conveyed this right to James Hunter, the person who, having acquired the superiority, made a grant to the intent that there should be a resignation made in his own favour as superior, for the purpose of making the superiority perfect by annexing to it the right of salmon-fishing, which had been the subject of the anterior grant. The charter of confirmation by James Hunter in favour of himself is dated the 7th of June 1784. It is found in the 83d page of the respondents' case. It proceeds on a narrative of a disposition dated the 16th of May 1683, "made and granted by Alexander Duncombe of Sundie, whereby he sold, analzied, and disponed" to him the subjects of the grants which was then the sub-

ject of the resignation in the document I have previously read.

Now, all this was well understood in the Court below, and the point was not even taken. It was not for a moment suggested. If the point had been capable of being taken, it no doubt would have occurred to Lord Curriehill and to the other Judges, and it would have occurred to the parties themselves. But it was not taken; and, accordingly, Lord Curriehill in his judgment says distinctly, first, that as a matter of course the parties have shown a right of salmon-fishing on either side. The language of the judgment is so distinct upon the point that I will read it, although it was referred to by my noble and learned friend. He says—"The defenders are owners of lands on the north shore of the estuary, opposite part of Balmbreich; and they also claim a right to salmon-fishings in the river *ex adverso* of the lands of Balmbreich from the north shore *ad medium filum*. They also have produced a title which conveys to them a right of salmon-fishing, which has been followed by possession."

Well, my Lords, that being the state of the case, it passed with the grant of the superiority which was subsequently made, followed by possession. The only title they produced was the grant of that superiority by Hunter, after Hunter had consolidated with it the right of salmon-fishing which had been previously granted to Duncan, and was then held as part of the *dominium utile* belonging to the *dominium directum* of that superiority. That being the state of the case, there can be no doubt that the principal argument of the appellant fails altogether in point of law.

The question that then arises is one of very great difficulty because of its great novelty. If the appellant had been in a condition to prove that this bank, which appears for years to have been shifting its locality, had for a considerable period of time been so annexed to his bank of the river as to become a permanent accretion or a constant fixture thereto, and thereby to have diminished permanently the width of the *alveus* of the river, then I should have been of opinion that the appellant had a right to have the *alveus* of the river measured from the north side of this permanent accretion, and consequently, that he would have been right in his contention. But the facts do not amount to any such case. They only amount to this—that the bank has shifted, and that now it is in closer proximity than it was formerly to the bank of the appellant, and is between the north aspect of that bank and the *medium filum* of the old *alveus* of the river. Well then, what is the position of the bank? It is not even averred by the appellant to have become permanently annexed to his shore. It is averred only that it lies opposite; and that there is a channel between it and the bank of the appellant; and that through that channel, even at low water, the water of the river runs, and at high water the bank altogether disappears, and the depth of water over the bank is sufficient for the passage of boats, and also for the exercise of fishing. Also the right of fishing is prosecuted by the appellant at low water in the channel between the innermost side of the floating bank and the shore of the appellant.

On these grounds, it is impossible to affirm that the shifting bank has become a permanent accretion, and it is impossible to bring it within the case that was supposed by the learned Judge in *Wedderburn* v. *Paterson*, where he puts the possible case of a bank adhering at one extremity to the shore of a proprietor's fishing place, and fixing itself in such a manner as to constitute between its inner side and the old shore of the river a sort of gully or *cul de sac* through which the water would not flow. And then he says, if by possibility such a case could occur, the result would be that for all practical and useful purposes so much of the former *alveus* of the river would be annihilated; and the proprietor of that particular part of the river might be entitled to have, as it were, a new measurement of the *alveus* of the river. Without discussing that, which is nothing in the world more than a species of *obiter dictum* of the learned Judge, and without giving any opinion on that point, which is wholly new as far as I am aware, and wholly unsupported by any other decision, it is sufficient to say that the facts of this case do not bring it into anything like the condition which is supposed in the *dictum* I have alluded to.

On the whole, therefore, although it is probable that from time to time a great advantage is gained by the respondents, and some prejudice sustained by the appellant, it is impossible to make the temporary state of things which we now find to exist the grounds on which to found an adjudication, for what exists to-day may be altered by the next winter flood in the Tay river; and the bank may be altogether swept away or removed to another locality. On these grounds, my Lords, both of law and of fact, I concur in the advice which has been given to your Lordships to dismiss this appeal.

Lord Colonsay—My Lords, I am of the same opinion. In the first place, as to the question of law that has been raised, I think that it is a very ingenious puzzle that has been thrown into the case, but I do not think that it ought to affect the judgment of the House. I think the general principle of consolidation and the meaning of resignation are substantially what was stated by my noble and learned friend who spoke last. And I am not surprised that I do not find upon the record here, either in the statements of the case or in the pleas, anything in the nature of the case which has been argued upon that point. It was said that there was an argument to that effect in the Court below, and that that appears from an admission in the case of the respondents. But the admission in the case for the respondents has reference to a different argument. The argument stated in the case for the respondents put forward in the Court below was this—that by the resignation of the fishings "James Hunter" (the respondent) "had lost the right to them altogether, because it was said there could be no effectual consolidation seeing that *ex facie* of his titles James Hunter was not superior in the salmon-fishings." Now, the argument maintained here was that he lost his right to the fishing because of the resignation. I do not understand how that well could be. I do not see how consolidation could lose to him the right of fishing which he had acquired. I think it would be a very extraordinary doctrine to hold that by resigning that right in his own favour he had lost it, unless there had been a new infeftment or feudalising. I do not think that that is a sound doctrine. Then, again, it has been said that he had not the right of superiority. If that were so, I do not see how it can be said that he could effectually resign into his own hands, or that there was any resignation at all.

On the other part of the case—the question of fact, certainly—it is very important to attend to the particular circumstances of the case, for it involves

a good deal of novelty. At the same time, I think there is a principle for the solution of it. The general doctrine and rule of law is that each party is entitled to fish to the centre of the stream. Then let us see what is the effect of anything that arises in the *alveus* which is inconvenient to a party whose fishing is on the southern side of the centre of the stream. Now, supposing that this had been a smaller bank than it is, and that it had not approached so near at its western end to the property of the appellant, and that it had been a mere bank arising in his portion of the stream, which made it inconvenient for fishing so near the *medium filum*, because he could not cast his net between the shore and the bank, is that a reason why the other party should be prevented from having his right substantially as it was found? Clearly not. The only thing that could deprive him of the application of the ordinary rule as to what is to constitute the *medium filum* would be what my noble and learned friend who spoke last alluded to, and what was alluded to in the case of *Wedderburn* v. *Paterson*—namely, that there had been something attached to the soil—some extension of the proper shore on the southern side—that would have made it the point from which you were to measure the centre of the river. Therefore I think that here, so long as the bank is in the position in which it is admitted by the parties to be, we cannot alter the *termini* from which we are to measure where the *medium filum* is. I am glad to observe at the same time that while matters stand in this position it does not appear that the fishings of the appellant have been damaged by it. On the contrary, so far as the evidence goes, it rather appears that the effect of it has been rather to deepen the water on his—the southern side—of the stream, and to give him a greater amount of fishing than he had before. However, that is his good fortune. I think the judgment of the Court below ought to be affirmed.

Interlocutors affirmed, and appeal dismissed, with costs.

Agents for Appellant—H. G. & S. Dickson, W.S., and Loch & Maclaurin, Westminster.

Agents for Respondents—T. & R. B. Ranken, W.S., and Hibbard & Beck, London.

Thursday, June 30.

GLASGOW UNION RAILWAY CO. *v.* HUNTER.

(*Ante*, vol. vi, p. 260.)

Damages — Verdict — Railway — Bridge — Noise — Nuisance—Smoke. Held, (1) reversing decision of First Division, the verdict of a jury summoned under the Lands Clauses Act should be set aside so far as it gave compensation to a proprietor, part of whose ground had been taken by a railway company, for damage to the other part caused by noise of trains, smoke, and general nuisance, and deterioration; (2) with First Division, but that damages might be due for obstruction to light and air caused by the erection of a bridge.

Opinions by Lord Chancellor and Lord Chelmsford that, as the jury had evidently gone wrong in allowing 10 per cent. on a feu-duty which did not belong to the respondent, their verdict on this point should be set aside.

Opinions by Lords Westbury and Colonsay that it must be allowed to stand.

The respondent was owner of a property in Glasgow, part of which fronted Eglinton Street. Part of his property to the back was taken by the appellants under statutory powers. The question of compensation was sent to a jury, in terms of the "Lands Clauses Consolidation (Scotland) Act 1845." The respondent claimed compensation (1) for the value of the property to the back, taken by the appellants; and (2) for the damage done to his remaining property through the construction of a bridge spanning Eglinton Street and adjoining his property fronting that street.

The jury returned this verdict—

"The jury unanimously find the pursuer (respondent) entitled to the following sums, viz.:—

For the property to be taken, .	£1205	4	0
For old materials thereon, .	65	0	0
	£1270	4	0
For the compulsory purchase thereof at 10 per cent., .	127	0	0
Less value of the feu-duty at 20	£1397	4	0
years' purchase, . . .	639	0	0
	£758	4	0
For damage to the pursuer's (respondent's) remaining property caused by noise of trains, railway bridge across the street, smoke, and general nuisance, and deterioration of the tenement next the railway, ...	392	0	0
	£1150	4	0

In all, One thousand one hundred and fifty pounds four shillings sterling; but the jury find no damage done to the pursuer's (respondent's) gable next the railway."

The appellants sought in this action to reduce the verdict, alleging "The said verdict was *ultra vires* of the jury, inept, and null, in so far as (1) the jury awarded to the respondent, in addition to the price of the subjects taken as for the compulsory purchase thereof, a sum of 10 per cent. upon the value of the feu-duty with which the subjects were burdened. The value of said property was £639. This feu-duty did not belong to the respondent, but to the superior of the said property, and was a burden upon the respondent's interest therein. The said verdict was further *ultra vires* of the jury, in so far as (2) the jury awarded to the respondent compensation in name of damage to the respondent's remaining property caused by noise of trains, railway bridge across the street, smoke, and general nuisance, and deterioration of the tenement next the railway. The jury had no power under the Act of Parliament under which the inquiry took place to give damages on any such ground."

The Lord Ordinary (MURE) held that the jury were wrong in giving 10 per cent. upon the value of the feu-duty with which the subjects were burdened, as it did not belong to the respondent, but that the other items were right. The First Division recalled the Lord Ordinary's interlocutor, and held that the verdict of the jury was right in all the items. The Company then appealed to the House of Lords.

Sir R. PALMER, Q.C., and LLOYD, Q.C., for them, argued—Whatever may have been thought to be the law at the time of these judgments in the Court of Session, it has been subsequently settled